



KENYA RAILWAYS

Tender Document

For

**PROPOSED FINANCE, DESIGN, CONSTRUCTION, COMMISSION AND
OPERATION OF STUDENT ACCOMMODATION WITHIN NAIROBI RAILWAY
CITY (SPP)**

TENDER NO. KR/SCM/SPP/001/2023-2024

The Managing Director

Kenya Railways

P.O. Box 30121-00100

NAIROBI, KENYA.

Closing Date: 05th January 2024

Closing Time: 1000Hours

TABLE OF CONTENTS

| | |
|---|----|
| DEFINITION OF TERMS | 4 |
| PART 1: INVITATION TO TENDER | 7 |
| 1. INTRODUCTION | 9 |
| 1.1 Overview of Nairobi Railway City | 9 |
| 1.2 Objective of the Invitation of the Tender | 11 |
| 2. PROJECT DEVELOPMENT INFORMATION | 12 |
| 3. INSTRUCTIONS TO BIDDERS | 15 |
| 3.1 General | 15 |
| 3.2 Bid Documents | 21 |
| 3.3 Preparation of Bids | 22 |
| 3.4 Submission of Bids | 24 |
| 3.5 Bid Opening | 26 |
| 3.6 Award of Contract | 27 |
| 3.7 Negotiation Process | 29 |
| 3.8 ANNEX A - Appendix To Instructions To Bidders. | 31 |
| 4. PROJECT SPECIFICATIONS AND REQUIREMENTS | 34 |
| 4.1 Technical Requirements | 34 |
| 4.1.1 Urban Form | 34 |
| 4.1.2 Development Mix | 34 |
| 4.1.3 Access | 34 |
| 4.1.4 Utilities | 35 |
| 4.1.5 Design Standards | 35 |
| 4.1.6 Quality | 35 |
| 4.1.7 Defects liability period | 36 |
| 4.1.8 Site investigations | 36 |
| 4.1.9 Approvals | 36 |
| 4.1.10 Local Compliance | 36 |
| 4.1.11 Insurance | 36 |
| 4.1.12 Experience of similar developments | 37 |
| 4.1.13 Programme for Delivery | 37 |
| 4.2 ESG and Climate Resilience Considerations | 37 |
| 4.3 Financial and Commercial Specifications | 49 |
| 4.3.1 Lease and Compensation Structure | 49 |

| | | |
|---|--|------------|
| 4.3.2 | Competitive Rental Rates | 50 |
| 4.3.3 | Financial Projections | 50 |
| 4.3.4 | Project Financing | 51 |
| 4.4 | Operational Specifications | 51 |
| 4.4.1 | Operating Plan | 51 |
| 4.4.2 | Marketing and Tenant Acquisition | 51 |
| 5. | EVALUATION AND QUALIFICATION CRITERIA | 53 |
| 5.1 | Evaluation of the Technical Proposal..... | 53 |
| 5.2 | Evaluation of the Financial Proposal: | 58 |
| PART 2: CONDITIONS OF CONTRACTS AND CONTRACT FORM(S) | | 63 |
| PART 3: STANDARD FORMS | | 148 |

DEFINITION OF TERMS

| TERM | DEFINITION |
|-----------------------------------|---|
| Bid/Tender | Shall mean the proposal containing the Mandatory Requirements, Technical Proposal and Financial Proposal as submitted by the Bidder in response to this Invitation to Tender Document; |
| Bidder/Tenderer | Shall mean the entity (Sole Proprietorship/Company/Joint Venture/any other legal entity constituted in accordance with the laws of Kenya) or a consortium which will respond to this Invitation to Tender; |
| Bid Documents | Shall mean this Invitation to Tender together with all its attached Annexes, Standard Forms and any issued Addendum to the Tender; |
| Bid Security | Shall mean the security provided by every Bidder to the Procuring Entity along with the Bid in a sum stated in the Appendix to Instructions to Bidders; |
| Bid Submission Deadline | Shall mean the final date and time for the Bidders to submit their Bids as noted in Invitation to Tender Document; |
| Bid Validity Period | Shall mean the period during which Bids must remain valid as determined under this Bid document; |
| Clause | Shall mean a particular section or provision of these Bid Documents; |
| Consideration | Shall mean the cumulative payment comprising the Stand Premium, KR's Annual Rent and the Revenue Share payable to Kenya Railways as consideration for the Lease; |
| Contract | Shall mean the general conditions, the special conditions, its schedules and any amendments thereto; |
| Developer | Shall mean the successful Bidder with whom the Procuring Entity shall enter a Lease for the implementation of the Project; |
| Development Control Centre | Shall mean the agency or office of the NRC responsible for enforcement of development control guidelines within the Nairobi Railway City Masterplan area. |
| ESG | Shall mean the environmental, social and governance factors, which are a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as, without limitation, the impact of the Project on the environment, the conduct of social and business relationships and governance ethics; |

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| Financial Proposal | Shall mean the financial proposal submitted by the Bidder pursuant to Section 5 of the ITT (defined herein below) document; |
| ITB | Shall mean the Instructions to Bidders; |
| ITT | Shall mean the Invitation to Tender; |
| KR | Shall mean the Kenya Railways, a government-owned state corporation established in 1977 under the Kenya Railways Corporation Act Chapter 397 of the laws of Kenya; |
| KR's Annual Rent | Shall mean the annual monetary payment made by the successful Bidder to the Procuring Entity for utilization of the land on which the buildings are to be constructed; |
| Lease | Shall mean the lease instrument that shall be entered into by the Procuring Entity and the successful Bidder in respect of the Project Site; |
| Lease Term | Shall mean the forty-five (45) year period commencing on the effective date of the Lease and lapsing on the expiration date as provided under the Lease; |
| Letter of Award ("LOA") | Shall mean the official signed letter of award issued by KR to the successful Bidder in respect of the Project and shall be as per terms mentioned in the Invitation to Tender Document; |
| Nairobi Railway City Master Plan | Shall mean the Nairobi Railway City Strategic National Installation and Project Plan of 2023 –2024 (as may be amended from time to time) for the redevelopment of Nairobi Central Railway Station and its surrounding areas into an iconic, multimodal, transit oriented urban development; |
| Nairobi Railway City | Shall mean the redevelopment of the Nairobi Central Railway Station and its surrounding areas into an iconic, multimodal, transit-oriented urban development by KR within the Nairobi Railway City Strategic National Installation and Project Plan area; |
| Present Value or PV | Shall mean the current value of the expected income stream discounted at a specified rate of return; |
| Procuring Entity | Shall mean KR; |
| Project Implementation Committee | Shall mean the committee responsible for providing implementation oversight of the Project; |
| Project | Shall mean the financing, design, construction, commissioning, and operation, of Purpose-Built Student Accommodation (defined |

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| | herein below) within the Nairobi Railway City for the duration of the Lease; |
| Project Facilities | Shall mean all the facilities to be developed by the Successful Bidder at the Project Site (defined herein below); |
| Project Site or Site | Shall mean a portion of one decimal five seven (1.57) acres or thereabouts demarcated by KR for the Project, being Block 41 Parcel 234 (Part); |
| Proposed Room Rental Rate | Shall mean the proposed room rental rate submitted by the Bidders in the Financial Proposal comprising the projections of the Bidders on the average monthly rental rate of the units pursuant to Section 5 of the ITT document; |
| Purpose Built Student Accommodation (“PBSA”) | Shall mean residential housing units that are specifically built for occupancy by university and college students; |
| Revenue share | Shall mean the periodic monetary payment by the Successful Bidder to the Procuring Entity from the revenue generated from the occupation of the PBSA units; |
| Review Board | Shall mean the administrative board of the Public Procurement Regulatory Authority responsible for reviewing requests for review lodged by the public relating to the procurement process undertaken by the Procuring Entity hereunder; |
| Technical Proposal | Shall mean the technical proposal submitted by the Bidder pursuant to the format specified under Section 5 of the ITT document; |
| Stand Premium | Shall mean a single, upfront payment made by the successful Bidder to the Procuring Entity on or before execution of the Lease; |
| Works | All activities relating to the design, construction, testing and commissioning of the Project and the Amenities to be performed by the Developer in accordance with the Contract (as may be varied, amended or supplemented from time to time). |

PART 1: INVITATION TO TENDER

Tender No. KR/SCM/SPP/001/2023-2024

Tender Name: Proposed Finance, Design, Construction, Commission and Operation of Student Accommodation Within Nairobi Railway City (SPP).

1. Kenya Railways (KR) invites sealed bids for the Proposed Finance, Design, Construction, Commission and Operation of Student Accommodation Within Nairobi Railway City (SPP). A detailed description of the Nairobi Railway City and the Procuring Entity's requirements for this project is provided in Section 1 and 2 of this Bid Document.
2. Bidding will be conducted through a Specially Permitted Procurement Method using a standardized bidder document.
3. Interested bidders may obtain further information in respect to the Bid Documents during office hours *i.e. 0900 to 1500 hours* (EAT) at the address given below:

The Managing Director Kenya Railways
Kenya Railways Headquarters, Block C
Haile Selassie Avenue
P.O. BOX 30121 - 00100
Nairobi, Kenya Tel:
Email: procure@krc.co.ke

4. Bids shall remain valid for 240 working days from the date of bid opening.
5. The bid must be accompanied by a bid security of Kenya Shillings Ten million (KES 10,000,000) from a reputable commercial bank registered in Kenya which will remain valid for 210 calendar days.
6. The terms of the definitive contract between the procuring entity and the Successful Bidder will be agreed upon during the negotiation phase of the Project.
7. The Bidder shall chronologically serialize all pages of the bid documents submitted including the front/cover page and any appendices. The bidder shall indicate the total number of pages in the front/cover page.
8. Completed bids must be delivered to the address below on or before 05th January 2024 at 1000Hours East African Time. Electronic bids submissions **WILL NOT** be permitted.
9. Late bids will be rejected.
10. Bids will be opened immediately after the deadline date and time specified above or any deadline date and time specified later. The bid will be publicly opened in the presence of the Bidders' designated representative who choose to attend at the address provided below.
11. The addresses referred to above are:

A. Address for obtaining further information

The Managing Director Kenya Railways
Kenya Railways Headquarters, Block C
Haile Selassie Avenue
P.O. BOX 30121 - 00100
Nairobi, Kenya
Tel:

Email: procure@krc.co.ke

B. Address for Submission of Bids

The Managing Director Kenya Railways
P.O. BOX 30121 - 00100
Nairobi, Kenya
Bid Box located on Block C Reception
Kenya Railways Headquarters,
Haile Selassie Avenue

C. Address for Opening of Bids

Kenya Railways Headquarters
Haile Selassie Avenue
Block C, Sattima Conference Room
On 1st Floor

**General Manager – Supply Chain Management
For: Managing Director**

1. INTRODUCTION

1.1 Overview of Nairobi Railway City

The Government of Kenya (GoK) is undertaking measures to enhance business opportunities and spur economic growth through investment in infrastructure projects to reduce congestion by enhancing mass rapid transit through multi-modal transport systems. In support of this, Kenya Railways (“**KR**”) or the “**Procuring Entity**”) is implementing various programs as part of its Strategic Plan for the fiscal period 2022 – 2027 whose aim is to upscale the rail transport sector’s contribution to national growth and economic development. One of the key investment priorities for KR is the redevelopment of the Nairobi Central Railway Station and its surrounding areas into an iconic, multimodal, transit-oriented urban development to be known as the ‘Nairobi Railway City’ in accordance with the Nairobi Railway City Strategic National Installation & Project Plan (“**NRCSNIPP**” or the “**Nairobi Railway City Master Plan**” or the “**Masterplan**”).

Nairobi Railway City is an authentically Kenyan, multimodal transit-oriented urban development over 438. acres of prime city real estate within the Nairobi Railway City Master Plan area that seeks to establish a new beating heart for the capital and boost the economic and social development.

The vision of Nairobi Railway City is to serve as a functional, urban centrepiece for Nairobi’s growing global reputation as a leading modern city and cohesive nerve centre for the Nairobi Multimodal Transport System. The Master Plan is in full strategic alignment with Nairobi Urban Transport Study, Mass Rapid Transit System Study, the Nairobi Integrated Urban Development Master Plan (NIUPLAN), Nairobi Transport Master Plan, and Nairobi Commuter Rail Master Plan which ensures seamless integration with the greater plans for Nairobi.

The Procuring Entity envisions creating an equilibrium between social benefits for the city and economic returns with the key objectives being;

- Expansion of the Nairobi central business district (“**CBD**”) aimed at decongesting the CBD and promoting the spatial restructuring of Nairobi;
- Creation of a new central station hub as Nairobi’s premier transport interchange that delivers transport capacity to sustain the future growth of Nairobi county;
- The surrounding development which will, over time, provide new meeting places, new business districts for Government and for domestic and international companies, new neighbourhoods for family living, new open spaces for recreation and wellness;
- Low-carbon buildings of medium density, high amenity, and high accessibility to public transport;
- Creation of approximately 5,000 jobs during the construction phase with more than 5,000 people expected to work within the first phase of the Nairobi Railway City upon completion;
- Present an exemplar African model of how a climate-resilient urban regeneration project in a carbon-constrained environment can be delivered through ESG and climate-smart approaches;
- Establishment of a place which is sustainable and safe, forward-looking and

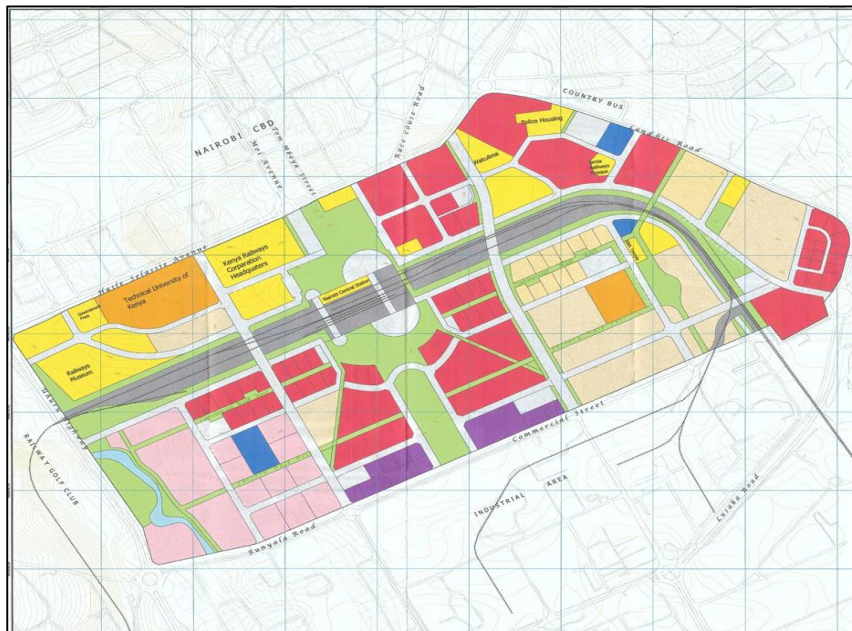
authentically Kenyan; and

- Enhance the global competitiveness of Nairobi while providing a framework for coordinating public and private investment.

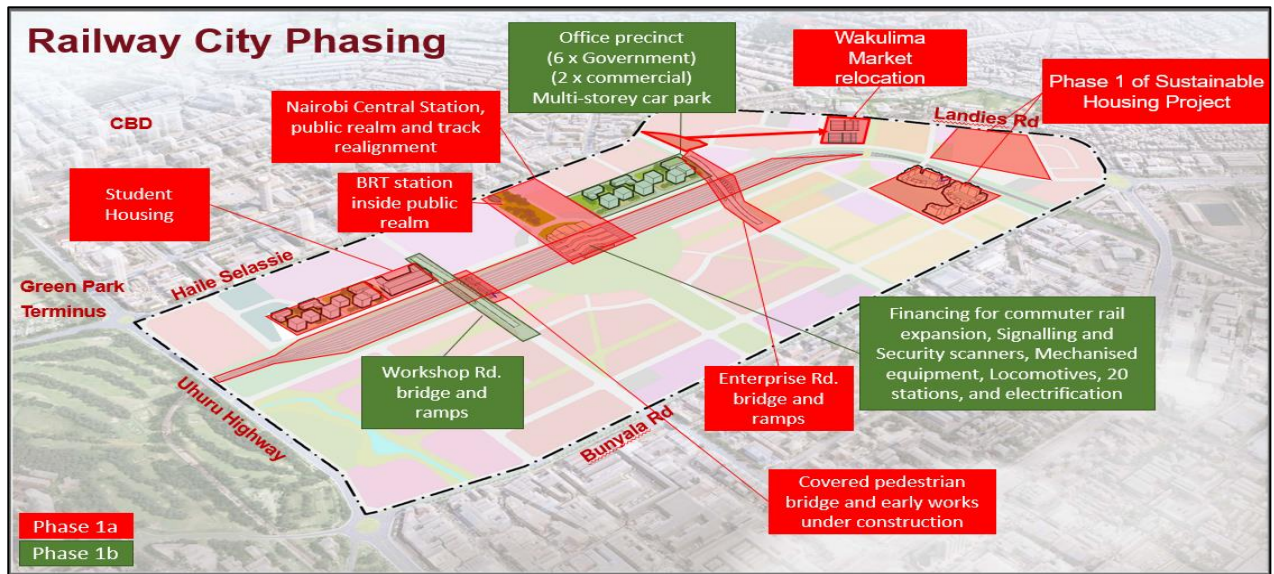
The Nairobi Railway City was designated a Special Planning Area on 14th February 2020 and was subsequently gazetted as a Project of Strategic National Importance on 21st May 2021.

The Master Plan was approved by Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development on 23rd August 2023. The Nairobi Railway City Master Plan describes the development of a transit-oriented development around a new Central Station and Public Realm, allowing for significant expansion of the capacity of the Nairobi Commuter Rail Network and urban regeneration in the land surrounding the Central Station.

Overall, the Masterplan identifies various users as outlined in extract below:



Nairobi Railway City will be implemented in a phased approach over a number of years with phase 1 and phase 2 comprising of the following priority projects;



1.2 Objective of the Invitation of the Tender

Through the Specially Permitted Procurement Procedure (SPPP), as stipulated under Section 114A of the Public Procurement and Asset Disposal Act, No. 33 of 2015 (PPADA), KR wishes to invite eligible bidders to undertake development of the proposed finance, design, construction, commission and operation of student accommodation within Nairobi Railway City (SPPM). The intention of this process is to identify a suitable developer with the technical expertise, resources and skills to design, finance, build, and operate the PBSAs in accordance with the specifications of the Procuring Entity. The eligible bidders must prove their ability to undertake the development through demonstration of financial and technical capacity. The project must be undertaken without transfer of risks or investor obligations to the Government. The Government of Kenya, through KR, will provide to the successful Bidder (“**Developer**”) the land for the project through a long-term lease on whose basis, the Developer will make payments under the compensation structure that has been outlined in this Bid document.

2. PROJECT DEVELOPMENT INFORMATION

2.1 Project Rationale

Kenya has witnessed significant growth in tertiary education, evidenced by the increasing number of tertiary institutions and enrolled students. This expansion has been primarily driven by factors such as population growth, government policies aimed at enhancing educational access and technical skills, the implementation of the 'Parallel' program allowing public universities to admit privately-sponsored students, and favourable immigration policies enabling citizens from other countries to study in Kenya.

Since 1987, the number of tertiary institutions has experienced exponential growth, rising from four fully-fledged universities to a total of sixty-eight in 2022 (with 35 being public universities). Likewise, student enrolment has steadily increased from around 3,000 students in the 1970s to 562,925 students enrolled in universities in 2022, with 80 percent of them in public institutions. Additionally, the total number of Technical and Vocational Education and Training (TVET) institutions reached 2,401 in 2022, with a student enrolment of 562,499.

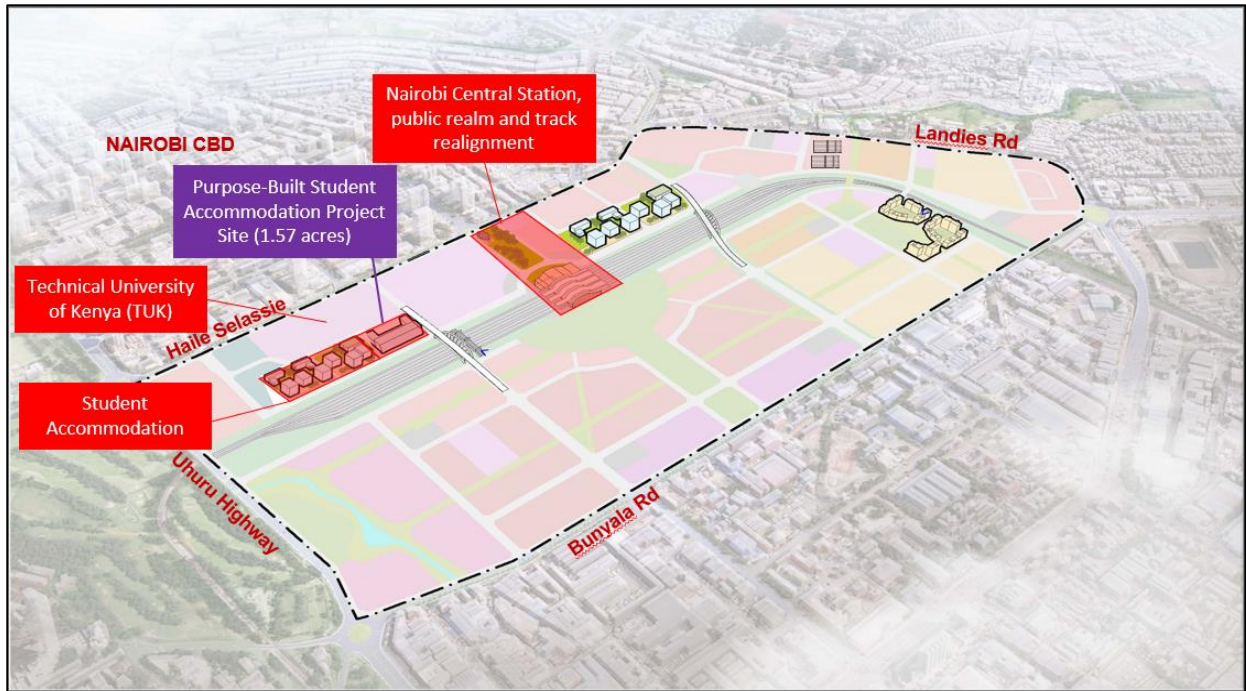
Despite the growth in students and institutions, there has been inadequate investment in student accommodation to match the rising enrolment rates. In 2018, the Ministry of Education highlighted that the available student housing in local institutions was 300,000, while the overall enrolment was 520,900 at that time. This has led to overcrowding in existing on-campus housing, and many students are forced to seek private accommodation off-campus.

Acknowledging the shortage of quality and affordable student accommodation, Kenya Railways intends to address this issue by providing land for development of PBSAs through a lease arrangement with a private developer.

2.2 PBSA Project Description

The PBSA Project will be undertaken as part of Phase 1 of Nairobi Railway City and has been identified as one of the key early mover elements for the implementation of the Nairobi Railway City Master Plan. The project envisions the development of accommodation for a minimum of 2,500 students to bridge the gap between demand for quality and affordable student accommodation and the increasing enrolment of students in universities.

The Site earmarked for the project is owned by KR and is registered as Block 41, Parcel 234 (Part). The Site is strategically located in close proximity to the current Technical University of Kenya (TUK), Pate Bay Road to the North, Workshops Road to the East and Station Road to the South. It is approximately 320m from the proposed new public realm and Central Station, and 190 metres from Haile Selassie Avenue which forms the southern boundary of the current Nairobi CBD.

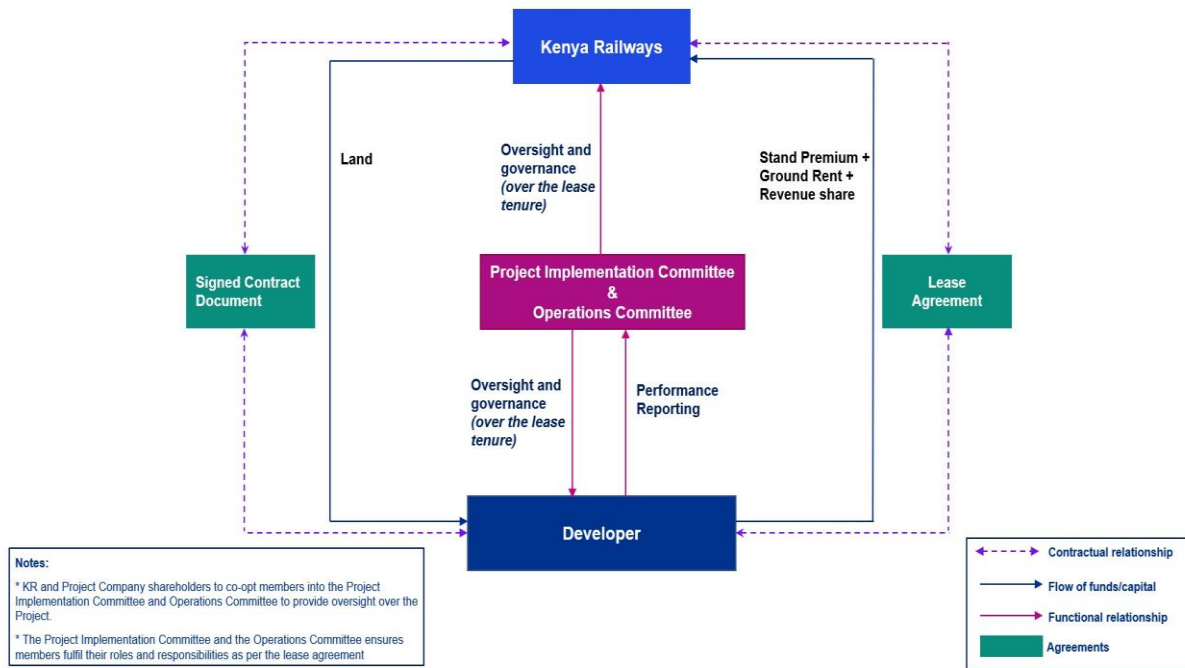


2.3 Project delivery model

Under the envisaged contractual structure, the Developer will be granted a long-term lease (forty-five years) (the "**Lease Term**") for the earmarked Project Site for purposes of developing the Project. The Developer will be obligated to design, finance, construct, commission, operate, and manage the student housing units during the Lease Term, after which period, the Project Site shall revert to KR. This lease tenure is informed by the Kenya Railways Land Management Policy.

The relationship between KR and the Bidder shall be governed in accordance with the terms of the Contract and the Lease. Further, the Contract and the Lease will comprise the Project governance structure including oversight, decision-making and reporting obligations during the Project lifecycle.

Figure 1: Proposed governance structure



During the Lease Term, the developer will be expected to make payments to KR under a hybrid compensation structure whereby, the developer will be required to pay a Stand Premium before or at the signing of the Lease, KR's Annual Rent with annual escalation and a share of development revenue. Upon expiry of the Lease Term, the KR's Annual Rent and the share of development revenue from the developer will cease and the Lease will terminate, with the properties developed under the Project reverting automatically and fully to KR.

The Developer will be allowed to charge the Project Site on condition that all funds raised by charging the land shall be deposited into an escrow account where KR will be a signatory and such funds shall only be used for the purposes of developing the Project Facilities.

3. INSTRUCTIONS TO BIDDERS

3.1 General

3.1.2 Scope of Tender

The Procuring Entity as defined under the definition of terms invites bids for the proposed finance, design, construction, commission and operation of student accommodation within Nairobi Railway City (SPPM).

3.1.3 Eligibility and Mandatory Requirements

Bidders are strongly advised that only bids meeting the following mandatory requirements will be evaluated;

- a. A certified copy of the Certificate of Incorporation or registration document(s) of the Bidder or its notarised equivalent from the Bidder's country of domicile. Foreign bidders must demonstrate willingness to obtain legal authorization to conduct business in Kenya upon award of contract;
- b. If applicable, a certified copy of the Bidder's official search (CR-12) from the Registrar of Companies, or the notarised equivalent for the Bidder's country of domicile;
- c. A certified copy of the Bidder's Memorandum and Articles of Association or the equivalent organisational governing document(s) evidencing that the Bidder has the capacity to submit a Bid through bid processes and to enter into commercial agreements;
- d. A certified copy of a valid Kenya Revenue Authority Tax Compliance Certificate, or the notarized equivalent from the Bidder's country of domicile;
- e. A certified copy of the Audited Accounts of the Bidder for the last Three (3) consecutive years (2020, 2021, 2022);
- f. Bid security in the form of an Unconditional Bank Guarantee in accordance with Standard Form 1;
- g. A copy of the duly filled Power of Attorney Form in accordance with Standard Form 3
- h. A copy of the duly filled Confidential Business Questionnaire in accordance with Standard Form 4
- i. A copy of the duly filled Bidder's information in accordance with Standard Form 5. In the case of Joint Ventures, a copy of the duly filled Standard Forms 5 and 6;
- j. A copy of the duly filled Certificate of Independent Bid Determination in accordance with Standard Form 7;
- k. A copy of the duly filled self-declaration that the Bidder is not debarred in the matter of the Public Procurement and Asset Disposal Act, No. 33 of 2015 in accordance with Standard Form 8;
- l. A copy of the duly filled self-declaration that the Bidder will not engage in any corrupt or fraudulent practices in accordance with Standard Form 9;
- m. A copy of the duly filled declaration and commitment to the code of ethics in accordance with Standard Form 10;
- n. One (1) Original, Four (4) Copies and One (1) Electronic Copy (Flash Disk or CD) of the Technical Proposal and Financial Proposal respectively;
- o. A copy of the duly filled Litigation History Form in accordance with Standard Form 11;
- p. Authorized person to sign the bid and initialize all pages on behalf of the Bidder;

- q. A certified copy of the Bidder's business permit;
- r. Letters of intent to finance the Project from the Bidder's holding company, equity investors, and/or a reputable financial institution(s).
- s. A copy of the duly signed Site visit form in the prescribed format (Standard Form 12); and
- t. All copies of original documents must be certified by an Advocate of the High Court of Kenya or Notary Public.

Bidding consortia/Joint Ventures must also submit the following additional documents, as applicable:

- a. A certified or duly notarized copy of the Power of Attorney Form appointing the lead consortium member in accordance with Standard Form 2; and
- b. Joint Venture/consortium agreement or written letter of intent to execute a Joint Venture Agreement in the event of a successful Bid, together with a copy of the proposed agreement.

3.1.4 Constituent Parts of Mandatory Requirements

| PRELIMINARY AND MANDATORY REQUIREMENTS | | |
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| NO | MANDATORY REQUIREMENTS | REQUIRED |
| 1. | A certified copy of the Certificate of Incorporation or Registration Certificate. For foreign Firms, the certificate of incorporation must be notarized by a public notary in the country of issue. The bidder must be a registered Company and Legally Authorized to do Business in Kenya. Foreign Bidders must provide a written declaration of intention to obtain a certificate of compliance. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 2. | If applicable, a certified copy of the Bidder's official search (CR12) from registrar of companies issued in the last six (6) months showing the list of company directors and shares held by all the Directors. Copies of ID's / Passports for all the Directors listed must be attached. Citizens MUST provide a copy of CR-12 from Registrar of Companies. Foreign firms must provide notarized equivalent document from their Registrar of Companies in their country of domicile. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 3. | A certified copy of the Bidder's Memorandum and Articles of Association or the equivalent organizational governing document(s) evidencing that the bidder has the capacity to submit a bid through bid processes and to enter into commercial agreements. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 4. | A certified copy of a valid f Kenya Revenue Authority Tax Compliance Certificate (tax compliance certificate MUST be valid at the date of bid opening) or the notarized equivalent in the Bidder's country of domicile. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |

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| 5. | <p>A Certified copy of the Audited Accounts of the Bidder for the last three (3) consecutive years (2020, 2021, 2022).</p> <ul style="list-style-type: none"> ▪ For Purpose of the Evaluation, the Accounts are considered to be certified if issued by a registered CPA Firm recognized by ICPAK and signed by the Companies Directors. ▪ The practicing number of the independent auditor i.e. CPA member signing the accounts must be indicated in the independent’s auditors report. ▪ Auditors practicing license for 2022 should be attached. ▪ The Accounts must be complete (Full Audited Accounts i.e. not sections of it). ▪ Any Discrepancies in the Accounts must be explained in the notes failure to which the accounts will be rejected. ▪ For the lead bidder: <ul style="list-style-type: none"> I. Current ratio must be ≥ 1 II. Acid Test ratio must be ≥ 0.5 | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 6. | <p>A bid security in the form of a Bank Guarantee of Kenya Shillings Ten Million Only (Kshs 10,000,000.00) from a reputable Commercial Bank registered in Kenya which shall remain valid for two hundred and ten (210) calendar days.</p> | Each Bidder/ Joint Consortium submission |
| 7. | <p>The written confirmation of authorization to sign on behalf of the bidder shall consist of:</p> <ul style="list-style-type: none"> ▪ A letter appointing a Power of Attorney who shall be authorized to commit the Bidder. ▪ A specimen signature of such appointee shall be expressly included in the appointing letter. ▪ A copy of the Identification card/passport for the appointee shall also be attached. The authorization shall be duly signed by directors appearing in CR12 or by the director of the firm with the highest shares together in the presence of a Commissioner of Oaths, giving the name of person who has been authorized to submit/execute this contract as a binding document. This person should sign all the documents related to this bid. | Each Bidder/ Joint Consortium submission |

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| 8. | A copy of the duly filled, Stamped and Signed Confidential Business Questionnaire (Form 4) Must provide a Contact address: Physical, Postal, Telephone and Email address of the Firm and clearly indicate the list of Directors or Partners as applicable and details of citizenship. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 9. | A copy of the duly filled Bidder's Information (Form 5). In the case of Joint Ventures, a copy of the duly filled Standard Forms 5 and 6. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 10. | A copy of the duly filled Certificate of Independent Bid Determination (Form 7). | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 11. | A copy of the duly filled Form 8 Self declaration confirming that the person/Bidder is not debarred in the matter of the Public Procurement and Asset Disposal Act No. 33 of 2015. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 12. | A copy of the duly filled Form 9 Self Declaration confirming that the person/Bidder will not engage in any corrupt or fraudulent practice. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 13. | A copy of the duly filled and signed Self-declaration and commitment to the code of ethics in accordance with Standard 10. | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 14. | Bidders Must Submit One (1) Original, Four (4) Copies and One (1) Electronic Copy (Flash Disk or CD) Tender document; | Each Bidder/ Joint Consortium submission |
| 15. | Bidders must provide a copy of the duly filled, signed and stamped Litigation History Form on any Litigation or Arbitration resulting from contracts executed in the last five (5) years, in format provided in the bid document. (Form 11) | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 16. | The Authorized person to sign the bid on behalf of the bidder and must sign or initialize all the pages of the Bid where entries (i.e., all the forms) or amendments have been made | Each Bidder/ Joint Consortium submission |

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| 17. | In the case of a Consortium arrangement, the Bidder shall also submit a Consortium/Joint Venture Agreement that has been duly executed and notarized by all the Consortium Members and evidences the consent of each Member to join the Consortium and participate in the bidding process. Alternatively, a letter of intent to execute a Joint Venture Agreement in the event of a successful Bid shall be signed by all members and submitted with the Bid, together with a copy of the proposed Agreement. | Joint Consortium submission |
| 18. | In the case of a Consortium arrangement, each Member shall submit a certified or duly notarized copy of the Power of Attorney appointing the lead consortium member and authorizing such lead consortium member to, among other things, submit the bid, and negotiate the Contracts, Lease and other documents relating to the Projects on behalf of the Consortium in accordance with Standard Form 2. | Each Member of the Consortium |
| 19. | A certified copy of single business permit for local/citizen Bidders and equivalent document for foreign firms from the countries of domicile | Each Bidder/ Each Member of the Consortium/Each Member of the Joint Venture |
| 20. | Letters of intent to finance the Project from the Bidder's holding company, equity investors, and/or a reputable financial institution(s). | Joint Submission |
| 21. | A copy of the duly signed site visit form in the prescribed format (Standard Form 12) | Joint Submission |
| 22. | Serialized to ensure compliance with Section 74 (i) Public Procurement and Assets Disposal Act, 2015 (in format 1,2,3,4.....to the last page). Bidders must indicate the total number of pages of their bid submission in the cover/front page of the bid documents. | Joint Submission |

3.1.5 Eligible Bidders

- a. A Bidder may be a private entity, a state-owned enterprise or institution or any combination of such entities in the form of a joint venture (“**JV**”) or consortium arrangement under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. In the case of a JV, all members shall be jointly and severally liable for the execution of the entire Contract in accordance with the Contract terms. The maximum number of JV members shall be specified in the Appendix to the Instructions to Bidders.
- b. A Bidder may be a consortium of firms, who shall submit, together with their Bid submission, proof of agreement that each member of the consortium has

consented to join the consortium and participate in the bidding process. The Bidder will be expected to identify the lead consortium member and other members, define each member's ownership, and describe the role of each member in the design, financing, construction, and operation of the Project. Each member of a consortium which submits a Bid shall be bound jointly and severally by the terms and conditions of the Contract and shall be jointly responsible for the performance of the obligations under the Contract.

