



PublicPrivate
Partnership
Commission

REQUEST FOR PROPOSAL

**FOR DEVELOPMENT, MANAGEMENT AND CONCESSIONING OF THEME
(AMUSEMENT) PARKS FOR BLANTYRE CITY COUNCIL THROUGH A PPP
ARRANGEMENT**

8TH JULY, 2022

REF No.: PPPC/CNS/58/08-2020

TABLE OF CONTENTS

Contents

1	PROJECT INFORMATION MEMORANDUM.....	6
1.1	INTRODUCTION.....	6
1.2	PROJECT BACKGROUND.....	8
1.3	PROJECT DESCRIPTION.....	8
1.4	PROJECT LOCATION.....	9
2	MARKET ANALYSIS.....	10
3	REGULATORY FRAMEWORKS.....	11
4	DEVELOPMENT AND OPERATION PLAN.....	13
5	INTRODUCTION.....	18
5.1	Project Background.....	18
5.2	Brief description of bidding Process.....	20
6	INSTRUCTIONS TO BIDDERS.....	23
6.1	GENERAL.....	23
6.2	DOCUMENTS.....	31
6.2.4	PREPARATION AND SUBMISSION OF BID.....	32
6.4	EVALUATION PROCESS.....	38
6.5	QUALIFICATION AND BIDDING.....	41
7	CRITERIA FOR EVALUATION.....	42
7.1	QUALIFICATION STAGE.....	42
7.2	FINANCIAL OPENING.....	43
8	FRAUD AND CORRUPT PRACTICES.....	45
9	MISCELLANEOUS.....	46
10	APPENDIX I.....	49
10.1.2	Letter Comprising the Bid.....	49
10.1.3	ANNEX-I.....	53
10.1.4	Annex - II.....	55
10.1.5	Annex -III.....	57
10.1.6	Annex -V Statement of Legal Capacity.....	59
11	APPENDIX II.....	60
12	APPENDIX III.....	62
13	APPENDIX IV.....	65

DISCLAIMER

The information contained in this Request for Proposal document (the “**RFP**”) or subsequently provided to Bidder(s), whether verbally or in documentary or any other form by or on behalf of Blantyre City Council (BCC) or any of its employees or advisors, is provided to Bidder(s) on the terms and conditions set out in this RFP and such other terms and conditions subject to which such information is provided.

This RFP is not an agreement and is neither an offer nor invitation by BCC to the prospective Bidders or any other person. The purpose of this RFP is to provide interested parties with information that may be useful to them in making their financial offers pursuant to this RFP. This RFP contains salient information pertaining to the subject PPP project for purposes of providing background information and the broad historical, technical and operational context to the interested bidders. The RFP does not purport to contain all the information that each Bidder may require. This RFP may not be responsive to the needs of all investors and in any event it is not possible for BCC, its employees or advisors to address the specific circumstances, investment objectives, financial situation and particular needs of each investor. While every effort has been made to ensure accuracy of the facts, the RFP has been prepared on the basis that each bidder will undertake their own detailed financial and technical due diligence reviews of the project in order to arrive at a decision to invest. BCC and its agents are therefore unable to guarantee the accuracy of assumptions, assessments, statements and information contained in the Bidding Documents, especially in RFP and Draft PPP Agreement. Each Bidder should, therefore, conduct its own investigations and analysis of information for purposes of supporting a decision to invest. For this purpose, the bidders are encouraged to engage independent professional specialists to provide professional advice and come up with accurate and reliable information and assumptions to support the technical and financial proposals expected. Information provided in this RFP to the Bidder(s) is on a wide range of matters, some of which may depend upon interpretation of law. The information given is not intended to be an exhaustive account of statutory requirements and should not be regarded as a complete or authoritative statement of law. BCC accepts no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed herein.

BCC, its employees and advisors make no representation or warranty and shall have no liability to any person, including any Bidder under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this RFP or otherwise, including the accuracy, adequacy, correctness, completeness or reliability of the RFP and any assessment, assumption, statement or information contained therein or deemed to form part of this RFP or arising in any way for participation in this Bid Process. BCC also accepts no liability of any nature whether resulting from negligence or otherwise howsoever caused arising from reliance of any Bidder upon the statements contained in this RFP.

BCC may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement the information, assessment or assumptions

contained in this RFP. The issue of this RFP does not imply that BCC is bound to select a Bidder or to appoint the Selected Bidder, as the case may be, for the Project and the PPC reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.

The Bidder shall bear all its costs associated with or relating to the preparation and submission of its Bid including but not limited to preparation, copying, postage, delivery fees, expenses associated with any demonstrations or presentations which may be required by BCC or any other costs incurred in connection with or relating to its Bid. All such costs and expenses will remain with the Bidder and BCC shall not be liable in any manner whatsoever for the same or for any other costs or other expenses incurred by a Bidder in preparation for submission of the Bid, regardless of the conduct or outcome of the Bidding Process.

1 PROJECT INFORMATION MEMORANDUM

1.1 INTRODUCTION

Blantyre City is the commercial and industrial capital of Malawi with a population of 800, 264 as per the 2018 National Population Census. The population exceeds to 1.2 million during the day with people coming in from Chiradzulu, Mulanje and Thyolo and other surrounding areas to work in the City. The City is managed by Blantyre City Council (BCC) which provides urban services in accordance with the 1998 Local Government Act (as amended in 2010) and the 1998 National Decentralisation Policy.

Rapid population growth of Blantyre City has resulted in increased demand for municipal services such as municipal parks and recreation. Consequently, there has been pressure on the Council's limited resources, existing facilities, equipment and or infrastructure. Notwithstanding the challenges that high urban population growth has brought about, the Council is, however, obliged to offer quality services.

Blantyre City is endowed with a number of open spaces, rivers and stream, water reservoirs and hills, each of which presents a potential area for recreation. Unfortunately, most of these places do not have basic recreation amenities despite being patronized by residents. According to a recent study, people fail to utilize parks due to both structural and intrapersonal barriers. Structural barriers which prevent people from visiting and utilizing parks include absence of parks in many communities, poor conditions of parks and some existing facilities and absence of recreational and sanitary facilities. Some of the intrapersonal barriers include insecurity in the park due to perception of poor security in all parks, not having enough time, working during unsociable hours, poor health or mobility and other extracurricular preferences.