- c. KR officials, representatives, employees, and their relatives (spouse and children) are not eligible to participate.
- d. A Bidder that has been debarred by the PPRA from participating in public procurement shall be ineligible to participate in the bid process or be awarded a contract. The list of debarred firms and individuals is available from the website of PPRA www.ppra.go.ke.
- e. Foreign Bidders are eligible to participate. Foreign Bidders are required to source at least forty percent (40%) of their development inputs (in supplies, sub-contracts and labor) from local suppliers and contractors.
- f. Pursuant to the eligibility requirements of ITB 3.1.5(e), a bidder is considered a foreign Bidder, if it is registered in Kenya, has less than 51 percent (51%) ownership by nationals of Kenya. JVs are considered foreign Bidders if the individual member firms are registered in Kenya and have less than 51 percent (51%) ownership by nationals of Kenya.

3.1.6 Falsified Information:

A Bidder who gives false information in the Bid document about their qualifications, who refuses to enter into negotiations after notification of intention to award contract, or who refuses to enter into a contract after issue of letter of award shall be considered for debarment from participating in future public procurement.

3.1.7 Cost of Bidding

The Bidder shall bear all costs associated with the preparation and submission of its Bid and of negotiating the terms of the Contract, including undertaking any visit to the Project Site. KR will in no case be liable for those costs, regardless of the conduct or outcome of the bidding process.

3.1.8 Site Visit

- a. The Bidder is advised to visit and examine the Project Site and its surroundings and obtain for itself at its own cost and responsibility, all information that may be necessary for preparing the Bid(s).
- b. The Bidder and any of its authorised representative(s) will be granted permission by KR to access the Project Site for the purposes of such visit, but only upon the express condition that the Bidder, its personnel, representatives or agents, will release and indemnify KR from and against all liability in respect thereof and will be responsible for personal injury (whether fatal or otherwise), loss of/or damage to property and any other loss, damage, costs and expenses however caused, which but for the exercise of such permission, would not have arisen.

- c. Bidders shall arrange for a Site visit on a specific date(s) as indicated in the Appendix to Instructions to Bidders. A designated representative(s) of KR will be available to meet the visiting Bidders at the Project Site. The designated representative(s) will not be available at any other time for Site inspection visits.

3.2 Bid Documents

3.2.1 Contents of Bid Documents:

The Bid documents comprise the documents listed below and should be read together with any addendum issued in accordance with Instruction to Bidders (the "**Bid Document**"). The Bid Document shall consist of Parts 1, 2 and 3, as follows:

PART 1. INVITATION TO TENDER

Section 1 - Introduction

Section 2 - Project Development Information

Section 3 - Instruction to Bidders

Section 4 - Project Specification and Requirements

Section 5 - Evaluation and Qualification Criteria

PART 2: CONDITIONS OF CONTRACT AND CONTRACT FORM(S)

Section I – General Conditions of Contract

Section II – Special Conditions of Contract

PART 3: STANDARD FORMS

The Bidder is expected to carefully examine all instructions, conditions, terms and forms in this tender document. Failure to comply with the requirements for Bid submission will be at the Bidder's risk.

Pursuant to clauses 3.1.2 and 3.1.3 of Instructions to Bidders, Bids which are not substantially responsive to the requirements of the Bid Documents will be rejected.

3.2.2 Clarification of Bid Documents

A Bidder requiring any clarification relating to the Bid documents may notify the Procuring Entity in writing at the Procuring Entity's address specified in the Appendix to the Instructions to Bidders. KR will respond in writing to any request for clarification which is received earlier than **seven (7) calendar days** prior to the deadline for the submission of bids. Written copies of KR's response will be available to all eligible tenderers on KR Website & PPIP Portal. If so specified in the Appendix to Instructions to Bidders, the Procuring Entity shall also promptly publish its response at the website identified in the Appendix to Instructions to Bidders. If the Bidder sends an inquiry after the stated days, KR shall have the option of either responding to the inquiry and extension of the date of submission of Bids.

KR shall reply to any clarifications sought by the Bidder within three (3) working days of receiving the request to enable the Bidder to make timely submission of Bid(s).

3.2.3 Amendment of Tender Documents

At any time prior to the deadline for submission of Bids, KR may, for any reason, whether at its own initiative or in response to a clarification requested by a Bidder, modify the Bid documents by issuing an addendum thereto.

Any addendum will be notified in writing to all prospective Bidders who have obtained the Bidding document from the Procuring Entity. KR shall also promptly publish the addendum on the Procuring Entity's website as specified in the Appendix to Instructions to Bidders.

In order to allow prospective Bidders reasonable time in which to take the addendum into account in preparing their Bids, KR may, at its discretion, extend the deadline for the submission of Bids.

3.3 Preparation of Bids

3.3.1 Language of the Bid

The Bid and all correspondence and documents relating to the Bid exchanged between the Bidder and KR shall be written in the English language. Supporting documents and printed literature that are part of the Bid may be in another language, provided they are accompanied by an accurate translation of the relevant passages in the English language, in which case, for purposes of interpretation of the Bid, the translation shall govern.

3.3.2 Documents Comprising the Bid

The forms submitted with the Bid documents shall be used without exception subject to extensions of the schedules in the same format and to the provisions of Clause 3.3.6 regarding the alternative forms of Bid security.

3.3.3 Currencies of the Bid

The currency for the purpose of the Bid shall be Kenya Shillings (Kshs). The conversion to Kenya Shillings shall be based on the corresponding exchange rate specified by the Central Bank of Kenya, on the closing date of Bid submission.

3.3.4 Bid Validity

The Bid shall remain valid and open for acceptance for a period of two hundred and forty (240) working days from the date of Bid opening or from the extended date of Bid opening.

In exceptional circumstances prior to expiry of the original Bid validity period, KR may request Bidders for a specified extension of the period of validity (which shall be 30days). The request and the responses thereto shall be made in writing. A Bidder may decline the request without forfeiting the Bid Security. A Bidder agreeing to the request will not be required nor permitted to modify its Bid but will be required to extend the validity of the Bid Security correspondingly.

3.3.5 Bid Security

As part of its bid, the Bidder shall furnish to KR a Bid Security of Kenya Shillings Ten Million (Kshs. 10,000,000) from an established and reputable commercial bank registered in the Republic of Kenya.

The Bid Security shall be required to be valid for two hundred and ten (210) calendar days from the date of Bid opening or from the extended date of Bid opening. If the Bid validity period is extended in accordance with ITB 3.3.4, the validity period of the Bid Security shall also be extended correspondingly. Any Bid not accompanied by an acceptable Bid Security will be rejected by KR as non-responsive.

The Bid Security of unsuccessful Bidders will be available to the respective bidders after Contract signing. The Bid security of the successful Bidder will be returned upon the Bidder executing the Contract.

The Bid Security may be forfeited under the following circumstances:

- If the bidder withdraws its Bid at any time during the stipulated period of Bid Validity (or as may be extended)
- If the bidder, for the period of Bid Validity, in KR's opinion, commits material breach of any of the terms and / or conditions contained in the Bid Document and / or subsequent communication from KR in this regard.
- In the case of a successful Bidder, if it fails to:
 - a. accept the Letter of Award, or
 - b. sign the Contract.

In the event that the Bid is declared non-responsive, the Bid Security in such cases shall be returned to the respective Bidder within 30 calendar days from such cessation without interest.

3.3.6 No Alternative Bids

The Bidder shall submit a Bid which complies fully with the requirements of the Bid Documents unless otherwise provided for in the Appendix to Instruction to Bidders. Only one Bid may be submitted by each Bidder either by itself or as a partner in a bidding consortium.

The Bidder shall not attach any conditions of its own to its Bid. Any Bidder who fails to comply with this Clause will be disqualified.

3.3.7 Pre-Bid Meeting

There will be a pre-bid meeting on a specific date as provided in the Appendix to Instructions to Bidders. The purpose of the meeting will be to clarify any issues in the tender document and propose any amendments thereto.

The Bidder is requested as far as possible to submit any questions in writing, to reach KR not later than seven (7) calendar days before the tender opening date. It may not be practicable at the meeting to answer questions received late, but questions and responses will be transmitted in accordance with the following:

- a) Minutes of the meeting including the text of the questions raised and the responses given together with any responses prepared after the meeting will be transmitted without delay to all the Bidders. Any modification of the Bid documents listed in which may become necessary as a result of the pre-bid meeting shall be made by KR exclusively through the issue of an Addendum and not through the minutes of the pre-bid meeting.
- b) Non-attendance at the pre-bid meeting will not be cause for disqualification of a Bidder.

3.3.8 Format and Signing of Bid

The Bidder shall prepare one original of the documents comprising the bid as outlined in Clause 3.3.8 and clearly mark it “ORIGINAL”. In addition, the Bidder shall submit copies of the Bid, in the number specified in the Appendix to Instruction to Bidders and clearly mark them “COPY.” In the event of any discrepancy between the original and the copies, the original shall prevail.

The copy of the Bid shall be typed or written in indelible ink and shall be signed by a person or persons duly authorized to sign on behalf of the Bidder. All pages of the Bid where amendments have been made shall be initialled by the person or persons signing the bid.

In case the Bidder is a JV, the Bid shall be signed by an authorized representative of the JV on behalf of the JV, and so as to be legally binding on all the members as evidenced by a Power of Attorney signed by their duly authorized representatives in the prescribed form.

The complete Bid shall be without alterations, interlineations or erasures, except as necessary to correct errors made by the Bid, in which case such corrections shall be initialled by the person or persons signing the bid.

3.4 Submission of Bids

3.4.1 Sealing and Marking of Bids

The Bidder shall deliver the Bid submission in a single sealed envelope, or in a single sealed package, or in a single sealed container marked “TENDER NO: KR/SCM/SPP/001/2023-2024:

PROPOSED FINANCE, DESIGN, CONSTRUCTION, COMMISSION AND OPERATION OF STUDENT ACCOMMODATION WITHIN NAIROBI RAILWAY CITY (SPPM)”. Within the single sealed envelope, package or container, the Bidder shall place the following three separate envelopes or packages or containers labelled and sealed as illustrated below:

- i. The Bidder shall place One (1) original Bid Document and four (4) copies, One (1) electronic copy inclusive of Mandatory, Technical & Financial Requirements in a sealed envelope clearly marked **Original, Copies** and **Electronic Copy**. The Bidder shall clearly mark the original document as “**ORIGINAL**” and the **four (4) copies** as “**Electronic Copy**”.

In the event of discrepancy between the original and the copy, the original shall prevail.

The inner and outer envelopes shall be addressed to KR at the address stated in the Appendix to Instructions to Bidder and bear the name and identification of the Bid stated in the said Appendix with a warning “DO NOT OPEN BEFORE.....(The date and time for opening of bids)” as stated in the said Appendix.

The inner envelopes shall each indicate the name and address of the Bidder to enable the Bid to be returned unopened in case it is declared “late”, while the outer envelope shall bear no mark indicating the identity of the Bidder.

If the outer envelope is not sealed and marked as instructed above, KR will assume no responsibility for the misplacement or premature opening of the Bid. A Bid opened prematurely for this cause will be rejected by KR and returned to the Bidder.

3.4.2 Deadline for Submission of Bids

Bids must be received by KR at the address specified in the Appendix Instructions to Bidder and on the date and time as specified in the Invitation to Tender.

Proof of posting will not be accepted as proof of delivery and any Bid delivered after the above stipulated time, from whatever cause arising will not be considered.

Bulky Bids which cannot be placed in the Bid box will be received by KR at Kenya Railways Headquarters, Block B, Ground Floor, Supply Chain Department. Ensure that the documents are officially received before closing time and entered into the register for inclusion during Bid opening.

KR may at its discretion, extend the deadline for the submission of Bids through the issue of an addendum in accordance with Clause 3.2.3 of the Instruction to Bidders, in which case all rights and obligations of KR and the Bidder previously subject to the original deadline shall thereafter be subjected to the new deadline as extended.

Any Bid received by KR after the prescribed deadline for submission of Bids will be returned to the Bidder unopened.

3.4.3 Modification and Withdrawal of Bids

The Bidder may modify or withdraw its bid after bid submission, provided that written notice of the modification or withdrawal is received by KR prior to the prescribed deadline for submission of bids.

The Bidder’s modification or withdrawal notice shall be prepared, sealed, marked and dispatched in accordance with the provisions for the submission of bids, with the inner and outer envelopes additionally marked “**MODIFICATION**” or “**WITHDRAWAL**” as appropriate.

No bid may be modified subsequent to the deadline for submission of bids.

No bid may be withdrawn in the interval between the deadline for submission of bids and the period of bid validity specified on the bid form. Withdrawal of a bid during this interval will result in the forfeiture of the Bid Security.

Subsequent to the expiry of the bid validity period prescribed by KR, and the Bidder having not been notified by KR of the award of the Contract or the Bidder does not

intend to conform with the request of KR to extend the period of bid validity, the Bidder may withdraw its bid without risk of forfeiture of the Bid Security.

3.5 Bid Opening

3.5.1 Bid Opening

KR will open the outer envelope and the inner envelopes containing the “**MANDATORY REQUIREMENTS**” & “**TECHNICAL PROPOSAL**” in the presence of the Bidders Representatives who choose to attend at the time and location indicated in the Invitation to Bid. The Bidders’ representatives who are present shall sign a register evidencing their attendance.

Bids for which an acceptable notice of withdrawal has been submitted, pursuant to Clause 3.4.3 will not be opened. KR will examine the bids to determine whether they are complete, whether the requisite Bid Securities have been furnished, whether the documents have been properly signed and whether the bids are generally in order.

At the bid opening, KR will announce the Bidder’s names, the presence of the requisite Bid Security and such other details as KR, at its discretion, may consider appropriate. No Bid shall be rejected at the bid opening except for late bids.

KR shall prepare minutes of the bid opening including the information disclosed to those present.

Bids not opened and read out at bid opening shall not be considered for further evaluation, irrespective of the circumstances. Any bid recited after the deadline for submission of bid shall be returned to the Bidder unopened.

3.5.2 Confidentiality

After the public opening of bids, information relating to the examination, clarification, evaluation and comparisons of bids and recommendations concerning the award of Contract shall not be disclosed to Bidders or other persons not officially concerned with such process until the award of Contract is announced.

Any effort by a Bidder to influence KR in the process of examination, evaluation and comparison of bids and decisions concerning award of Contract may result in the rejection of the Bidder’s bid.

3.5.3 Clarification of Bids

To assist in the examination, evaluation and comparison of bids, KR may ask Bidders individually for clarification of their bids. The request for clarification of the response shall be in writing, but no change in the price or substance of the bid shall be sought, offered or permitted except as required to confirm the correction of arithmetical errors discovered by KR during the evaluation of the bid.

No Bidder shall contact KR on any matter relating to its bid from the time of the bid opening to the time the Contract is awarded. If the Bidder wishes to bring additional information to the notice of KR, he shall do so in writing.

3.5.4 Determination of Responsiveness

The Procuring Entity will start by examining all bids to ensure they meet in all respects the eligibility criteria and requirements in the ITB 3.1.3, and that the bid is complete in all aspects in meeting the requirements of Instructions to Bidder. Bids that do not submit a Financial Proposal will also be rejected at this stage. Bids that do not pass the Preliminary Examination will be considered non-responsive and will not be considered further.

3.5.5 Evaluation Process

Following the receipt of submissions, the Procuring Entity will appoint an evaluation committee who will evaluate the submissions on the basis of the completeness of information provided by the Bidders as well as responsiveness to criteria set out in this bid document.

The Bid Evaluation Committee shall evaluate the Bid(s) within 30 days from the date of opening the Bid(s).

The Procuring Entity shall use the criteria and methodologies listed in this Section 5 to evaluate bids and arrive at the bidder with the highest evaluated combined score for the technical proposal and the financial proposal. The bid that (i) meets the eligibility and mandatory criteria, (ii) has been determined to be substantially responsive to the Bid Documents, and (iii) is determined to have the highest combined score shall be selected for award of contract. Bidders should therefore meet these criteria without material deviations, reservation, or omission.

The Procuring Entity will conduct due diligence on the submissions provided by the bidders, including but not limited to:

- a) Verification of documents including certified copies and certifying entities or individuals.
- b) Verification of company documentation including certificate of incorporation, memorandum of articles, IDs and PINs of Directors, and other related documents.
- c) Verification of submitted technical documents along with the project profiles and experience including contacting of previous clients.
- d) Verification of financial documents and references from financiers, lenders, and banks, as case may be.
- e) Verification of submitted bid security.
- f) Upon completion of the evaluation of the bid submissions, the Bidder with the highest evaluated combined score will be invited for negotiations to discuss and conclude the Contract.

3.6 Award of Contract

3.6.1 Award Criteria

Subject to Clause 3.6.2, KR will award the bidder and enter into a Contract with the Successful Bidder:

- a) Whose bid is determined to be substantially responsive to the bid documents, and
- b) Who has been assessed as being technically and financially capable, and
- c) **Who has attained the highest combined score in the TECHNICAL and FINANCIAL evaluation.**

KR reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidders or any obligation to inform the affected Bidders of the grounds for KR's action.

3.6.2 Notification of Intention to enter into a Contract

Prior to the expiry of the Bid Validity Period, the Procuring Entity shall issue to all bidders, a Notification of Intention to Enter into a Contract with the Successful Bidder. The Notification of Intention to Enter into a Contract shall contain, at a minimum, the following information:

- 1 the name and address of the first ranking bidder;
- 2 the name and address of the second ranking bidder;
- 3 a statement of the reason(s) why the bid of the unsuccessful bidder to whom the letter is addressed was unsuccessful;
- 4 the expiry date of the Standstill Period; and
- 5 instructions on how to request a review and/or submit a complaint during the stand still period.

3.6.3 Standstill period

The Contract shall not be signed earlier than the expiry of a Standstill Period of 14 days to allow for requests for review from unsuccessful bidders to the Review Board. Where only one Bid is submitted, the Standstill period shall not apply.

Where a Standstill Period applies, it shall commence when the Procuring Entity has transmitted to each Bidder the Notification of Intention to enter into an Contract with the Successful Bidder.

3.6.4 Letter of Award

Prior to the expiry of the bid validity period prescribed by KR, upon expiry of the Standstill Period, and upon completion of review for requests that have been filed with the Review Board within the Standstill Period, KR will issue the Letter of Award to the Successful Bidder.

Upon receipt of the Letter of Award from KR, the Successful Bidder shall send a written acknowledgement agreeing to comply with the conditions set out therein and the timelines towards negotiation and execution of the Contract.

3.6.5 Signing of the Contract

The Successful Bidder shall sign, date and return to KR the Contract and return it to KR within twenty-eight (28) days from the date of its receipt of the Contract unless there is an administrative review request.

Upon signing of the Contract with the successful bidder, KR will promptly notify other Bidders that their proposals have been unsuccessful and their bid security will be returned within 28 days without interest.

In the absence of an administrative review request, failure of the Successful Bidder to enter into a Contract within the stipulated period shall constitute sufficient grounds for the annulment of the Letter of Award (LoA) and forfeiture of the bid security. In such event, KR reserves the right to invite the second-best evaluated Bidder for negotiations or, call for fresh Bids or take any such measures as may be deemed fit in the sole discretion of KR including annulment of the bidding process.

3.6.6 Fraud and Corruption

The Procuring Entity requires that the Bidders observe the highest standards of ethics during the procurement process and execution of contract.

Bidders shall sign and provide a declaration that they have not and will not be involved in corrupt or fraudulent practices.

The Procuring Entity will reject a contract award if it determines that the Bidder selected as the successful developer has engaged in corrupt or fraudulent practices during the bidding process.

Further, Bidders who are found to have indulged in corrupt or fraudulent practices risk being debarred from participating in public procurement in Kenya.

3.7 Negotiation Process

The Procuring Entity will appoint a team for the purpose of the negotiations.

The Procuring Entity will negotiate with the Successful Bidder following the conclusion of the evaluation process. Should negotiations fail with the first Successful Bidder, the bidder with the second-best evaluated bid will be invited to negotiate a contract.

The place of negotiations will be communicated in the Letter of Award.

The first meeting will outline key areas of negotiation including technical design submissions, legal and financial structuring, and other important areas to both parties.

Subsequent meetings will then review submissions of the technical design and specifications for the development by the Bidder.

The following meeting will consider legal and finance considerations including:

- a) Review of the marked-up Contract, and other legal documents governing the project delivery model.
- b) Review of financial work plan;
- c) Disclosures on the sources of funding for the projects;
- d) Review of marketing strategy and plan;
- e) Assessment of readiness for financial close; and
- f) Other relevant information related to legal and financial arrangements for the project.

Other meetings to address outstanding issues will be scheduled as needed, and lead to execution of the Contract.

3.8 ANNEX A - Appendix To Instructions To Bidders.

| | | |
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| 1 | Project Name | The design, financing, construction, commissioning, operation and transfer of Purpose-built Student Accommodation at the Nairobi Railway City. The reference number for this bid is KR/SCM/SPP/001/2023-2024 |
| 2 | Procuring Entity | Kenya Railways (KR) |
| 3 | Address for obtaining clarification or further information | The Managing Director Kenya Railways Kenya Railways Headquarters P.O. Box 30121-00100, Nairobi Attention: General Manager, Supply Chain Management Kenya Railways Headquarters Block B, Haile Selassie Avenue Supply Chain Department Ground Floor City: Nairobi Zip Code. 30121- 00100 Country: Kenya Email: procure@krc.co.ke The Procuring Entity shall publish its responses at the website www.krc.co.ke/tenders/ |
| 4 | Maximum Joint Venture Members | Maximum number of members in the Joint Venture (JV) shall be Four . |
| 5 | Pre-Bid conference | A Pre-Bid conference shall take place at the following date, time and place: Date: 13 th December 2023 Time: 1000Hours (EAT) Place: Virtual Meeting or at Kenya Railways Headquarters. Minutes of the pre-bid conference will be published on the following website: www.krc.co.ke/tenders/ |
| 6 | Site Visit | A pre-arranged Site visit of the proposed Project Site shall take place on the week commencing Monday 18 th December 2023 and ending Friday 22 nd December 2023 during office hours between 0900hrs and 1600hrs. Bidders will write to Kenya Railways via email procure@krc.co.ke to arrange the pre-bid visit. |
| 7 | Address for Submission of Bids | The Managing Director Kenya Railways Kenya Railways Headquarters P.O. Box 30121-00100, Nairobi Attention: General Manager, Supply Chain Management Kenya Railways Headquarters Block C, |

| | | |
|----|---|--|
| | | <p>Haile Selassie Avenue Reception Area, Ground Floor City: Nairobi Zip Code. 30121- 00100 Country: Kenya</p> <p>Bid documents shall be deposited in Bid Box located at the Kenya Railways headquarters, Block C Ground Floor Reception Area, Nairobi, Kenya. Bulky bid documents that cannot fit in the bid box shall be delivered and registered at Supply Chain Management Department Block B Ground Floor.</p> |
| 8 | Bid Submission Deadline | The Bid Submission Deadline will be on 05th January 2024 at 1000 Hours East African Time (EAT). |
| 9 | Location, Time and Date for Bid Opening | The tender document inclusive of Mandatory, Technical and Financial shall be opened at Kenya Railways Head Quarters Block B Ground Floor, Closing Dated: 5th January, 2024 at 1000Hours (EAT) |
| 10 | Bid Currency | Kenya Shillings (Kshs) |
| 11 | Bid Validity Period | <p>The Bid validity period shall be 240 working days from and including the date of bid opening.</p> <p>The additional validity period above the validity period shall be 30days</p> |
| 12 | Bid Security | <p>A Bid Security shall be required.</p> <p>Bidder shall provide a Bid Security in the form of a Bank Guarantee from a reputable Commercial Bank registered in Kenya of Kenya Shillings Ten Million Only (Kshs:10,000,000.00) which will remain valid for 210 calendar days</p> |
| 13 | Number of Copies of the Bid | <p>In addition to the One (1)Original Bid Document, the number of copies required is Four :(4 No) One (1) electronic copy (inclusive of the mandatory, technical and financial proposal) and 3 copies.</p> <p>In this case Electronic copy; shall refer to flash drive or a Compact Disc (CD).</p> <p>Bidder will be required to provide firmly bound bid documents (in either perfect cover, hard copy or case bound).</p> <p>NB: Loose documents will not be accepted during tender opening.</p> <p>The bid documents should be paginated/serialized (each page of the bid submission must have a number and the numbers must be in chronological order)</p> |

| | | |
|----|-----------------------------|--|
| | | For pagination the numbering system to be used are numerical numbers i.e. 1,2,3,4,.....n (n being the last page of the bid document) in accordance with section 74 (i) of the PPAD Act, 2015. |
| 14 | Sealing and Marking of bids | <p>The Bidder shall deliver the bid submission in a single sealed envelope, or in a single sealed package, or in a single sealed container bearing the name and Reference number of the Bid addressed to the Procuring Entity and a warning “DO NOT OPEN BEFORE.....(the time and date for Bid opening date)”. Within the single envelope, package or container, the Bidder shall place the following three separate envelopes or packages or containers labelled and sealed as illustrated below:</p> <p>Envelope/Package Contain One (1) Original marked ‘ORIGINAL’, four (4) Copies marked ‘COPIES’ and One (1) electronic copy.</p> <p>All to be sealed in a plain outer envelope clearly marked as above.</p> |

4. PROJECT SPECIFICATIONS AND REQUIREMENTS

4.1 Technical Requirements

4.1.1 Urban Form

The ground floor of the development should be well considered in relation to the surrounding streets which will have a very high level of pedestrian traffic during peak hours, and surrounding uses, in particular the TUK campus to the north. Whilst requiring security and privacy for residents, the developer should adopt a design which embraces the urban context of the site, maximizes the benefits of the new public realm in close proximity to the site and embraces opportunity for food and beverage (F&B) outlets to benefit from visitors and the high number of students within the vicinity within the TUK campus.

The development shall conform to the following parameters:

- Maximum ground coverage – 40%
- Maximum plot ratio – 380%
- Maximum number of floors – Ground + 9
- Maximum height of any building- 32metres

4.1.2 Development Mix

The development is expected to provide accommodation for a minimum of 2,500 students in rooms with a range of sizes (e.g., studio, 2 bed sharing, 4 bed sharing). Rooms shall include adequate space for private study and have a good level of provision of bathroom and kitchen facilities (individual per room or shared). Shared washroom areas must be within individual lockable rooms for safeguarding.

Convenience retail, food and beverage, laundry and recreational space must be included within the development. Private outdoor space, accessible only to residents must be included. It is anticipated that retail and F&B facilities will be located at ground floor and open to visitors. Access to residential floors must be controlled and only for residents and accompanied visitors. Recreational facilities should not include bars, clubs or other uses that will cause disturbance to residents or neighbours.

4.1.3 Access

Vehicular primary access to the development should be taken from Pate Bay Road, with access from Station Road only for occasional deliveries (outside commuter rail peak hours) and emergencies. The Developer is encouraged to provide ease of access for pedestrians and bicycle users on both Pate Bay Road and Station Road. No access or egress is permitted on Workshops Road.

Future phases of the Nairobi Railway City development include upgrading of Workshops Road (north and south of the railway) to serve as a through road via a bridge over the railway yard. The bridge ramp will be elevated as it passes the Project Site and prevent connection between Pate Bay Road and Workshops Road.

4.1.4 Utilities

The vicinity of the Project Site is served by power, water, and sewerage underground utilities. The developer shall, at its own cost be responsible for provision of the on-site infrastructure within the boundaries of the Project Site that will be necessary for the success of the Project. Requirements for back-up power and water will be assessed and met by the developer.

4.1.5 Design Standards

The development must be designed in accordance with all relevant legislation in Kenya. It is expected that it will be designed in accordance with the draft National Building Code, 2022. This includes design using Eurocodes. International best practice (e.g. BS9999) is anticipated to be used for the design for fire and life safety as this is a building with high density residential occupancy. Appropriate modifications to the standard should be applied in consideration of the context, particularly in relation to on-site storage of water for firefighting.

Parking spaces, space for bicycles, e-scooters and e-charging shall be provided as appropriate for the building occupancy type. The Developer must consider the location and use of the site, its proximity to public transport, provision of shared parking silos within the wider Railway City development, and proximity to urban services when proposing the number of car parking spaces within the development. It is expected that the parking spaces number will be lower than typical standards for Nairobi developments.

The design must include space for delivery vehicles (including larger vehicles and motorbike deliveries e.g. Uber Eats) to service the site without any hindrance to passing traffic on the access road(s).

4.1.6 Quality

The design life of the development shall be 50 years. Design and construction shall be high quality to minimize need for maintenance during operation. Fixtures and fittings (e.g. sanitary ware, furniture and soft furnishings shall be robust) and suitable for their intended institutional use. Sanitary ware shall be of a grade intended for public use.

The Developer shall include a quality management plan for the design, construction, and operation phases of the development. The Developer shall provide a maintenance schedule for regular, occasional, and preventative maintenance and a schedule for periodic refurbishment through the Lease Term.

The Developer shall include an occupational, health and safety management plan for the construction and operation phases of the development. The design shall incorporate 'safe by design' principles, promoting passive security and safeguarding within the development and principles of construction design and management that promote safety in the future maintenance of the development.

4.1.7 Defects liability period

The defects liability period during which the Developer is responsible for all maintenance and latent defects shall be 12 months.

4.1.8 Site investigations

The Developer is responsible for carrying out a site-specific geotechnical investigation and any other site survey required for the design and construction of the development.

4.1.9 Approvals

The Developer is responsible for obtaining all necessary statutory approvals during design, construction and operation of the development, including payment of all statutory fees. All plans and designs will be submitted to the Development Control Centre for onward submission to the Cabinet Secretary, Ministry of Lands and Physical Planning for final approval, as Nairobi Railway City is designated as a Special Planning Area.

4.1.10 Local Compliance

The Developer must include a team with all necessary qualifications and registrations to deliver the design and construction in Kenya, including, but not limited to, registration with AAK, EBK, BORAQS and NCA. Foreign Developers are required to source at least forty percent (40%) of their development inputs (in supplies, sub-contracts and labour) from local suppliers and contractors. International teams must demonstrate how the statutory requirements for registration will be met by the developer.

4.1.11 Insurance

The Developer shall provide and maintain insurance against all risks in respect of the Project during the duration of the lease as may be required by Law. This shall include but not be limited to:

1. Construction All Risk Insurance: Coverage for physical damage or loss to the construction project during the construction phase, which may be caused by fire, theft, natural disasters, and accidents.
2. Worker's Compensation Insurance: As required by Kenyan law, including and without limitation, employer's liability insurance for all employees of the developer's consortium performing any work on any improvements being constructed on the Site.
3. Comprehensive General Liability: Against claims for personal injury (including bodily injury and death and property damage). Such insurance shall provide coverage for blanket contractual, explosion, collapse and underground coverage, broad form property damage and personal injury insurance.
4. Property Insurance: Coverage during the operations phase to cover the buildings against risks such as fire, theft and vandalism.

4.1.12 Experience of similar developments

The Developer is required to have delivered and operated projects of a similar typology and magnitude. Experience in Sub-Saharan Africa is an added advantage. Demonstration of this experience will be included in the bidder’s submission as indicated in the evaluation criteria following.

Relevant experience of key developer/consortium team members must be demonstrated as indicated in the evaluation criteria following.

4.1.13 Programme for Delivery

The Developer shall provide a development programme from contract signing to occupation in the form of a Gantt chart.

4.2 ESG and Climate Resilience Considerations

Objectives for ESG and climate resilience mainstreaming

The PBSA project at the Nairobi Railway City will:

1. Be an Architecture that has a thoughtful integration of all the high points of the spectrum of great spaces while accommodating the health, well-being, and performance of students it accommodates.
2. Integrate with the well-articulated live-study-play environment presented by the 'student district' of the master plan and anchored by the current TUK.
3. Present a model of how a climate-resilient student housing project in a carbon-constrained tropical environment can be delivered.
4. Cohere and communicate evidence around climate resilience to demonstrate that climate action in student accommodation brings broader benefits to the city and beyond.
5. Allow for the extraction of environmental design principles and operational guidelines that will feed into the policy and practice spaces of climate-conscious environmental management of multi-residential building typologies in Nairobi.

ESG and climate resilience requirements for the student housing project

Table 1: Environmental sustainability issues

| ENVIRONMENTAL SUSTAINABILITY ISSUES | | |
|--|---|--|
| Strategies that allow for passive reciprocity between the Parcel- level Design and the ambient environment. | | |
| | COMPULSORY REQUIREMENTS | GOOD TO HAVE |
| 1. Health and wellbeing aspects | Thermal comfort <u>Illustrate passive thermal design strategies across:</u> 1. Site Layout | Thermal comfort 1. Environmental design architect 2. Temporal thermal |

| | | |
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| <p>Objectives</p> <p>To ensure Visual comfort, Thermal comfort, and Indoor Air Quality are passively achieved. In the end, the student accommodation should promote wellness and manage the absence of illness imposed by the building(s)</p> | <ol style="list-style-type: none"> 2. Built form and characteristics – floor plate orientation, room depths, court/atria design, ventilation strategies etc 3. Façade design – WWR / WOA 4. Building fabric specification – external wall, external glazing, roof design 5. Building use aspects – Occupancy hours, occupancy density, equipment density <p>Visual Comfort</p> <p><u>Illustrate passive lighting design strategies across:</u></p> <ol style="list-style-type: none"> 1. Appropriate daylighting quantity to all spaces as per standard illuminance levels 2. Efficient night time lighting quantity 3. Internal and external lighting plan 4. View out from all useable spaces <p>Indoor Air Quality</p> <p><u>Illustrate passive means of:</u></p> <ol style="list-style-type: none"> 1. Cross ventilation 2. Air change rate per hour required in each space <p>Universal accessibility</p> <ol style="list-style-type: none"> 1. Illustrate safe, inclusive, and accessible design. | <p>comfort management plan</p> <p>Visual Comfort</p> <ol style="list-style-type: none"> 1. Lighting design expert 2. Day and night-time distribution of light– illuminance uniformities 3. Glare management 4. Illustrate quality of light – Colour rendering etc <p>Indoor Air Quality</p> <ol style="list-style-type: none"> 1. CFD models of the buildings during design 2. A post-construction Indoor air quality plan 3. Temporal CFD Models tracking air quality |
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| | | <p>maintenance over time, including Uncertainty and Sensitivity Analysis</p> |
| <p>2. Energy aspects</p> <p>Objectives</p> <p>To ensure the reduction of primary energy demand through building & systems design and specification, passive design solutions, and energy-efficient equipment solutions.</p> | <p>Passive design</p> <p>Illustrate all the above passive design strategies towards indoor health and wellbeing in a way that minimises operational energy use of the building towards a low carbon design.</p> <p>Renewable energy supply</p> <ol style="list-style-type: none"> 1. Illustrate Solar energy solutions – Solar water heating and solar energy production to offset a minimum of 25% of hot water demand and energy demand, respectively. | <p>Environmental engineering expertise</p> <ol style="list-style-type: none"> 1. Environmental electrical engineer <p>Renewable energy supply</p> <ol style="list-style-type: none"> 1. Illustrate solar energy solutions – solar water heating and solar energy production to offset 100% of hot water demand and building energy demand, respectively. <p>Energy monitoring</p> <ol style="list-style-type: none"> 1. Illustrate energy monitoring and display devices. 2. Illustrate submetering of spaces or groups of spaces that have substantial energy uses. <p>Energy-efficient equipment</p> <ol style="list-style-type: none"> 1. Provision of Eco-labelled Equipment e.g., Energy efficient |

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| | | equipment fixtures that are AAA+ energy rated |
| <p>3. Water management aspects</p> <p>Objectives</p> <p>To ensure sustainable and efficient water management across the source-distribution-use-water systems installation value chain.</p> | <p>Water source</p> <ol style="list-style-type: none"> 1. Provide and implement a rainwater harvesting plan. 2. Provide and implement a greywater recycling plan for non-portable use. <p>Water consumption</p> <ol style="list-style-type: none"> 1. Develop and implement a water use efficiency/optimisation plan. <p>Water efficient equipment appliances and fixtures</p> <ol style="list-style-type: none"> 1. Sensor-operated tap systems for kitchens, bathrooms, laundry areas etc 2. Install low-flow fixtures and faucets 3. Install dual flush systems for Urinals and Toilets | <p>Environmental engineering expertise</p> <ol style="list-style-type: none"> 1. Environmental mechanical engineer <p>Water monitoring</p> <ol style="list-style-type: none"> 1. Provide Water demand and supply monitoring and display devices – water metres. 2. Install high-efficiency check valve(s). |
| <p>4. Waste management aspects</p> <p>Objective</p> <p>To ensure sustainable waste management practices across the construction stage, operational stages and any long-term repairs, maintenance and renovations</p> | <p>Construction waste management</p> <ol style="list-style-type: none"> 1. Provide a pre-demolition audit for any existing structure on site to determine reuse feasibility and maximise material recovery from demolition. 2. Provide and implement a construction waste management plan – on-site and off-site. | <p>Construction waste management</p> <ol style="list-style-type: none"> 1. Demolition recycling plan 2. Foreman to report on construction waste management |

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| <p>envisioned for the building(s)</p> | <p>Operational waste management</p> <ol style="list-style-type: none"> 1. Provide a dedicated space(s) and facilities for segregation, storage and management of wastes generated by the student housing facilities, its occupants, and activities. 2. Illustrate connection to NRC and/or citywide waste collection scheme. 3. Develop and implement a parcel-level composting plan <p>Stormwater waste management</p> <ol style="list-style-type: none"> 1. Provide and implement a sustainable stormwater management plan within the parcel boundaries. | <p>Operational waste management</p> <ol style="list-style-type: none"> 1. Provide and implement a Smart waste management system from Collecting – sorting – composting/recycling <p>Stormwater waste management</p> <ol style="list-style-type: none"> 1. Recycle all stormwater on site |
| <p>5. Land ecology and biodiversity aspects</p> <p>Objective</p> <p>To ensure that the design not only upholds any ecological value of the site and surrounding land but also enhances the parcel's long-term biodiversity.</p> | <p>Protection of and minimising impact on existing site ecology</p> <ol style="list-style-type: none"> 1. Undertake Site Analysis to establish the ecological value of the site. 2. If a value has been established, illustrate, and implement a plan to protect all ecological features on site. <p>Enhance site ecology</p> <ol style="list-style-type: none"> 1. Develop a site ecology and biodiversity enhancement strategy. 2. Implement at least 50% of the Site Ecology and Biodiversity enhancement | <p>Protection of and minimising impact on existing site ecology</p> <ol style="list-style-type: none"> 1. Onboard a qualified Landscape architect and ecologist <p>Enhance site ecology</p> <ol style="list-style-type: none"> 1. Onboard a qualified Landscape architect and ecologist 2. Implement 100% of the Site Ecology and Biodiversity enhancement recommendations within |

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| | <p>recommendations before an occupation certificate is issued.</p> <p>Long-term Eco diversity management</p> <ol style="list-style-type: none"> 1. Develop a long-term site landscape enhancement management plan. 2. Submit landscape enhancement and management plan | <p>the report in the final design and build before the occupation certificate is issued.</p> <p>Long-term Eco diversity management</p> <ol style="list-style-type: none"> 1. Onboard a qualified Landscape architect and ecologist |
| <p>6. Building Materials aspects</p> <p><u>Objective</u></p> <p>To ensure the most negligible impact of construction material to the environment through design, building material specification, procurement processes, construction and long-term repair and maintenance of the building.</p> | <p>Low Embodied Carbon of Material</p> <ol style="list-style-type: none"> 1. Onboard an environmental expert with Carbon foot printing expertise on long-lived assets. 2. Undertake Carbon footprint quantification of both the Shell and Core (foundation, external walls, floors and roof) & building schedules (door, window, finishes). Carbon footprint quantification to include: <ol style="list-style-type: none"> 1. Global Warming Potential Total (kgCO₂eq) 2. Acidification Potential Total (kgSO₂eq) 3. Eutrophication Potential Total (kgNeq) 4. Ozone Depletion Potential Total (CFC-11eq) 5. Smog Formation Potential Total (kgO₃eq) 6. Primary Energy Demand Total (MJ) 7. Non-renewable Energy | <p>Low Embodied Carbon of Material</p> <ol style="list-style-type: none"> 1. Undertake Carbon footprint quantification of Shell and Core (foundation, external walls, floors and roof); All building schedules; All fit-outs and components and All building finishes. Carbon footprint quantification to include: <ol style="list-style-type: none"> 1. Global Warming Potential Total (kgCO₂eq) 2. Acidification Potential Total (kgSO₂eq) 3. Eutrophication Potential Total (kgNeq) 4. Ozone Depletion Potential Total (CFC-11eq) 5. Smog Formation Potential Total |

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| | <p>Demand Total (MJ)</p> <p>8. Renewable Energy Demand Total (MJ)</p> <p>Appropriate Building Materials and Technologies</p> <p>1. Specify at least 50% of locally sourced building material.</p> <p>Responsible sourcing of construction products</p> <p>1. A written confirmation from the principal developer that all timber and timber-based products will be sourced in compliance with the Kenyan definition of Legally harvested and legally traded timber.</p> <p>2. Contractor to develop and submit a sustainable material sourcing and procuring plan</p> | <p>(kgO₃eq)</p> <p>6. Primary Energy Demand Total (MJ)</p> <p>7. Non-renewable Energy Demand Total (MJ)</p> <p>8. Renewable Energy Demand Total (MJ)</p> <p>2. Undertake a Life cycle cradle to grave assessment of all building materials used.</p> <p>Appropriate Building Materials and Technologies</p> <p>1. Specify at 100% of locally sourced building material</p> <p>Responsible sourcing of construction products</p> <p>1. Principle developer is certified to fulfil all responsible sourcing of material certification</p> <p>2. Developer to develop a sustainable procurement plan.</p> |
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Table 2: Social Responsibility (s)

SOCIAL RESPONSIBILITY (S)

Strategies that ensure responsible social practices across all phases of the design, build and use of the student accommodation

| | COMPULSORY REQUIREMENTS | GOOD TO HAVE |
|---|---|--|
| <p>1. Responsible social practices during the Design Phase</p> | <p>The design must be visually appealing. It must embody all the high points of good urban design with a sense of place.</p> <p>Design Brief to include rational sizes and proportions of student-friendly living, catering areas, general communal areas, meeting rooms, leisure areas and open spaces.</p> <p>Design for inclusivity – Gender, Faith, Age – to ensure that all spaces are inclusive for all its residents.</p> <p>Design must espouse orientation and wayfinding principles across</p> <p>a) Well-planned layouts identifying key elements such as entrances, reception areas, sanitary facilities, etc.</p> <p>b) Good lighting conditions with additional illumination at decision points such as access routes, entrances, staircases, lifts, etc.</p> <p>c) Clear information and legible and easily understood signage, including availability in different languages where appropriate to the asset's location.</p> | <ol style="list-style-type: none"> 1. Undertake a comprehensive stakeholder engagement to ascertain students' accommodation spatial needs and priorities. 2. Implement, through design, all the recommendations following the above students' accommodation needs assessment. 3. The design must espouse the design coherence factors (Dilani's attributes) of <ol style="list-style-type: none"> a. Comprehensibility – wayfinding, perception, colour b. Manageability – aesthetic elements, stimuli, ergonomic c. Meaningfulness – social support, culture, autonomy, freedom, positive distractions |
| <p>2. Responsible social practices during the Construction phase</p> | <p>Principle contractor must:</p> <ol style="list-style-type: none"> 1. Ensure the safety and wellbeing of all construction workers. 2. Implement fair labour practices. 3. Engage with immediate site neighbours, local communities, and stakeholders to mitigate any | <p>Principle to:</p> <ol style="list-style-type: none"> 1. Illustrate at least 50% youth labour engagement to capitalise on Nairobi's high youth dividend. 2. Illustrate a promotion of youth skill supply, skill development and project placement. |

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| | <p>potential negative impacts of the construction process.</p> <p>4. Illustrate support for local businesses and source materials locally to promote economic development.</p> | |
| <p>3. Responsible social practices during the Operational Phase</p> | <p>Student accommodation management to:</p> <ol style="list-style-type: none"> 1. Provide and maintain amenities that promote physical and mental wellbeing of students. 2. Ensure the safety and security of residents. 3. Promote a sense of community and inclusion. | <p>Student accommodation management to:</p> <ol style="list-style-type: none"> 1. Develop and implement a student housing salutogenesis masterplan that, among other things, ensures a state of complete physical, mental, and social wellbeing of students and all-support staff. The Salutogenesis masterplan will identify and encompass all factors that promote health and wellbeing and provide a framework for creating environments supporting individuals' overall wellbeing. <p>NB: Health is more than the absence of illness. Health and wellbeing aspects of (E) ensure that building related illness is at bay.</p> |

Table 3: Good governance practices

| <p>GOOD GOVERNANCE PRACTICES (G)</p> <p>Strategies that allow for both short-term (design and construction stages) and long-term (Operational phase of the student housing) bankable good governance practices of the student housing project</p> | | |
|--|---|--|
| | <p>COMPULSORY REQUIREMENTS</p> | <p>GOOD TO HAVE</p> |
| <p>1. Good governance practices during the Design stage of the Student Housing</p> | <ol style="list-style-type: none"> 1. Develop a clear sustainability brief that sets out ESG/CR objectives and targets alongside student housing brief and | <ol style="list-style-type: none"> 1. An Environmental design consultant 2. An environmental life cycle cost, benefits, and trade- |

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| | <p>spatial requirements.</p> <ol style="list-style-type: none"> 2. Hold stakeholder consultations and demonstrate the stakeholder contributions to the design. 3. The design team must report, receive feedback, and respond to NRC's designated ESG/CR expert across all design stages - Concept, Schematic, Project approval and Detail design stages. | <p>offs reporting.</p> |
| <p>2. Good governance practices during the Construction phase</p> | <ol style="list-style-type: none"> 1. Implement the NHC/NCA-compliant Health and Safety protocols set for active sites. 2. Principle contractor must have an ISO1400/EMAS certification. 3. The principal contractor must report receive feedback and respond to NRC's ESG/CR expert across all construction level stages agreed upon | <ol style="list-style-type: none"> 1. A Clerk of works to monitor ESG/CR compliance throughout the construction stage. |
| <p>3. Good governance practices during the Project completion and handover</p> | <ol style="list-style-type: none"> 1. Training schedule prepared for building occupants and facilities managers to illustrate – aftercare guidelines. | <ol style="list-style-type: none"> 1. Develop a building user guide with an implementation plan. 2. Develop and implement a post-occupancy evaluation plan across all post-occupancy ESG and CR aspects as guided by NRC's ESG/CR expert |

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| <p>4. Good governance practices during the Operational phase of the student accommodation</p> | <ol style="list-style-type: none"> 1. Lessee to ensure clear communication with tenants and fair and consistent enforcement of rules and policies. 2. Lessee to ensure regular maintenance and upkeep of the property. 3. Lessee to illustrate a means of responsiveness to tenant/students' concerns and feedback. | |
|--|--|--|

Table 4: Climate Resilience

| <p>CLIMATE RESILIENCE Designing to manage the impact of climate change by anticipating and comprehensively managing the increasing temperatures, water scarcity and flooding risks.</p> | | |
|--|--|---|
| | <p>COMPULSORY REQUIREMENTS</p> | <p>GOOD TO HAVE</p> |
| <p>1. Overheating risk management</p> | <p><u>During Design</u></p> <ol style="list-style-type: none"> 1. Meet all passive thermal design compulsory requirements above. 2. Carry out an overheating risk estimation for main indoor and outdoor spaces. 3. Develop an overheating risk management plan. 4. Adapt the design or specification to incorporate the measures identified by the risk assessment and long-term overheating risk management in the final | <ol style="list-style-type: none"> 1. Develop temporal overheating risk management plans. 2. Undertake Uncertainty and Sensitivity Analysis and management plan for a 50year timespan of the design |

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| | <p>design.</p> <p><u>During the Operational phase of the building</u></p> <ol style="list-style-type: none"> Describe all indoor overheating risk Coping mechanisms, preventative mechanisms, and future adaptive design mechanisms. | |
| <p>2. Water scarcity risk management</p> | <p><u>During Design</u></p> <ol style="list-style-type: none"> Meet all compulsory requirements for water management above. Carry out a water scarcity risk evaluation to identify and evaluate the impact of reduced portable water sources due to increasing drought conditions. Carry out a water scarcity risk estimation. Develop a water scarcity risk management plan. Adapt the design or specification to incorporate the measures identified by the risk assessment and long-term management in the final design. <p><u>During the Operational phase of the building</u></p> <ol style="list-style-type: none"> Describe all water scarcity risk Coping mechanisms, preventative mechanisms, and future adaptive water management design mechanisms. | <ol style="list-style-type: none"> Develop temporal water scarcity risk management plans. Undertake Uncertainty and Sensitivity Analysis and management plan for a 50year time span of the design |

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| 3. Liveability management | 1. Illustrate alignment of the design to the city's liveability plans across: <ol style="list-style-type: none"> 1. Urban food security 2. Urban Energy security 3. Urban water security | 1. Illustrate a cyclic and self-supporting - <ol style="list-style-type: none"> a. Urban food security of the design b. Urban Energy security of the design c. Urban water security of the design |
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4.3 Financial and Commercial Specifications

4.3.1 Lease and Compensation Structure

KR plans to enter into a 45-year lease with the developer to allow the development and operation of the PBSA project. It is envisioned that the developer and KR will negotiate and agree on a hybrid compensation structure comprising of a Stand Premium, KR's Annual Rent and a share of development revenue. At the end of the lease term, payments from the developer will cease and the lease will terminate, with the PBSAs reverting automatically and fully to Kenya Railways.

Bidders will provide their proposed consideration to be offered to Kenya Railways in Financial Bid Form 1, in accordance with the guideline below:

| Proposed Consideration payable to Kenya Railways | Minimum |
|--|------------------------------|
| Stand Premium | KES 150 million |
| KR's Annual Rent | KES 60 million |
| Revenue Share | To be proposed by the bidder |

- It is anticipated that the stand premium will be payable to KR upon or before signing of the lease;
- The proposed KR's Annual Rent shall be payable in advance commencing on the third year of the Commencement Date of the Contract, and incorporate an annual escalation rate not exceeding the Consumer Price Index (CPI) for every subsequent year;
- The Bidder is required to propose a suitable revenue share model to be implemented during the operation period of the Project, specifying the periodic payments to be made to KR. The details of the proposed revenue sharing arrangement should be presented within the financial proposal. The proposed mechanism should be based solely on the top-line revenue generated from renting the lettable areas of the Project and should not take into account any operational expenses.

- Furthermore, the Bidder is expected to compute and furnish the Present Value (PV) of cashflows payable to KR. This calculation should encompass the Stand Premium, KR's Annual Rent, and the Revenue Share, all discounted at an annual rate of 20%.

4.3.2 Competitive Room Rental Rates

The developer will charge competitive room rental rates that are affordable to the student population in Nairobi to enable achievement of optimal occupancy rates, while generating sufficient revenue to operate and maintain the property, recoup their investment and realisation of sufficient returns on investment. It is expected that the proposed room rents will include a periodical escalation rate not exceeding the Consumer Price Index (CPI). As part of their financial proposal, the Bidder shall provide, in Financial Bid Form 2, the proposed room rate per bed (inclusive of service charge, exclusive of utilities) per proposed room typology at the start of project operations and calculate the average monthly rent for year 1 of operations.

4.3.3 Financial Projections

Bidders will demonstrate the financial feasibility and sustainability of the project throughout the 45-years. Bidders shall provide a detailed financial model that encapsulates the envisioned project. The Financial Model should be prepared in MS Excel format and must be submitted in electronic format (flash disk or CD). For the avoidance of doubt, the Ms Excel sheets **shall not** be in PDF format. Bidders are required to fill out Financial Bid Form 3 comprising key assumptions that correspond with the submitted financial model. Bidders shall also provide a detailed narrative as indicated under the notes in Financial Bid Form 3 to facilitate the review.

Financial Models must include the following information:

- Proposed room-type mix and anticipated rental rates;
- Project timelines including lease term, construction period and operation period;
- Design and construction costs, financing, and scheduling assumptions and all other identifiable project costs;
- All revenues and expenses, including operating and maintenance expenses and net operating income;
- Annual cash flow after debt and/or equity obligations;
- Disclosure of inflation assumptions;
- Taxes (where applicable);
- Maintenance reserves allocation;
- Additional revenue beyond room rental revenue, if any
- Cost of capital assumptions for Project funding – full term of ground lease;
- All KR consideration including the Stand Premium, KR's Annual Rent and revenue share.

4.3.4 Project Financing

To facilitate successful implementation of the project, the developer will be required to raise the necessary financing (equity and/or debt finance) to cover the total project development costs, during the construction and operational phases. Project development costs shall include but not be limited to the cost of design, permits and approvals, lease registration cost, the independent technical expert cost, operation and maintenance expenses, maintenance reserves allocation, insurance and consideration to KR.

As part of the Mandatory Requirements, the Bidder shall provide the following information to demonstrate having made financing arrangements for the development and construction of the project:

- a. A letter of intent to finance the project from its holding company, equity investors or a reputable financial institution(s).
- b. Any other available resources to fund the total project development costs.

4.4 Operational Specifications

The Developer will operate and maintain the student housing project to ensure availability and suitability for student accommodation. The developer will also manage tenant acquisition, marketing, leasing and rental agreements and collect revenue through rent during the operations period.

4.4.1 Operating Plan

The Bidder shall develop and implement robust operational and maintenance procedures to ensure the project's long-term sustainability. This will include the following:

- a. Provision of necessary services and facilities to tenants including but not limited to water, garbage collection, security, electricity, and internet connectivity for the overall wellbeing of tenants
- b. Property cost management and routine maintenance
- c. Housekeeping of student rooms, furniture, appliances, machines and installations
- d. Cleaning and maintenance of common areas
- e. Recruitment and supervision of required staff
- f. Management and maintenance of sub-lease agreements
- g. Maintenance of staff and tenant records
- h. Monitoring and controlling student activities in the student housing premises
- i. Management of accounts and finance

4.4.2 Marketing and Tenant Acquisition

The Bidder shall develop a comprehensive Marketing Plan to promote the properties and to aid in the occupation of the Purpose-Built Student Accommodation units.

The marketing plan shall include a detailed description of the following parameters:

- a. Defining the target market for the PBSA units

- b. Product awareness campaign and the timing of the launch
- c. Process and timelines to achieving full occupancy
- d. Geographic scope of the marketing plan to reach target markets
- e. Scope for partnerships in the marketing plan
- f. Strategy to manage student churn rate

5. EVALUATION AND QUALIFICATION CRITERIA

5.1 Evaluation of the Technical Proposal

Each Bidder shall submit a complete Technical Proposal, by duly completing the Bid forms provided in Part 3 of this document, for the Project. The Bidder shall not amend or change the Bid Forms, in any way whatsoever, other than for duly filling the required data. Any Bid which does include amendments or additions of whatsoever nature to the Bid Forms shall be rejected. All copies of original documents must be certified by a Commissioner of Oaths. This includes, without limitation, academic or professional certificates, financing agreements, certificates of occupation, and membership certificates required as part of the technical proposal. The Procuring Entity shall then consider the Technical Proposal of the Bids who have been found responsive. The Procuring Entity shall allocate scores for each criterion on the Table of Scores below. The Procuring Entity will evaluate the Technical Proposals of all Bids that will have passed the Preliminary examination for Determination of Responsiveness. The Procuring Entity will use the following criteria and scoring system as indicated in Table 1 below. This is to ensure that the Procuring Entity opens and considers Financial Proposals of proposals that meet the threshold score of the Technical Proposal.

Technical Proposal Evaluation

The Technical Proposal shall be evaluated and scored using a scale of 100% allocated according to the quality, thoroughness and credibility of the Technical Proposal elements as defined in Section 4 (Project Specifications and Requirements). The available total points and relative weights for these elements are presented in the Table 1 below:

NB: Bidders who will attain a Technical score of 70% and above under each category in the Technical Evaluation shall proceed to the Financial Evaluation stage. Those who do not attain the score shall be considered non-responsive and shall not be considered for financial evaluation.

The Technical marks shall have a weight of 60% in the overall combined score which will be calculated as below:

$$T_x = TS \times 60\%$$

Where:

TS is the Technical score obtained in Table 1 as a percentage; and

T_x is the weighted Technical Score

Technical Evaluation Criteria

Table 1: Technical evaluation criteria summary

| | Requirement | Max Score | Min |
|-----|------------------------------|-----------|-----|
| 1.0 | Relevant Previous Experience | 40 | 70% |
| 2.0 | Team Composition (5) | | |

| | | | |
|-----|---|-----|-----|
| | Key Experts (7) | 20 | 70% |
| | Financial capacity to deliver (8) | | |
| 3.0 | ESG and CR | 20 | 70% |
| 4.0 | Proposed method of delivery and operation | 20 | 70% |
| | Total Technical Score | 100 | |

Technical Evaluation Criteria

| | Requirement | Max score | Marks |
|---------------|--|-----------|-------|
| 1.0 | Relevant Previous Experience | 40 | |
| a) | Provide evidence of undertaking 5 multi-residential accommodation projects, (either ongoing or completed) within the last ten (10) years, each having more than 300 residential units. Evidence of design, construction and operation must be included e.g. submission of completion certificate, developer contract, lease agreement. Experience of student accommodation and within Sub-Saharan Africa is an added advantage. Include the project name, location, gross built area, number of rooms, and project value. | | 35 |
| b) | Proof of experience in successfully undertaking at least 2 IFC-EDGE (or equivalent) rated similar projects from design, construction to commercial operation as lead developer within the last ten (10) years. | | 5 |
| 2.0(i) | Team Composition | 5 | |
| a) | Project Team Organization chart for the project design, construction management, project management, sales and marketing, property management and others as required. | | 2 |
| b) | Company profile for key firm(s) within the team demonstrating a minimum experience of ten years and above in handling housing projects of similar size. Profiles of 4 firms within the team may be | | 2 |

| | | | |
|-----------------|--|-----------|-----|
| | presented. 4 Maximum 2 pages per firm. | | |
| c) | Description of the role of each firm within the project team, including demonstration of compliance with Kenyan regulatory requirements. | | 1 |
| 2.0(ii) | Key Experts | 7 | |
| a) | Bidders must provide CVs of key experts demonstrating a minimum of 10 years' experience in handling projects of a similar nature. CVs must be signed and accompanied with certified academic and professional practicing certificates where applicable. Up to 7 key experts' CVs to be provided. | | 7 |
| 2.0(iii) | Financial capacity to deliver the project | 8 | |
| a) | Demonstrate how, within the last 10 years, as lead developer, the bidder has successfully raised at least KES 1.5 Billion debt or equity for each of at least 2 similar projects. Provide evidence of how the financing arrangements were put in place taking into account sourcing of finance, time and quantum. The evidence will be in the form of bank confirmation letters, share subscription agreements or signed financing agreements. | 6 | |
| b) | Certified copies of audited financial statements showing a cumulative real estate turnover of at least KES 500 million for the last three (3) years. | 2 | |
| 3.0 | ESG and CR | 20 | |
| 3.1 | Certification and Experience schedules | 5 | |
| a) | <u>Project team's Developer</u> to submit any certificate of ESG and/or sustainability development competence. | | 0.5 |
| b) | <u>Project team's Architect</u> to submit 1 A Carbon Footprint Analyst Course certificate or accredited professional in their team 2 An experience schedule of a suitably qualified energy/carbon modelling expert in their team | | 1.5 |

| | | | |
|------------|--|-----------|---|
| | Any certificates, memberships that show expertise in architectural environmental design | | |
| c) | <u>Project team's Electrical Engineer</u> to submit 1 An experience schedule in renewable energy modelling and installations 2 Any Sustainable design and development certification | | 1 |
| d) | <u>Project team's Structural and Civil Engineer</u> to submit 1 An experience schedule in sustainable urban drainage systems Any Sustainable design and development certification | | 1 |
| e) | <u>Project team's Mechanical Engineer</u> to submit 1 An experience schedule in sustainable water & sanitation management as well as sustainable mechanical installation 2 Any Sustainable design and development certification | | 1 |
| 3.2 | Proposed conceptual design requirements | 10 | |
| a) | <u>Environmental sustainability</u> Maximum 2-pages of illustrative descriptions of how the proposed design fulfils and upholds all the compulsory environmental sustainability requirements listed in section 4.2 above | | 5 |
| b) | <u>Social sustainability</u> Maximum 2-pages of illustrative descriptions of how the proposed design fulfils and upholds all the compulsory social sustainability requirements listed in section 4.2 above | | 1 |
| c) | <u>Good Governance</u> 1 Project team Architect to provide a clear project sustainability brief that sets out all ESG/CR objectives and targets alongside the student housing spatial requirements stipulated in the Project Brief. 2 Maximum 2-page descriptions of how the proposed design fulfils and upholds all the compulsory good governance requirements listed in section 4.2 above | | 1 |
| d) | <u>Climate Resilience</u> 1 Maximum 1-page illustrative description of how the proposed design manages overheating risk | | 3 |

| | | | |
|------------|--|-------------------------------------|------|
| | <p>2 Maximum 1-page illustrative descriptions of how the proposed design manages water scarcity risk</p> <p>3 Maximum 1-page illustrative descriptions of how the proposed design upholds Nairobi's liveability plans across maintaining urban food security, urban energy security and urban water security</p> | | |
| 3.3 | Experience through projects delivered | 5 (2.5 marks per project) | |
| A) | <u>Environmental sustainability</u> Bidders to include examples from case studies of projects they have undertaken to demonstrate how all the environmental sustainability minimum requirement objectives (section 4.2) were met | | 1.25 |
| b) | <u>Social sustainability</u> Bidders to include examples from case studies of projects they have undertaken to demonstrate socially responsible design deliverables | | 0.25 |
| c) | <u>Good Governance</u> Bidders to include examples from case studies of projects they have undertaken to demonstrate good governance aspects they have addressed in their prior projects | | 0.25 |
| d) | <u>Climate Resilience</u> Bidders to include examples from case studies of projects they have Designed to manage the impact of climate change by anticipating and comprehensively managing the increasing temperatures, water scarcity and flooding risks. | | 0.75 |
| 4. | Proposed method of delivery and operation | 20 | |
| a) | Bidders must describe their proposed method of delivery including contractor procurement, construction monitoring and quality assurance, operating model and facilities management to demonstrate that quality outcomes are delivered and maintained throughout the project lifecycle. | | 4 |
| b) | Bidders must provide a narrative describing broad massing and architectural concepts which govern the proposal for the site layout and building design. The narrative should also | | 5 |

| | | | |
|------------------------------|---|------------|---|
| | describe any details of the design including comments on materials and finishes, taking into account local supply chains and desire for low maintenance. | | |
| c) | Bidders must describe their proposed approach to health and safety at all stages of the project. Certification related to health and safety accreditation, relevant to the project, is an added advantage. | | 2 |
| d) | Bidders must describe their proposed approach to quality control at all stages of the project. Certification related to quality assurance relevant to the project is an added advantage. | | 2 |
| e) | Bidders must describe their proposed approach to risk management at all stages of the project. | | 2 |
| f) | Bidders must provide a project programme from Contract signing through to operation in the form of a Gantt chart. | | 5 |
| Total Technical Score | | 100 | |

A proposal shall be rejected at this stage if it does not respond to important aspects of the Project Specifications and Requirements or if it fails to achieve the minimum technical score of 70% under each category.

5.2 Evaluation of the Financial Proposal:

Each Bidder shall submit a complete financial proposal, by duly completing the Financial Bid forms provided in Part 3 of this document, for the Project. The Bidder shall not amend or change the Financial Bid Forms, in any way whatsoever, other than for duly filling the required data. Any Bid which does include amendments or additions of whatsoever nature to the Financial Bid Forms shall be rejected.

The Financial Proposal shall comprise the following documents:

| Constituent Parts of the Financial Proposal | |
|--|---|
| Financial Proposal | The Proposed Consideration to be offered to Kenya Railways in accordance with Section 4.3 – Financial Bid Form 1. |
| | The Proposed Rental Rates in accordance with Section 4.3 – Financial Bid Form 2. |
| | The Financial Model in accordance with Section 4.3 – Financial Bid Form 3 |

| | |
|--|--|
| | The Proposed Marketing Plan in accordance with Section 4.3 – Financial Bid Form 4. |
|--|--|

The Bidder shall submit the above-mentioned documents in accordance with the following conditions and instructions.

Financial Proposal Envelope

The Financial Bid (Forms 1, 2, 3, and 4) shall be enclosed in separate envelopes with the following inscription: “Financial Proposal”. All the Financial Bid envelopes for the Project shall then be enclosed in the Financial Bid Envelope in accordance with the Instructions to Bidders 3.4.1 of this Bid Document.

Financial Proposal Basic Conditions

- i. Any Financial Proposal including any basis or conditions of the Financial Proposal or any additional document of whatsoever nature other than those required under Section 5 of this Bid Document shall be rejected.
- ii. Any Financial Proposal including any conditions, provisions, restrictions, basis of Financial Proposal calculations or assumptions of whatsoever nature presented in any form shall be rejected.
- iii. Any Financial Proposal including any alterations, amendments or changes in the Financial Bid Forms 1, 2, 3, or 4 other than filling these forms as indicated, shall be rejected.
- iv. In the event of any discrepancy between words and figures in the Financial Bid Forms, the amounts indicated in words shall prevail.

Financial Score Summary

The Financial Proposal shall be evaluated and scored using a scale of 100% allocated according to each of the elements of the Financial Proposal elements as described below:

- i. Proposed Consideration as provided by the Bidder in Section 5 – Financial Bid Form 1 (60%)
- ii. Proposed room rent rate as provided by the Bidder in Section 5 – Financial Bid Form 2 (20%)
- iii. Financial Model assumptions as provided by the Bidder in Section 5- Financial Bid Form 3. (10%)
- iv. Proposed Marketing Plan as provided by the Bidder in Section 5 – Financial Bid Form 4 (10%)

Bidders must attain a financial score of 70% and above under each category in the Financial Evaluation.

Table 2: Financial Score Summary

| Evaluation Attributes | Weighting % (Z) | Score (Y) | Minimum Score (Z*Y) | Bidders Score (Z*Y) |
|------------------------------|------------------------|------------------|----------------------------|----------------------------|
| Proposed Consideration | 60 | /30 points | 70% | |
| Proposed Room Rental Rate | 20 | /10 points | 70% | |
| Financial Model | 10 | /40 points | 70% | |
| Marketing Plan | 10 | /20 points | 70% | |
| Total Score | 100 | | | |

Financial Evaluation Criteria

Proposed Consideration- 30 points maximum

| Parameter | Minimum |
|--|----------------|
| Stand premium | KES 150mn |
| Annual Ground rent | KES 60mn |
| The Present Value of the future payment made to KR | KES 0mn |
| Total | |

Proposed Room Rental Rate- 10 points maximum

Bidders with the highest proposed average rental rate (inclusive of service charge, exclusive of utilities) within the acceptable range will attain the full 10 points. Other bidders within the acceptable range will be allocated points on a pro-rata basis (proposed room rental rate/ highest room rental rate within the acceptable range x 10 points). Bidders with rental rates that are not within the acceptable range will get 0 points.

Steps to determine the acceptable range and eliminate outliers:

- i. The Bidder will provide in Financial Bid Form 2 the proposed room rental rate per bed per proposed room typology at the start of project operations and calculate the average monthly rent for year 1 of operations.
- ii. The average room rental rate proposed by each bidder will be listed in descending order and the median rent will be determined
- iii. The upper boundary of acceptable bids shall be calculated as rents 50% higher than the median rent (1.5 x median rent)

- iv. The lower boundary of acceptable bids shall be calculated as the higher of KES 10,000 per month or rents 50% lower than the median rent (0.5 x median rent)
- v. Rents above the upper boundary or below the lower boundary will be allocated 0 points.

Financial Model- 40 points maximum

- a. Demonstration of unit typologies and rental rates (5 points)
- b. Demonstration of all applicable project’s costs including but not limited to design, surveys and approvals, construction costs, and financing costs (5 points)
- c. Demonstration of rental revenue, occupancy rates, operating expenses and net operating income (10 points)
- d. Demonstration of consideration to be paid to Kenya Railways comprising the Stand Premium, KR’s Annual Rent and Revenue Share (10 points)
- e. Identification and demonstration of financing structure (5 points)
- f. Scenario analysis demonstrating alternative value-creating parameters (5 points)

Marketing Plan – 20 Points Maximum

The marketing plan shall be evaluated as follows:

- a. Defining the target market for the PBSA units (4 points).
- b. Product awareness campaign and timing of the launch (4 points).
- c. Process and timelines to achieving full occupancy (2 points).
- d. Geographic scope of the marketing plan to reach target markets (2 points).
- e. Scope for partnerships in the marketing plan (4 points).
- f. Strategy to manage student churn rate (4 points).

Financial Marks shall have an overall weight of 40% in the overall combined score.

$$F_x = FS \times 40\%$$

Where:

FS is the Financial score obtained in Table 2; and

F_x is the weighted average Financial Score

$$\text{Overall Combined Score} = T_x + F_x$$

The Bidder who shall have attained the highest overall combined score shall be the Successful Bidder.