The cost of providing municipal services has escalated over the years due to rising costs of human resource, materials and equipment necessary for delivering such services. In this regard, the Council has to increase its locally generated revenue if it is to adequately provide such services.

To address the challenges of lack of recreation facilities, the Council intends to transform the existing open spaces and parks with sound public infrastructure in the form of theme parks. All open spaces and parks earmarked for revitalization are strategically located within the city and accessible from every corner of Blantyre within the radius of a concentration of symbols of history of Blantyre and Malawi.

The Council, in recent times, has shifted from the mere provision of municipal services to a broader business concept, becoming fully-fledged business centre. With rapid population growth, increased day time population and residents' exposure to modern life style, development of a theme parks is a viable commercial activity that can help increase the revenue base of the Council. The development of parks is supported by the Blantyre Urban Structure Plan.

Theme Parks

Amusement parks are places set aside in an urban area for recreational purposes for residents and visitors to the urban area and for the protection of fragile natural landscapes. It is designed, operated and maintained by the urban authority or managed as a business. Amusement Parks bring a lot of benefits to the ecological setting in which they are found as such they are an essential part of urban infrastructure and heritage. Vegetation provided by parks trap solar radiation thus modifying the microclimate by lowering temperatures of the surrounding area, bringing changes in the composition and structure of urban flora and fauna.

Social scientists agree on the benefits of parks to the environment and to residents, pointing to the discovery that parks contribute to the good health of urban residents. City developers also agree on the benefits of parks by suggesting that parks add economic benefits to the city by potentially increasing the attractiveness of a place to do business, live and work. It has been proven that due to their inherent beauty, parks are often suitable as recreational areas or picnic sites. These benefits accrue as a result of interactions and interrelationships between and among the vegetation, environment and people.

Amusement parks are characterized by the presence of playgrounds, gardens, hiking, running and fitness trails or paths, sports field and courts, public restrooms and picnic facilities, depending on the budget and natural features available. They can in a unique way be the catalysts for wider community and economic spin-offs in a way that other neighbourhood facilities or buildings are unable to achieve. In particular, they offer free, open, non-discriminatory access all day, every day and are visible representations of neighbourhood quality.

In its quest to realize its vision, mission and objectives, Blantyre City Council proposes to develop amusement parks that will take their place among the existing parks in Malawi and the Southern African region.

1..2 PROJECT BACKGROUND

Blantyre City Council recognizes the importance of the Sustainable Development Goals (SDGs) and Malawi's Growth and Development Strategies (MGDS) pillars. The strategic focus areas have been aligned to pillars which include corporate governance; revenue collection; financial management; human resource management; information and communication; civic participation in municipal governance and development.

Blantyre has a participatory and democratic system of governance. Councilors are elected by city residents while the Mayor is elected from among the Councilors. The Secretariat comprises of appointed staff members and together with the civil society groups make the governance system.

One of the service departments is the Directorate of Leisure, Cultural and Environmental Services mandated to mitigate the effects of climate change and create a safe and pleasant natural and built city environment and ensure the provision of leisure and recreation services and the preservation of arts and culture. Challenges to Services delivery are many in the leisure and culture sector, they include inadequate space for recreation and the expression of the arts.

1..3 PROJECT DESCRIPTION

The project name is the Development of Theme Parks in Blantyre City as follows:

Lot 1 Development of a mixed-use recreation park at Rangeley Park

Lot 2 Development of a mixed-use recreation park at Jubilee Park

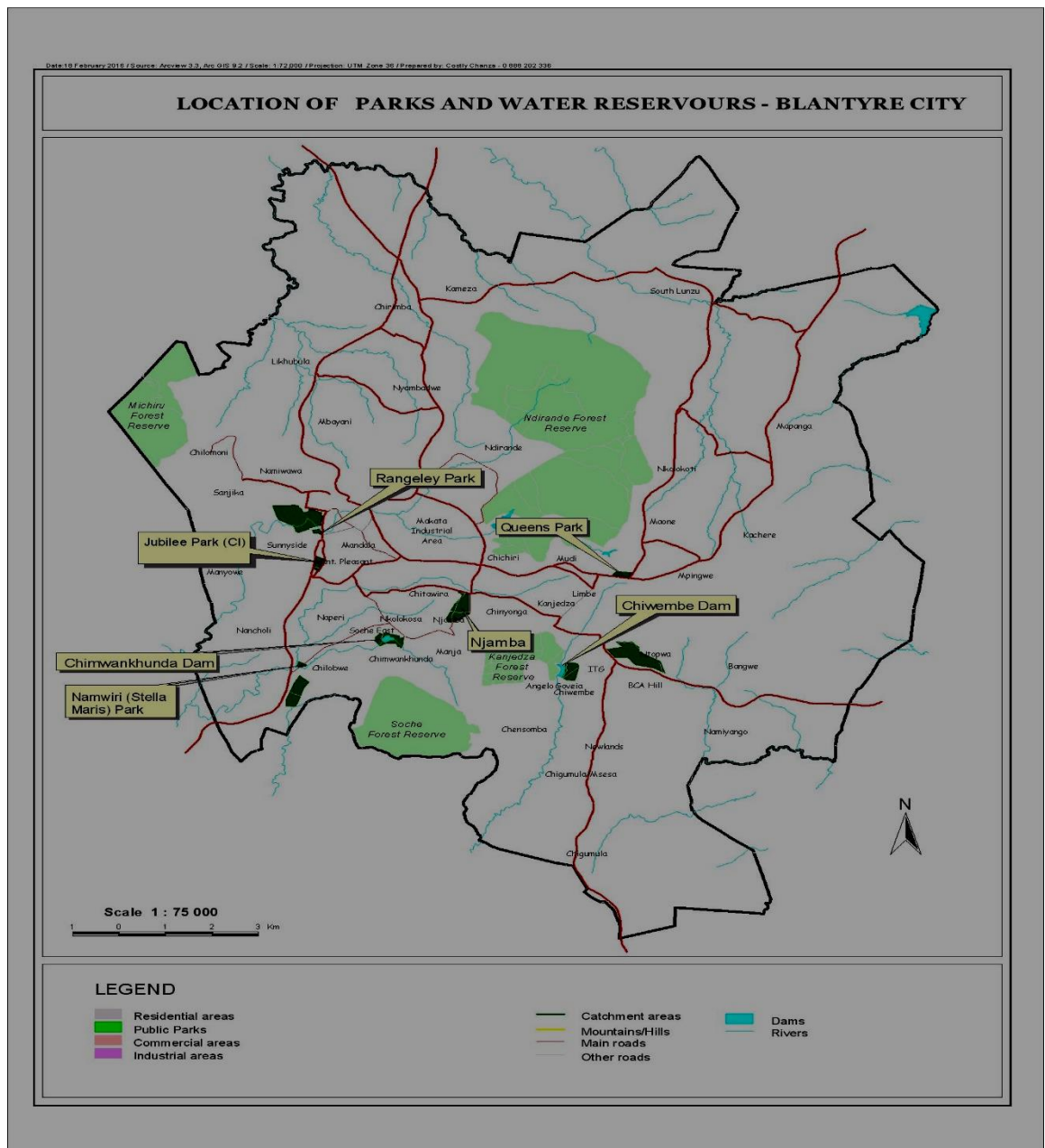
The Council proposes to invite reputable local and international organizations to provide proposals for the development of amusement parks on a revenue sharing basis. The service provider shall design, build, finance, operate, maintain and transfer all amusement park facilities to the Council upon expiry of the contract period.