PART 2: CONDITIONS OF CONTRACTS AND CONTRACT FORM(S)

Section I – General Conditions of Contract

A. DEFINITIONS AND INTERPRETATION

1.1 Definitions

- 1.1.1 Unless the context otherwise requires, the following terms wherever used in the Contract have the following meanings:
- 1.1.1.1 **Abandonment** means the failure to carry out all or substantially all of the Works or to operate the Project to provide Services as contemplated by the Contract for a period of thirty (30) consecutive Business Days or during ninety (90) Business Days (whether consecutive or not) in any twelve (12) month period;
 - 1.1.1.2 **Accounting Year** means the financial year commencing from 1st day of January of any calendar year and ending on the 31st day of December of the calendar year;
 - 1.1.1.3 **Affected Party** has the meaning given to it in Clause 26.1.1;
 - 1.1.1.4 **Agreed Form** in relation to any document, is the form of document agreed between the Parties and initialled by or on behalf of the Parties for the purposes of identification;
 - 1.1.1.5 **Amenities** shall include student study areas, common rooms, facilities management offices, kitchenettes, laundry facilities, dining halls and where applicable, commercial facilities;
 - 1.1.1.6 **Applicable Laws** means all laws, brought into force and effect by the Government of Kenya or a relevant County Government including but not limited to rules, regulations and notifications made thereunder, and judgements, decrees, injunctions, writs and orders of any court of record, applicable to the Contract and the exercise, performance and discharge of the respective rights and obligations of the Parties, as may be in force and effect during the subsistence of the Contract and **Applicable Law** shall be construed accordingly;
 - 1.1.1.7 **Applicable Permits** means all clearances, licences, permits, authorisations, no objection certificates, consents, approvals and exemptions required to be obtained or maintained under any Applicable Law in connection with the design, construction, finance, operation and maintenance of the Project during the subsistence of the Contract;
 - 1.1.1.8 **Arbitration Act** means the Arbitration Act, 1995 and shall include modifications to or its re-enactments, as in force from time to time;
 - 1.1.1.9 **Architect** means such person (s) or firm as the Developer may from time to time appoint as the architect for the Project;

- 1.1.1.10 **Associate** or **Affiliate** means, in relation to either Party, a person who controls, is controlled by, or is under the common control with such Party (as used in this definition, the expression **control** means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than fifty per cent (50%) of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person, whether by operation of law or by contract or otherwise);
- 1.1.1.11 **Availability Certificate** means the certificate to be issued by the Developer certifying that the O&M Services are available;
- 1.1.1.12 **Award** has the meaning given to it in Clause 34.3.5;
- 1.1.1.13 **Bank** means a bank or financial institution incorporated in Kenya and licensed with the Central Bank of Kenya under the Banking Act (Chapter 488, Laws of Kenya
- 1.1.1.14 **Base Case Financial Model** means as at Commencement Date, the base case financial model for the project which incorporates the forecasted cash flow statements of the Developer including all expenditure, revenues, taxation and financing of the Project together with the income statements and balance sheets of the Developer over the Project Term, and details of all assumptions, calculations and methodology used in the compilation as at the Commencement Date;
- 1.1.1.15 **Bid** means the documents in their entirety comprised in the bid submitted by the Successful Bidder in response to the RFP in accordance with the provisions of the RFP;
- 1.1.1.16 **Bid Security** means the security provided by every Bidder to the Procuring Entity along with the Bid in a sum stated in the Appendix to the Bid, and which is to remain in force until the Commencement Date ;
- 1.1.1.17 **Business day** means a day other than a Saturday, a Sunday and a Public Holiday in Kenya;
- 1.1.1.18 **Capital Expenditure** means any expenditure treated as capital under IFRS;
- 1.1.1.19 **Change in Ownership** means any sale, transfer or disposal of any legal, beneficiary's or equitable interest in any or all of the shares in the Developer (including the control over exercise of voting rights conferred on those shares, control over the right to appoint or remove directors or the rights to dividends);
- 1.1.1.20 **Change in Law** means the coming into effect after the Commencement Date of any Applicable Law, or any amendment or variation to any Applicable Law, other than any Applicable Law that on or before the Commencement Date, has been published:

- 1.1.1.21 in a bill in a form substantially similar to the Applicable Law enacted pursuant to such publication; or
- 1.1.1.22 as an Act of Parliament that has not yet been brought into effect;
- 1.1.1.23 **Change of Scope** has the meaning given to it in Clause 17.1.1;
- 1.1.1.24 **Companies Act** means the Companies Act, Act No. 17 of 2015, Laws of Kenya;
- 1.1.1.25 **Commencement Date** means the date of the Lease being the third (3rd) Business Day after the date on which the last of the Conditions Precedent shall have been satisfied (or waived by the Party entitled thereto) or an earlier date that the Parties may by mutual consent determine;
- 1.1.1.26 **Conditions Precedent** means the Developer's Conditions Precedent and/or the Procuring Entity's Conditions Precedent (as the case may be) and **Condition Precedent** shall be construed accordingly;
- 1.1.1.27 **Confidential Information** means all information a Party receives as a result of entering into the Contract which relates to any of these:
- (a) the negotiations leading up to, and the provisions or subject matter of, the Project or any ancillary matter; and/or
 - (b) the other Party's business, financial or other affairs;
- 1.1.1.28 **Consents** means all consents, permits, clearances, authorisations (including the environmental authorisation), approvals, rulings, exemptions, registrations, filings, decisions and/or licences required to be issued by or made with any Government Authority in connection with the performance of the Project;
- 1.1.1.29 **Construction Commencement Date** means the date of the Lease provided that the developer shall commence construction works no later than six months from the date of the Lease;
- 1.1.1.30 **Construction Period** means the period beginning from the Construction Commencement Date and ending on the Final Completion Date;
- 1.1.1.31 **Construction Works** means all activities relating to the construction, testing and commissioning of the Project and the Amenities to be performed by the Developer in accordance with the Contract (as varied, amended or supplemented from time to time);
- 1.1.1.32 **Contract** means this Contract, the Recitals and Schedules and any amendments from time to time made in accordance with the provisions contained in this Contract;

- 1.1.1.33 **Contract Month** means each calendar month occurring during the Project Term, and in respect of the first month and the last month of the Project Term, the respective relevant portion of that month;
- 1.1.1.34 **Contract Period** means the period from and including the Commencement Date to the Project Expiry Date, or if earlier, the Termination Date;
- 1.1.1.35 **Contract Year** means a period of twelve (12) months commencing 1 January, provided that:
- (a) the first Contract Year shall be the period commencing on the Commencement Date and ending on 31 December; and
 - (b) the final Contract Year shall be the period commencing on 1 January immediately preceding the last day of the Contract Period and ending on the last day of the Contract Period;
- 1.1.1.36 **Developer** means the successful bidder with whom the Procuring Entity shall enter into the Contract and the Lease for the implementation of the Project ;
- 1.1.1.37 **County Government** means a county government provided for under Article 176 of the Constitution of Kenya, 2010;
- 1.1.1.38 **Covenant** has the meaning given to it in Clause 6.2.4;
- 1.1.1.39 **CPI** means the consumer price index for all commodities as published by the Central Bank of Kenya (or any other Government agency in Kenya) (**Index**) or failing such publication or in the event of a fundamental change to the Index, such other index as the Parties may agree, or such adjustments to the Index as the Parties may agree (in each case with the intention of putting the Parties in no better nor worse position than they would have been had the Index not ceased to be published or the relevant fundamental change not been made) or, in the event that no such agreement is reached, as may be determined in accordance with the Dispute Resolution Procedure. Any reference to CPI shall, unless the context otherwise requires, be construed as reference to the latest monthly CPI published no later than thirty (30) days prior to the [Commencement Date];
- 1.1.1.40 **Cure Period** means the period specified in the Contract for curing any breach or default of any provision of the Contract by the Party responsible for such breach or default and shall: commence on the date on which a notice is delivered by one Party to the other Party asking the latter to cure the breach or default specified in such notice;

- (a) not relieve any Party from liability to pay Damages or compensation under the provisions of the Contract; and
- (b) not in any way be extended by any period of Suspension under the Contract;

provided that if the cure of any breach by the Developer requires any reasonable action by the Developer that must be approved by the Procuring Entity, the applicable Cure Period shall be extended by the period taken by the Procuring Entity to accord their approval;

- 1.1.1.41 **Damages** means the damages payable by either Party to the other as set out in the Contract representing the Direct Losses arising from a breach of contract likely to be suffered and incurred by the Party entitled to receive the same and are not, for the avoidance of doubt, calculated by way of penalty;
- 1.1.1.42 **Debt Due** means at any date, all amounts due and payable by the Developer that are outstanding under the Financing Agreements at that date, but excluding all default interest, breakage premiums as well as all fees, costs and expenses whatsoever in connection with any hedging arrangements entered into by the Developer;
- 1.1.1.43 **Defect** means any defect or fault in the Works and/or the Amenities (not being a Snag) which occurs due to a failure by the Developer to comply with the Works Certification Documents or otherwise to comply with its obligations under the Contract;
- 1.1.1.44 **Defective Works** means any of the Works that suffers a Defect;
- 1.1.1.45 **Delay Event** means either a Force Majeure Event or a Relief Event;
- 1.1.1.46 **Design** means drawings produced to show the look and function or workings of a building before it is constructed;
- 1.1.1.47 **Design Data** means all drawings, reports, documents, plans, software, formulae, calculations and other data relating to the design, construction, testing or operation of the Project in each case that is used by or on behalf of the Developer and/or the Principal Sub-Contractors in connection with the provision of the Works or Services or the performance of the Developer's obligations under the Contract;

- 1.1.1.48 **Detailed Design** means the design drawings and supporting documents prepared by the Project Company which are fit for construction and are in compliance with Applicable Law and the Design and Construction Standards. Such Detailed Design shall consist of all designs, engineering documentation, drawings, specifications and calculations necessary for the Project Company to carry out the Construction Works and prepared in accordance with the Design and Construction Standards to meet relevant Performance Standards which, inter alia include design drawings of horizontal alignment of the project.
- 1.1.1.49 **Developer Conditions Precedent** has the meaning given to it in Clause 5.4 and **Developer Condition Precedent** shall be construed accordingly;
- 1.1.1.50 **Developer Default** has the meaning ascribed to it in Clause 29.1;
- 1.1.1.51 **Developer Change of Scope** has the meaning given to it in Clause 17.2.1;
- 1.1.1.52 **Development Program** means a detailed time programme of works to be undertaken in respect of the Works which shall be submitted by the Developer to the Procuring Entity, the ITE and the PIC in accordance with Clause 13.2;
- 1.1.1.53 **Direct Agreement** means the direct agreement entered into between the Developer, the Lender and the Procuring Entity;
- 1.1.1.54 **Direct Losses** means all damages, losses, liabilities, claims, actions, costs, expenses (including the cost of legal or professional services, legal costs being on an indemnity basis), proceedings, demands and charges whether arising under statute, contract or at common law but excluding Indirect Losses;
- 1.1.1.55 **Discriminatory Change in Law** means a Change in Law which specifically applies to the Project and not to similar projects, the Developer any party to the Project Documents and/or Financing Agreements and no other person;
- 1.1.1.56 **Dispute** has the meaning given to it in Clause 34.1.1 and **Disputes** shall be construed accordingly;
- 1.1.1.57 **Dispute Resolution Procedure** means the procedure for resolution of Disputes set out in Clause 34;
- 1.1.1.58 **Document** or **Documentation** means documentation in printed or written form, or in CD ROM, tapes, discs, drawings, computer programmes, writings, reports, photographs, films, cassettes, or expressed in any other written, electronic, audio or visual form;

- 1.1.1.59 **Drawings** means all of the drawings, calculations and documents pertaining to the Project as set out under Section 4 of the Tender Document (Project Specifications and Requirements);
- 1.1.1.60 **Effective Date** means the date of the Contract;
- 1.1.1.61 **Encumbrances** means, in relation to the Project, any encumbrances such as mortgage, charge, pledge, lien, hypothecation, security interest, assignment, privilege or priority of any kind having the effect of security or other such obligations, and shall include any designation of loss payees or beneficiaries or any similar arrangement under a policy pertaining to the Project, where applicable herein, and **Encumbrance** shall be construed accordingly;
- 1.1.1.62 **Energy** means electricity, oil, coal and any other fossil-based oil;
- 1.1.1.63 **Estimate** has the meaning given to it in Clause 17.1.2.1;
- 1.1.1.64 **Estimated Change in Project Costs** means the aggregate of any increase in construction costs, operating costs and financing costs less the aggregate of any estimated reduction in construction costs, operating costs and financing costs;
- 1.1.1.65 **Exempt Refinancing** means any Refinancing:
- (a) that arises solely from a change in taxation or accounting treatment of the Developer;
 - (b) that comprises a waiver, approval or any similar action taken in respect of breaches or to avoid breaches of the any Project Document, or which occurs in the ordinary day-to-day administration of the Project Documents; or
 - (c) that effects any syndication, sell-down, cession or granting of security or granting of any rights of participation by the Lenders (or by the agent acting on their behalf, or any security company or trust holding any security in respect of the Debt Due and other obligations of the Developer and the Principal Sub-Contractors for the benefit of the Lenders) of or in relation to any Lender's rights under any Financing Agreement in favour of any Qualifying Financial Institution;
- 1.1.1.66 **Expiry Date** means the last date of the period of forty-five (45) years after the Commencement Date
- 1.1.1.67 **Fast Track Dispute Resolution Procedure** has the meaning given to it in Clause 34.4.1;
- 1.1.1.68 **Final Completion** means the full compliance of the Works with the Works Certification Documents subject to the Snags and Defective Works having been rectified;

- 1.1.1.69 **Final Completion Certificate** means the certificate issued by the ITE certifying Final Completion in accordance with Clause 15.2;
- 1.1.1.70 **Final Completion Date** means the date on which the Final Completion Certificate is issued;
- 1.1.1.71 **Final Completion Inspection** means the inspection by the ITE to determine whether Final Completion has been achieved;
- 1.1.1.72 **Final Completion Inspection Report** means the report to be prepared by the ITE upon completion of the Final Completion Inspection;
- 1.1.1.73 **Final Maintenance Survey** has the meaning given to it in Clause 19.3.2.1;
- 1.1.1.74 **Financial Close** means the date on which all the conditions precedent under the Financing Agreements have been fulfilled and/or waived and the Developer has immediate and unconditional access to such funding under the Financing Agreements;
- 1.1.1.75 **Financial Model** means the Base Case Financial Model in the Agreed Form (as updated from time to time in accordance with the terms of the Contract) setting forth the capital and operating costs of the Project and related revenues, and including a description of the assumptions and parameters used for making calculations and projections;
- 1.1.1.76 **Financial Package** means the financing package indicating the total capital cost of the Project and the means of financing the Project, as set out in the Financial Model and approved by the Lender, and includes Equity and all financial assistance specified in the Financing Agreements;
- 1.1.1.77 **Financing Agreements** means any agreement (but excluding any agreement for the provision of Shareholder Loans) under or pursuant to which any senior finance facility is provided to the Developer in relation to the Project and, in each case any security agreements including the Direct Agreement in connection therewith, in all cases which are approved in writing by the Procuring Entity as a Financing Agreement;
- 1.1.1.78 **Force Majeure Event** has the meaning given to it in Clause 26;
- 1.1.1.79 **General Change in Law** means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law;
- 1.1.1.80 **Government** means the Government of Kenya;

- 1.1.1.81 **Good Industry Practice** means generally accepted design, construction, operating or maintenance practices with respect to the health industry. This covers standards of practice obtained by exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person seeking in good faith to comply with its contractual obligations, complying with all Applicable Law and engaged in the same type of undertaking and under the same or similar circumstances and conditions;
- 1.1.1.82 **Government Authority** means any department, division or sub-division of the Government or a County Government and includes any commission, board or statutory body under the control of the Government or a County Government, as the case may be, and having jurisdiction over all or any part of the Project or the performance of all or any of the services or obligations of the Developer under or pursuant to the Contract;
- 1.1.1.83 **Gross Revenue** means all pre-tax gross revenues and receipts earned by the Developer under or pursuant to the Contract, at any time from the commercial operation date computed on monthly basis in accordance with the Contract up to the Transfer Date, and shall include any monies received from sub-licensees and other persons, by the Developer as deposits (refundable or otherwise);
- 1.1.1.84 **Gross Revenue Share** shall have the meaning as in Clause 21.2;
- 1.1.1.85 **IAS Regulation** means Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards;
- 1.1.1.86 **ICT** means information and communication technology;
- 1.1.1.87 **ICT Assets** means the hardware, software, networks, telecommunications, systems, projectors, screens, whiteboards, peripherals, manuals, documentation and related ICT products and materials provided at the Procuring Entity by or on behalf of the ICT service provider or the Procuring Entity;
- 1.1.1.88 **IFRS** means the International Financial Reporting Standards within the meaning of the IAS Regulation to the extent applicable to the relevant financial statements;
- 1.1.1.89 **Independent Technical Expert** or **ITE** means the person appointed jointly by the Procuring Entity and the Developer to act as independent technical expert to the Project in accordance with the Independent Expert's Deed of Appointment;
- 1.1.1.90 **ITE's Deed of Appointment** means the deed of appointment of the Independent Expert;

- 1.1.1.91 **Indirect Losses** means loss of profits, loss of use, loss of production, loss of business, loss of business opportunity, or any claim for consequential loss or for indirect loss or any nature but excluding any of the same that relate to loss of revenue under the Contract;
- 1.1.1.92 **Insolvency Act** means the Insolvency Act, Act No. 18 of 2015;
- 1.1.1.93 **Inspection Report** has the meaning given to it in Clause 14.2.1;
- 1.1.1.94 **Insurance Cover** means the aggregate of the maximum sums insured under the insurances taken out by the Developer pursuant to Clause 24, and includes all insurances required to be taken out by the Developer under Clause 24 but not actually taken, and when used in the context of any act or event, it shall mean the aggregate of the maximum sums insured and payable or deemed to be insured and payable in relation to such act or event;
- 1.1.1.95 **Insurance Proceeds** means the benefit proceeds paid out by any type of insurance policy as a result of a claim;
- 1.1.1.96 **Intellectual Property Rights** means all patents, trademarks, service marks, logos, get-up, trade names, internet domain names, rights in designs, blue prints, programmes and manuals, drawings, copyright (including rights in computer software), database rights, semi-conductor, topography rights, utility models, rights in know-how and all or other intellectual property rights, in each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by the Developer or any Associate of the Developer for the purpose of carrying out the Works and/or providing the Services and/or otherwise for the purposes of the Contract;
- 1.1.1.97 **Interim Maintenance Report** has the meaning given to it in Clause 19.3.1.5;
- 1.1.1.98 **Interim Maintenance Survey** has the meaning given to it in Clause 1219.3.1.1 and **Interim Maintenance Surveys** shall be construed accordingly;
- 1.1.1.99 **Interim Maintenance Surveyor** has the meaning given to it in Clause 19.3.1.2;
- 1.1.1.100 **Kenya Shilling** or **KES** means the lawful currency of the Republic of Kenya;
- 1.1.1.101 **Lease** means the lease to be entered between the Developer and the Procuring Entity over the Site;

- 1.1.1.102 **Lenders** means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Developer under any Financing Agreements for meeting all or any part of the Total Project Cost and **Lender** shall be construed accordingly;
- 1.1.1.103 **Lenders' Representative** means the person duly authorised by the Lenders to act for and on behalf of the Lenders with regard to matters arising out of or in relation to the Contract, and includes his successors and assigns;
- 1.1.1.104 **Maintenance Requirements** means the maintenance requirements set out in the Project Facilities Output Specifications;
- 1.1.1.105 **Maintenance Surveyor** has the meaning given to it in Clause 19.3.2.2;
- 1.1.1.106 **Make Safe** means ensuring that no individuals are in danger and that reasonable measures have been taken to avoid the fault spreading or unauthorised access to and/or the use of the area (including Equipment within the area), and **Made Safe** shall be construed accordingly;
- 1.1.1.107 **Material Adverse Effect** means a material adverse effect of any act or event on the ability of either Party to perform any of its obligations under and in accordance with the provisions of the Contract and which act or event causes a material financial burden or loss to either Party;
- 1.1.1.108 **Material Damage Policy** means the material damage insurance policy required to be maintained by the Developer as part of the Insurances;
- 1.1.1.109 **Material Outstanding Interim Maintenance** has the meaning given to it in Clause 19.3.1.6;
- 1.1.1.110 **Nominated Company** means a company incorporated under the provisions of the Companies Act or the Companies Act, Chapter 488 of the Laws of Kenya (now repealed), selected by the Lender and proposed to the Procuring Entity for assignment and/or transfer of the Project and the Project Agreement as provided in the Contract and the Direct Agreement;
- 1.1.1.111 **Non-Political Event** has the meaning given to it in Clause 26.2, and **Non-Political Events** shall be construed accordingly;
- 1.1.1.112 **O&M Commencement Date** means the date falling one (1) Business Day from the Final Completion Date on which the Developer shall commence the O&M Services;

- 1.1.1.113 **O&M Contract** means the operation and maintenance contract that is entered into between the Developer and the O&M Contractor for performance of all or any of the O&M Services;
- 1.1.1.114 **O&M Contractor** means the Developer or the person, if any, with whom the Developer has entered into an O&M Contract for discharging O&M Services for and on behalf of the Developer under the Contract;
- 1.1.1.115 **O&M Expenses** means any expenditure treated as operating expenditure under IFRS;
- 1.1.1.116 **O&M Services** means services associated with the operation and maintenance of the Project and includes all matters connected with or incidental to such operation and maintenance and provision of services and facilities in accordance with the provisions of the Contract;
- 1.1.1.117 **Operation Period** means the period commencing from the O&M Commencement Date and ending on the Transfer Date, or if earlier the Termination Date;
- 1.1.1.118 **Operations Committee** means the steering committee established as part of the Project framework as the governance group responsible for overseeing and managing the Operations Period of the Project pursuant to the terms of the Contract, which committee will have representatives from both the Developer and Procuring Entity;
- 1.1.1.119 **Outstanding Interim Maintenance** has the meaning given to it in Clause 19.3.1.6;
- 1.1.1.120 **Output Specifications** means the Project Facilities Output Specifications and the Service Output Specifications;
- 1.1.1.121 **Parties** means the Procuring Entity and the Developer collectively and **Party** shall mean either of them;
- 1.1.1.122 **Planned Maintenance** means pre-arranged maintenance work mutually agreed by the Parties;
- 1.1.1.123 **Political Event** has the meaning given to it in Clause 26.3 and **Political Events** shall be construed accordingly;
- 1.1.1.124 **PPAD** means the Public Procurement and Asset Disposal Act No. 33 of 2015 Laws of Kenya;
- 1.1.1.125 **Practical Completion** means a state of completion where, in the opinion of the Developer's architect, the Works are substantially complete and can effectively and be conveniently used for the intended purposes;
- 1.1.1.126 **Practical Completion Certificate** means a certificate issued by the Developer's architect certifying, in the architect's opinion, that Construction Works have been finalized;

- 1.1.1.127 **Practical Completion Inspection** means the inspection by the Developer's architect to determine whether Practical Completion is achieved;
- 1.1.1.128 **Practical Completion Inspection Report** means the report prepared by the Developer's architect upon completion of the Practical Completion Inspection;
- 1.1.1.129 **Preservation Costs** has the meaning given to it in Clause 14.5.3;
- 1.1.1.130 **Principal Sub-Contractors** means the contractors (if any) appointed by the Developer to undertake Works and the O&M Contractor and **Principal Sub-Contractor** shall mean either of them;
- 1.1.1.131 **Principal Sub-Contracts** means the contracts for Works and the O&M Contract and **Principal Sub-Contract** shall mean either of them;
- 1.1.1.132 **Procuring Entity Change of Scope Proposal** has the meaning given to it in Clause 17.1.1.5;
- 1.1.1.133 **Procuring Entity Conditions Precedent** has the meaning given to it in Clause 5.5 and a **Procuring Entity Condition Precedent** shall be construed accordingly;
- 1.1.1.134 **Procuring Entity Default** has the meaning given to it in Clause 29.2;
- 1.1.1.135 **Procuring Entity Indemnified Persons** has the meaning given to it in Clause 32.1.1;
- 1.1.1.136 **Procuring Entity Representative** means the individual appointed by the Procuring Entity to oversee all matters related to the Project;
- 1.1.1.137 **Professional Team** means the architects, structural engineers, mechanical and electrical engineers employed by a Principal Sub-Contractor in connection with the Works and any employer's agent employed by a Principal Sub-Contractor;
- 1.1.1.138 **Programme of Planned Maintenance** has the meaning given to it in Clause 18.2.4;
- 1.1.1.139 **Prohibited Act** means:
- (a) the direct or indirect offering, giving or agreeing to give to the Procuring Entity, the Government or any organ of the State or to any person employed by or on behalf of the Procuring Entity or any organ of the State any gift, payment of money or consideration of any kind as an inducement or reward:
 - (i) for any act or omission in relation to the procurement of the Contract; or

- (ii) for favouring or not showing favour or disfavouring any person in relation to the procurement of the Contract; or
 - (b) committing, attempting or conspiracy to commit any common law or statutory offence of fraud or any offence under the Public Officer Ethics Act (Act no. 4 of 2003), the Anti-Corruption and Economic Crimes Act (Act no. 3 of 2003) and any other existing anti-corruption or bribery law in Kenya; or
 - (c) defrauding or attempting to defraud or conspiring to defraud the Procuring Entity or any Government Authority;
- 1.1.1.140 **Project** means the designing, construction, financing, operation and management of students' accommodation in accordance with the provisions of the Contract, and includes all works, services and equipment;
- 1.1.1.141 **Project Assets** means all physical and other assets relating to and forming part of the Site including (a) rights over the Site in the form of the Lease or otherwise; (b) tangible assets such as civil works and equipment including foundations, pavements, drainage works, electrical systems, communication systems, rest areas, and administrative offices; (c) Project Facilities situated on the Site; (d) Applicable Permits and authorisations relating to or in respect of the Project; I product warranties and guarantees, operating instructions and the like;
- 1.1.1.142 **Project Implementation Committee** means the steering committee of the Project representing the governance group of the Project deciding issues, problems and directions for the Project (including the most members of the Procuring Entity and the Developer);
- 1.1.1.143 **Project Completion Schedule** means the progressive Project Milestones in an agreed scheduling software for completion of the Project on or before the lapse of the Construction Period ;
- 1.1.1.144 **Project Data** means:
- (a) all Design Data; and
 - (b) any other materials, documents or data acquired or brought into existence or used in relation to the Works, the Services or the Contract,

in each case that is used by or on behalf of the Developer and/or the Principal Sub-Contractors in connection with the provision of the EPC Services or O&M Services or the performance of the Developer's obligations under the Contract;

- 1.1.1.145 **Project Documents** means the Financing Agreements, the Lease, the Direct Agreement, the Shareholders Agreement, the Principal Sub-Contracts and all other contracts described in the Contract relating to the performance of the Project, each executed by the parties thereto simultaneously with the Contract or otherwise in an Agreed Form, and **Project Document** shall be construed accordingly;
- 1.1.1.146 **Project Facility** means any student accommodation together with the external areas within the student accommodation site boundaries and **Project Facilities** shall be construed accordingly;
- 1.1.1.147 **Project Facilities Output Specifications** means the requirements of the Procuring Entity in relation to the Project as set out in the Tender Document;
- 1.1.1.148 **Project Milestones** means the project milestones set out in the Project Documents and **Project Milestone** shall be construed accordingly;
- 1.1.1.149 **Project Term** means the period starting on and from the Commencement Date and ending on the Expiry Date, or the Termination Date, whichever is earlier;
- 1.1.1.150 **Public Holiday** means a public holiday as defined under the Public Holidays Act, Chapter 4, Laws of Kenya and any day that may be gazetted as a public holiday by the Government;
- 1.1.1.151 **Qualifying Change in Law** means:
- (a) a Discriminatory Change in Law;
 - (b) a Specific Change in Law; and/or
 - (c) a General Change in Law which comes into effect after the Commencement Date which involves an increase in the Capital Expenditure;
- 1.1.1.152 **Qualifying Financial Institution** means:
- (a) a Bank;
 - (b) any pension scheme registered in terms of the Retirement Benefits Act, Act No. 3 of 1997, Laws of Kenya;
 - (c) any collective investment scheme registered in terms of the Capital Markets Authority, Chapter 485A, Laws of Kenya; and

- (d) any bank or financial institution that has loaned debt finance to private sector parties in emerging market economies as defined by the World Bank;
- 1.1.1.153 **Recyclable Waste** means municipal waste which in the Procuring Entity's opinion is economical to recycle;
- 1.1.1.154 **Reference** has the meaning given to it in Clause 34.4.1.1;
- 1.1.1.155 **Reference Banks** means the four (4) largest Banks on Kenya by market capitalization, from time to time and **Reference Bank** shall be construed accordingly;
- 1.1.1.156 **Refinancing** means:
- (a) any amendment, variation, novation, supplement or replacement of any Financing Agreement;
 - (b) the exercise of any right, or the grant of any waiver or consent, under any Financing Agreement;
 - (c) the disposition of any rights or interests in, or the creation of any rights of participation in respect of, any Financing Agreement or the creation or granting of any other form of benefit or interest in either the Financing Agreements or the contracts, revenues or assets of the whether by way of security or otherwise; or
 - (d) any other arrangement put in place which has an effect which is similar to any of (a) to (c) (inclusive);
- 1.1.1.157 **Relief Event** means any of the following:
- (a) fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent that it does not constitute a Force Majeure Event), earthquakes, riot and civil commotion;
 - (b) failure by any statutory undertaker, Utility Provider, local authority or other like body to carry out works or provide services;
 - (c) any accidental loss or damage to the Site or any roads servicing it;
 - (d) Any prolonged failure or shortage of power, fuel or transport;
 - (e) any blockage or embargo which does not constitute a Force Majeure Event,

unless any of the events listed in paragraphs (a) I(e) (inclusive) arises (directly or indirectly as a result of any wilful default or wilful act of the Developer or any of its associates;

- 1.1.1.158 **Request for Proposal or RFP** means an open request for bids to complete a new project proposed by the company or other organization that issues it.
- 1.1.1.159 **Services** means services of operation and maintenance of the Project, and **Service** shall be construed accordingly;
- 1.1.1.160 **Shareholders** means the holders of the Equity;
- 1.1.1.161 **Shareholders Agreement** means the agreement(s) between the Shareholders and/or the Developer dealing with the Shareholders' rights, protections and obligations in respect of the Developer;
- 1.1.1.162 **Site** means a portion of land measuring approximately one decimal five seven (1.57) acres demarcated by the Procuring Entity and leased out to the Developer for a period of Forty Five (45) Years.
- 1.1.1.163 **Snags** in relation to completion of the Works (including landscaping), means any outstanding or unsatisfactory Works and/or damages to the Works which, when measured against the requirements of the relevant Works Certification Documents, are minor and do not prevent such Works from substantially complying with the Works Certification Documents, and the Procuring Entity from using the affected portion of the Project Facilities for their intended purposes, or the Developer from providing the O&M Services in respect thereof and a **Snag** shall be construed accordingly;
- 1.1.1.164 **Specific Change in Law** means any Change in Law which specifically refers to the provision, of services the same as or similar to the Services or to the holding of shares in companies whose main business is providing, in relation to the education sector, services the same as or similar to the Services;
- 1.1.1.165 **Specifications and Standards** means the specifications and standards relating to the quality, quantity, capacity and other requirements for the Project;
- 1.1.1.166 **Staff** means those persons engaged or employed by the Developer to carry out the Services, including independent contractors and any employees of the Procuring Entity seconded to the Developer for that purpose;
- 1.1.1.167 **Stand Premium** means a non-refundable lump sum payment made by the Developer to the Procuring Entity on or before the Commencement Date as consideration for the Lease;

- 1.1.1.168 **Step-In Period** means the period during which the Procuring Entity or a Lender exercises its step-in rights pursuant to the Contract, the Direct Agreement and/or the Principal Sub-Contracts as the case may be;
- 1.1.1.169 **Sub-Contracted Services** means those Services which are carried out by the Sub-Contractors;
- 1.1.1.170 **Sub-Contractor** means a Principal Sub-Contractor or any other person engaged by the Developer from time to time as may be permitted by the Contract, to procure the provision of the Works and/or the Services (or any of them);
- 1.1.1.171 **Subordinated Debt** means the aggregate of the following sums expressed in Kenya Shilling outstanding as on the Termination Date:
- (a) the principal amount of the debt provided by lenders or the Shareholders for funding the Project and subordinated to the loans provided by any Lenders who are deemed to be senior lenders in respect of the Project; and
 - (b) all accrued interest on the debt referred to in paragraph (a) above;
- 1.1.1.172 **Successful Bidder Proposal** means the proposal submitted by the Successful Bidder in response to the RFP;
- 1.1.1.173 **Taxes** means any Kenyan taxes including excise duties, customs duties, value added tax, sales tax, local taxes, service tax, cess and any impost or surcharge of like nature on the goods, materials, equipment and services incorporated in and forming part of the Project charged, levied or imposed by any Government Authority, but excluding any interest, penalties and other sums in relation thereto imposed on any account whatsoever. For the avoidance of doubt, Taxes shall not include taxes on corporate income;
- 1.1.1.174 **Tender Document** means the invitation to tender issued by the Procuring Entity;
- 1.1.1.175 **Termination** means the expiry or termination of the Contract;
- 1.1.1.176 **Termination Date** means the date of early termination of the Contract in accordance with the terms set out in the Contract;
- 1.1.1.177 **Termination Notice** means the communication issued in accordance with the provisions of the Contract by one Party to the other Party terminating the Contract;
- 1.1.1.178 **Total Project Cost** means the capital cost of the Project as set out in the Financial Package;

1.1.1.179 **Transfer Date** means the Expiry Date or the Termination Date, whichever is earlier;

1.1.1.180 **Unforeseeable Conduct** means the taking of any action after the Commencement Date by the Procuring Entity (including any Change in Law) or failure to carry out its obligations as prescribed by Law and:

- (a) the principal effect of which is directly borne by:
 - (i) the Project;
 - (ii) the Developer and not other persons; and
- (b) in respect of which the Developer is not entitled to any other relief pursuant to any other provisions of the Contract;
- (c) which was not nor were its consequences foreseen by the Developer on or before the Commencement Date; and
- (d) which its consequences could not be reasonably foreseen by any person in the position of the Developer on or before Commencement Date,

provided that the following shall not constitute Unforeseeable Conduct:

- (i) where any act or omission of the Procuring Entity or Government Authority is in direct response to any act or omission of the Developer which is illegal (other than an act or omission rendered illegal by virtue of such conduct of the Contracting Party or Government Authority) or in violation of agreements to which the Developer is a party;
- (ii) the Procuring Entity or a Government Authority takes necessary action under the Contract and any Applicable Laws, as the case may be;
- (iii) an increase in taxes of general application which does not discriminate against the Developer; and
- (iv) such conduct by the Procuring Entity or Government Authority is required as a result of a Force Majeure Event and is reasonably proportionate to it;

1.1.1.181 **Uninsurable** in relation to a risk means either that:

- (a) insurance is no longer available from reputable insurers in the Kenyan and Lloyds insurance market; or

(b) even if insurance is available from reputable insurers in the Kenyan and Lloyd's insurance market, the insurance premium payable for insuring that risk has increased to such a level that the risk is no longer being insured against in the Kenya insurance market;

1.1.1.182 **Users** means students, visitors and members of the public who utilise any of the Project for a fee;

1.1.1.183 **Utility** means electricity, water, sewerage and effluent disposal systems, communication systems, including but not limited to, telephones, and surface water disposal, and **Utilities** shall be construed accordingly;

1.1.1.184 **Utility Provider** means a statutory undertaker, utility company or organisation, the Procuring Entity or any person who provides the Utilities;

1.1.1.185 **Works** means the design and construction component of the Project to be performed by the Developer in accordance with the Contract;

1.1.1.186 **Works Certification Documents** means:

(a) the Project Facilities Output Specifications;

(b) the Successful Bidder Proposal;

(c) the Design;

(d) all variations effected during the Construction Period.

1.2 Interpretation

1.2.1 In the Contract, unless the context otherwise requires, references to any legislation or any provision thereof shall include amendment or re-enactment or consolidation of such legislation, regulation or any provision thereof so far as such amendment or re-enactment or consolidation applies or is capable of applying to any transaction entered into under the Contract;

1.2.1.1 references to Laws of Kenya or Kenyan 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;

- 1.2.1.2 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;
- 1.2.1.3 the table of contents, headings or sub-headings in the Contract are for convenience of reference only and shall not be used in, and shall not affect, the construction or interpretation of the Contract;
- 1.2.1.4 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;
- 1.2.1.5 references to **construction** or **building** include, unless the context otherwise requires, investigation, developing, engineering, procurement, delivery, transportation, installation, processing, fabrication, testing, commissioning and other activities incidental to the construction or building, and **construct** or **build** shall be construed accordingly;
- 1.2.1.6 references to **development** include, unless the context otherwise requires, construction, renovation, refurbishing, rehabilitation, augmentation, upgrading and other activities incidental, and **develop** shall be construed accordingly;
- 1.2.1.7 any reference to any period of time shall mean a reference to time according to East Africa Time;
- 1.2.1.8 any reference to **day** shall mean a reference to a calendar day;
- 1.2.1.9 any reference to **month** shall mean a reference to a calendar month;
- 1.2.1.10 references to any date, period or Project Milestone shall mean and include such date, period or Project Milestone as may be extended in accordance with the terms of the Contract;
- 1.2.1.11 any reference to any period commencing **from** a specified day or date and **until** a specified day or date shall include both such days or dates; provided that if the last day of any period computed under the Contract is not a Business Day, then the period shall run until the end of the next Business Day;
- 1.2.1.12 the words importing singular shall include plural and vice versa;
- 1.2.1.13 references to any gender shall include the other and the neutral gender;

- 1.2.1.14 **indebtedness** shall be construed so as to include any obligation (whether incurred as principal or surety) for the payment or repayment of money, whether present or future, actual or contingent;
- 1.2.1.15 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;
- 1.2.1.16 save and except as otherwise provided in the Contract, 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; provided that this Sub-clause shall not operate so as to increase liabilities or obligations of the Procuring Entity under or pursuant to the Contract in any manner whatsoever;
- 1.2.1.17 any agreement, consent, approval, authorisation, notice, communication, information or report required under or pursuant to the Contract from or by any Party or the Independent Expert shall be valid and effective only if it is in writing under the hand of a duly authorised representative of such Party or the Independent Expert, as the case may be, on its behalf and not otherwise;
- 1.2.1.18 the Schedules and Recitals to the Contract form an integral part of the Contract and will be in full force and effect as though they were expressly set out in the body of the Contract and any reference to **the Contract** shall include the Schedules and the Recitals; and
- 1.2.1.19 references to Recitals, Clauses, Sub-clauses or Schedules in the Contract shall, except where the context otherwise requires, mean references to recitals, clauses, sub-clauses and schedules of or to the Contract, and references to a Paragraph shall, subject to any contrary indication, be construed as a reference to a paragraph of the Contract or of the Schedule in which such reference appears.

- 1.2.1.20 Unless expressly provided otherwise in the Contract, any Documentation required to be provided or furnished by the Developer to the Procuring Entity and/or the Independent Expert shall be provided free of cost and in three (3) copies, and if the Procuring Entity and/or the Independent Expert is required to return any such Documentation with their comments and/or approval, they shall be entitled to retain two (2) copies of any such Documentation.
- 1.2.1.21 The rule of construction, if any, that a contract should be interpreted against the parties responsible for the drafting and preparation thereof, shall not apply to the Contract.
- 1.2.1.22 Any word or expression used in the Contract shall, unless otherwise defined or construed in the Contract, bear its ordinary English meaning.
- 1.2.1.23 If a definition of a particular term or expression in the Contract imposes substantive rights and obligations on a Party such rights and obligations shall be given effect to and shall be enforceable notwithstanding that they are contained in a definition.

1.3 **Priority of agreements, clauses and schedules**

- 1.3.1 The Contract, and all other agreements and documents forming part of or referred to in the Contract are to be taken as mutually explanatory, and unless otherwise expressly provided elsewhere in the Contract, the priority of the Contract and other documents and agreements forming part of the Contract or referred to in the Contract shall, in the event of any conflict between them, be in the following order:
 - 1.3.1.1 the Contract;
 - 1.3.1.2 the Lease;
 - 1.3.1.3 the Letter of Acceptance;
 - 1.3.1.4 the Form of Tender;
 - 1.3.1.5 the Special Conditions of Contract;
 - 1.3.1.6 these General Conditions of Contract; and
 - 1.3.1.7 all other agreements and documents forming part of the Contract or referred to in the Contract.
- 1.3.2 In case of ambiguities or discrepancies within the Contract, the following shall apply:
 - 1.3.2.1 between two (2) or more Clauses of the Contract, the provisions of a specific Clause relevant to the issue under consideration shall prevail over those in other Clauses;
 - 1.3.2.2 between the Clauses of the Contract and the Schedules, the Clauses shall prevail and between Schedules and Annexes, the Schedules shall prevail;

- 1.3.2.3 between any two (2) Schedules, the Schedule relevant to the issue shall prevail;
- 1.3.2.4 between the written description on the Drawings and the Specifications and Standards, the latter shall prevail;
- 1.3.2.5 between the dimension scaled from the Drawings and its specific written dimension, the latter shall prevail; and
- 1.3.2.6 between any value written in numerals and that in words, the latter shall prevail.

2 Commencement and Duration

The Contract and the rights and obligations of the Parties shall take effect on the Commencement Date and (subject to the provisions of early termination set out in the Contract) shall continue until the Expiry Date.

B. THE PROJECT

3 Scope of the Project

- 3.1 The scope of the Project shall mean and include, during the Project Term:
 - 3.1.1 The design, construction and financing of the Project on the Site, in all cases in conformity with the Tender document;
 - 3.1.2 the operation and maintenance of the Project in accordance with the provisions of the Contract including without limitation the provisions under the Tender document; and
 - 3.1.3 performance and fulfilment of all other obligations of the Developer in accordance with the provisions of the Contract and matters incidental to the Agreement or necessary for the performance of any or all of the obligations of the Developer under the Contract.

4 The Project

- 4.1 Subject to and in accordance with the provisions of the Contract, the Procuring Entity hereby grants to the Developer the exclusive right and licence to build, operate and maintain the Project, and the Developer hereby agrees to implement the Project subject to and in accordance with the terms and conditions set out in the Contract.
- 4.2 The Procuring Entity may, for purposes of the Project, delegate or assign any of its statutory rights, powers or functions which the Procuring Entity is empowered by law to delegate or assign.
- 4.3 Subject to and in accordance with the provisions of the Contract, the Developer is obliged or entitled (as the case may be) to:
 - 4.3.1 access and use the Site for the purpose of and to the extent conferred by the Contract;
 - 4.3.2 finance, design and build the Project;
 - 4.3.3 Operate and maintain the Project;

- 4.3.4 Perform and fulfil all of the Developer's obligations under and in accordance with the Contract;
- 4.3.5 bear and pay all costs, expenses and charges in connection with or incidental to the performance of the obligations of the Developer under the Contract except where provided for as a shared cost in the Contract;
- 4.3.6 neither assign, transfer or sublet or create any lien or Encumbrance on the Contract and/or any Project Document on the whole or any part of the Project and/or Site nor transfer, lease or part possession of the Project or Site, save and except as expressly permitted by the Contract and with the written consent of the Procuring Entity; and
- 4.3.7 transfer and divest possession, operation and all other rights and interests granted to the Developer in respect of the Project under the Contract to the Procuring Entity on the Transfer Date.

4.4 **Project Governance**

The Parties agree to work together in good faith and the Developer undertakes to keep the Procuring Entity reasonably informed of its activities under the Contract.

4.4.1 **Establishment of Governance Committees**

4.4.1.1 The Parties shall establish the following committees to provide governance and oversight over the Project:

- (a) a Project Implementation Committee (**PIC**) responsible for oversight and decision-making on classified matters during the Construction Period; and
- (b) an Operations Committee (**OC**) responsible for oversight and decision-making on classified matters during the Operation Period.

4.4.1.2 Each of the committees will be referred to individually as a "Committee" and collectively as the "Committees", as the context so requires.

4.4.2 **Composition of the Governance Committees**

4.4.2.1 The Committees shall comprise representatives appointed by the Procuring Entity and the Developer according to the terms of the Contract (the Appointed Representatives). Each Party shall have the right, from time to time, to substitute new members, on a permanent or temporary basis, for any of its previously Appointed Representatives, subject to the terms of the Contract.

4.4.2.2 The Appointed Representatives will be required to possess the requisite expertise and authority to effectively participate in oversight and decision-making processes necessary to achieve the purpose and objectives of the relevant Committee.

4.4.2.3 Each Committee will designate a suitable chairperson from its membership, who will be responsible for:

- (a) presiding over meetings;
- (b) facilitating discussions;
- (c) ensuring the fulfilment of Committee objectives in tandem with the success of the Project;
- (d) managing Committee activities;
- (e) ensuring that timely reports are made to the Procuring Entity and Developer in accordance with the Contract; and
- (f) any other responsibilities that may be prescribed under the Contract.

4.4.2.4 Notwithstanding the foregoing, it is expressly understood that the chairperson's authority is contingent upon the decisions reached by the Committee and the chairperson will be required to act in strict compliance with the decisions and resolutions adopted by the relevant Committee.

4.4.3 Duties and Responsibilities of the PIC

4.4.3.1 The PIC shall be responsible for:

- (a) oversight over all design and construction-related activities and project progress during the Construction Period;
- (b) making informed decisions pertaining to the Project's construction on matters referred to it under the terms of the Contract in tandem with the Project objectives, timelines and technical standards;
- (c) undertaking regular monitoring of the design and construction progress and comparing the same against project milestones and timelines;
- (d) approving or rejecting adjustments to the design and construction plan or project schedule as necessary, according to the recommendation of the ITE;

- (e) supervising compliance with quality standards, safety regulations and environmental requirements in the design and construction activities;
- (f) providing regular updates and reports to the Developer and the Procuring Entity (the Project Stakeholders) on design and construction progress, issues and decisions;
- (g) facilitating effective communication between the Project Stakeholders; and
- (h) any other duties and responsibilities that may be prescribed under the Contract.

4.4.4 Duties and Responsibilities of the OC

4.4.4.1 The OC shall be responsible for:

- (a) oversight over all operational activities and services related to the student accommodation facilities during the Operation Period;
- (b) making informed decision regarding the efficient operation of the facilities in tandem with the Project objectives, service quality standards and sustainability goals;
- (c) reviewing and approving operational plans and strategies developed by the O&M Contractor;
- (d) promoting and overseeing sustainability practices in the Facility operations in tandem with environmental, social and governance (ESG) principles in all operational activities;
- (e) providing regular updates and reports to the Project Stakeholders on operational progress, issues and decisions;
- (f) any other duties and responsibilities as may be prescribed in the Contract.

4.5 Independent Technical Expert

4.5.1 Appointment of Independent Technical Expert

The Procuring Entity shall in consultation with the Developer jointly appoint a suitably qualified and experienced consulting Engineering / Architectural / Project Management / Quantity Survey firm of international repute selected in accordance with the agreed selection criteria which shall be the ITE. Such selection shall be in compliance with all laws relating to procurement. The appointment shall be made at or prior to the date of Financial Close and shall be for a period of two (2) years or upon issuance of the Certificate of Final Completion in accordance with Clause 15.2, whichever is later.

4.5.2 Duties and Functions

The ITE shall discharge its duties and functions substantially in accordance with the terms of reference in such an agreement to be entered into with it. The ITE will be required to act independently, fairly and impartially and shall have a duty of care to both the Procuring Entity and the Developer.

The roles and functions of the ITE shall include, without limitation to, the following:

- a) Review, inspection and monitoring Works;
- b) Review the period or any extension thereof, for performing any duty or obligation; and
- c) Assisting the Procuring Entity and the Developer in resolution of disputes arising out of the Lease.

4.5.3 Remuneration

The remuneration, cost and all expenses of the ITE shall be borne by the Developer and shall be subject to a maximum of Kenya Shillings [] per month.

5 Conditions Precedent

- 5.1 The respective rights and obligations of the Parties under the Contract shall be subject to the satisfaction in full of the Conditions Precedent or waiver of the Conditions Precedent in accordance with the terms of the Contract.
- 5.2 Upon execution of the Contract by the Parties, the Developer will undertake the application (including assignment where applicable) of all relevant permits relating to environmental protection and conservation of the Site (if any).
- 5.3 On the Commencement Date, the Developer shall pay the Stand Premium in full to the Procuring Entity.
- 5.4 The Conditions Precedent required to be satisfied by the Developer to achieve the Commencement Date shall be deemed to have been fulfilled when the Developer shall have delivered to the Procuring Entity:
 - 5.4.1 the Stand Premium in full;

- 5.4.2 the Direct Agreement executed by all parties (other than the Procuring Entity);
- and
- 5.4.3 a confirmation that all the Financing Agreements have been executed by the Lenders,
- (Developer Conditions Precedent),**
- provided that upon request in writing by the Developer, the Procuring Entity may, in its discretion, waive any of the Conditions Precedent set out in this Clause 5.4. For avoidance of doubt, the Procuring Entity may, in its sole discretion, grant any waiver hereunder with such conditions as it may deem fit.
- 5.5 The Conditions Precedent required to be satisfied by the Procuring Entity to achieve the Commencement Date shall be deemed to have been fulfilled when the Procuring Entity shall have delivered to the Developer the following:
- 5.5.1 the duly executed Lease for the grant of the lease hold rights for the Site to the Developer;
- 5.5.2 the Direct Agreement executed by the Procuring Entity; and
- 5.5.3 confirmation that the Developer shall have full vacant access to the Site.
- (Procuring Entity Conditions Precedent).**
- 5.6 The Procuring Entity shall make all reasonable endeavours to satisfy the Procuring Entity's Conditions Precedent and within the time stipulated in Clause 5.8 and the Developer shall make all reasonable endeavours to satisfy the Developer Conditions Precedent within the time stipulated in Clause 5.7 and each Party shall provide the other Party with such reasonable cooperation as may be required to assist that Party in satisfying its respective Conditions Precedent. The Parties shall notify each other in writing at least once a month on the progress made in satisfying its respective Conditions Precedent. Each Party shall promptly inform the other Party when any of its respective Condition Precedent has been satisfied.
- 5.7 Subject to Clause 5.9, in the event (i) that the Developer fails to satisfy any or all of the Developer Conditions Precedent within a period of one hundred and eighty (180) days from the Effective Date, and (ii) the delay has not occurred as a result of failure to fulfil the obligations under Clauses 5.2 and/or Clause 5.5 or any other breach of the Contract by the Procuring Entity, the Procuring Entity shall be entitled to terminate the Contract in accordance with the provisions herein.
- 5.8 In the event the Procuring Entity fails to satisfy any or all of the Procuring Entity Conditions Precedent within a period of one hundred and eighty (180) days from the Effective Date, and the delay has not occurred as a result of any other breach of the Contract by the Developer, then the Procuring Entity shall not be entitled to terminate the Contract, as a result of such non-fulfilment or failure by the Procuring Entity, the Developer is not able to fulfil any or all of its Conditions Precedent.

- 5.9 Neither Party shall be required to pay the other Party any Damages pursuant to Clauses 5.7 and 5.8 for any delay in fulfilling any or all of its respective Conditions Precedent where such delay results from a Delay Event, Political Event or Change in Law or in the case of the Procuring Entity, where there is any delay in the obtaining vacant access to the Site.

6 Obligations of the Developer

6.1 General obligations of the Developer

- 6.1.1 Subject to and in accordance with the terms and conditions of the Contract, the Developer shall at its own cost and expense procure finance for and undertake the design, engineering, procurement, construction, operation and maintenance of the Project and observe, fulfil, comply with and perform all its obligations set out in the Contract or arising from or in connection with the Contract. Neither the Procuring Entity nor any Government Agency shall provide any guarantee or support to the Developer except as otherwise specifically provided in the Contract.
- 6.1.2 The Developer shall at all times comply with all Applicable Laws and Applicable Permits (including any renewals as required) in the performance of its obligations under the Contract.
- 6.1.3 Subject to the provisions of Clauses 6.1.1 and 6.1.2, the Developer shall discharge its obligations under the Contract in accordance with Good Industry Practice and as a reasonable and prudent person.
- 6.1.4 The Developer shall, at its own cost and expense, in addition to and not in derogation of its obligations elsewhere set out in the Contract:
- 6.1.4.1 make, or cause to be made, necessary applications to the relevant Government Authority with such particulars and details, as may be required for obtaining the Applicable Permits necessary for the Works and the operation and maintenance of the Project, and obtain and keep in force and effect such Applicable Permits in conformity with the Applicable Laws;
- 6.1.4.2 procure, as required, the appropriate proprietary rights, licences, agreements and permissions for materials, methods, processes and systems used or incorporated into the Project;
- 6.1.4.3 perform and comply with its obligations under the Financing Agreements and under the Principal Sub-Contracts to ensure that such agreements and contracts are not terminated by reason of an action or inaction of the Developer;
- 6.1.4.4 make reasonable efforts to maintain harmony and good industrial relations among the personnel employed by it or the Principal Sub-Contractors in connection with the performance of its obligations under the Contract;

- 6.1.4.5 ensure and procure that the Principal Sub-Contractors comply with all Applicable Permits and Applicable Laws in the performance by them, pursuant to any Principal Sub-Contract to which they are a party, of any of the Developer's obligations under the Contract;
- 6.1.4.6 not do or omit to do any act, deed or thing which may in any manner contravene any provisions of the Contract;
- 6.1.4.7 support, cooperate with and facilitate the Procuring Entity in the implementation and operation of the Project in accordance with the provisions of the Contract;
- 6.1.4.8 perform its obligations under the Contract in a manner consistent with the Procuring Entity discharging its statutory duties and/or functions undertaken by it;
- 6.1.4.9 comply with and not to commit any offence under the provisions of the Environmental Management and Co-ordination Act, 1999 ("EMCA") and any subsequent modifications amendments or re-enactments thereof and the directions of the National Environmental Management Authority ("NEMA") and in particular not to engage in or allow the engaging in of any activities in the Site resulting in any Environmental Matters (as herein defined). "Environmental Matters" means any waste or hazardous waste (as defined by the EMCA), effluent radiation pollutant emissions substance or activity perceived as capable of causing harm to man or other living organism or of damaging the environment or public or human health or welfare or to the conservation or protection of the environment or of man or any living organism or relating to nuisance noise, defective premises or health; defective premises or health;
- 6.1.4.10 without prejudice to the provisions of Clause 4.3.7, divest its rights and interests in relation to the Project to the Procuring Entity upon Termination of the Contract, in accordance with the provisions of the Contract; and
- 6.1.4.11 ensure the security of its personnel or that of any Principal Sub-Contractors engaged in performing its obligations in relation to the Project as set out in the Contract.

6.2 **Obligations relating to Principal Sub-Contracts**

- 6.2.1 It is expressly agreed that the Developer shall, at all times, be responsible and liable for all its obligations (and should not be relieved or excused of any responsibility, liability or obligation) under the Contract notwithstanding anything contained in the Principal Sub-Contracts (and the appointment of any Principal Sub-Contractor under the Principal Sub-Contracts) or any other agreement, and no default under any Principal Sub-Contract or agreement shall excuse the Developer from its obligations, responsibilities or liabilities under the Contract.

- 6.2.2 The Developer shall submit to the Procuring Entity the final draft of all Principal Sub-Contracts and Financing Agreements (or any amendments or replacements to the Principal Sub-Contracts) for its review and comments, and the Procuring Entity shall have the right (but not the obligation) to undertake such review and will provide its comments (if any), to the Developer. The Developer shall not enter into such Principal Sub-Contracts or Financing Agreements without the written approval of the Procuring Entity, such approval not to be unreasonably withheld or delayed subject to the provisions of Clause 6.2.5.
- 6.2.3 The Developer shall not replace, modify or otherwise amend any of the Financing Agreements (or their terms) without the prior written consent of the Procuring Entity where such modification, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the Procuring Entity on early termination of the Contract), and in the event that any replacement, modification or amendment is made without such prior written consent, the Developer shall not enforce such replacement, modification or amendment nor permit enforcement thereof against the Procuring Entity. For the avoidance of doubt, the Procuring Entity acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the debt of the Developer provided that as a result of such restructuring or rescheduling there is no increase in any financial liability or obligation to be assumed by the Procuring Entity and provided also that such consent shall not in any manner absolve the Developer or the Principal Sub-Contractors from any liability or obligation under the Contract (unless agreed by the Procuring Entity).
- 6.2.4 The Developer shall procure that each of the Principal Sub-Contracts contains provisions that entitle the Procuring Entity to step into such agreement, in its sole discretion subject to the Direct Agreement, in substitution of the Developer in the event of Termination (the **Covenant**). The Developer expressly agrees to include the Covenant in all its Principal Sub-Contracts and undertakes that it shall, in respect of each of the Principal Sub-Contracts, procure and deliver to the Procuring Entity an acknowledgment and undertaking, in a form acceptable to the Procuring Entity, from each of the Contractors that they acknowledge and accept the Covenant and undertake to be bound by the same and not to seek any relief or remedy whatsoever from the Procuring Entity in the event of Termination.

6.2.5 Notwithstanding anything to the contrary contained in the Contract, the Developer agrees and acknowledges that selection or replacement of either (i) the contractor to undertake the Works; or (ii) an O&M Contractor and execution of the O&M Contract shall, in both cases, be subject to the prior written approval of the Procuring Entity from a competence, national security and public interest perspective and the decision of the Procuring Entity in this respect is final, conclusive and binding on the Developer. The Developer undertakes that it shall not give effect to any such selection or contract without prior written approval of the Procuring Entity. It is also agreed that the Procuring Entity shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Developer or the Principal Sub-Contractors from any liability or obligation under the Contract (unless agreed by the Procuring Entity).

6.3 Obligations relating to Change in Ownership

6.3.1 The Developer shall not undertake or permit any Change in Ownership except with the prior written approval of the Procuring Entity.

6.3.2 Notwithstanding anything to the contrary contained in the Contract and in addition to any other restriction, the Developer agrees and acknowledges that:

6.3.3 all acquisitions of Equity by an acquirer, either by himself or with any person acting in concert, directly or indirectly, including by transfer of the direct or indirect legal or beneficial ownership of control of any Equity, in aggregate of more than ten per cent (10 %) of the total Equity of the Developer; or

6.3.4 any acquisition of any control directly or indirectly of the Board of Directors of the Developer by any person either by himself or together with any person or persons acting in concert with him,

6.3.5 shall constitute a Change in Ownership requiring the prior written approval of the Procuring Entity from the public interest perspective. The decision of the Procuring Entity in this respect is final, conclusive and binding on the Developer, and undertakes that it shall not give effect to any such acquisition of Equity or control of the Board of Directors of the Developer without such prior written approval of the Procuring Entity which shall not be unreasonably withheld. For the avoidance of doubt, it is expressly agreed that approval of the Procuring Entity hereunder shall be limited to technical and financial competence and public interest perspective, and the Procuring Entity shall endeavour to convey its decision thereon within sixty (60) days of notification by the Developer. It is also agreed that the Procuring Entity shall not be liable in any manner on account of grant or otherwise of such approval and that such approval or denial thereof shall not in any manner absolve the Developer from any liability or obligation under the Contract.

6.4 Employment of foreign nationals

The Developer acknowledges, agrees and undertakes that employment of foreign personnel by the Developer /or the Principal Sub-Contractors shall be done upon demonstrable evidence that the skills of the foreign personnel are not locally available and shall be subject to grant of requisite regulatory permits and approvals including employment/residential visas and work permits, if any required, and the obligation to apply for and obtain the same shall and will always be of the Developer and, notwithstanding anything to the contrary contained in the Contract, refusal of or inability by the Developer or any of the Principal Sub-Contractors or other subcontractors to obtain any such permits and approvals shall not constitute a Force Majeure Event, and shall not in any manner excuse the Developer from the performance and discharge of its obligations and liabilities under the Contract.

7 Obligations of the Procuring Entity

- 7.1 The Procuring Entity shall, and with the support, financial or otherwise, of other relevant Government Authorities where applicable, undertake, comply with and perform all its obligations set out in the Contract or arising under or in connection with the Contract.
- 7.2 The Procuring Entity will endeavour to, subject to the Applicable Laws:
 - 7.2.1 upon written request from the Developer, and subject to the Developer complying with Applicable Laws, provide reasonable support and assistance to the Developer in procuring Applicable Permits required from any Government Authority for implementation and operation of the Project;
 - 7.2.2 upon written request from the Developer, provide reasonable assistance to the Developer in obtaining access to all necessary infrastructure facilities and utilities, including water and electricity at rates and on terms no less favourable to the Developer than those generally available to commercial customers receiving substantially equivalent services;
 - 7.2.3 make reasonable endeavours to procure that no barriers are erected or placed on or about the Project by any Government Authority or persons claiming through or under it, except for reasons of national security, law and order or collection of Taxes;
 - 7.2.4 not intentionally do or omit to do any act, deed or thing which may in any manner contravene any of the provisions of the Contract;
 - 7.2.5 support, cooperate with and facilitate the Developer in the implementation and operation of the Project in accordance with the provisions of the Contract; and
 - 7.2.6 upon written request from the Lender or the Lender's Representative, the Procuring Entity has to undertake Termination of the Developer, as the case may be, in accordance with the Direct Agreement.

8 Representations and Warranties

8.1 Representations and warranties of the Developer

- 8.1.1 The Developer has entered the Contract in reliance on the representations and warranties of the Developer and the Developer represents and warrants to the Procuring Entity (and in the case of Clause 8.1.1.11 undertakes) that:
- 8.1.1.1 it is duly organised and validly existing under the laws of Kenya, and has full power and authority to execute and perform its obligations under the Contract and the Project Documents to carry out the transactions contemplated by the Contract and the Project Documents;
 - 8.1.1.2 it has taken all necessary corporate and other actions under the Applicable Laws to authorise the execution and delivery of the Contract and to validly exercise its rights and perform its obligations under the Contract, the Financing Agreements and the Principal Sub-Contracts;
 - 8.1.1.3 it has the financial standing and capacity to undertake the Project in accordance with the terms of the Contract;
 - 8.1.1.4 the Contract constitutes its legal, valid and binding obligation, enforceable against it in accordance with the terms hereof, and its obligations under the Contract will be legally valid, binding and enforceable obligations against it in accordance with the terms of the Contract;
 - 8.1.1.5 it is subject to the laws of Kenya, and hereby expressly and irrevocably waives any immunity in any jurisdiction in respect of the Contract or matters arising in connection to or pursuant to the Contract including any obligation, liability or responsibility under the Contract;
 - 8.1.1.6 the execution, delivery and performance of the Contract and the Project Documents shall not conflict with, result in the breach of, constitute a default under, or accelerate performance required by any of the terms of its Memorandum and Articles of Association, any Applicable Laws, Applicable Permits and/or Consent or any covenant, contract, agreement, arrangement, understanding, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected;
 - 8.1.1.7 there are no actions, suits, proceedings, or investigations pending or, to its knowledge, threatened against it at law or in equity before any court or before any other judicial, quasi-judicial or other Government Authority, the outcome of which may result in the breach of the Contract or the Project Documents or which individually or in the aggregate may result in any impairment of its ability to perform any of its obligations under the Contract or the Project Documents;

- 8.1.1.8 it is not in violation or default with respect to any order, writ, injunction or decree of any court or any order of any Government Authority which may result in any material adverse effect on its ability to perform its obligations under the Contract and the Project Documents and no fact or circumstance exists which may give rise to such proceedings that would adversely affect the performance of its obligations under the Contract or the Project Documents;
- 8.1.1.9 it has complied with the 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 Contract or the Project Documents;
- 8.1.1.10 it shall at no time undertake or permit any Change in Ownership except in accordance with the provisions of Clause 6.3;
- 8.1.1.11 its Shareholders have the financial standing and resources to fund the required Equity and to raise the debt necessary for undertaking and implementing the Project in accordance with the Contract;
- 8.1.1.12 all its rights and interests in the Project and the Project Documents shall pass to and vest in the Procuring Entity on the Transfer Date free and clear of all liens, claims and Encumbrances, without any further act or deed on its part or that of the Procuring Entity, and that none of the Project Assets shall be acquired by it, subject to any agreement under which a security interest or other lien or Encumbrance is retained by any person, save and except as expressly provided in the Contract;
- 8.1.1.13 no representation or warranty by it contained in the Contract or in any other document furnished by it to the Procuring Entity or to any Government Authority in relation to the Applicable Permits 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;
- 8.1.1.14 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 Contract or for influencing or attempting to influence any officer or employee of the Procuring Entity or any Government Authority in connection with it; and

8.1.1.15 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 (as defined at section 384 of the Insolvency Act).

8.1.2 The representations set out in this Clause 8.1.1 (other than Clause 8.1.1.14) shall survive execution of the Contract.

8.2 Representatives and warranties of the Procuring Entity

8.2.1 The Procuring Entity represents and warrants to the Developer that:

8.2.1.1 it has full power and authority to execute, deliver and perform its obligations under the Contract and to carry out the transactions contemplated in the Contract and that it has taken all actions necessary to execute the Contract and exercise its rights and perform its obligations, under the Contract; and

8.2.1.2 it has taken all necessary actions under the Applicable Laws to authorise the execution, delivery and performance of the Contract.

9 Disclosure

In the event that any occurrence or circumstance comes to the attention of either Party that renders any of its representations or warranties untrue or incorrect, such Party shall immediately notify the other Party of the same. 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 Contract.

C. DEVELOPMENT AND OPERATIONS

10 Direct Agreement

10.1 The Developer, in conjunction with the Procuring Entity and the Lenders, shall conclude a Direct Agreement simultaneously with the Contract, in terms of which the Lenders may, under certain circumstances as set out in the Direct Agreement, step into the position of the Developer.

10.2 The Developer agrees to conclude the Direct Agreement and shall cooperate with the Procuring Entity to execute and deliver any other documents and provide other information reasonably required from time to time by the Lenders including:

10.2.1 appropriate consents to assignment;

10.2.2 copies of the constitutional documents of the Developer;

10.2.3 copies of the corporate resolutions of the Developer approving the terms of and entry into the Contract and the Direct Agreement; and

10.2.4 copies of the certificate of the Developer certifying all copy documents delivered, and including specimen signatures of authorised signatories.

10.3 The Developer shall from time to time, for the purpose of refinancing or the further financing of the Project or any part thereof, enter into other agreements in the same form as the Direct Agreement subject to such amendments to those agreements as may be required as the new or replacement Lenders may require and as are agreed by the Parties. The Developer shall not execute or deliver any other required financing documentation which would be inconsistent with the provisions of the Contract or the Direct Agreement, or which involves the assumption of the obligations by the Developer other than those provided for in the Contract or the Direct Agreement.

11 Title Matters

11.1 The Site

The Project shall comprise the Site and in respect of which a Lease shall be granted by the Procuring Entity to the Developer in accordance with the Contract.

11.2 Vacant possession

11.2.1 Subject to Clause 5.5.3, the Parties agree that on or prior to the Commencement Date, the Procuring Entity shall have granted vacant access to that part of the Site belonging to it to the extent necessary for the Project. In the event Financial Close is delayed solely on account of delay by the Procuring Entity in failing to secure the grant of vacant access for land necessary for the Project, neither Party shall be liable to payment of any Damages to the other Party in accordance with the provisions of Clause 5.9.

11.3 Site to be free from Encumbrances

Subject to the provisions of Clause 11.2, the Site shall be made available by the Procuring Entity to the Developer free from any registered Encumbrances. For the avoidance of doubt, it is agreed that existing rights of way, easements, privileges, liberties and appurtenances to the Site shall not be deemed to be Encumbrances. It is further agreed that the Developer accepts and undertakes to bear any and all risks arising out of the inadequacy or physical condition of the Site.

11.4 Protection of Site from encroachments

During the Project Term, the Developer shall protect the Site from any and all occupations, encroachments or Encumbrances, and shall not place or create nor permit any Principal Sub-Contractor or other person claiming through or under the Developer to place or create any Encumbrance or security interest over all or any part of the Site or the Project Assets, or on any rights of the Developer in the Project Assets or under the Contract, save and except as otherwise expressly set out in the Contract.

11.5 Access to Procuring Entity and Independent Technical Expert

The Lease and right to the Site granted to the Developer under the Contract shall always be subject to the right of access of the Procuring Entity and the ITE and their employees and agents for inspection, viewing and exercise of their rights and performance of their obligations under the Contract.

12 Infrastructure

12.1 Existing Infrastructure and right of way

Notwithstanding anything to the contrary contained herein, the Developer shall, for the purpose of operation and maintenance of any infrastructure or road specified, allow free access to the Site at all times for the authorised persons and vehicles of the relevant Government Agency.

12.2 Shifting of obstructing infrastructure

The Developer shall, subject to Applicable Laws, provisions of Applicable Permits and with the assistance of the Procuring Entity, undertake shifting of any infrastructure, including electric lines, water pipes and telephone cables, to an appropriate location or alignment within or outside the Site, if and only if such infrastructure causes or shall cause a Material Adverse Effect on the construction, operation or maintenance of the Project.

13 The Works

13.1 Overall responsibility

13.1.1 The Developer shall carry out the Works:

13.1.1.1 in accordance with the terms of the Contract; and

13.1.1.2 so as to procure satisfaction of the scope of the Project and Specifications and Standards.

13.1.1.3 The Developer warrants that it has used and will continue to apply Good Industry Practice and employ the degree of skill and care in the design of the Project and the Project Facilities 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.

13.2 Obligations prior to commencement of construction

13.2.1 Prior to commencement of Construction Works, the Developer shall:

13.2.1.1 submit to the PIC, its detailed design, construction methodology, Project quality management plan, and the procurement, engineering and construction time schedule for completion of the Project in accordance with the Project Completion Schedule;

13.2.1.2 submit to the PIC the Development Program;

- 13.2.1.3 appoint its representative duly authorised to deal with the Procuring Entity in respect of all matters under or arising out of or relating to the Contract;
- 13.2.1.4 undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with the Contract, the Applicable Laws and Applicable Permits; and
- 13.2.1.5 make its own arrangements for quarrying of materials needed for the Project under and in accordance with the Applicable Laws and Applicable Permits.

13.3 The Development Program

13.3.1 Prior to commencement of the Works, the Developer shall submit to the PIC the Development Program in accordance with Clause 13.2.1.2.

13.3.2 The Developer shall ensure that Works shall be undertaken in accordance with the Development Program and shall be completed on or before the Final Completion Date, such completion to be evidenced by the issuance of a Final Completion Certificate confirming substantive completion of the Works in compliance with Works Certification Document **PROVIDED THAT** if the Developer fails to complete Works in line with the Development Program, then in such circumstances, the Developer shall, without prejudice to any other remedies that the Procuring Entity may have under the Contract at law or equity, pay delay damages to the Procuring Entity for such default (**Delay Damages**). The Delay Damages shall be charged as nought decimal one per centum (0.1%) of the Stand Premium per Business day for so long as the duration the default continues. The payment of Delay Damages shall not relieve the Developer from its obligations to complete the Works or from any other duties, obligations or responsibilities, which it may have under the Contract.

13.3.3 The Developer may (but without prejudice to any other available right or remedy) if construction shall not be completed within six (6) months from the Date of lapse of the Construction Period, elect to treat such delays as a fundamental breach of the Developer's obligations under the Contract.

14 Monitoring of the Works

14.1 Monthly progress reports

During the Construction Period, the Developer shall, no later than seven (7) days after the end of each month, deliver to the PIC and the ITE a monthly report on the progress of the Works and shall promptly give such other relevant information as may be reasonably required by the ITE.

14.2 Inspection

14.2.1 During the Construction Period, the ITE shall inspect the Works at such intervals (but not less than on a monthly basis) at the Procuring Entity requests and make a report of such inspection (the Inspection Report) stating in reasonable detail the Defects (if any) with particular reference to the Scope of the Project and Specifications and Standards. It shall send a copy of the Inspection Report to the Procuring Entity and the Developer within seven (7) days of such inspection and upon receipt thereof, the Developer shall rectify and remedy any identified Defects stated in the Inspection Report. Any inspection or submission of an Inspection Report by the ITE shall not relieve or absolve the Developer of its obligations and liabilities under the Contract in any manner whatsoever.

14.2.2 The Developer shall also ensure that the ITE and/or the Procuring Entity shall have at reasonable times and on reasonable notice the right (but not so as to delay or impede the progress of the Works) to access the Site in order to inspect the state and progress of the Works and to monitor compliance by the Developer with its obligations under the Contract. In addition, the Developer and the Procuring Entity shall have monthly meetings to discuss the progress of the Works.

14.3 Right to Inspect

14.3.1 Provided that the ITE has notified the Developer of its intention at any time prior to the Completion Date, the ITE shall have the right to inspect any part or parts of the Works where the ITE reasonably believes that such part or parts of the Works is or are defective and the Developer shall comply with such request.

14.3.2 In the event that results of any inspection conducted under this Clause 14.3 establish the existence of any Defects in the Works, the Developer shall rectify and make good such Defects and any consequence of such Defects at no cost to the Procuring Entity and furnish a report to the ITE confirming that this has been achieved. The ITE shall require the Developer to carry out or cause to be carried out tests to determine that such remedial measures have brought the Works into compliance with the Specifications and Standards, and the procedure set forth in this Clause 14.3 shall be repeated until such Works conform to the Specifications and Standards. For the avoidance of doubt, it is agreed that tests pursuant to this Clause 14.3 shall be undertaken in addition to and independent of the tests that shall be carried out by the Developer for its own quality assurance in accordance with Good Industry Practice.

14.3.3 If following the exercise by the ITE of his right pursuant to Clause 14.3.1, the inspection shows that the relevant part or parts of the Works are defective, the Developer shall be required to rectify and such rectification shall not entitle the Developer to an extension of time.

14.4 Delays during construction

If the Developer fails to achieve any of the Project Milestones or the ITE shall have reasonably determined that the rate of progress of the Works is such that the Works are not likely to be achieved by the end of the Construction Period, it shall notify the Developer to this effect, and the Developer shall, within fifteen (15) Business days of such notice deliver to the ITE a detailed report setting out in reasonable detail the steps that the Developer and the contractor undertaking the Works propose to take to expedite progress and the period within which it shall achieve the Final Completion Date. **PROVIDED THAT** the provisions of Clause 13.3.2 shall apply in the event of non-compliance with the Development Program.

14.5 Suspension of unsafe Construction Works

14.5.1 Upon recommendation by the ITE, the Procuring Entity may by written notice require the Developer to suspend forthwith the whole or any part of the Works if, in the reasonable opinion of the Procuring Entity, such work threatens the safety of the Users and pedestrians.

14.5.2 The Developer shall, following receipt of a notice under Clause 14.5.1, promptly suspend the Works or any part of the Works for such time and in such manner as may be specified by the Procuring Entity and thereupon carry out remedial measures to secure the safety of such suspended Works and the Users. The Developer may by written notice require the ITE to inspect such remedial measures and make a report to the Procuring Entity recommending whether or not such suspension may be revoked. Upon receiving the recommendations of the ITE, the Procuring Entity shall either revoke such suspension or instruct the Developer to carry out such other and further remedial measures as may be necessary in the reasonable opinion of the Procuring Entity, and the procedure set out in this Clause 14.5.2 shall be repeated until such suspension is revoked.

14.5.3 Subject to Clause 26.5.2 all reasonable costs incurred for maintaining and protecting the Works or part of the Works during the period of suspension (**Preservation Costs**), shall be borne by the Developer.

14.5.4 If suspension of Works is for reasons not attributable to the Developer, the ITE shall determine any extension of the dates set out in the Project Completion Schedule to which the Developer is reasonably entitled and shall notify the Procuring Entity accordingly whereupon the Procuring Entity shall extend such Project Completion Schedule dates in accordance with the recommendations of the ITE.

15 Completion

15.1 Practical Completion

15.1.1 The Developer shall upon completion of Construction Works procure issuance of the Practical Completion Certificate and shall thereafter notify the ITE and the PIC.

15.2 Final Completion

- 15.2.1 Upon receipt of the Practical Completion Certificate, the Developer shall notify the ITE and the Procuring Entity in writing when it is ready for the Final Completion Inspection.
- 15.2.2 The ITE shall by no later than five (5) Business Days after the receipt of the notice from the Developer that it is ready for the Final Completion Inspection, complete the inspection of the Project Facilities in order to determine whether Final Completion has been completed in accordance with the Project Completion Schedule.
- 15.2.3 During the Final Completion Inspection, the ITE shall compile a Final Completion Inspection Report and deliver it to the Procuring Entity and the Developer on completion of the Final Completion Inspection.
- 15.2.4 The ITE shall specify in the Final Completion Inspection Report the time frame within which the Snags should be repaired or completed in order to achieve Final Completion.
- 15.2.5 If the ITE is satisfied that Final Completion is achieved, it shall simultaneously with the issuance of the Final Completion Inspection Report, issue the Final Completion Certificate.
- 15.2.6 If the ITE is not satisfied that Final Completion is achieved:
- 15.2.6.1 the ITE shall update the Final Completion Inspection Report and the time frame within which the Snags should be repaired or completed in order to achieve Final Completion.
 - 15.2.6.2 the Developer shall remedy the matters listed in the Final Completion Inspection Report to the satisfaction of the ITE within the time frame specified in the Final Completion Inspection Report;
 - 15.2.6.3 the Developer shall notify the ITE and the Procuring Entity in writing when it is ready for the next Final Completion Inspection.
 - 15.2.6.4 the ITE shall by no later than five (5) Business Days after the receipt of the written notice from the Developer that is ready for another Final Completion Inspection, complete the inspection of the Project Facilities in order to determine whether Final Completion is achieved; and
 - 15.2.6.5 if the ITE is satisfied that the matters listed in the Final Completion Inspection Report have been so remedied, then the ITE shall no later than three (3) Business Days after the ITE's last inspection issue and deliver the Final Completion Certificate to the Procuring Entity and the Developer.
- 15.2.7 The process set out in this Clause 15.2 shall be repeated as often as is necessary until the ITE issues and delivers the Final Completion Certificate to the Procuring Entity and the Developer.
- 15.2.8 Upon receipt of the Final Completion Certificate from the ITE, the Developer shall in accordance with the provisions of the Contract:

- 15.2.8.1 deliver to the Procuring Entity space layouts which shall be in sufficient detail; and
- 15.2.8.2 issue an Availability Certificate.
- 15.2.8.3 Nothing in the Contract shall be deemed to imply that the Procuring Entity makes any representation or warranty of whatsoever nature as to the value, design, construction, refurbishment, maintenance, operation or fitness for use of the Project Facilities or any of the Project Assets.