1..4 PROJECT LOCATION

1.4.1 The proposed mixed-use park for Rangely park is along Victoria Avenue in the Sunnyside area across Mudi River adjacent to Blantyre Sports Club and covers an area of 32,400 square meters. It is a walking distance from Blantyre CBD (about 10min). The Mudi River runs through the southern end of the park south of Blantyre Sport Club golf course (green connection) and north of Sunnyside. This is an attractive site to customers wishing to access the park.

1.4.2 The proposed children's park at Jubilee is located adjacent to the Catholic Church on the Chikwawa road in the Mount Pleasant area. It covers an area of 17,280 square metres. It is also within walking distance (about 15 minutes) but can also be easily accessed using public transport. This is an attractive site to customers wishing to access the park.

Map below shows location of the proposed parks:



2 MARKET ANALYSIS

As a fast-growing City, Blantyre needs well designed amusement parks which can offer the residents and visitors to the city recreation opportunities at the same time protecting the urban environment from degradation. Currently, the city has no open space worth calling an amusement park which can offer day time family recreation. The closed places offering games and other family entertainment are as follows;

Location	Facilities
Victoria Gardens	Children recreation amenities, restaurant
Crossroads Shopping Mall	Family games
Chichiri Shopping Mall	Children recreation amenities, restaurants, bar
Gellato	Children recreation amenities, restaurant
Blantyre Sports Club	Swimming pool, children's games, bar, sports grounds, restaurant
Limbe Country Club	Children's recreation amenities, bar, restaurant, sports grounds

Despite having the places mentioned above, the undeveloped open spaces especially at Rangely Park and Jubilee are regularly used by the residents for family events or get togethers. The demand for purposely built recreation facilities is there and will always be there as the residents of the city continue being exposed to modern life. The 2018 population census has revealed that 56% of the city's population (449 621) is aged above 18 years. This is the group that will lead the remaining 44% in patronizing the usage of parks and therefore provide a good market to the investor.

Records also indicate that weddings are mainly held in gardens as such it is highly anticipated that the developed parks will attract interest of those intending to hold weddings.

The users of the parks will be willing to pay user fees when accessing the facilities. This conclusion is being drawn on the premise that the residents are already paying for most of the almost similar facilities.

3 REGULATORY FRAMEWORKS

3.1 Local Government Act 1998 (as amended in 2010)

The Act under Schedule 2 function number 5 mandates the Council to provide and maintain vehicle parking places, bus shelters, including places specifically set

aside and maintained for the parking of heavy vehicles and street furniture and levy charges on any parking place by simple resolution as the Council shall think fit.

Physical Planning Act 2016

The objective of this Act is to make provision for physical planning and the orderly and progressive development of land in both urban and rural areas; to preserve and improve amenities thereof; for the grant of permission to develop land and for other powers of control over the use of land; for the establishment of the Physical Planning Council; for the establishment of the Physical Planners Board; for the registration and regulation of physical planners and for matters connected therewith and incidental thereto.

3.3 The Public Private Partnership Act 2011

The objective of the Act is to provide for partnerships between the public sector and private sector for the supply of infrastructure and delivery of services as means of contributing towards sustaining economic growth, social development and infrastructure development; to provide for the development and implementation of public private partnership arrangements in Malawi for the delivery of infrastructure and services; to provide for the establishment of the Public-Private Partnership Commission; to provide for private sector participation in state-owned enterprises, commercial entities and commercial assets; and to provide for matters connected with or incidental to the foregoing.

3.4 Public Health Act 1968

The Act gives provisions for the recommended sanitary facilities in public places which the investor will need to take note of.

3.5 Environmental Management Act 2017

An Act to make provision for the protection and management of the environment; the conservation and sustainable utilization of natural resources and for matters connected therewith and incidental thereto.

3.6 Blantyre City Council Parks and Recreation Bylaws 2019

These bylaws regulate the operation of parks in the city of Blantyre.