16 Certificate of Occupation

The Developer will use all reasonable endeavours after issuance of the Final Completion Certificate to comply with such requirements as should permit the relevant Competent Authority to issue an occupation certificate for the Project.

17 Change of Scope

17.1 Procuring Entity Change of Scope

17.1.1 The Procuring Entity has the right to propose a change of scope to the Project in accordance with this Clause 17. The Procuring Entity shall not propose a Change of Scope which:

17.1.1.1 requires the O&M Services to be provided in a way that infringes any law or is inconsistent with Good Industry Practice;

17.1.1.2 would cause any Consent or Applicable Permit to be revoked (if used) or be unobtainable;

17.1.1.3 would, if implemented, result in a material change in the nature of the Project; or

17.1.1.4 would materially and adversely affect the O&M Services in a way that is not compensated for in accordance with the Contract.

17.1.1.5 If the Procuring Entity requires a Change of Scope to the Project, it must serve a notice on the Developer detailing the requested Change of Scope (**Procuring Entity Change of Scope Proposal**).

17.1.2 The Procuring Entity Change of Scope Proposal shall:

17.1.2.1 set out the Change in Scope required in sufficient detail as to enable the Developer to calculate and provide the estimated revised Project costs in accordance with Clause 17.1 (the **Estimate**); and

17.1.2.2 require the Developer to provide the Procuring Entity within twenty (20) Business Days (or such longer period as the Parties may agree) of receipt of the Procuring Entity Change of Scope Proposal, with the Estimate.

17.1.3 As soon as practicable and in any event within twenty (20) Business Days (or such longer period as the Parties may agree) after having received the Procuring Entity Change of Scope Proposal, the Developer shall, subject to Clause 17.1, deliver the Estimate to the Procuring Entity. The Estimate shall include the opinion of the Developer on:

17.1.3.1 whether relief from compliance with its obligations under the Contract (in whole or part) is required, including the obligations of the Developer to achieve the Operation Period and meet the Output Specifications and/or the Service Standard during the implementation of the Change of Scope;

17.1.3.2 any impact on the Operation Period;

17.1.3.3 any impact on the provision of the O&M Services;

17.1.3.4 any amendment required to the Contract and/or any Project Document as a result of the Change of Scope;

- 17.1.3.5 any estimated revised Project costs (including any increase in the premiums payable in respect of the Insurances) that result directly from the Change of Scope;
 - 17.1.3.6 any loss of revenue that will result directly from the Change of Scope;
 - 17.1.3.7 any Capital Expenditure that is required or no longer required as a result of the Change of Scope;
 - 17.1.3.8 any Consents which are required; and
 - 17.1.3.9 the proposed method of certification of any Works or operational aspects of the Change of Scope required by the Procuring Entity Change of Scope Proposal.
- 17.1.4 As soon as practicable after the Procuring Entity receives the Estimate, the Parties shall discuss and agree on the issues set out in the Estimate. The Developer shall:
- 17.1.4.1 provide evidence that it has put a condition on the Principal Sub-Contractors to minimise any increase in costs and maximise any reduction in costs;
 - 17.1.4.2 demonstrate how any Capital Expenditure to be incurred or avoided is being measured in a cost-effective manner; and
 - 17.1.4.3 demonstrate that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Procuring Entity Change of Scope concerned, has been taken into account in the amount which in its opinion has resulted or is required under Clauses 17.1.3.5 and/or 17.1.3.6.
- 17.1.5 The Developer shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirement that the Developer should not be worse off as a result of the implementation of the Change of Scope) when procuring any work, supplies, materials or equipment required in relation to the Change of Scope.
- 17.1.6 If the Parties cannot agree on the contents of the Estimate, the dispute will be determined in accordance with Clause 34.4.
- 17.1.7 As soon as practicable after the contents of the Estimate have been agreed or otherwise determined, the Procuring Entity shall:
- 17.1.7.1 confirm the Estimate (as modified) in writing; or
 - 17.1.7.2 withdraw the Procuring Entity Change of Scope Proposal.
- 17.1.8 Notwithstanding the other provisions of this Clause 17:

- 17.1.8.1 if, on receipt of the Procuring Entity Change of Scope Proposal pursuant to Clause 17.1, the Developer is of the opinion that such Change of Scope is likely to result in an increase in the Project risk or its financial risk or to generally adversely affect the risk profile of the Developer, it shall, as soon as practical and in any event within ten (10) Business Days (or such longer period as the Parties may agree) after having received the Procuring Entity Change of Scope Proposal, serve a notice on the Procuring Entity stating its opinion and reasons; and
- 17.1.8.2 the Parties shall meet as soon as practical and in any event within ten (10) Business Days of receipt of the notice served in accordance with sub-clause 17.1.8.1. If the Parties agree that such Change of Scope is likely to increase the Project risk or the Developer's financial risk or to generally adversely affect the risk profile of the Developer, the Procuring Entity Change of Scope Proposal shall be withdrawn. If the Parties are unable to agree on the likely effects of the Procuring Entity Change of Scope Proposal, either Party may refer the matter to the ITE pursuant to Clause 34.4. If it is determined by the ITE that the Procuring Entity Change of Scope Proposal will increase the Project risk, financial risk or generally adversely affect the risk profile of the Developer, the Procuring Entity Change of Scope Proposal may be withdrawn or varied to reduce such risks. If the ITE determines that the Procuring Entity Change of Scope Proposal will not increase the Project risk, financial risk or generally adversely affect the risk profile of the Developer, the Procuring Entity Change of Scope Proposal shall be processed in terms of Clause 17.1.2.
- 17.1.9 The Procuring Entity will confirm the Estimate (as modified) in writing within twenty (20) Business Days of the contents of the Estimate having been agreed in accordance with Clause 17.1.7.1 or determined pursuant to Clause 17.1.8.2, the Procuring Entity Change of Scope Proposal shall be deemed to have been withdrawn.
- 17.1.10 If the Estimate (as modified) involves estimated Capital Expenditure, the Developer shall obtain funding for the whole of the estimated Capital Expenditure, from either the Lenders or other commercial sources, on terms reasonably satisfactory to it and the Procuring Entity.
- 17.1.11 If the Developer is unable to obtain funding for the whole of the estimated Capital Expenditure within twenty (20) Business Days of the date that the Procuring Entity confirmed the Estimate, the Developer shall inform the Procuring Entity in writing and request the Procuring Entity to pay the costs relating to the Estimate, unless the Procuring Entity agrees to pay the costs involved in accordance with this Clause 17.

17.1.12 Subject to Clause 17.1.10 and 17.1.11, the Procuring Entity may, at any time following the date on which the Estimate is confirmed, agree to meet all or, to the extent the Developer has obtained funding for only part of the Capital Expenditure, the remaining part of the Capital Expenditure.

17.1.13 At the same time that the Developer gives the Estimate, it shall also provide the Procuring Entity with a proposal as to whether the Financial Model should change, and if so, the manner in which it should change. If the Procuring Entity accepts the proposal, the Financial Model shall be adjusted as proposed. If the Procuring Entity rejects such proposal and the Parties are unable to agree the required changes to the Financial Model within twenty (20) Business Days of the Procuring Entity rejection of the Developer's proposal, the Procuring Entity Change of Scope Proposal shall be withdrawn or submitted for determination in accordance with the Fast Track Dispute Resolution.

17.1.14 It is acknowledged that any material amendment to the Contract shall be as prescribed under the Public Procurement and Asset Disposal Act No. 33 of 2015 Laws of Kenya.

17.2 Developer Change of Scope

17.2.1 If the Developer wishes to introduce a Change of Scope, it must serve a notice on the Procuring Entity providing details of such Change of Scope (**Developer Change of Scope Proposal**).

17.2.2 The Developer Change of Scope Proposal must:

17.2.2.1 set out the proposed Change of Scope in sufficient detail to enable the Procuring Entity to evaluate the Developer Change of Scope Proposal in full;

17.2.2.2 specify the Developer's reasons for the Developer Change of Scope Proposal;

17.2.2.3 request the Procuring Entity to consult with the Developer with a view to deciding whether to agree to the Developer Change of Scope Proposal and, if so, what consequential changes the Procuring Entity requires as a result;

17.2.2.4 specify all implications of the Developer Change of Scope Proposal on the Contract and any of its terms; and

17.2.2.5 indicate if there are any dates by which a decision by the Procuring Entity is critical.

17.2.3 The Procuring Entity shall evaluate the Developer Change of Scope Proposal taking into account all relevant issues, including, inter alia, whether:

17.2.3.1 a change in the revenue share will occur and the extent of such;

17.2.3.2 the Change of Scope will affect O&M Services;

- 17.2.3.3 the Change of Scope will interfere with the relationship of the Procuring Entity with third parties or any of the Procuring Entity functions;
 - 17.2.3.4 the financial strength of the Developer is sufficient to perform the Change of Scope;
 - 17.2.3.5 the residual value of the Project Assets is reduced;
 - 17.2.3.6 the Change of Scope materially affects the risks or costs to which the Procuring Entity is exposed; and
 - 17.2.3.7 any amendment shall be required to the Contract and/or any Project Document as a result of the Developer Change of Scope Proposal if approved.
- 17.2.4 As soon as practicable after receiving the Developer Change of Scope Proposal, but no later than ten (10) Business Days, the Parties shall meet and discuss the matters referred to in it. During their discussions the Procuring Entity may, at its sole discretion, propose modifications or accept or reject the Developer Change of Scope Proposal.
- 17.2.5 If the Procuring Entity accepts the Developer Change of Scope Proposal (with or without modification), the Developer shall begin to implement the relevant changes arising from the Change of Scope within ten (10) Business Days of the Procuring Entity's written acceptance. Within this period, the Parties shall consult and agree on the remaining details as soon as practicable and shall enter into any documents to amend the Contract or any relevant Project Documents which are necessary to give effect to the Change of Scope.
- 17.2.6 If the Procuring Entity rejects the Developer Change of Scope Proposal, it shall not be obliged to give its reasons for such a rejection, subject to any applicable Law.

18 Operation and Maintenance

18.1 Operation

- 18.1.1 The Developer undertakes to provide and/or commence the O&M Services on the O&M Commencement Date, provided that the Developer shall not be entitled to provide and/or commence the O&M Services before the end of the Construction Period unless it gives the Procuring Entity three (3) months' written notice of its intention to achieve an earlier date and obtains the Procuring Entity's prior written consent.
- 18.1.2 The Developer shall provide the O&M Services from the O&M Commencement Date throughout the Operation Period.
- 18.1.3 The Developer shall from the Operation Period ensure (or procure that the O&M Contractor and any other persons for whom it is responsible ensures) that the O&M Services are available and provided:

- 18.1.3.1 in such manner that ensures that the specifications under the Tender document are met; and
- 18.1.3.2 in accordance with the terms of the Contract.

18.2 Maintenance

- 18.2.1 Not more than three (3) months prior to:
 - 18.2.1.1 the O&M Commencement Date, the Developer shall submit to the Procuring Entity and the OC a programme of Planned Maintenance for the Project Facilities and Project Assets covering the period from the O&M Commencement Date to the commencement of the next Financial Year; and
 - 18.2.1.2 the commencement of each Financial Year, the Developer shall submit to the Procuring Entity and the OC a programme of Planned Maintenance for the Project Facilities and Project Assets for that Financial Year,
 - 18.2.1.3 together with details of any known major scheduled items of Planned Maintenance for the immediately succeeding year (each such schedule being a **Draft Programme of Planned Maintenance**).
- 18.2.2 Each Draft Programme of Planned Maintenance shall contain the following information:
 - 18.2.2.1 details of the proposed start and end dates for each item of Planned Maintenance, the works to be carried out and the proposed hours of work;
 - 18.2.2.2 details of any material effect of the Planned Maintenance on providing the O&M Services that the Developer is aware of; and
 - 18.2.2.3 details of any effect of the Planned Maintenance on the activities and/or functioning of the Procuring Entity that the Developer is aware of.
- 18.2.3 Each Draft Programme of Planned Maintenance put forward by the Developer shall be reviewed by the Procuring Entity and the OC, and the Procuring Entity shall notify the Developer within fifteen (15) Business Days of receipt whether it has any objections or comments, failing which the Procuring Entity and the OC shall be deemed to have accepted the Draft Programme of Planned Maintenance, which shall then be final for that Financial Year.
- 18.2.4 Upon receipt of the Procuring Entity's and the OC's objections, the Developer shall amend the Draft Programme of Planned Maintenance and resubmit to the Procuring Entity and the OC for review (as contemplated above), until such time as the Procuring Entity either accepts the Draft Programme of Planned Maintenance submitted or does not object thereto within the allotted time period, where after the Draft Programme of Planned Maintenance shall be final for that Financial Year (**Programme of Planned Maintenance**).

- 18.2.5 Any dispute between the Parties as to any Draft Programme of Planned Maintenance shall be resolved in accordance with the Fast Track Dispute Procedure.
- 18.2.6 The Developer shall not carry out any Planned Maintenance or Unplanned Maintenance save:
 - 18.2.6.1 in accordance with the Programme of Planned Maintenance; or
 - 18.2.6.2 in accordance with any request for deferment or acceleration of the Planned Maintenance in Clause 18.2.7.
- 18.2.7 Irrespective of whether or not the Programme of Planned Maintenance has been agreed or not the Procuring Entity may, at any time, require the Developer to accelerate or defer any Planned Maintenance to the extent that:
 - 18.2.7.1 such acceleration or deferment will not materially prejudice any relevant manufacturer's warranties; provided that the Developer shall ensure that all such relevant manufacturer's warranties are entered into on normal commercial terms;
 - 18.2.7.2 such acceleration or deferment will not result in additional costs being incurred by the Developer in carrying out the Planned Maintenance or where it will result in additional costs being incurred by the Developer in carrying out the Planned Maintenance, the Procuring Entity having agreed to pay for such costs, as a Pass Through Cost; provided that the Developer shall disclose the original cost estimate providing such information as may be required by the Procuring Entity with reference to, inter alia, the Base Case Financial Model;
 - 18.2.7.3 spare parts or other required resources are available, should Planned Maintenance be accelerated;
 - 18.2.7.4 the acceleration or deferment will not result in other items of Planned Maintenance being negatively impacted upon by such acceleration or deferment;
 - 18.2.7.5 the acceleration or deferment will not materially and adversely impact on the ability of the Developer to comply with its obligations in relation to the O&M Services,
 - 18.2.7.6 by giving written notice to the Developer, (unless otherwise agreed) of not less than forty (40) Business Days prior to the maintenance, which notice shall set out the time and/or periods at a scheduled date for carrying out such Planned Maintenance or during which the Procuring Entity requires the Planned Maintenance to be performed.

18.2.8 Notwithstanding any requested acceleration or deferral of the Planned Maintenance, the Developer shall not be excused from failing to meet its obligations under the Contract as a result of any such requested acceleration or deferral.

18.2.9 **Unplanned Maintenance**

18.2.9.1 If the need arises for Unplanned Maintenance, the Developer shall notify the Procuring Entity upon becoming aware of the need for such Unplanned Maintenance with an indication of the proposed commencement date and the proposed hours or work required to perform the Unplanned Maintenance, and shall carry out such Unplanned Maintenance, provided that the Developer shall take reasonable steps to minimise the impact of the Unplanned Maintenance on the functions and activities of the Procuring Entity or Users.

18.2.9.2 If it is anticipated by the Procuring Entity that any Unplanned Maintenance would have the effect of disrupting the Procuring Entity or User functions or activities, the Developer shall propose to the Procuring Entity a different, more convenient commencement date for such Unplanned Maintenance and shall carry out the Unplanned Maintenance upon the Procuring Entity consenting to the rescheduled commencement date for such Unplanned Maintenance.

18.2.10 The provisions of this Clause 18 are subject to, and do not affect the Developer's obligations under Clause 19.3.1.

19 Monitoring of Operation and Maintenance

19.1 Monitoring by the Developer

19.1.1 The Developer undertakes ensure the performance of the O&M Services in accordance with the Project Facilities Output Specifications.

19.1.2 The Developer shall, in respect of each of the component parts of the O&M Services (as per the Project Facilities Output Specifications), develop and maintain a detailed written performance monitoring mechanism and procedure in a format and with content acceptable to the Procuring Entity, by which performance monitoring mechanism and procedure shall be based on mechanisms and monitoring frequencies to be approved by the Procuring Entity.

19.1.3 The performance monitoring mechanisms and procedures referred to in this Clause 19.1 shall be implemented by the Developer with effect from the O&M Commencement Date in order to evaluate on a consistent basis whether and to what extent the Project Facilities Output Specifications are attained.

19.2 Monitoring by the Procuring Entity

- 19.2.1 The Procuring Entity (acting by itself or through the appointment of a nominated contractor) may, at its own expense, carry out such monitoring and/or audit of the O&M Services and of the Developer's performance monitoring mechanisms and procedures referred to in Clause 19.1 (including through the use of joint monitoring) and quality assurance procedures as it may from time to time require. If such a Procuring Entity review reveals that the monitoring systems of the Developer are defective and the O&M Services are not meeting the Project Facilities Output Specifications, the Developer shall bear the costs of such review and any remedial actions that may be required as a result of such a review.
- 19.2.2 The Procuring Entity may, in its absolute discretion, attend with the Developer whilst the Developer is carrying out its own monitoring procedures, and jointly monitor any aspect of the O&M Services.
- 19.2.3 The Procuring Entity shall, in addition, be entitled to perform an annual review of the Developer's maintenance, operating and management procedures relating to the Project.
- 19.2.4 The Procuring Entity shall, on the Developer's reasonable request, on reasonable notice, and at the Developer's cost, attend and jointly monitor any aspect of any of the O&M Services where the Developer believes that to do so would enhance the delivery or monitoring of such O&M Services.
- 19.2.5 In conducting the monitoring contemplated in this Clause 19.2, the Procuring Entity shall not be deemed by its actions, inactions or otherwise at any time, to confirm or agree that the provision of the O&M Services or operation of the Project Facilities or any part thereof complies with the Project, the Project Facilities Output Specifications and/or the Performance Standards and such compliance shall at all times be the sole responsibility of the Developer.

19.3 Monitoring of Maintenance

19.3.1 Interim Maintenance Surveys

19.3.1.1 The Developer shall ensure that an interim maintenance survey (**Interim Maintenance Survey**) of the Project Assets and Project Facilities is conducted in respect of:

19.3.1.1.1 the fifth (5th) anniversary of Completion Date, to be carried out within forty five (45) days of the fifth (5th) anniversary of the O&M Commencement Date;

19.3.1.1.2 the tenth (10th) anniversary of the Completion Date to be carried out within forty five (45) days of the tenth (10th) anniversary of the O&M Commencement Date;

- 19.3.1.1.3 the fifteenth (15th) anniversary of the Commencement to be carried out within forty five (45) days of the fifteenth (15th) anniversary of the O&M Commencement Date;
 - 19.3.1.1.4 the twentieth (20th) anniversary of the Commencement to be carried out within forty five (45) days of the twentieth (20th) anniversary of the O&M Commencement Date;
 - 19.3.1.1.5 the twenty-fifth (25th) anniversary of the Commencement to be carried out within forty five (45) days of the twenty-fifth (25th) anniversary of the O&M Commencement Date;
 - 19.3.1.1.6 the thirtieth (30th) anniversary of the Commencement to be carried out within forty five (45) days of the thirtieth (30th) anniversary of the O&M Commencement Date;
 - 19.3.1.1.7 the thirty-fifth (35th) anniversary of the Commencement to be carried out within forty five (45) days of the thirty-fifth (35th) anniversary of the O&M Commencement Date; and
 - 19.3.1.1.8 the fortieth (40th) anniversary of the Commencement to be carried out within forty five (45) days of the fortieth (40th) anniversary of the O&M Commencement Date.
- 19.3.1.2 The purpose of the Interim Maintenance Survey is to:
- 19.3.1.2.1 review the actual maintenance carried out during the period since O&M Commencement Date or the last Interim Maintenance Survey (as the case may be) to the current Interim Maintenance Survey for the Project Assets and the Project Facilities;
 - 19.3.1.2.2 review the planned maintenance during the period since the start of the O&M Commencement Date or the last Interim Maintenance Survey (as the case may be) to the current Interim Maintenance Survey for the Project Assets and the Project Facilities; and
 - 19.3.1.2.3 determine the degree to which actual maintenance carried out complied with the Planned Maintenance during the period under review of each item of the Project Assets and Project Facilities.

- 19.3.1.3 The Interim Maintenance Survey shall be carried out by a reputable and suitably qualified independent expert with appropriate knowledge of the operation of serviced hostel accommodation for the Procuring Entity from a panel of five (5) such experts nominated by the Developer and the Procuring Entity (**Interim Maintenance Surveyor**)]. The Developer shall give the Interim Maintenance Surveyor such rights of access to the Project Facilities, documentation and personnel of the Developer and the O&M Contractor, as may reasonably be required by the Interim Maintenance Surveyor to enable him/her to carry out the Interim Maintenance Survey.
- 19.3.1.4 The Developer shall pay the costs of the Interim Maintenance Survey and the retention of the Interim Maintenance Surveyor for the purpose of undertaking the Interim Maintenance Surveyor.
- 19.3.1.5 The Developer shall ensure that the Interim Maintenance Surveyor prepares a report on his/her findings following the conclusion of the Interim Maintenance Survey (the **Interim Maintenance Report**) and that the Interim Maintenance Report is furnished to the Developer, the Procuring Entity and the Procuring Entity Representative.
- 19.3.1.6 The Developer shall procure that the Interim Maintenance Report contains an assessment by the Interim Maintenance Surveyor as to whether or not there has been any variance between the Planned Maintenance and the maintenance which was actually carried out in the period under review including any Unplanned Maintenance, and if there is a variance to indicate:
- 19.3.1.6.1 whether such variance is material, and if so, when such planned and un-carried out maintenance ought to be carried out in relation to it (**Material Outstanding Interim Maintenance**); and
- 19.3.1.6.2 whether such variance is not material (**Outstanding Interim Maintenance**).
- 19.3.1.7 In respect of any Outstanding Interim Maintenance, the Developer shall be obliged, in writing to the Procuring Entity and the Procuring Entity Representative (and copied to the Interim Maintenance Surveyor) to advise on why that maintenance was not carried out and when it will be carried out.
- 19.3.1.8 The Developer shall be obliged to carry out any Material Outstanding Interim Maintenance within the time period identified in the Interim Maintenance Report.

19.3.2 Final Maintenance Survey

- 19.3.2.1 The Developer shall ensure that a final maintenance survey of the Project Assets and Project Facilities is carried out twelve (12) months prior to the Expiry Date, which shall be conclusive proof of the state of the Project Assets and Project Facilities as at the expiry of the Project Term (**Final Maintenance Survey**).
- 19.3.2.2 The Final Maintenance Survey shall be carried out by a reputable and suitably qualified independent expert with appropriate knowledge of the operation of accommodation student facilities, selected by the Procuring Entity from a panel of five (5) such experts nominated by the Developer (**Maintenance Surveyor**). The Developer shall give the Maintenance Surveyor such rights of access to the Project Facilities, documentation and personnel of the Developer and the O&M Contractor as may reasonably be required by the Maintenance Surveyor to enable him/her to carry out the Final Maintenance Survey.
- 19.3.2.3 The Developer shall pay the costs of the Final Maintenance Survey and the retention of the Maintenance Surveyor for the purpose of undertaking same.
- 19.3.2.4 The purpose of the Final Maintenance Survey is to:
- 19.3.2.4.1 assess the maintenance requirements for the Project Assets and the Project Facilities (**Assessed Maintenance Requirements**) for the last twelve (12) months of the Project Term (the **Assessment Period**);
 - 19.3.2.4.2 provide a programme for carrying out the Assessed Maintenance Requirements for each Contract Month over the Assessment Period;
 - 19.3.2.4.3 determine the anticipated lifespan of each item of the Project Assets.
- 19.3.2.5 The Final Maintenance Survey shall in the absence of manifest error be final and binding on the Parties in respect of determining the Assessed Maintenance Amount.
- 19.3.2.6 Following the completion of the Final Maintenance Survey, the Maintenance Surveyor shall prepare a report on his/her findings (the **Final Maintenance Survey Report**) and the Final Maintenance Survey Report shall be furnished to the Developer, the Procuring Entity and the Procuring Entity Representative.
- 19.3.2.7 The Maintenance Surveyor shall provide each Party with a copy of the Final Maintenance Survey Report, including a copy of the programme for carrying out the Assessed Maintenance Requirements (if any).

D. FINANCIAL COVENANTS

20 Financial Close

20.1 The Developer hereby agrees and undertakes that it shall achieve Financial Close within one hundred and eighty (180) days from the Effective Date subject to any delay in Financial Close which has occurred solely as a result of any default or delay by the Procuring Entity in procuring satisfaction of the Condition Precedent specified in Clause 5.5 or due to the occurrence of a Force Majeure Event.

20.2 Termination **due to failure to achieve Financial Close**

20.2.1 Notwithstanding anything to the contrary contained in the Contract in the event that Financial Close does not occur, for any reason whatsoever, within the period set out in Clause 20.1 (or any extended period agreed at the sole discretion of the Procuring Entity) provided thereunder, all rights, privileges, claims and entitlements of the Developer under or arising out of the Contract shall be deemed to have been waived by, and to have ceased with the concurrence of the Developer, and the Contract shall be deemed to have been terminated by mutual agreement of the Parties.

20.2.2 Upon Termination under Clause 20.2.1 other than a failure by the Procuring Entity to satisfy the Conditions Precedent set out in Clause 5.5, the Procuring Entity shall be entitled to encash the Bid Security and appropriate the proceeds thereof as Damages; provided however, that if Financial Close has not occurred solely as a result of the Procuring Entity being in default of any of its obligations under Clause 5.8, it shall, upon Termination, return the Bid Security.

21 Stand Premium and Gross Revenue Share

21.1 Stand Premium

21.1.1 The Developer shall pay to the Procuring the Stand Premium on or before the Commencement Date equivalent to a sum of Kenya Shillings [*] (KES. [*]) .

21.2 Gross Revenue Share

21.2.1 The Developer shall, subject to terms hereof, pay to the Procuring Entity revenue share of its Gross Revenue, which shall be equivalent to [*] % (per cent) of the Gross Revenue (“Gross Revenue Share”) payable on annually basis, beginning from the O&M Commencement Date.

21.2.2 The Gross Revenue Share for a particular year shall be payable by the Developer by the fifth (5th) Business Day of the last day of the last month of the Contract Year and shall be subject to verification and reconciliation on annual basis, as required by the Procuring Entity in its discretion. For this purpose, the Parties hereby agree as follows:

21.2.2.1 the Procuring Entity and its authorized representatives shall be permitted to inspect at any reasonable time the books, records and other material kept by or on behalf of the Developer in order to check or audit any information related to the calculation of Gross Revenue Share as paid/reported to Procuring Entity. The Developer shall make available to the Procuring Entity and its authorized representatives such information and grant such access as they shall reasonably require in connection therewith.

21.2.2.2 Without prejudice to the quarterly reconciliation based inter alia on the statutory auditor's certificate, the applicable Gross Revenue used for final annual verification/reconciliation shall be the revenue as certified by independent auditor, to be appointed in following manner-

21.2.2.2.1 the Procuring Entity shall nominate a panel of six reputed chartered accountancy firms, out of which Developer shall have the right to object to maximum of three (3) nominees, and the Procuring Entity shall appoint any one nominee to whom Developer has not objected. The cost of such independent auditor shall be shared by Parties to the Contract; and

21.2.2.2.2 pursuant to such certification, if it is established that previous reporting of Gross Revenue is inaccurate, then the Developer shall, notwithstanding anything to the contrary contained in the Contract pay the differential amount with interest at the rate of four percent (4%) per annum above the Kenya Bank's Reference Rate ("KBRR") prescribed by the Central Bank of Kenya and also fully bear the cost of engaging independent auditor.

21.3 KR's Annual Rent

21.3.1 In consideration of this Lease, the Developer shall pay to the Procuring Entity the Rent payable annually in advance on an accrued basis from the date prescribed in the Lease, and which shall be exclusive of any tax payable by the Developer and/or any other deductions whatsoever.

21.3.2 The initial rent payable during the date prescribed in the Lease, shall be the sum of Kenya Shillings [.] and shall escalate at a compound rate not more than the consumer price index per annum throughout the Project Term.

21.4 Set Off

21.4.1 The Developer shall not be entitled to retain or set off any amount due or that may be due to the Procuring Entity by the Developer.

21.4.2 In addition to Deductions, the Procuring Entity may (at its discretion) retain or set off any amount owed to it by the Developer under the Contract which has, by agreement or determination under the Contract, fallen due and payable, against any amount due to the Developer under the Contract.

22 Changes to the Financial Model

- 22.1 On the Commencement Date the Procuring Entity shall take possession of a date stamped read-only CD-ROM or flash drive containing the Base Case Financial Model together with a true and correct copy of the Base Case Financial Model.
- 22.2 The Developer shall, if it reasonably anticipates any material deviation from the then current Financial Model arising from a change in or variation of any of its obligations contemplated in the Contract, notify the Procuring Entity of same without undue delay and shall prepare and deliver a revised Financial Model to the Procuring Entity for its approval. Unless the Parties agree otherwise, the revised Financial Model shall be in substantially the same form as the Base Case Financial Model and prepared using the format and methodology of the Base Case Financial Model.
- 22.3 If the Developer and the Procuring Entity do not agree upon a revised Financial Model within ten (10) Business Days of delivery thereof, either Party may refer the dispute to be determined in accordance with the Fast Track Resolution Procedure and no Distributions other than those consented to prior to the revised Financial Model may be made pending resolution of such dispute.
- 22.4 Within ten (10) Business Days of any revised Financial Model either being accepted by the Procuring Entity or determined in accordance with the Fast Track Resolution Procedure, the Developer shall deposit with the Procuring Entity a revised date stamped read-only CD-ROM or flash drive containing the revised Financial Model and the date upon which the Financial Model was agreed or determined (as the case may be) and each such revision shall have a version number incremental to the previous Financial Model, and the latest in time shall be the Financial Model which applies for the time being to the Contract.

23 Refinancing

23.1 Requirement for Procuring Entity Consent

- 23.1.1 The Developer must obtain the Procuring Entity's prior written approval for any Refinancing (other than an Exempt Refinancing).
- 23.1.2 Subject to the provisions of this Clause 23 and the Procuring Entity concurring that the proposed Refinancing is an Exempt Refinancing, the Developer may implement any Exempt Refinancing without the prior approval of the Procuring Entity but must notify the Procuring Entity in writing of the said Exempt Refinancing.
- 23.1.3 For the avoidance of any doubt, the notification and approval requirements set out in this Clause 23 do not apply to any Permitted Borrowing.

23.2 Developer Details

23.2.1 The Developer must promptly provide the Procuring Entity with:

23.2.1.1 full details of any proposed amendments to be made to or waivers granted under any of the Project Documents to give effect to such Refinancing;

23.2.1.2 a copy of the proposed financial model relating to such Refinancing (if any) and the basis for the assumptions used in that financial model;

23.2.1.3 the reasons for such Refinancing; and

23.2.1.4 any other information that may be reasonably necessary to enable the Procuring Entity to assess such Refinancing having regard to the following provisions.

23.3 Right to Audit

The Procuring Entity shall be entitled on prior written notice to the Developer (at any time before, during and/or after any Refinancing) to audit any financial model and documentation relating to any Refinancing.

24 Insurance

24.1 Requirements to Maintain

24.1.1 The Developer shall take out and shall thereafter maintain and keep in full force and effect the insurances in respect of the Project as may be required by Law (the **Insurances**). Each of the Insurances must be taken out and become fully effective not later than the earliest date required by Law.

24.1.2 Each Insurance must be taken out with an insurer, and on terms, approved by the Procuring Entity.

24.1.3 The payment of the insurance premiums due and payable in respect of any Insurance shall be the responsibility of the Developer.

24.2 Obligations on Parties

The Developer shall not take any action or fail to take any action, or (in so far as is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under a policy applying to any Insurance.

24.3 Nature of the Insurances

24.3.1 The Developer undertakes that each Insurance shall:

24.3.1.1 without limiting the provisions of Clause 24.3.2, name the Developer as the insured and the Procuring Entity as an interested party;

- 24.3.1.2 provide for non-vitiating protection in respect of any claim made by the Procuring Entity as an interested party. If non-vitiating protection is unavailable when any such insurance policy is first placed, then the Developer shall procure same insofar as any non-vitiating protection subsequently becomes available prior to each renewal of the policy, or provide written confirmation promptly upon the renewal thereof as to the unavailability thereof to the Procuring Entity. If any non-vitiating protection subsequently becomes available, Procuring Entity shall be entitled to require the Developer to procure such protection and the costs thereof shall be borne by the Developer;
 - 24.3.1.3 contain a provision waiving the insurers' subrogation rights against the Procuring Entity, officials, employees, staff, or agents of the Procuring Entity;
 - 24.3.1.4 provide for ninety (90) days' prior written notice of its cancellation, non-renewal or amendment to be given to the Procuring Entity by the underwriter of such Insurance;
 - 24.3.1.5 contain a provision recording that such Insurance is a primary insurance and shall not be brought into contribution by any other insurances; and
 - 24.3.1.6 provide for payment of any proceeds under the Material Damage Policy.
- 24.3.2 The Developer shall procure that each of the Insurances shall name the Procuring Entity as a co-insured for its separate interest.

24.4 Evidence of Policies

- 24.4.1 The Developer shall provide, to the Procuring Entity:
- 24.4.1.1 true and complete copies of the policies of all the Insurances (together with any other information reasonably requested by the Procuring Entity relating to such policies) and the Procuring Entity shall be entitled to inspect them during ordinary business hours;
 - 24.4.1.2 satisfactory evidence that the premiums due and payable under any such policies have been paid and that the Insurances are in full force and effect in accordance with the requirements of this Clause 24; and
 - 24.4.1.3 on or before the date of expiry of any Insurance, satisfactory evidence that the relevant insurance has been or is being renewed.

24.5 Renewal Certificate

The Developer must obtain a renewal certificate in respect of any Insurance expiring prior to the end of the Project Term and furnish the Procuring Entity with true and complete copies of each certificate of renewal for such Insurance as soon as possible but in any event on or before the renewal date.

24.6 Breach

If the Developer breaches any of Clauses 24.1.1, 24.1.2 or 24.1.3, in relation to any Insurance, the Procuring Entity may pay any premiums required to keep such Insurance in force and effect, or itself procure such Insurance and may recover all premiums or other costs incurred by it in doing so from the Developer on written demand.

24.7 Procuring Entity Approval

The Developer shall not settle or permit the settlement of any insurance claim whatsoever relating to the infringement of any right of the Procuring Entity without the prior consent of the Procuring Entity.

24.8 Limit of Liability

Neither the failure to comply nor full compliance with the insurance provisions of the Contract shall limit or relieve the Developer of its liabilities and obligations under the Contract.

24.9 Non-vitiating cover

Insofar as non-vitiating cover is unavailable, the Developer shall, and shall ensure that each of the Principal Subcontractors, warrant in favour of the Procuring Entity and for the duration of such non-availability that it and each of the Principal Subcontractors shall not make any misrepresentation to the insurer, or breach any condition or warranty made to the insurer, which would cause the relevant insurance policy to fail.

24.10 Proceeds

24.10.1 The Developer shall apply any proceeds of any policy of the Insurance:

24.10.1.1 in the case of third party legal liability or employer's liability insurance, in satisfaction of the claim, demand, proceeding or liability in respect of which the proceeds are payable; and

24.10.1.2 in the case of any other Insurance, so as to ensure the performance by the Developer of its obligations under the Contract.

24.10.2 The Developer shall bear the risk of any shortfall in the proceeds of any Insurance.

24.11 Uninsurable Risks

- 24.11.1 If a risk usually covered by the Insurances becomes Uninsurable, then the Developer shall notify the Procuring Entity within thirty (30) days of the risk becoming Uninsurable or the Developer becoming aware that such risk shall become Uninsurable on the renewal of any Insurance. Such notice shall include the Developer's proposals on what it reasonably considers appropriate to manage, mitigate and control the Uninsurable risk.
- 24.11.2 If the Parties agree, or it is determined in accordance with Clause 34.4, that:
- 24.11.2.1 the risk is Uninsurable;
 - 24.11.2.2 the risk being Uninsurable is not caused by the actions or omissions of the Developer or a Principal Subcontractor; and
 - 24.11.2.3 other service providers carrying on businesses similar to the Project would cease to do so as a result of such Uninsurability,
 - 24.11.2.4 then the Parties shall meet to discuss and agree on the means by which the risk should be managed (including by way of self-insurance by either the Procuring Entity or the Developer). Pending determination thereof, the Uninsurable risk shall be at the risk of the Developer.
- 24.11.3 The Developer shall bear the onus of proving the circumstances in Clauses 24.11.2.1, 24.11.2.2 and 24.11.2.3.
- 24.11.4 If the requirements of Clauses 24.11.1 and 24.11.2 are met:
- 24.11.4.1 the Contract shall continue in force and effect; and
 - 24.11.4.2 on the occurrence of the risk (but only if that risk has continued to be Uninsurable) the Procuring Entity shall, at its election, either pay:
 - 24.11.4.2.1 to the Developer an amount equal to the Insurance Proceeds that would have been payable had the risk continued to be insurable, in which event the Contract will continue; or
 - 24.11.4.2.2 an amount equal to the amount set out in Clause 26.6 and the Contract will terminate as if for Force Majeure.
- 24.11.5 Where a risk which was previously Uninsurable, ceases to be Uninsurable, the Developer shall as soon as reasonably possible after becoming aware of that fact, procure and maintain insurance in respect of that risk and the provisions of the Contract shall apply in respect of that risk.

25 Accounts and Audit

- 25.1 The Developer shall provide to the Procuring Entity all information, documents, records and the like (including all contracts and Project Documents concluded by it for the purposes of or ancillary to the implementation of this Project) in the possession of, or available to, the Developer as may reasonably be requested by the Procuring Entity for the purpose of complying with any of its statutory reporting obligations including its obligations under the Applicable Laws.
- 25.2 The Developer shall use all reasonable endeavours to ensure that all such information in the possession of any counter-party in respect of any Project Document shall be available to the Procuring Entity and the Developer has included, or shall include, appropriate provisions to this effect in all Project Documents.
- 25.3 Without limiting the generality of Clauses 25.1 and 25.2, the Developer shall:
- 25.3.1 provide and shall procure that its Principal Subcontractors shall provide all such information as the Procuring Entity may reasonably require from time to time to enable the Procuring Entity to provide reports and returns as required by any Government Authority, including (in the case of the O&M Contractor only) reports and returns regarding the physical condition of any building occupied by the Procuring Entity for purposes of the Project, health and safety, national security and environmental safety; and
- 25.3.2 note and facilitate the Procuring Entity's compliance with the Access to Information Act (Act No. 31 of 2016, Laws of Kenya) in the event that the Procuring Entity is required to provide information to any person pursuant to that Act.
- 25.4 For a period of not less than twelve (12) months following the Termination Date or the Expiry Date, whichever is applicable, or otherwise in accordance with Applicable Laws the Developer shall retain in safe storage (either electronically or in hardcopy) all records required in terms of the Contract, which were in existence at the Expiry Date or the Termination Date. Upon expiry of such period or such earlier date as may be requested by the Procuring Entity, the Developer shall deliver all such records (or where such records are required by Law to remain with the Developer or the Shareholders, copies thereof) to the Procuring Entity or to its nominee in such manner and at such location as the Procuring Entity shall specify. The costs relating to the retention of such records in safe storage and delivery of same shall be borne by the Developer.

E. FORCE MAJEURE, RELIEF EVENTS AND TERMINATION

26 Force Majeure

26.1 Definition of Force Majeure

- 26.1.1 As used in the Contract, the expression Force Majeure Event shall mean occurrence in Kenya of a Non-Political Event and/or a Political Event, if it affects the performance by the Party claiming the benefit of Force Majeure (the Affected Party) of its obligations under the Contract and which act or event:

- 26.1.1.1 is beyond the reasonable control of the Affected Party;
- 26.1.1.2 is unforeseeable;
- 26.1.1.3 the Affected Party could not have prevented or overcome by exercise of due diligence and following Good Industry Practice;
- 26.1.1.4 has Material Adverse Effect on the Affected Party; and
- 26.1.1.5 directly causes that Party to be unable to comply with all or a material part of its obligations under the Contract.

26.2 **Non-Political Event**

26.2.1 A **Non-Political Event** shall mean one or more of the following acts or events:

- 26.2.1.1 act of God, epidemic, extremely adverse weather conditions, earthquake, landslide, cyclone, 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
- 26.2.1.2 any judgement or order of any court of competent jurisdiction or statutory authority made against the Developer in any proceedings for reasons other than resulting from (i) any failure of the Developer to comply with any Applicable Law or Applicable Permit, or (ii) on account of breach by the Developer or any Sub-Contractor of any Applicable Law or Applicable Permit or of any contract, or (iii) enforcement of the Contract by the Procuring Entity, or (iv) exercise of any of its rights under the Contract by the Procuring Entity.

26.3 **Political Event**

26.3.1 A **Political Event** shall mean one or more of the following acts or events:

- 26.3.1.1 unlawful or unauthorised or unjustified revocation of, or refusal to renew or grant without valid cause, any Applicable Permit required by the Developer to perform its obligations under the Contract by the Government (or any Governmental Authority); provided that such delay, modification, denial, refusal or revocation did not result from the Developer's (or any Principal Sub-Contractor'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;
- 26.3.1.2 riots and blockades in Kenya except where arising solely as a result of or are attributable to any action or inaction of the Developer or its Sub-Contractors;

26.3.1.3 a declared act of war, invasion, armed conflict or act of foreign enemy, or military action or sabotage; or

26.3.1.4 any Change in Law.

26.4 Duty to report Force Majeure Event and performance

26.4.1 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice in respect of a Force Majeure Event shall include full particulars of: the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Clause 26 with evidence in support thereof;

26.4.1.1 the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under the Contract;

26.4.1.2 the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and

26.4.1.3 any other information relevant to the Affected Party's claim.

26.4.2 The Affected Party shall not be entitled to any relief for or in respect of a Force Majeure Event unless it shall have notified the other Party of the occurrence of the Force Majeure Event as soon as reasonably practicable, and in any event no later than seven (7) days after the Affected Party knew, or ought reasonably to have known, of its occurrence, and shall have given particulars of the probable material effect that the Force Majeure Event is likely to have on the performance of its obligations under the Contract.

26.4.3 For so long as the Affected Party continues to claim to be materially affected by such Force Majeure Event, it shall provide the other Party with regular (and not less than weekly) reports containing information as required by Clause 26.4.1, and such other information as the other Party may reasonably request the Affected Party to provide.

26.5 Effect of Force Majeure Event on the Project

26.5.1 Upon the occurrence of any Force Majeure Event prior to the Completion Date, the periods set forth in Clause 20 for achieving Financial Close and the dates set out in the Project Completion Schedule shall be extended for a period equal in length to the duration of the relevant Force Majeure Event.

26.5.2 At any time after the Completion Date, if any Force Majeure Event occurs before the

Completion Date, the Project Term and the dates set out in the Project Completion Schedule shall be extended by a period equal in length to the duration of the relevant Force Majeure Event. If the Force Majeure Event occurs after the Completion Date, the Project Term shall not be extended and Clause 26.6 shall apply.

26.6 Allocation of costs arising out of a Force Majeure Event

- 26.6.1 Upon the occurrence of any Force Majeure Event prior to the Completion Date, each Party shall bear its respective costs and no Party shall be required to pay to the other Party any costs whatsoever.
- 26.6.2 Upon occurrence of a Force Majeure Event, the Affected Party shall by notice report such occurrence to the other Party forthwith. Any notice in respect of a Force Majeure Event shall include full particulars of:
- 26.6.2.1 the nature and extent of each Force Majeure Event which is the subject of any claim for relief under this Clause 26 with evidence in support thereof;
 - 26.6.2.2 the estimated duration and the effect or probable effect which such Force Majeure Event is having or will have on the Affected Party's performance of its obligations under the Contract;
 - 26.6.2.3 the measures which the Affected Party is taking or proposes to take for alleviating the impact of such Force Majeure Event; and
 - 26.6.2.4 any other information relevant to the Affected Party's claim.
- 26.6.3 Save and except as expressly provided in this Clause 26, no Party shall be liable in any manner whatsoever to the other Party in respect of any loss, damage, cost, expense, claims, demands and proceedings relating to or arising out of occurrence or existence of any Force Majeure Event or exercise of any right pursuant to the Contract.

26.7 Termination for Force Majeure Event

- 26.7.1 If a Force Majeure Event subsists for a period of one hundred and eighty (180) days or more within a continuous period of three hundred and sixty five (365) days, either Party may in its discretion terminate the Contract by issuing a Termination Notice to the other Party without being liable in any manner whatsoever, save as provided in this Clause 26, and upon issue of
- 26.7.2 such Termination Notice, the Contract shall, notwithstanding anything to the contrary contained in the Contract, stand terminated; provided that before issuing such Termination Notice, the Party intending to issue the Termination Notice shall inform the other Party of such intention and grant fifteen (15) days' time to make a representation, and may after the expiry of such fifteen (15) days period, whether or not it is in receipt of such representation, in its sole discretion issue the Termination Notice.

26.8 Dispute Resolution

In the event that the Parties are unable to agree in good faith about the occurrence or existence of a Force Majeure Event, such Dispute shall be finally settled in accordance with the Dispute Resolution Procedure; provided that the burden of proof as to the occurrence or existence of such Force Majeure Event shall be upon the Party claiming relief and/or excuse on account of such Force Majeure Event.

26.9 Relief from performance of obligations

- 26.9.1 If the Affected Party is (or claims to be) rendered wholly or partially unable to perform its obligations under the Contract because of a Force Majeure Event, it shall be excused from performance of such of its obligations to the extent it is unable to perform on account of such Force Majeure Event; provided that:
- 26.9.2 the suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure Event;
- 26.9.3 the Affected Party shall make all reasonable efforts and take all reasonable steps to (i) mitigate the consequences of such an event upon the performance of its obligations under the Contract and (ii) to mitigate or limit damage to the other Party arising out of or as a result of the existence or occurrence of such Force Majeure Event and to cure the same with due diligence; and
- 26.9.4 when the Affected Party is able to resume performance of its obligations under the Contract, it shall give to the other Party notice to that effect and shall promptly resume performance of its obligations under the Contract.

27 Relief Events

- 27.1 If and to the extent that a Relief Event is the direct cause of:
 - 27.1.1 a failure by the Developer to achieve any Project Milestone within the specified period or the Completion Date; or
 - 27.1.2 a failure by the Developer to rectify Defects within the periods specified in the Project Facilities Output Specifications,
 - 27.1.3 then the Developer may apply for any relief from any rights of the Procuring Entity arising under the Contract in respect of such failure and the grant of such relief shall be at the sole discretion of the Procuring Entity.
- 27.2 If and to the extent that a Relief Event is the direct cause of:
 - 27.2.1 failure or delay by any statutory authority, entity, Utility Provider, local authority, county government or like body, to carry out works or provide services, including failure to undertake any required works for the movement of Utilities; or
 - 27.2.2 any action or inaction of a county government or other government agency other than the Procuring Entity whose effect is to delay any Project Milestone,

- 27.2.3 then the Developer shall be entitled to apply for any relief from any rights of the Procuring Entity arising under Clause 27.3 of the Contract.
- 27.3 To obtain relief, the Developer must within twenty (20) days after it becomes aware that a Relief Event has occurred or is likely to cause a delay, provide to the Procuring Entity a notice of claim for relief, including full details of the nature of the Relief Event, the date of occurrence and its likely duration. Thereafter and in any event within sixty (60) days it must demonstrate to the Procuring Entity that:
- 27.3.1 neither the Developer nor its Sub-Contractors could have avoided such occurrence and its consequences without incurring material expenditure;
 - 27.3.2 the Relief Event directly caused a delay to the achievement of, respectively, a Project Milestone, the Scheduled Date or rectification of a Defect within the time period specified in the Project Facilities Output Specifications;
 - 27.3.3 the need for relief;
 - 27.3.4 the time lost which could not reasonably be mitigated or recovered by its contractors acting in accordance with Good Industry Practice; and
 - 27.3.5 the Developer has used and is continuing to use reasonable endeavours to perform its obligations under the Contract.
- 27.4 In the event that the Developer has complied with its obligations under Clause 27.3 then:
- 27.4.1 the relevant Project Milestone, or, the time to repair the Defect may be postponed by such time as is reasonable for such a Relief Event, taking into account the likely effect of the delay; and
 - 27.4.2 the Procuring Entity shall not be entitled to exercise its right to terminate the Contract in respect of the relevant Relief Event, provided that where the Developer fails to achieve any revised date or time as agreed pursuant to this Clause 27.4 the Procuring Entity shall be entitled to make Adjustments in accordance with the relevant provisions and may enforce any of its rights under the Contract.

28 Compensation for Breach of Agreement

28.1 Compensation for default by the Developer

Subject to the provisions of Clause 28.2, in the event of the Developer being in default or breach of the Contract, it shall pay to the Procuring Entity by way of compensation, all direct costs suffered or incurred by the Procuring Entity as a consequence of such default or breach to place the Procuring Entity in a no better no worse position provided that no compensation shall be payable under this Clause 28.1 for any breach or default in respect of which Damages are expressly specified and payable under the Contract.

28.2 Mitigation of costs and damage

The Affected Party shall use all reasonable efforts to mitigate or limit any delay, costs and/or damage arising out of or as a result of breach of Contract by the other Party. Any dispute arising under this Clause 28 shall be referred to the Fast Track Resolution Procedure.

29 Termination

29.1 Termination for Developer Default

29.1.1 Save as otherwise provided in the Contract, in the event that any of the defaults specified in this Clause 29.1.1 shall have occurred, and where there is a stated Cure Period the Developer fails to cure the default within the Cure Period set out below, the Developer shall be deemed to be in default of the Contract (a Developer Default), unless the default has occurred solely as a result of any material breach of the Contract by the Procuring Entity or due to a Force Majeure Event or due to a Relief Event;

29.1.1.1 any business rescue proceedings, arrangement, composition or compromise with or for the benefit of creditors (as contemplated in the Insolvency Act or the Companies Act) being entered into by or in relation to the Developer, without the prior written consent of the Procuring Entity;

29.1.1.2 a liquidator, business rescue practitioner or the like taking possession of or being appointed over, or any winding-up, business rescue, execution or other process being levied or enforced (and not being discharged or set aside within twenty (20) Business Days taking such possession nor such appointment) upon, the whole or any material part of the assets of the Developer or placing the Developer under supervision for the purposes of commencing business rescue proceedings (in any of these cases, where applicable, whether provisional or final, and whether voluntary or compulsory);

29.1.1.3 the Developer ceases to carry on business;

29.1.1.4 a resolution being passed or an order being made for the administration, winding-up, placing under business rescue, liquidation or dissolution of the Developer not set aside within twenty (20) Business Days of such being passed or such order being made (in any of these cases, where applicable, whether provisional or final and whether voluntary or compulsory);

29.1.1.5 the Developer commits a breach of any of its material obligations under the Contract not covered by this Sub-Clause 29.1.1;

29.1.1.6 the Developer abandons the Works at any time;

- 29.1.1.7 the Developer ceases to provide all or a substantial part of the O&M Services in accordance with the Contract for a period exceeding ten (10) Business Days (other than as a consequence of:
- (a) a material breach by the Procuring Entity of its obligations under the Contract;
 - (b) a Relief Event; or
 - (c) a Force Majeure Event.
- 29.1.1.8 the Developer fails to pay any sum or sums due and payable to the Procuring Entity under the Contract (which sums are not in dispute) and such failure continues for thirty (30) Business Days from receipt by the Developer of a notice of non-payment from the Procuring Entity;
- 29.1.1.9 the Developer fails to obtain and maintain any Insurances as required in terms of Clause 24;
- 29.1.1.10 termination of the Financing Agreements as a result of any default or acceleration of any amounts payable under the Financing Agreements;
- 29.1.1.11 any breach of any provision of the Contract has occurred more than once and:
- (a) the Procuring Entity has given an initial warning notice to the Developer describing that breach and stating that if that breach persists for or recurs within a further period of thirty (30) Business Days after the initial warning notice, then the Procuring Entity may take further steps to terminate the Contract; and
 - (b) the Procuring Entity has issued a second and final warning notice following the persistence or recurrence of that breach in the period of thirty (30) days after the initial warning notice, stating that if that breach persists or recurs within the period of twenty (20) Business Days after the final warning notice then the Procuring Entity may terminate the Contract on ten (10) Business Days' written notice to the Developer if that breach has in fact persisted or recurred within the further period of a further twenty (20) Business Days after the final warning notice; or
- 29.1.1.12 any breach of the provisions of Clause 23.

29.2 Termination for Procuring Entity Default

- 29.2.1 In the event that any of the defaults specified below shall have occurred, the Procuring Entity shall be deemed to be in default of the Contract (Procuring Entity Default) unless the default has occurred as a result of any breach of the Contract by the Developer or due to Force Majeure or a Relief Event:

- 29.2.2 an expropriation or nationalisation of any material part of the Site or the Project by the Procuring Entity or a Government Authority, which has the effect of substantially frustrating the ability of the Developer, or makes it impossible, to undertake any part of the Project;
- 29.2.3 a material breach by the Procuring Entity of its obligations under the Contract which has the effect of substantially frustrating the ability of the Developer, or makes it impossible, to perform its obligations under the Contract for a continuous period of sixty (60) Business Days; and
- 29.2.4 a breach by the Procuring Entity of its obligations in terms of Clause 7.

F. OTHER PROVISIONS

30 Assignment and Charge

30.1 Restrictions on assignment and charges

- 30.1.1 Subject to Clauses 30.2 and 30.3 and the Financing Agreements, the Developer may not transfer or assign any of its rights, obligations or liabilities under the Contract, the Project or the Project Documents to any person, save and except with the prior consent in writing of the Procuring Entity at its absolute discretion.
- 30.1.2 Subject to the provisions of Clause 30.2, the Developer shall not create nor permit to subsist any Encumbrance, or otherwise transfer or dispose of all or any of its rights and benefits under the Contract or any Project Document to which the Developer is a party except with prior written consent of the Procuring Entity at its absolute discretion.

30.2 Permitted assignment and charges

- 30.2.1 The restrictions set out in Clause 30 shall not apply to any of the following:
- 30.2.2 liens arising by operation of law (or by an agreement evidencing the same) in the ordinary course of business of the Project; and
- 30.2.3 mortgages/pledges/hypothecation of goods/assets other than Project Assets and their related documents of title arising or created in the ordinary course of business of the Project and as security only for indebtedness to the Lender under the Financing Agreements.

30.3 Direct Agreement

- 30.3.1 The Lender or Lender's Representative on behalf of the Lender (as the case may be) may exercise the right to step-in and, if necessary, substitute the Developer pursuant to the Direct Agreement.
- 30.3.2 Upon substitution of the Developer under and in accordance with the Direct Agreement, the Nominated Company substituting the Developer shall be deemed to be the Developer under the Contract and shall enjoy all rights and be responsible for all obligations of the Developer under the Contract as if it were the Developer.

30.4 Assignment by the Procuring Entity

Notwithstanding anything to the contrary contained in the Contract, the Procuring Entity may, after giving [sixty (60)] days' notice to the Developer, novate, assign and/or transfer any of its rights and benefits and/or obligations under the Contract to a party who is, in the reasonable opinion of the Procuring Entity, capable of fulfilling all of the Procuring Entity's then outstanding obligations under the Contract.

30.5 Sub-Contracting

Nothing in the Contract shall prohibit the Developer from providing or procuring the Works or performing the O&M Services from a Sub-Contractor having the legal capacity, power and authority to become a party to and perform the obligations set out in the relevant contract to undertake the Works or O&M Contract and employing persons having the appropriate qualifications, experience and technical competence and having the resources available to it which are sufficient to enable it to perform the obligations of a Sub-Contractor under, respectively, the contract to undertake the Works and the O&M Contract and whose identity has been notified to the Procuring Entity (and who the Procuring Entity has approved, such approval not to be unreasonably withheld and to be given (or withheld) within thirty (30) days of notice), provided that the Developer remains liable for the Developer's obligations under the Contract.

31 Change in Law

31.1 If a Change of Law occurs or is shortly to occur, then either Party may write to the other to express an opinion on its likely effects to that Party in respect of the Project, giving details of its opinion of:

31.1.1 any necessary change to the Services;

31.1.2 whether any changes are required to the terms of the Contract to deal with the Change of Law;

31.1.3 any loss of revenue that will result from the relevant Change of Law;

31.1.4 any estimated change in Total Project Costs to the extent that that it directly results from the Change of Law; and

31.1.5 any capital expenditure that is required or no longer required as a result of a Change of Law,

in each case giving in full detail the procedure for implementing the change in O&M Services. Responsibility for the costs of implementation shall be dealt with in accordance with the Contract.

32 Liability and Indemnity

32.1 General indemnity

32.1.1 The Developer will indemnify, defend, save and hold harmless the Procuring Entity and its officers, servants, agents, advisers and Procuring Entity owned and/or controlled entities/enterprises (**Procuring Entity Indemnified Persons**) against any and all suits, proceedings, actions, demands and claims from third parties for any loss, damage, cost and expense of whatever kind and nature, whether arising out of any breach by the Developer of any of its obligations under the Contract or any related agreement or on account of any defect or deficiency in the provision of services by the Developer to any User in breach of the Contract or from any negligence of the Developer under contract or tort or on any other ground whatsoever, except to the extent that any such suits, proceedings, actions, demands and claims have arisen due to any negligent act of the Procuring Entity Indemnified Persons.

33 Rights and Title over the Site

33.1 Rights

For the purpose of the Contract, the Developer shall have rights to the use of the Site subject to and in accordance with the Contract and the Lease.

33.2 Property taxes

All property taxes on the Site shall be payable by the Procuring Entity as owner of the Site provided, however, that any such taxes payable by the Developer under Applicable Laws for use of the Site shall not be reimbursed or payable by the Procuring Entity.

33.3 Restriction on sub-letting

The Developer shall not part with possession of, sublicense or sublet the whole or any part of the Site, save and except as may be expressly set out in the Contract and the Lease provided that nothing contained in this Clause 33.3 shall be construed or interpreted as restricting the right of the Developer to appoint Contractors for the performance of its obligations under the Contract including for operation and maintenance of all or any part of the Project.

34 Dispute Resolution

34.1 Manner of Dispute resolution

34.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to the Contract (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the Dispute) shall, in the first instance, be attempted to be resolved amicably by either the PIC or the OC and the conciliation procedure set out in Clause 34.2.

34.1.2 The Parties agree to use all reasonable endeavours for resolving all Disputes arising under or in respect of the Contract promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

34.2 Conciliation

- 34.2.1 In the event of any Dispute relating to the matters within the competence of OC or PIC either Party may, by written notice to the other, refer the Dispute to the ITE OC or PIC to mediate and assist the Parties in arriving at an amicable settlement thereof.
- 34.2.2 If mediation by the OC or PIC does not result in the Dispute being resolved (as evidenced by the signing of the written terms of settlement) within thirty (30) Business Days of the Dispute being referred to the ITE OC or PIC under Clause 34.2.2, or if the Dispute does not relate to the matters within the competence of OC or PIC, either Party may, by written notice to the other, refer such Dispute to the Managing Director of the Procuring Entity and the Chairman of the Board of Directors of the Developer for amicable settlement (the Executives). Upon such reference, the Executives shall endeavour to meet no later than 7 (seven) days from the date of reference to discuss and attempt to amicably resolve the Dispute.
- 34.2.3 If such meeting does not take place within the seven (7) day period or the Dispute is not amicably settled within fifteen (15) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within thirty (30) days of the notice in writing referred to in Clause 34.2.2 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 34.3.

34.3 Arbitration

- 34.3.1 Any Dispute which is not resolved amicably by conciliation as provided in Clause 34.2 shall be finally decided by reference to arbitration which may be initiated by either Party under the United Nations Commission on International Trade Law (UNCITRAL) in accordance with the arbitration rules of UNCITRAL, 2013 (or such amended rules in force on the date on which the proceeding is instituted). The Parties hereby consent and submit to arbitration as set out in this Clause 34.3. The venue of such arbitration shall be Nairobi.
- 34.3.2 There shall be three (3) arbitrators of whom each Party shall select one, and the third arbitrator shall be appointed by the two (2) arbitrators so selected by the Parties, and in the event of disagreement between the two (2) arbitrators, the appointment shall be made in accordance with the UNCITRAL rules.
- 34.3.3 The proceedings shall be conducted in the English language, or if in another language, be accompanied by a certified English translation.
- 34.3.4 Where the UNCITRAL rules do not make provision for the manner in which the proceedings will be conducted, the arbitrators shall make rules of procedure to govern the proceedings.

- 34.3.5 The arbitrators shall make a reasoned award (the **Award**). Any Award made in any arbitration held pursuant to this Clause 34.3 shall be final and binding on the Parties as from the date it is made, and the Developer and the Procuring Entity agree and undertake to carry out such Award without delay.
- 34.3.6 The Developer agrees that an Award may be enforced against it and its assets wherever situated.
- 34.3.7 The Contract and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings set out in this Clause 34.3.

34.4 **Fast Track Resolution Procedure**

- 34.4.1 Any Dispute which relates to matters that are expressly stated in the Contract to be subject to the Fast Track Resolution Procedure may at any time be referred directly to an expert and the following provisions shall apply:
 - 34.4.1.1 either Party may upon written notice to the other refer the Dispute to an expert named by the Parties to act as expert who shall be an independent person with appropriate qualifications and experience (**Reference**). The first Party shall propose an expert from a list of experts, which list it shall also deliver to the other party and the other party shall confirm the proposed expert or choose from the list of experts proposed as the case may be, or object to the proposed expert or list of experts, giving reasons for the objection and proposing an alternative expert instead. In the event that the Parties are unable to agree upon an expert, the provisions of Clause 34.4.1.6 shall operate;
 - 34.4.1.2 the expert shall act as an expert and not as an arbitrator and shall act fairly and impartially. The expert shall have the power to request either party to provide him with such statements (which shall be written unless otherwise specifically required), documents or information that he may in his discretion determine;
 - 34.4.1.3 the expert shall have power to revise or overrule any decision or instruction of the Parties;
 - 34.4.1.4 the expert shall, within ten (10) Business Days of the date of the Reference, provide written notice of his decision to the Parties. If so requested by another Party, the expert shall provide written reasons for his decisions within five (5) Business Days of any such request, which request shall be made within five (5) Business Days of receipt of the expert's decision;
 - 34.4.1.5 the expert's fees shall be payable by such Party as the expert may, at his discretion, determine and in the absence of any such determination, in equal shares; and

34.4.1.6 in the event that the Parties cannot so agree, or have been unable to agree upon an expert pursuant to paragraph 34.4.1.1 within five (5) Business Days of their failure to do so either Party may request the Chairman for the time being of the Kenyan Branch of the Chartered Institute of Arbitrators, (the **Fast Track Resolution Procedure**).

34.4.2 The expert's decision shall be final and binding and shall forthwith be given effect to by the Parties save in the case of manifest error or bad faith on the expert's part, in which event either Party may commence proceedings in accordance with Clauses 34.2 and 34.3.

35 Reporting Requirements

35.1 The Developer shall for the duration of the Project Term:

35.1.1 maintain (which shall include the back-up, storage and safe custody of) a full record of particulars of the costs of providing the Project. Such records shall further include details of any commitments made by the Developer for future expenditure and details of any funds held by the Developer;

35.1.2 when requested by the Procuring Entity, furnish a summary of any of the aforementioned costs set out in Clause 35.1.1 in such form and detail as the Procuring Entity may reasonably require;

35.1.3 afford such facilities as the Procuring Entity may reasonably require for its representatives to examine and reproduce the records maintained under this Clause 35;

35.1.4 deliver to the Procuring Entity:

35.1.4.1 as soon as they become available (and in any event within ninety (90) days of the end of each Financial Year), copies of its financial statements for that period which shall contain an income statement and a balance sheet and a cash flow statement audited and certified by a firm of independent auditors; and

35.1.4.2 as soon as they become available (and in any event within thirty (30) days of the end of each of its financial half year and Financial Year end), copies of its unaudited financial statements for that half year or year (as the case may be) which shall contain an income statement, a balance sheet and a cash flow statement;

35.1.5 prepare the financial statements referred to in this Clause 35 on the basis consistently applied in accordance with IFRS and those financial statements shall give a true and fair view of the results of its operations for the period in question and the state of its affairs as at the date to which the financial statements are made up and shall disclose or reserve against all the liabilities (actual or contingent) of the Developer; and

- 35.1.6 at the request of the Procuring Entity, shall furnish the Procuring Entity with any and all information provided by it to the Lenders during the term of the Contract.
- 35.2 The Developer shall keep books of account in accordance with IFRS, and have same available for inspection by the Procuring Entity upon reasonable notice, shall present a report of the same to the Procuring Entity as and when requested and shall allow the Procuring Entity to arrange for an audit to be conducted from time to time as may be required by the Procuring Entity in its discretion and as may be required under any Law.
- 35.3 The Procuring Entity's rights of access to the books of account shall include the appointment of cost auditors for verification of cost expenditure, for the purpose of Clause 17 and Clause 17.2.
- 35.4 The Developer shall maintain (which shall include the back-up, storage and safe custody of) and/or produce the following records or reports in respect of the Site and the Project:
- 35.4.1 a full record of all incidents relating to health, safety and security which occur during the Project Term;
 - 35.4.2 full records of all maintenance procedures carried out during the Project Term;
 - 35.4.3 full records of all relevant training and instruction by a Principal Subcontractor of its personnel, together with the certificates and record of qualifications pertaining to it;
 - 35.4.4 organisational charts of the Developer and Principal Subcontractor personnel;
 - 35.4.5 a health and hygiene report to be completed every six (6) months.
- 35.5 The Developer shall:
- 35.5.1 have the items listed in Clause 35.4 available for inspection by the Procuring Entity upon reasonable notice;
 - 35.5.2 present a report of the same to the Procuring Entity as and when requested; and
 - 35.5.3 in respect of the items listed at Clauses 35.1, 35.2 and 35.4, provide the Procuring Entity, within five (5) Business Days of any amendment thereto, with an updated version of that item, reflecting the latest amendments.
- 35.6 The Developer shall maintain (which shall include the back-up, storage and safe custody of) such records for a period of at least five (5) years after the Expiry Date and make the same available to the Procuring Entity as the Procuring Entity may reasonably require.

36 Intellectual Property Rights

36.1 Project Data

The Developer shall make available to the Procuring Entity free of charge (and hereby irrevocably licences the Procuring Entity to use) all Project Data that might reasonably be required by the Procuring Entity and the Developer shall ensure that it obtains all necessary licences, permissions and consents to ensure that it can make the Project Data available to the Procuring Entity on these terms, for the purposes of:

- 36.1.1 the Procuring Entity's duties under the Contract;
- 36.1.2 the provision of Soft Services and/or the provision of ICT Assets; and
- 36.1.3 following the termination of the Contract, the design or construction of the Project, the operation, maintenance, or improvement of the Project and/or the provision of works and/or services the same as or similar to the Works and/or Services,

(together, the **Approved Purposes**), and in this Clause 36.1 "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with their other materials and the term "the right to use" shall be construed accordingly.

36.2 **Licence in respect of Intellectual Property Rights**

The Developer:

- 36.2.1 hereby grants to the Procuring Entity, free of charge, an irrevocable, non-exclusive and transferable (but only to any assignee or transferee of any rights or benefits under the Contract or upon or at any time following termination of the Contract) licence (carrying the right to grant sub-licences) to use Intellectual Property Rights which are or become vested in the Developer; and
- 36.2.2 shall, where any Intellectual Property Rights are or become vested in a third party, procure the grant of a like licence to that referred to in Clause 36.2.1 to the Procuring Entity,
in both cases, solely for the Approved Purposes.

36.3 **Vesting of Intellectual Property Rights**

The Developer shall ensure that any Intellectual Property Rights created, brought into existence or acquired during the term of the Contract vest, remain vested throughout the term of the Contract, in the Developer and the Developer shall enter into appropriate agreements with any Associate of the Developer (or other parties) that may create or bring into existence, or from which it may acquire, any Intellectual Property Rights.

36.4 **Maintenance of Data**

To the extent that any of the data, material and documents referred to in this Clause 36 are generated or maintained on a computer or similar system, the Developer shall procure for the benefit of the Procuring Entity, at no charge, the grant of a licence or sub-licence for any relevant software to enable the Procuring Entity or its nominee to access and otherwise use such data for the Approved Purposes. As an alternative, the Developer may provide such data, materials or documents in a format which may be read by software generally available in the market at the relevant time or in hard copy format.

36.5 Back-up and safe storage of data

The Developer shall ensure the back-up and storage in safe custody of the data, materials and documents referred to in Clause 36.4 in accordance with Good Industry Practice. Without prejudice to this obligation, the Developer shall submit to the Procuring Entity's Representative for approval its proposals for the back-up and storage in safe custody of such data, materials and documents and the Procuring Entity shall be entitled to object if the same is not in accordance with Good Industry Practice. The Developer shall comply, and shall cause all its Associates to comply, with all procedures to which the Procuring Entity's Representative has given its approval. The Developer may vary its procedures for such back-up and storage subject to submitting its proposals for change to the Procuring Entity's Representative, who shall be entitled to object on the basis set out above.

36.6 Indemnity

36.6.1 Where a claim or proceeding is made or brought against the Procuring Entity which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works, or the Project, infringes any Intellectual Property Rights of a third party then, unless such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Procuring Entity otherwise than in accordance with the terms of the Contract, the Developer shall indemnify the Procuring Entity at all times from and against all Direct Losses and Indirect Losses arising as a result of such claims and proceedings.

36.6.2 Where a claim or proceeding is made or brought against the Developer which arises out of the infringement of any Intellectual Property Rights or because the use of any materials, plant, machinery or equipment in connection with the Works or the Project infringes any rights in or to any Intellectual Property Rights of a third party then, if such infringement has arisen out of the use of any Intellectual Property Rights by or on behalf of the Procuring Entity otherwise than in accordance with the terms of the Contract and otherwise than as a result of a breach of this Clause 36 by the Developer then the Procuring Entity shall indemnify the Developer at all times from and against all Direct Losses and Indirect Losses arising as a result of such claims and proceedings.

36.7 Licence to the Developer

The Procuring Entity hereby grants to the Developer a non-transferable, non-exclusive, royalty free licence (carrying the right to grant sub-licences) to use for the duration of the Contract only and only for the purposes directly relating to the Project any Intellectual Property Rights relating to the Project which are or become vested in the Procuring Entity.

37 Miscellaneous

37.1 Governing law and jurisdiction

The Contract shall be construed and interpreted in accordance with and governed by the laws of Kenya.

37.2 Waiver

37.2.1 Waiver, including partial or conditional waiver, by either Party of any default by the other Party in the observance and performance of any provision of or obligations under the Contract:

37.2.1.1 shall not operate or be construed as a waiver of any other or subsequent default or of other provisions of or obligations under the Contract;

37.2.1.2 shall not be effective unless it is in writing and executed by a duly authorised representative of the Party; and

37.2.1.3 shall not affect the validity or enforceability of the Contract in any manner.

37.2.2 Neither the failure by either Party to insist on any occasion upon the performance of the terms, conditions and provisions of the Contract or any obligation nor time or other indulgence granted by a Party to the other Party shall be treated or deemed as waiver of such breach or acceptance of any variation or the relinquishment of any such right under the Contract.

37.3 Exclusion of implied warranties

The Contract expressly excludes any warranty, condition or other undertaking implied at law or by custom or otherwise arising out of any other agreement between the Parties or any representation by either Party not contained in a binding legal agreement executed by both Parties.

37.4 Survival

37.4.1 Termination shall:

37.4.1.1 not relieve the Developer or the Procuring Entity, as the case may be, of any obligations under the Contract which expressly or by implication survive Termination; and

37.4.1.2 except as otherwise provided in any provision of the Contract expressly limiting the liability of either Party, not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of, or caused by, acts or omissions of such Party prior to the effectiveness of such Termination or arising out of such Termination.

37.4.1.3 All obligations surviving Termination shall only survive for a period of six (6) years following the date of such Termination.