4 DEVELOPMENT AND OPERATION PLAN

The project objectives are as follows:

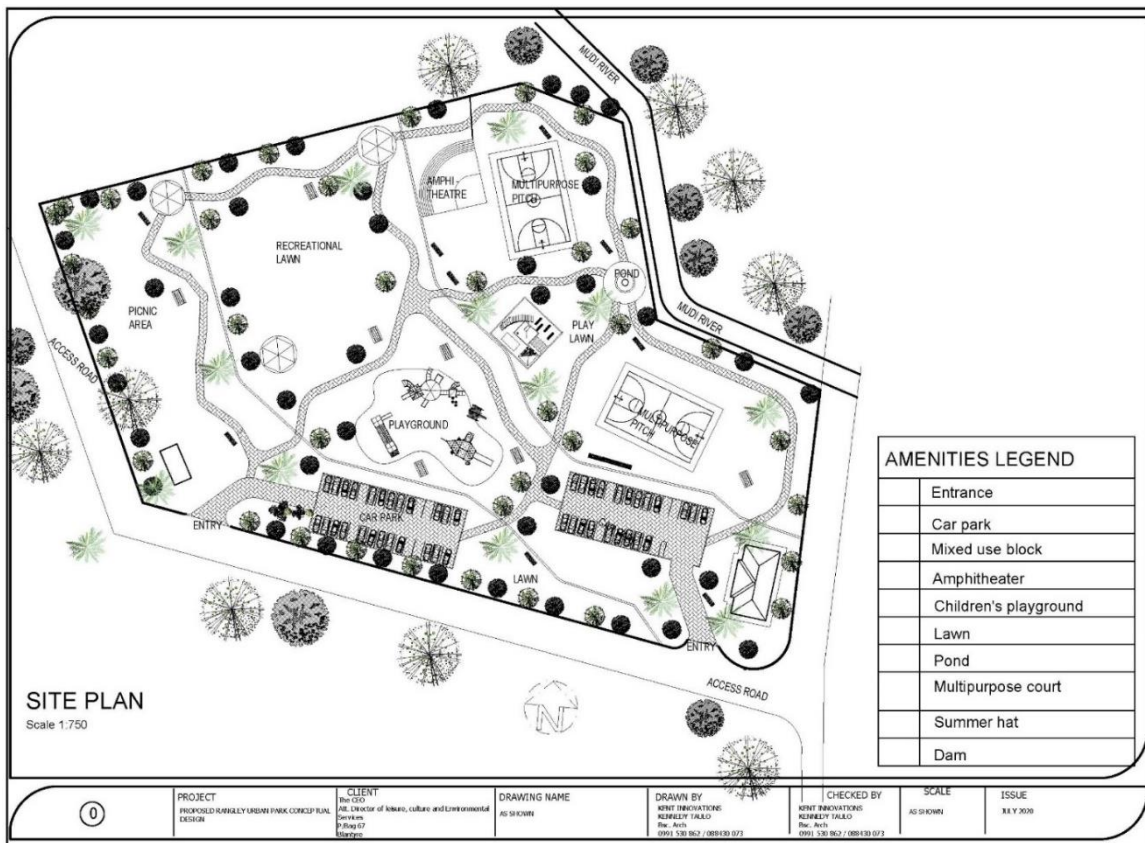
- a) To enhance social interaction among residents
- b) To offer education and learning opportunities for children.
- c) To increase recreational activities available within the park
- d) To improve the level of service available in the park
- e) To ensure that the natural diversity is enhanced significantly
- f) To increase economically viable activities within the park
- g) To increase revenue base of the City Council

To achieve the set objectives, the proposed sites should be upgraded to meet minimum standards set by the Council. The upgrade should include at least the following:

4.1 Rangely Park

The theme for this park is Mixed Use Recreation Park. The proposal is to have modern physical infrastructure including, perimeter fence, car parks, garden seats, summer hats, tuck-shop, administration office, ablution blocks, first-aid facility, guard house, thrill rides, ferris wheels; water fountain, playgrounds (volleyball, basketball/netball combo), roller coasters, restaurant, art gallery, bar, outdoor cinema, braii facility, heritage house, gymnasium, kids play area. These facilities will encourage higher levels of physical activity. Other notable features include floodlights and running tracks. Landscaping or hardscape will be provided to complement the recreational component. The figure below depicts the components of the proposed theme park.

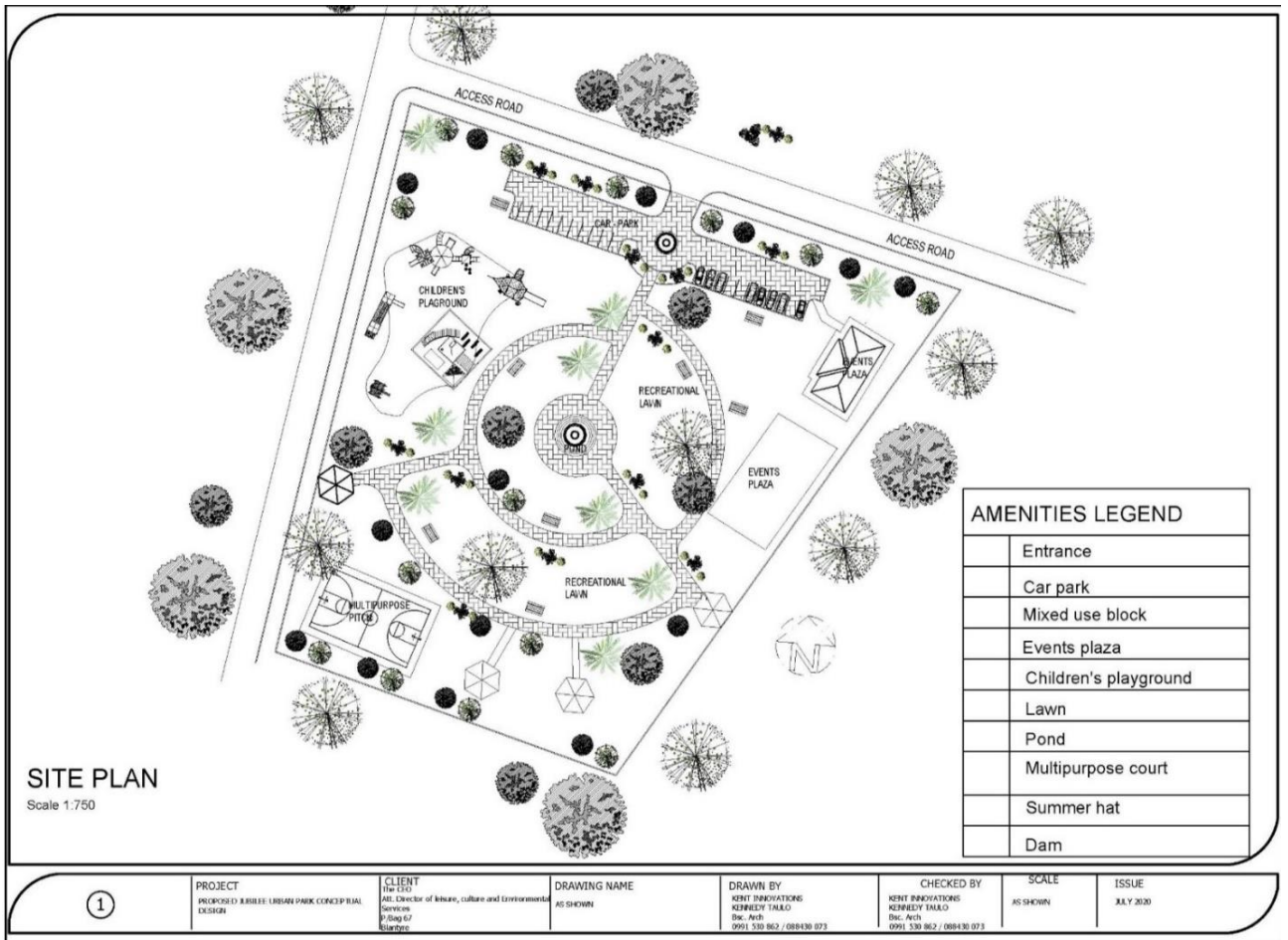
PROPOSED PLAN FOR RANGELY PARK



4.2 Jubilee Park

This is a children's park and facilities will include thrill rides, ferris wheels, seesaws, merry-go-rounds, swing set, slide, jungle gym, chin-up bars, sandbox, spring rider, monkey bars, overhead ladder, trapeze rings, playhouses and mazes, perimeter fence, car parks, garden seats, summer hats, tuck-shop, administration office, ablution blocks, first-aid facility, guard house, water fountain, playgrounds, roller coasters, restaurant, art gallery, bar, outdoor cinema, braii facility, heritage house, gymnasium, kids rides (chuchu train, dragon, carousel, elephant, jumping castle); many of which help children develop physical coordination, strength and flexibility as well as providing recreation and enjoyment. The figure below shows an overview of how the park will look like.

PROPOSED LAYOUT PLAN FOR JUBILEE PARK



PROJECT COMPONENTS	DESCRIPTION
Structure	<ul style="list-style-type: none"> The project is the development of amusement parks at Rangeley park and Jubilee park, The Concessionaire would develop the parks under design, build, finance, operate, maintain and transfer (DBFOMT). The concessionaire will recover investments over a period of time from the revenues from

	the properties developed under the project and any other applicable sources.
Concession Period	<ul style="list-style-type: none"> • 15 years for each lot • A construction period 2 year
Payment by Concessionaire	<ul style="list-style-type: none"> • Annual concession fee on accrual basis
Role of Concessions Authority (BCC)	<ul style="list-style-type: none"> • Grant of lease hold rights of the project site to the concessionaire • Provision of adequate rights to the concessionaire for collection of user charges, park fees and rentals from commercials. • Aid in getting all the required clearances
Role of Concessionaire (Project Developer)	<ul style="list-style-type: none"> • Detailing the Project components • Detailed designing and Engineering of facilities based on Concept • Achieving financial closure and making the necessary capital investment • Construction, Marketing, Operating, Maintaining and Managing (Utilities, Facilities, Equipment etc.) the Project during the Concession Period • Obtaining all clearances / approvals from the concerned Government Departments, handling legal issues etc.

POWER SUPPLY

Operating rides in the two Theme Parks under this project would demand dedicated reliable steady power supply. All rides in Theme parks heavily rely on stable supply of electricity. Electricity Supply Corporation of Malawi Limited (ESCOM) which has an installed hydropower supply capacity of 351MW, has a history of providing unstable power supply due to failure to generate the power from its hydro power stations arising from inadequate water supply in the Shire River. The current generation capacity of ESCOM is 351 MW, but Electricity Generation Company (EGENCO) the power generating company has only been

able to generate on average around 250 MW for the past 5 years on account of low water supply in the Shire river. Over and above this problem is the reliability of the generating plants themselves.

Amusement parks need a lot of energy to power rides, concessions and offices. The rides run on power and emanate tons of carbon particles from going into the atmosphere each year. Since Malawi does not have such Theme parks these places will attract a lot of visitors and create pollution in the atmosphere. It may become a concern to the close neighbourhoods especially Sunnyside and Mt Pleasant.

The bidder will be encouraged to take advantage of renewables to mitigate this risk. The bidder may consider installing solar on the roof or using other renewables such as wind as it is done by other theme parks elsewhere.

INVITATION FOR PROPOSAL

5 INTRODUCTION

5.1 Project Background

5.1.1 Blantyre City is the commercial and industrial capital of Malawi with a population of 800, 264 as per the 2018 National Population Census. The population exceeds to 1.2 million during the day with people coming in from Chiradzulu, Mulanje and Thyolo and other surrounding areas to work in the City.

Blantyre City is managed by Blantyre City Council (BCC) which provides urban services in accordance with the 1998 Local Government Act (as amended in 2010) and the 1998 National Decentralisation Policy.

Rapid population growth of Blantyre City has resulted in increased demand for municipal services such as municipal parks and recreation. Consequently, there has been pressure on the Council's limited resources, existing facilities, equipment and or infrastructure. Notwithstanding the challenges that high urban population growth has brought about, the Council is, however, obliged to offer quality services.