37.5 Entire Agreement

The Contract and the Schedules together and the Bid constitute a complete and exclusive statement of the terms of the agreement between the Parties on the Project, and no amendment or modification shall be valid and effective unless such modification or amendment is agreed to in writing by the Parties and duly executed by persons especially empowered in this behalf by the respective Parties. All prior written or oral understandings, agreements, offers or other communications of every kind pertaining to the Contract are abrogated and withdrawn other than those set out in the Bid.

37.6 Severability

If for any reason whatever, any provision of the Contract is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions, as nearly as is practicable to such invalid, illegal or unenforceable provision. Failure to agree upon any such provisions shall not be subject to the Dispute Resolution Procedure or otherwise.

37.7 No partnership

The Contract shall not be interpreted or construed to create an association, joint venture or partnership between the Parties, or to impose any partnership obligation or liability upon either Party, and neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

37.8 Third Parties

The Contract is intended solely for the benefit of the Parties, and their respective successors and permitted assigns, and shall not be construed to create any duty to, standard of care with reference to, or any liability to, any person not a Party to the Contract unless otherwise expressly provided for in the Contract.

37.9 Successors and Assigns

The Contract shall be binding upon, and inure to the benefit of the Parties and their respective successors and permitted assigns.

37.10 Notices

Any notice or other communication to be given by any Party to the other Party under or in connection with the matters contemplated by the Contract shall be in writing and shall:

37.10.1 in the case of the Developer, be given by e-mail and by letter delivered by hand to the address given and marked for attention of the person set out below or to such other person as the Developer may from time to time designate by notice to the Procuring Entity:

For the Procuring Entity: [*]

For the Developer: [*],

provided that notices or other communications to be given to an address outside Nairobi may, if they are subsequently confirmed by sending a copy thereof by registered acknowledgement due, air mail or by courier, be sent by facsimile or e-mail to the number as the Developer may from time to time designate by notice to the Procuring Entity;

37.10.2 in the case of the Procuring Entity, be given by e-mail and by letter delivered by hand and be addressed to the Managing Director of the Procuring Entity with a copy delivered to the Procuring Entity Representative or such other person as the Procuring Entity may from time to time designate by notice to the Developer; provided that if the Procuring Entity does not have an office in Nairobi it may send such notice by e-mail and by registered acknowledgement due, air mail or by courier; and

37.10.3 any notice or communication by a Party to the other Party, given in accordance with this Clause 37.10, shall be deemed to have been delivered when in the normal course of post it ought to have been delivered and in all other cases, it shall be deemed to have been delivered on the actual date and time of delivery; provided that in the case e-mail, it shall be deemed to have been delivered on the working day following the date of its delivery.

37.11 Language

All notices required to be given by one Party to the other Party and all other communications, Documentation and proceedings which are in any way relevant to the Contract shall be in writing and in English language.

37.12 Counterparts

The Contract may be executed in two (2) counterparts, each of which, when executed and delivered, shall constitute an original of the Contract.

37.13 Variation by the Developer and Procuring Entity

The Parties agree that any variation or amendment to the Contract shall be in writing, executed and consented to by both Parties.

Section II – Special Conditions of Contract

[To be written at the point of negotiation with the successful bidder]

PART 3: STANDARD FORMS

Standard Forms

- Standard Form 1: Bid security in the form of Unconditional Bank Guarantee
- Standard Form 2: Power of Attorney for designating Lead Consortium Member
- Standard Form 3: Power of Attorney for Authorized Representative
- Standard Form 4: Confidential business questionnaire
- Standard Form 5: Bidder information form
- Standard Form 6: Bidder's JV information form
- Standard Form 7: Duly filled Certificate of Independent Bid Determination
- Standard Form 8: Self declaration that the person/bidder is not debarred in the matter of the Public Procurement and Asset Disposal Act 2015
- Standard Form 9: Self declaration that the person/bidder will not engage in any corrupt or fraudulent practice
- Standard Form 10: Self declaration and commitment to the code of ethics
- Standard Form 11: Litigation History Form
- Standard Form 12: Certificate of bidder's visit of site

Technical Forms

- Technical Form 1: Relevant experience
- Technical Form 2: Key personnel schedule
- Technical Form 3: Resume and declaration
- Technical Form 4: Unit Typologies
- Technical Form 5: Financial capacity to deliver
- Technical Form 6: Developer ESG certification
- Technical Form 7: Architect ESG certification and relevant experience
- Technical Form 8: Electrical engineer ESG certification and relevant experience
- Technical Form 9: Structural and Civil Engineer ESG certification and relevant experience
- Technical Form 10: Mechanical engineer ESG certification and relevant experience
- Technical Form 11: Environmental sustainability project conceptual design requirements
- Technical Form 12: Social sustainability project conceptual design requirements
- Technical Form 13: Good governance project conceptual design requirements
- Technical Form 14: Climate resilience project conceptual design requirements
- Technical Form 15: Environment sustainability project delivery relevant experience
- Technical Form 16: Social sustainability project delivery relevant experience
- Technical Form 17: Good governance project delivery relevant experience
- Technical Form 18: Climate resilience project delivery relevant experience
- Technical Form 19: Project quality delivery and maintenance
- Technical Form 20: Massing and architectural concepts for site layout and building design
- Technical Form 21: Health and safety

- Technical Form 22: Quality control and assurance
- Technical Form 23: Risk management
- Technical Form 24: Project Programme

Financial Bid Forms

- Financial Bid Form 1: The Proposed Financial Package
- Financial Bid Form 2: The Proposed Rental Rates
- Financial Bid Form 3: The Financial Model
- Financial Bid Form 4: The Proposed Marketing Plan

MANDATORY REQUIREMENT FORMS

Standard Form 1: Bid security in the form of Unconditional Bank Guarantee

Beneficiary: _____

Invitation to Tender No: _____

Date: _____

TENDER GUARANTEE No.: _____

Guarantor: _____

1. We have been informed that _____ (hereinafter called “the Applicant”) has submitted or will submit to the Beneficiary its Bid (hereinafter called” the Bid”) for the execution of _____ under Invitation to Tenders No. __ (“the ITT”).
2. Furthermore, we understand that, according to the Beneficiary’s conditions, Bids must be supported by a Bid guarantee.
3. At the request of the Applicant, we, as Guarantor, hereby irrevocably undertake to pay the Beneficiary any sum or sums not exceeding in total an amount of _ (_) upon receipt by us of the Beneficiary’s complying demand, supported by the Beneficiary’s statement, whether in the demand itself or a separate signed document accompanying or identifying the demand, stating that either the Applicant:
 - a) has withdrawn its Bid during the period of Bid validity set forth in the Applicant’s Letter of Bid (“the Bid Validity Period”), or any extension thereto provided by the Applicant; or
 - b) having been notified of the acceptance of its Bid by the Beneficiary during the Bid Validity Period or any extension thereto provided by the Applicant, has failed to execute the Contract.
4. This guarantee will expire: (a) if the Applicant is the Successful Bidder, upon our receipt of copies of the Contract signed by the Applicant or (b) if the Applicant is not the Successful Bidder, upon the earlier of (i) our receipt of a copy of the Beneficiary’s notification to the Applicant of the results of the Bidding process; or (ii) two hundred and ten (210) calendar days from the bid submission date.
5. Consequently, any demand for payment under this guarantee must be received by us at the office indicated above on or before that date.

[signature(s)]

Standard Form 2: Power of Attorney for designating Lead Consortium Member

(each firm to designate Lead Consortium Member on separate sheet)

POWER OF ATTORNEY FOR DESIGNATING LEAD CONSORTIUM MEMBER

Whereas the Kenya Railways (“KR”) has invited proposals from interested parties for the financing, design, construction, commissioning, operation and transfer of Purpose-Built Student Accommodation at the Nairobi Railway City,

Whereas, the members of the Consortium are interested in bidding for the Project and implementing the Project in accordance with the terms and conditions of the Invitation to Bid Document and other connected documents in respect of the Project, and

Whereas, it is necessary under the Invitation to Tender Document for the Consortium Member to designate the Lead Consortium Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium’s bid for the Project who, acting jointly, would have all necessary power and authority to do all acts, deeds and things on behalf of the Consortium, as may be necessary in connection with the Consortium’s bid for the Project.

NOW THIS POWER OF ATTORNEY WITNESSETH THAT;

We, M/s. _____ (Consortium Member) (the respective names and addresses of the registered office) do hereby designate _____ being one of the

members of the Consortium, as the Lead Consortium Member of the Consortium, to do on behalf of the Consortium, all or any of the acts, deeds or things necessary or incidental to the Consortium’s bid for the Project, including submission of proposal, participating in conferences, responding to queries, submission of information / documents and generally to represent the Consortium in all its dealings with KR, any other Government Agency or any person, in connection with the Project until culmination of the process of bidding and thereafter till the Contract is entered into with KR.

We hereby agree to ratify all acts, deeds and things lawfully done by Lead Consortium Member, our said attorney pursuant to this Power of Attorney and that all acts deeds and things done by our aforesaid attorney shall and shall always be deemed to have been done by us / Consortium.

Dated this day of 2023.

Signed & Stamped:

Standard Form 3: Power of Attorney for Authorized Representative

POWER OF ATTORNEY FOR AUTHORISED REPRESENTATIVE

We (name and address of the registered office) do hereby constitute, appoint and authorize Mr. / Mrs. / Ms(name and residential address) who is presently employed with us and holding the position of As our attorney, to do in our name and on our behalf, all such acts, deeds and things necessary in connection with or incidental to our proposal for the project, “The financing, design, construction, commissioning, operation and transfer of Purpose-Built Student Accommodation at the Nairobi Railway City”, including signing and submission of all documents and providing information / responses to the Kenya Railways (“KR”), representing us in all matters before KR, and generally dealing with KR in all matters in connection with our Bid for the said Project.

We hereby agree to ratify all acts, deeds and things lawfully done by our said attorney pursuant to this Power of Attorney and that all acts, deeds and things done by our aforesaid attorney shall and shall always be deemed to have been done by us.

..... (Signature)
(Name, Title and Address)

..... (Signature)
(Name, Title and Address)

Accepted

..... (Signature)
(Name, Title and Address of the Attorney)

Standard Form 4: Confidential business questionnaire

Instruction to Bidder

The Bidder is instructed to complete the particulars required in this Form, *one form for each entity if Bidder is a JV or a Consortium*. Bidder is further reminded that it is an offence to give false information on this Form.

a) Bidder's details

| | ITEM | DESCRIPTION |
|---|---|--|
| 1 | Name of the Procuring Entity | |
| 2 | Reference Number of the Bid | |
| 3 | Date and Time of Bid Opening | |
| 4 | Name of the Bidder | |
| 5 | Full Address and Contact Details of the Bidder. | 1. Country 2. City 3. Location 4. Building 5. Floor 6. Postal Address 7. Name and email of contact person. |
| 6 | Current Trade License Registration Number and Expiring date | |
| 7 | Name, country and full address (<i>postal and physical addresses, email, and telephone number</i>) of Registering Body/Agency | |
| 8 | Description of Nature of Business | |
| 9 | State if Bidders Company is listed in stock exchange, give name and full address (<i>postal and physical addresses, email, and telephone number</i>) of | |

| | | |
|--|----------------------------|--|
| | state which stock exchange | |
|--|----------------------------|--|

General and Specific Details

b) Sole Proprietor, provide the following details.

Name in full:

Age:

Nationality:

Country of Origin:

Citizenship:

c) Partnership, provide the following details.

| | Names of Partners | Nationality | Citizenship | % Shares owned |
|---|--------------------------|--------------------|--------------------|-----------------------|
| 1 | | | | |
| 2 | | | | |
| 3 | | | | |

d) Registered Company, provide the following details.

i) Private or public Company _____

ii) State the nominal and issued capital of the Company:-

Nominal Kenya Shillings (Equivalent)

.....

Issued Kenya Shillings (Equivalent)

.....

iii) Give details of Directors as follows.

| | Names of Director | Nationality | Citizenship | % Shares owned |
|---|--------------------------|--------------------|--------------------|-----------------------|
| 1 | | | | |
| 2 | | | | |
| 3 | | | | |

Standard Form 5: Bidder information form

Date: _____ Invitation to Tender No. and
title: _____

| |
|---|
| Bidder's name |
| In case of Joint Venture (JV), name of each member: |
| Bidder's actual or intended country of registration: <i>[indicate country of Constitution]</i> |
| Bidder's actual or intended year of incorporation: |
| Bidder's legal address [in country of registration]: |
| 1. Attached are copies of original documents of: Articles of Incorporation (or equivalent documents of constitution or association), and/or documents of registration of the legal entity named above, in accordance with ITB 3.1.4 In case of JV, letter of intent to form JV or JV agreement, in accordance with ITB 3.1.4 In case of state-owned enterprise or institution, in accordance with ITB 3.1.4, documents establishing: <ul style="list-style-type: none">• Legal and financial autonomy• Operation under commercial law• Establishing that the Bidder is not under the supervision of the Procuring Entity |
| 2. Included are the organizational chart, a list of Board of Directors, and the beneficial ownership. |

Standard Form 6: Bidder's JV information form

(to be completed for each member of Bidder's JV)

Date: _____ ITT No. and
title: _____

| |
|---|
| Bidder's JV name: |
| JV member's name: |
| JV member's country of registration: |
| JV member's year of constitution: |
| JV member's legal address in country of constitution: |

JV member's authorized representative information

Name: _____

Address: _____

Telephone/Fax numbers: _____

E-mail address: _____

1. Attached are copies of original documents of

Articles of Incorporation (or equivalent documents of constitution or association), and/or registration documents of the legal entity named above, in accordance with ITB 3.1.4.

In case of a state-owned enterprise or institution, documents establishing legal and financial autonomy, operation in accordance with commercial law, and that they are not under the supervision of the Procuring Entity, in accordance with ITB 3.1.4.

2. Included are the organizational chart, a list of Board of Directors, and the beneficial ownership.

Standard Form 7: Duly filled Certificate of Independent Bid Determination

I, the undersigned, in submitting the accompanying Bid to the _____
_____[Name of Procuring Entity] for:_____[Name and number of tender] in response to
the invitation to tender made by:_____[Name of Bidder] do here by make the
following statements that I certify to be true and complete in every respect:

I certify, on behalf of_____[Name of Bidder] that:

1. I have read and I understand the contents of this Certificate;
2. I understand that the Bid will be disqualified if this Certificate is found not to be true and complete in every respect;
3. I am the authorized representative of the Bidder with authority to sign this Certificate, and to submit the Bid on behalf of the Bidder;
4. For the purposes of this Certificate and the Bid, I understand that the word "competitor" shall include any individual or organization, other than the Bidder, whether or not affiliated with the Bidder, who:
 - a) Has been requested to submit a Bid in response to this invitation to tender;
 - b) could potentially submit a bid in response to this invitation to tender, based on their qualifications, abilities or experience;
5. The Bidder discloses that [check one of the following, as applicable]:
 - a) The Bidder has arrived at the Bid independently from, and without consultation, communication, agreement or arrangement with, any competitor;
 - b) the Bidder has entered into consultations, communications, agreements or arrangements with one or more competitors regarding this invitation to tender, and the Bidder discloses, in the attached document(s), complete details thereof, including the names of the competitors and the nature of, and reasons for, such consultations, communications, agreements or arrangements;
6. In particular, without limiting the generality of paragraphs (5)(a) or (5)(b) above, there has been no consultation, communication, agreement or arrangement with any competitor regarding:
 - a) the proposed consideration;
 - b) methods, factors or formulas used to calculate the proposed consideration;
 - c) the intention or decision to submit, or not to submit, a bid; or
 - d) the submission of a bid which does not meet the specifications of the Invitation to Tender; except as specifically disclosed pursuant to paragraph(5)(b) above;
7. In addition, there has been no consultation, communication, agreement or arrangement with any competitor regarding the quality, quantity, specifications or delivery particulars of the Project to which this Invitation to Tender relates, except as specifically authorized by the procuring authority or as specifically disclosed pursuant to paragraph(5)(b) above;

8 the terms of the Tender have not been, and will not be, knowingly disclosed by the bidder, directly or indirectly, to any competitor, prior to the date and time of the official bid opening, or of the awarding of the Contract, whichever comes first, unless otherwise required by law or as specifically disclosed pursuant to paragraph (5)(b) above.

Name____ Title__ Date_*[Name, title and signature of authorized agent of Bidder and Date]*

Standard Form 8: Self declaration that the person/bidder is not debarred in the matter of the Public Procurement and Asset Disposal Act 2015

I,, of Post Office Box
being a resident ofin the Republic of
..... do hereby make a statement as follows: -

1. THAT I am the Authorised Representative/ Agent/ of
..... (*insert name of the Company*) who is a
Bidder in respect of **Tender No.**..... for..... (*insert
tender title/ description*) for..... (*insert name of the Procuring
entity*) and duly authorized and competent to make this statement.
2. THAT the aforesaid Bidder, its Directors and subcontractors have not been
debarred from participating in procurement proceeding under Part IV of the Act.
3. THAT what is deponed to here in above is true to the best of my knowledge,
information and belief.

.....
....
(Title) (Signature) (Date)

Bidder Official Stamp

Standard Form 9: Self declaration that the person/bidder will not engage in any corrupt or fraudulent practice

I,, of Post Office Box
 being a resident of.....in the Republic of
 do hereby make a statement as follows: -

1. THAT I am the Authorised Representative/Agent
 of.....

(insert name of the Company) who is a Bidder in respect of **Tender
 No.....**for

..... *(insert tender title/description)* for *(insert name of
 the Procuring entity)* and duly authorized and competent to make this statement.

2. THAT the aforesaid Bidder, its servants and/or agents /subcontractors will not
 engage in any corrupt or fraudulent practice and has not been requested to pay
 any inducement to any member of the Board, Management, Staff and/ or
 employees and/ or agents of..... *(insert name of the Procuring
 entity)* which is the procuring entity.

3. THAT the aforesaid Bidder, its servants and/or agents/subcontractors have not
 offered any inducement to any member of the Board, Management, Staff and/
 or employees and/ or agents of..... *(name of the procuring
 entity)*.

4. THAT the aforesaid Bidder will not engage /has not engaged in any corrosive
 practice with other bidders participating in the subject tender.

5. THAT what is deponed to here in above is true to the best of my knowledge
 information and belief.

.....
 ...
 (Title) (Signature) (Date)

Bidder's Official Stamp

Standard Form 10: Self declaration and commitment to the code of ethics

I.....(person) on behalf of **(Name of the Business/ Company/ Firm)**
..... declare that I have read and fully understood the contents of the Public Procurement & Asset Disposal Act, 2015, Regulations and the Code of Ethics for persons participating in Public Procurement and Asset Disposal activities in Kenya and my responsibilities under the Code.

I do hereby commit to abide by the provisions of the Code of Ethics for persons participating in Public Procurement and Asset Disposal.

Name of Authorized Signatory.....

Sign.....

Position.....

Office address.....

Telephone.....

Email.....

Name of the Firm/Company.....

Date.....

(Company Seal/ Rubber Stamp where applicable)

Witness

Name.....

Sign.....

Date.....

Standard Form 11: Litigation History Form

Historical Contract Non-Performance, Pending Litigation and Litigation History

Bidder's Name: _____ Date: _____ JV Member's Name _____ Invitation _____ to Tender No. and title: _____

| Non-Performed Contracts in accordance with Section 3, Instructions to Bidders | | | |
|--|---------------------------------------|---|--|
| <input type="checkbox"/> Contract non-performance did not occur since 1 st January 2018 specified in Section 3, Instructions to Bidders, 3.1.3. | | | |
| <input type="checkbox"/> Contract(s) not performed since 1 st January 2018 specified in Section 3, Instructions to Bidders, requirement 3.1.3 | | | |
| Year | Non-performed portion of contract | Contract Identification | Total Contract Amount (current value, currency, exchange rate and Kenya Shilling equivalent) |
| <i>[insert year]</i> | <i>[insert amount and percentage]</i> | Contract Identification: <i>[indicate complete contract name/number, and any other identification]</i> Name of Procuring Entity: <i>[insert full name]</i> Address of Procuring Entity: <i>[insert City/ street/building/floor number/room number/country]</i> Reason(s) for non-performance: <i>[indicate main reason(s)]</i> | <i>[insert amount]</i> |
| Pending Litigation, in accordance with Section 3, Instructions to Bidders | | | |
| <input type="checkbox"/> No pending litigation in accordance with Section 3, Instructions to Bidders | | | |
| <input type="checkbox"/> Pending litigation in accordance with Section 3, Instructions to Bidders as indicated below. | | | |

| Year of dispute | Amount in dispute (currency) | Contract Identification | Total Contract Amount (currency), Kenya Shilling Equivalent (exchange rate) |
|-----------------|------------------------------|-------------------------|---|
| | | | |

| | | | |
|---|---|--|--|
| | | Contract Identification: _____ Name of Procuring Entity: _____ Address of Procuring Entity: _____ Matter in dispute: _____ Party who initiated the dispute: _____ Status of dispute: _____ | |
| | | Contract Identification: Name of Procuring Entity: Address of Procuring Entity: Matter in dispute: Party who initiated the dispute: Status of dispute: | |
| Litigation History in accordance with Section 3, Instructions to Bidders | | | |
| <input type="checkbox"/> No Litigation History in accordance with Section 3, Instructions to Bidders <input type="checkbox"/> Litigation History in accordance with Section 3, Instructions to Bidders as indicated below. | | | |
| Year of award | Outcome as percentage of Net Worth | Contract Identification | Total Contract Amount (currency), Kenya Shilling Equivalent (exchange rate) |

| | | | |
|-----------------------------|-----------------------------------|---|-------------------------------|
| <p><i>[insert year]</i></p> | <p><i>[insert percentage]</i></p> | <p>Contract Identification: [indicate complete contract name, number, and any other identification]</p> <p>Name of Procuring Entity: <i>[insert full name]</i></p> <p>Address of Procuring Entity: <i>[insert City/ street/building/floor number/room number/country]</i></p> <p>Matter in dispute: <i>[indicate main issues in dispute]</i></p> <p>Party who initiated the dispute: <i>[indicate "Procuring Entity" or "Contractor"]</i></p> <p>Reason(s) for Litigation and award decision <i>[indicate main reason(s)]</i></p> | <p><i>[insert amount]</i></p> |
|-----------------------------|-----------------------------------|---|-------------------------------|

Standard Form 12: Certificate of bidder’s visit to site

This is to certify that

[M/s]

.....
..... Being the authorized representative/Agent of [Name of Bidder]
.....
.....

participated in the organized inspection visit of the site of the works for the [Name of Contract]..... held on

..... Day of 20

Signed

[KR’s Representative]

.....

NOTE: This form is to be completed whether the site visit is made at the time of the organized site or privately organized.

TECHNICAL SUBMISSION FORMS

Technical Form 1: Relevant experience

The bidder will provide the following information regarding corporate experience in accordance with Section 5.1 Item 1 (a)

| Project Name | Location | Gross Area (SQ.M) | Total Rooms | Project Value (KES) | Date of Occupation | Role(s) (Design, Construction, Operation) |
|--------------|----------|-------------------|-------------|---------------------|--------------------|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

Bidders may supply supplementary information for each project (up to 1 side A4 per project) to demonstrate relevance to the proposed Purpose-Built Student Accommodation at Nairobi Railway City.

The bidder will provide the following information regarding corporate experience in accordance with Section 5.1 Item 1 (b)

| Project Name | Location | Gross Area (SQ.M) | Building occupancy type (e.g. residential, commercial) | Date of occupation | Types of activities undertaken | IFC-EDGE Certification Date |
|--------------|----------|-------------------|--|--------------------|--------------------------------|-----------------------------|
| | | | | | | |
| | | | | | | |

Technical Form 2: Key personnel schedule

Bidders should provide the names and details of the suitably qualified Key Personnel to perform the Contract. The data on their experience should be supplied using the form below for each candidate.

Key Personnel

| | | |
|----|--|--|
| 1. | Title of position: | |
| | Name of candidate: | |
| | Duration of appointment: | <i>[insert the whole period (start and end dates) for which this position will be engaged]</i> |
| | Time commitment: for this position: | <i>[insert the number of days/week/months/ that has been scheduled for this position]</i> |
| | Expected time schedule for this position: | <i>[insert the expected time schedule for this position (e.g. attach high level Gantt chart]</i> |

Technical Form 3: Resume and declaration

| |
|----------------|
| Name of Bidder |
|----------------|

| | | |
|--|---|----------------|
| Position [# 1]: <i>[title of position from Form 2]</i> | | |
| Personnel information | Name: | Date of birth: |
| | Address: | E-mail: |
| | Professional qualifications: | |
| | Academic qualifications: | |
| | Language proficiency: <i>[language and levels of speaking, reading, and writing skills]</i> | |
| | | |
| Details | | |
| | Address of Employer: | |

| | |
|------------|--|
| Telephone: | Contact (manager / personnel officer): |
| Fax: | |
| Job title: | Years with present Employer: |

Summarize professional experience in reverse chronological order. Indicate particular technical and managerial experience relevant to the project.

| Project | Role | Duration of involvement | Relevant experience |
|-------------------------------|---|-------------------------|--|
| <i>[main project details]</i> | <i>[role and responsibilities on the project]</i> | <i>[time in role]</i> | <i>[describe the experience relevant to this position]</i> |
| | | | |
| | | | |
| | | | |

Declaration

I, the undersigned *Key Personnel*, certify that to the Lowest of my knowledge and belief, the information contained in this form correctly describes myself, my qualifications and my experience.

I confirm that I am available as certified in the following table and throughout the expected time schedule for this position as provided in the Bid:

| Commitment | Details |
|-------------------------------------|---|
| Commitment to duration of contract: | <i>[insert period (start and end dates) for which this Key Personnel is available to work on this contract]</i> |
| Time commitment: | <i>[insert period (start and end dates) for which this Key Personnel is available to work on this contract]</i> |

I understand that any misrepresentation or omission in this Form may:

- be taken into consideration during Bid evaluation;
- result in my disqualification from participating in the Bid;
- result in my dismissal from the contract.

Name of Key Personnel: *[insert name]*

Signature:

Date: (day month year):

Countersignature of authorized representative of the Bidder:

Signature:

Date: (day month year):

Technical Form 4: Unit Typologies

Unit Typologies

| Room Typology | Number of Rooms | Number of Beds | Size in Sq. m per Room |
|------------------|-----------------|----------------|------------------------|
| Single occupancy | | | |
| Double occupancy | | | |
| 4-bed occupancy | | | |
| other: | | | |
| other: | | | |
| Other: | | | |

Technical Form 5: Financial capacity to deliver

FINANCIAL CAPACITY TO DELIVER

| | |
|---|--|
| Project Name | |
| Project Start mm/year-Completion mm/year | |
| Description of Project | |
| Bidder's role in the Project | |
| Total Project Value (KES) | |
| Debt (KES) | |
| Equity (KES) | |
| Financier Reference Details | Name: Position: Phone: Email: |

Bidders must provide certified copies of financing agreements, letters from the bank and/or share subscription agreements as evidence of equity injected into the project as an attachment.

Technical Form 6: Developer ESG certification

The bidder will provide the following information regarding the developer’s experience in accordance with Section 5.1 Item 3.1 (a)

| Project Team Developer Name | Certificate of ESG and/or Sustainability Development competence |
|-----------------------------|---|
| | |

Technical Form 7: Architect ESG certification and relevant experience

The bidder will provide the following information regarding the architect’s experience in accordance with Section 5.1 Item 3.1 (b)

| Project Team Architect Name | Carbon Analyst certification | Footprint Course | Experience schedule of a Qualified Energy/Carbon Modelling expert in the team | Membership/expertise in environmental design |
|-----------------------------|------------------------------|------------------|---|--|
| | | | | |
| | | | | |
| | | | | |
| | | | | |

Technical Form 8: Electrical engineer ESG certification and relevant experience

The bidder will provide the following information regarding the electrical engineer’s experience in accordance with Section 5.1 Item 3.1 (c)

| Project Electrical Team Engineer Name | Experience schedule in renewable energy modelling and installations | Sustainable design and development certification |
|---------------------------------------|---|--|
| | | |
| | | |
| | | |
| | | |

Technical Form 9: Structural and Civil Engineer ESG certification and relevant experience

The bidder will provide the following information regarding the structural and civil engineer’s experience in accordance with Section 5.1 Item 3.1 (d)

| Project Structural Engineer Name | Team and Civil | Experience sustainable systems | schedule in urban drainage | Sustainable development | design certification | and |
|----------------------------------|----------------|--------------------------------|----------------------------|-------------------------|----------------------|-----|
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

Technical Form 10: Mechanical engineer ESG certification and relevant experience

The bidder will provide the following information regarding the mechanical engineer’s experience in accordance with Section 5.1 Item 3.1 (e)

| Project Mechanical Engineer Name | Team | Experience in water and sanitation management | schedule in sustainable mechanical installations | Sustainable design and development certification |
|----------------------------------|------|---|--|--|
| | | | | |
| | | | | |
| | | | | |
| | | | | |
| | | | | |

Technical Form 11: Environmental sustainability project conceptual design requirements

| |
|--|
| Maximum 2-pages of illustrative descriptions of how the proposed design fulfils and upholds all the compulsory environmental sustainability requirements listed in section 4.2 above |
| |

Technical Form 12: Social sustainability project conceptual design requirements

Maximum 2-pages of illustrative descriptions of how the proposed design fulfils and upholds all the compulsory social sustainability requirements listed in section 4.2 above

Technical Form 13: Good governance project conceptual design requirements

- 1 Project team Architect to provide a clear project sustainability brief that sets out all ESG/CR objectives and targets alongside the student housing spatial requirements stipulated in the Project Brief.
- 2 Maximum 2-page descriptions of how the proposed design fulfils and upholds all the compulsory good governance requirements listed in section 4.2 above

Technical Form 14: Climate resilience project conceptual design requirements

Maximum 1-page illustrative description of how the proposed design manages overheating risk

Maximum 1-page illustrative descriptions of how the proposed design manages water scarcity risk

Maximum 1-page illustrative descriptions of how the proposed design upholds Nairobi's liveability plans across maintaining urban food security, urban energy security and urban water security

Technical Form 15: Environment sustainability project delivery relevant experience

Bidders to include examples from case studies of projects they have undertaken to demonstrate how all the environmental sustainability minimum requirement objectives (section 4.2) were met.

Technical Form 16: Social sustainability project delivery relevant experience

Bidders to include examples from case studies of projects they have undertaken to demonstrate socially responsible design deliverables.

Technical Form 17: Good governance project delivery relevant experience

Bidders to include examples from case studies of projects they have undertaken to demonstrate good governance aspects they have addressed in their prior projects.

Technical Form 18: Climate resilience project delivery relevant experience

Bidders to include examples from case studies of projects they have Designed to manage the impact of climate change by anticipating and comprehensively managing the increasing temperatures, water scarcity and flooding risks.

Technical Form 19: Project quality delivery and maintenance

Bidders must describe their proposed method of delivery including contractor procurement, construction monitoring and quality assurance, operating model and facilities management to demonstrate that quality outcomes are delivered and maintained throughout the project lifecycle,

Technical Form 20: Massing and architectural concepts for site layout and building design

Bidders must provide a narrative describing broad massing and architectural concepts which govern the proposal for the site layout and building design.

The narrative should also describe any details of the design including comments on materials and finishes, taking into account local supply chains and desire for low maintenance.

Technical Form 21: Health and safety

Bidders must describe their proposed approach to health and safety at all stages of the project.

Certification related to health and safety accreditation, relevant to the project, is an added advantage.

Technical Form 22: Quality control and assurance

Bidders must describe their proposed approach to quality control at all stages of the project
Certification related to quality assurance relevant to the project is an added advantage.

Technical Form 23: Risk management

Bidders must describe their proposed approach to risk management at all stages of the project.

Technical Form 24: Project Programme

Bidders must provide a project programme from Contract signing through to operation in the form of a Gantt chart

| |
|--|
| |
|--|

FINANCIAL TENDER FORMS

Financial Bid Form 1: The Proposed Consideration

| Proposed Consideration payable to Kenya Railways | Minimum | Proposed |
|--|-----------------|----------|
| Stand Premium | KES 150 million | |
| KR's Annual Rent | KES 65 million | |
| The PV of the future payment made to KR | | |

NOTE:

- The calculated PV will include the Stand Premium, KR's Annual Rent and the Annual Revenue Share, discounted at a rate of 20% per annum.
- The bidder shall provide a written description of the proposed revenue share mechanism and shall form part of this Financial Bid Form 1. The revenue share mechanism should only be based on the gross revenue.

Financial Bid Form 2: The Proposed Rental Rates

| Room Typology | Monthly rent per bed |
|------------------|----------------------|
| Single occupancy | KES |
| Double occupancy | KES |
| 4-bed occupancy | KES |
| other: | KES |
| other: | KES |
| other: | KES |

NOTE:

- The rental rates shall be inclusive of service charge and water utility cost.

| Calculation of Average Monthly Rent per Bed | |
|--|-----|
| Total monthly rental revenue assuming full occupancy (X) | KES |
| Total beds in the development (Y) | |
| Average monthly rent per bed (X/Y) | KES |

NOTE:

- The bidder shall provide the proposed rental rate for the first year of operations.
- The bidder shall also provide the average monthly rent per bed calculated by dividing the total monthly rent in the first year of operations assuming full occupancy by the total number of beds provided.

Financial Bid Form 3: The Financial Model

| Project Component | Assumptions | | | Notes |
|--------------------------------|------------------------|-----------------------------|--------------------------------|---|
| 1.Development Areas | | | | |
| | Number of rooms | Area per room (Sq.m) | Number of beds per room | |
| Single bed occupancy: | | | | <i>Indicate N/A if not applicable</i> |
| Double bed occupancy: | | | | |
| Four-bed occupancy: | | | | |
| Other room type: | | | | |
| Other room type: | | | | |
| Other room type: | | | | |
| Total | | | | <i>Provide total number of rooms, total lettable area and total number of beds in the development</i> |
| Total Built Area (Sq.m) | | | | |
| Net Lettable Area (NLA) (Sq.m) | | | | |
| Student accommodation % of NLA | | | | |
| Retail % of NLA | | | | <i>Indicate N/A if not applicable</i> |
| Other use % of NLA | | | | <i>Provide particulars in the detailed description. Indicate N/A if not applicable</i> |

| | | |
|-----------------------------------|------------|--|
| 2. Timelines | | |
| Ground Lease Term (years) | | |
| Pre-construction period (months) | | <i>Provide scheduled period for design, approvals, and mobilisation of contractors</i> |
| Construction period (months) | | |
| Defects Liability Period (months) | | |
| Operations period (years) | | |
| 3. Development Costs | | |
| Construction Costs | KES | <i>Inclusive of all applicable taxes</i> |
| Furniture, Fittings, Equipment | KES | <i>Provide particulars in detailed description</i> |
| Professional Fees | KES | <i>Inclusive of applicable taxes. Provide particulars in the detailed description.</i> |
| Other costs | KES | <i>Provide particulars in the detailed description.</i> |
| Total Development Costs | KES | <i>Total development costs excluding financing costs</i> |
| | | |
| 4. Project Financing Plan | | |
| | | |
| Total Equity Sources | KES | <i>Include breakdown of equity sources in detailed description.</i> |
| Total Debt Sources | KES | <i>Include breakdown of all debt sources in detailed</i> |

| | | |
|-----------------------------------|------------|---|
| | | <i>description</i> |
| Debt: Equity Ratio | | <i>Ratio during Year 1 of construction</i> |
| | | |
| 4.Operations | | |
| Single bed occupancy: | KES | <i>Provide monthly rent for Year 1 of operations. Indicate N/A if not applicable</i> |
| Double bed occupancy: | KES | |
| Four-bed occupancy: | KES | |
| Other room type: | KES | |
| Other room type: | KES | |
| Other room type: | KES | |
| Rental Escalation % | | <i>Provide annual escalation on Year 2 of operations and describe rental escalation plan during the lease term.</i> |
| Occupancy rate Yr 1 % | | <i>Average for Year 1 of operations</i> |
| Occupancy rate Yr 2 % | | <i>Average for Year 2 of operations</i> |
| Occupancy rate Yr 3 % | | <i>Average for Year 3 of operations</i> |
| Retail rental revenue | KES | <i>Include retail revenue for Year 1 of operations (if any)</i> |
| Rental revenue from other sources | KES | <i>Include revenues for Year 1 of operations for other potential services (if any)</i> |
| Total Operating expenses | KES | <i>Total Year 1 operating expenses</i> |
| Repair and Replacement Reserve | KES | <i>Provide annual provision and include basis in the detailed description</i> |
| Expense annual inflation % | | <i>Provide basis for escalation in the detailed description</i> |

Financial Bid Form 4: The Proposed Marketing Plan

Marketing Proposal in the form of a written plan not exceeding **Two Thousand Five Hundred (2,500) words** in single-spaced format detailing the marketing strategies and customer conversion of the Bidder

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