Blantyre City is endowed with several open spaces, rivers and stream, water reservoirs and hills, each of which presents a potential area for recreation. Unfortunately, most of these places do not have basic recreation amenities despite being patronized by residents.

To address the challenges of lack of recreation facilities, the Council intends to transform the existing open spaces and parks with sound public infrastructure in the form of theme parks. The need for revitalization of the parks is further supported by the need to increase the revenue base of the Council. The Council intends to develop the theme parks through Public-Private Partnership (the "PPP") arrangement. The Council has decided to carry out the bidding process for the selection of a private investor/operator as the bidder to whom the Project may be awarded. The private party is expected to develop the theme parks under design, build, finance, operate, maintain and eventually transfer through a Public Private Partnership agreement. The PPP agreement will have a concession period of fifteen (15) years. The proposed parks are located as follows:

Lot	Lot Name	Project Sites	Total Area
1	Rangeley Park	Along Victoria Avenue in the Sunnyside area across Mudi River adjacent to Blantyre Sports Club	32,400 square meters
2	Jubilee Park	Adjacent to the Catholic Church on the Chikwawa road in the Mount Pleasant area	17,280 square meters

- 5.1.2 The Selected Bidder may undertake to incorporate a Special Purpose Vehicle (“**SPV**”) (the “**Successful bidder/investor**”) and shall be responsible for designing, financing, procurement, construction, operation and maintenance of the Project under and in accordance with the provisions of the PPP Agreement (the “**PPP Agreement**”) to be entered into between BCC and the Successful bidder/investor in the form provided as part of the Bidding Documents pursuant hereto.
- 5.1.3 The scope of work will broadly include development of the theme Parks to high class standards with efficient operation and maintenance thereof as per the PPP Agreement.
- 5.1.4 The PPP Agreement sets forth the detailed terms and conditions for the Development, Financing, Management and Operation right to the Successful bidder/investor, including the scope of the Successful bidder/investor’s services and obligations (the “**Development & Operation Right**”).
- 5.1.5 The statements and explanations contained in this Request For Proposal (the “**RFP**” document) are intended to provide a better understanding to the Bidders about the subject matter of this RFP and should not be construed or interpreted as limiting in any way or manner the scope of services and obligations of the Successful bidder/investor set forth in the PPP Agreement or BCC’s rights to amend, alter, change, supplement or clarify the scope of work, the Development and Operation right to be awarded pursuant to this RFP or the terms thereof or herein contained. Consequently, any omissions, conflicts or contradictions in the Bidding Documents including this RFP are to be noted, interpreted and applied appropriately to give effect to this intent, and no claims on that account shall be entertained by BCC.
- 5.1.6 The BCC shall receive bids pursuant to this RFP in accordance with the terms set forth in this RFP and other documents to be provided by the BCC pursuant to this RFP, as modified, altered, amended and clarified from time to time by the BCC (collectively the “**Bidding Documents**”), and all Bids shall be prepared and submitted in accordance with such terms on or before the date specified in Table

1, Schedule of Bidding Process for submission of Bid (the “**Bid Due Date**”).

- 5.1.7 BCC nor its agents will not facilitate the successful bidder/investor in seeking grants/subsidies from the Government or any other Financial Institutions.

5.2 Brief description of bidding Process

5.2.1 BCC acting through the Public Private Partnership Commission, has adopted a single stage two envelop bidding process for the selection of the Bidder for award of the Contract. The first part (the “**Technical Evaluation**”) of the Bidding Process involves assessing interested party and/or parties/ consortium on the basis of their Technical and Financial Capacity in accordance with the provisions of Clause 7.1. At the end of the Technical Evaluation, only those Bidders whose Technical Evaluation Score meet the minimum required evaluation points shall qualify to have their Financial Proposals opened for the financial evaluation (the “**Financial Evaluation**”) in accordance with the provisions of Clause 7.2. The Bid shall be valid for a period of not less than 180 days (one hundred and eighty days) from the Bid Due Date as specified in Table 1.

5.2.2 For the purpose of Technical Evaluation, Bidders would be required to furnish all the information as specified in this RFP and any other documents provided by the PPP Commission. Only those Bidders declared as qualified at the technical evaluation stage shall be eligible to have their financial proposals opened for financial evaluation.

5.2.3 During the financial evaluation stage, the financial proposal (the “**Financial Offer**”) submitted by the Bidders as hard copy (Appendix-V) will be evaluated.

5.2.4 Bids are invited based on the **Quality and Cost Based Selection (QCBS)**. The period is fixed at **15 years** with the provision that the Agreement will be reviewed every three years. After Technical Evaluation Stage and subject to requirements of the RFP, the concession fee, level of investment and revenue sharing arrangement shall constitute the criteria for evaluation of Bids and the selection of the preferred Bidder.

5.2.5 The bidder with highest combined technical and financial score shall be declared the Preferred Bidder. The remaining qualifying Bidders shall be kept on reserve and may be considered according to their scores in case the preferred Bidder declines. In the event that none of the other Bidders is willing to take the offer, the PPP Commission may, in its discretion, invite fresh Bids from the

remaining Bidders or annul the Bidding Process, as the case may be.

- 5.2.6 As part of the Bidding Documents, the PPP Commission will provide a Draft PPP Agreement and any other information pertaining/ relevant to the Project.
- 5.2.7 Further and other details of the Bidding Process to be followed and the terms thereof are spelt out in the subsequent sections of this RFP.
- 5.2.8 Any queries or request for additional information concerning this RFP shall be submitted in writing or by fax or e-mail to the following address

The Chief Executive Officer

The Public Private Partnership Commission

2nd Floor, Livingstone Towers

Glyn Jones Road

P O Box 937

Blantyre

Malawi

Phone : +265 (0) 1 823 655

Fax : +265 (0) 1821 248

E-Mail : info@pppc.mw

The envelopes/communications shall clearly bear the following identification/title:

Queries/ Request for Additional Information: RFP for “Development of Theme Parks in Blantyre City through a Public Private Partnership Arrangement”.

Table 1: Schedule of Bidding Process

SCHEDULE OF BIDDING PROCESS NO.	EVENT DESCRIPTION	DATE
1	ISSUE OF RFP TO APPLICANTS	8 TH JULY, 2022
2	SITE VISIT	22 ND JULY, 2022
3	PRE-BID MEETING	28 TH JULY, 2022
4	LAST DATE OF RECEIVING QUERIES	12 TH AUGUST, 2022
5	LAST DATE FOR SUBMISSION OF BID (BID DUE DATE)	31 ST AUGUST 2022 AT 2:00PM LOCAL TIME
6	DATE FOR OPENING TECHNICAL PROPOSALS	31 ST AUGUST 2022 AT 2:00PM LOCAL TIME
7	INFORMING THE QUALIFIED BIDDERS	1 ST OCTOBER, 2022
8	DATE OF OPENING FINANCIAL PROPOSAL FOR TECHNICALLY QUALIFIED BIDS	13 TH OCTOBER, 2022
9	ISSUE OF LETTER OF AWARD (LOA)	WITHIN 3 MONTHS OF THE DATE OF OPENING OF FINANCIAL OFFER
10	ACCEPTANCE BY THE SUCCESSFUL BIDDER OF THE LETTER OF AWARD	WITHIN 21 DAYS FROM THE ISSUE OF LETTER OF ACCEPTANCE (LOA)
11	SIGNING OF CONCESSIONING AGREEMENT	WITHIN 45 DAYS FROM THE ISSUE OF LETTER OF ACCEPTANCE (LOA)

BCC will endeavor to adhere to the dates indicated above. However, it reserves the right to effect changes to the above dates, if the need arises. Such change, if any, will be communicated to all Bidders and would also be uploaded at PPC's website (www.pppc.mw) from time to time.

6 INSTRUCTIONS TO BIDDERS

6.1 GENERAL

6.1.1 *Scope of Bids*

6.1.1.1 The PPC wishes and invites Bids from experienced and capable Bidders in the format and within the specified date and time as described in this RFP. Bidders are free to bid for one Lot or both Lots.

6.1.2 *Eligibility of Bidders*

6.1.2.1 For determining the eligibility of Bidders for their qualification hereunder, the following shall apply:

- (a) The Bidder to qualify may be a single entity or a group of entities (the “**Consortium**”), coming together to develop the Project. However, no Bidder applying individually or as a member of a Consortium, as the case may be, can be member of another Bidder.
- (b) A Bidder should be a private entity, or entities with a formal intent to enter into an agreement or under an existing agreement to form a Consortium. A Consortium shall be eligible for consideration subject to the conditions set out in Clause 6.1.2.6.
- (c) A Bidder shall not have a conflict of interest (the “**Conflict of Interest**”) that affects the Bidding Process. Any Bidder found to have a Conflict of Interest shall be disqualified. Without limiting the generality of the above, a Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:
 - (i) the Bidder, its Member or Associate (or any constituent thereof) and any other Bidder, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder, its Member or an Associate thereof (or any shareholder thereof having a shareholding of not more than 25% (twenty five per cent) of the paid up and subscribed share capital of such Bidder, Member or Associate, as the case may be) in the other Bidder, its Member or Associate, is not more than 25% (twenty five per cent) of the subscribed and paid up equity share capital thereof; provided further that this

disqualification shall not apply to any ownership by a bank, insurance company, pension fund or a public financial institution. For the purposes of this Clause 6.1.2.1, indirect shareholding held through one or more intermediate persons shall be computed as follows: (aa) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the “**Subject Person**”) shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (bb) subject always to sub-clause (aa) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause (bb) if the shareholding of such person in the intermediary is less than 26% (twenty six per cent) of the subscribed and paid up equity shareholding of such intermediary; or

- (ii) a constituent of such Bidder is also a constituent of another Bidder; or
- (iii) such Bidder, its Member or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder, its Member or Associate, or has provided any such subsidy, grant, concessional loan or subordinated debt to any other Bidder, its Member or any Associate thereof; or
- (iv) such Bidder has the same legal representative for purposes of this Bid as any other Bidder; or
- (v) such Bidder, or any Associate thereof has a relationship with another Bidder, or any Associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each other’s information about, or to influence the Bid of either or each other; or
- (vi) such Bidder or any Associate thereof has participated as a consultant to BCC in the preparation of any documents, design or technical specifications of the Project.

Notwithstanding anything stated herein a conflict of interest situation arising at the Qualification will be considered to subsist only, as between such

Applicants attracting conflict of interest provisions on account of shareholdings, who submit bids under this document.

Explanation:

In case a Bidder is a Consortium, then the term Bidder shall include each Member of such Consortium.

For purposes of this RFP, Associate means, in relation to the Bidder/ Consortium Member, a person who controls, is controlled by, or is under the common control with such Bidder / Consortium Member (the “**Associate**”). 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 50% (fifty per cent) 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 by operation of law.

- (d) A Bidder shall be liable for disqualification if any legal, financial or technical adviser of BCC and the PPPC in relation to the Project is engaged by the Bidder, its Member or any Associate thereof, as the case may be, in any manner for matters related to or incidental to the Project during the Bidding Process or subsequent to the (i) issue of the Letter of Award (LOA) or (ii) execution of the PPP Agreement. In the event that any such adviser is engaged by the Successful bidder/investor, as the case may be, after issue of the LOA or execution of the PPP Agreement for matters related or incidental to the Project, then notwithstanding anything to the contrary contained herein or in the LOA or the PPP Agreement and without prejudice to any other right or remedy of BCC, the LOA or the PPP Agreement, as the case may be, shall be liable to be terminated without BCC being liable in any manner whatsoever to the Successful bidder/investor for the same. For the avoidance of doubt, this disqualification shall not apply where such adviser was engaged by the Bidder, its Member or Associate in the past but its assignment expired or was terminated 6 (six) months prior to the date of issue of this RFP. Nor will this disqualification apply where such adviser is engaged after a period of 1 (one) year from the date of signing of the PPP Agreement.

6.1.2.2 For the Technical Evaluation, the technical bids will be assessed in the following areas:

- (A) **Technical Capacity:** For demonstrating technical capacity and experience (the “**Technical Capacity**”), the Bidder shall, over the past 10 (Ten) financial years preceding the Bid Due Date, have:
 - (i) Operated, managed and maintained a park; and

(ii) Developed or enhanced and financed a park with demonstration of qualified staff on the ground.

(B) **Financial Capacity:** The Bidder shall have a minimum Net Worth (the “**Financial Capacity**”) of US\$200,000 (United States Dollars Five Hundred Thousand) at the close of the preceding financial year.

(In case an Applicant has issued any fresh Equity Capital during the current financial year, the same shall be permitted to be added to the Applicants assessed Net-Worth.)

In case of a Consortium, the combined technical capacity and net worth of those Members, who have and shall continue to have an equity share of at least 26% (Twenty Six per cent) each in the SPV, should satisfy the above conditions of eligibility; provided that each Member shall, for a period of 5 (five) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (Twenty Six per cent) of the subscribed and paid up equity of the SPV.

6.1.2.3 Operation and Management (O&M) Experience: The bidder shall demonstrate competence in O&M of park facilities in conformity with the provisions of the PPP agreement.

6.1.2.4 The Bidder shall enclose with its Bid, audited financial statements of the past 5 years in respect of the projects specified in paragraph 6.1.2.2 (A) above. In case a particular job / contract has been jointly executed by the Bidder (as part of a consortium), it should further support its claim for the share in work done for that particular job / contract by producing a certificate from its client; and

6.1.2.5 The Bidder should submit a Power of Attorney as per the format at Appendix-II, authorizing the signatory of the Bid to commit the Bidder. In the case of a Consortium, the Members should submit a Power of Attorney in favour of the Lead Member as per format at Appendix-III.

6.1.2.6 Where the Bidder is a single entity, it may be required to form an appropriate Special Purpose Vehicle, incorporated under the Companies Act (the “**SPV**”), to execute the PPP Agreement and implement the Project. In case the Bidder is a Consortium, it shall, in addition to forming an SPV, comply with the following additional requirements:

(a) Number of members in a consortium shall not exceed 3 (three);

- (b) Subject to the provisions of sub clause (a) above, the Bid should contain the information required for each member of the Consortium;
- (c) Members of the consortium shall nominate one member as the Lead Member (the '**Lead Member**') who shall have an equity shareholding of at least 26% (Twenty Six percent) of the paid up and subscribed equity of the SPV. The lead member shall hold such equity at least for five years from the commercial operation date of the project. The nomination(s) shall be supported by a Power of Attorney, as per the format at Appendix III: Format for Power of Attorney for Lead Member of Consortium signed by all the other members of the Consortium;
- (d) the Bid should include a brief description of the roles and responsibilities of individual members, particularly with reference to financial and technical obligations;
- (e) an individual Bidder cannot at the same time be member of a Consortium applying for the Bid. Further, a member of a particular Bidder Consortium cannot be member of any other Bidder Consortium applying for the Bid;
- (f) the members of a Consortium shall form an appropriate SPV to execute the Project, if awarded to the Consortium;
- (g) members of the Consortium shall enter into a binding Joint Bidding Agreement, substantially in the form specified at Appendix-IV (the "**Joint Bidding Agreement**"), for the purpose of making the Bid. The Joint Bidding Agreement, to be submitted along with the Bid, shall, *inter alia*:
 - (i) convey the intent to form an SPV with shareholding / ownership equity commitment(s) in accordance with this RFP, which would enter into the PPP Agreement and subsequently perform all the obligations of the Successful bidder/investor in terms of the PPP Agreement, in case the Development & Operation right to undertake the Project is awarded to the Consortium;
 - (ii) clearly outline the proposed roles and responsibilities, if any, of each member;
 - (iii) commit the minimum equity stake to be held by each member;
 - (iv) commit that each of the members, whose experience will be evaluated for the purposes of this RFP, shall subscribe to 26% (Twenty Six per cent) or more of the paid up and subscribed equity of the SPV and shall

further commit that each such member shall, for a period of 5 (Five) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (Twenty Six per cent) of the subscribed and paid up equity share capital of the SPV; and

(v) Members of the consortium undertake that they shall collectively hold at least 51% (fifty one percent) of the subscribed and paid up equity of the SPV at all times until the second anniversary of the commercial operation date of the project

(vi) include a statement to the effect that all members of the Consortium shall be liable jointly and severally for all obligations of the Successful bidder/investor in relation to the Project until the Financial Close of the Project is achieved in accordance with the PPP Agreement; and

(h) except as provided under this RFP and the Bidding Documents, there shall not be any amendment to the Joint Bidding Agreement without the prior written consent of the PPC.

6.1.2.7 Any entity which has been barred by the Government of Malawi, or any entity controlled by it, from participating in any project (BOT or otherwise), and the bar subsists as on the date of Bid would not be eligible to submit a Bid, either individually or as member of a Consortium.

6.1.2.8 A Bidder including any Consortium Member or Associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or a judicial pronouncement or arbitration award against the Bidder, Consortium Member or Associate, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated by any public entity for breach by such Bidder, Consortium Member or Associate.

6.1.2.9 In computing the Technical Capacity and Net Worth of the Bidder / Consortium Members under Clauses 6.1.2.2, 6.1.2.4 and 7.1.2, the Technical Capacity and Net Worth of their respective Associates would also be eligible hereunder. It is clarified that a certificate from a qualified external auditor who audits the book of accounts of the Applicant or the Consortium Member shall be provided to demonstrate that a person is an Associate of the Applicant or the Consortium as the case may be.

6.1.2.10 The following conditions shall be adhered to while submitting a Bid:

(a) Bidders should attach clearly marked and referenced continuation sheets in the event that the space provided in the

prescribed forms in the Annexes is insufficient. Alternatively, Bidders may format the prescribed forms making due provision for incorporation of the requested information;

- (b) information supplied by a Bidder (or other constituent Member if the Bidder is a Consortium) must apply to the Bidder, Member or Associate named in the Bid and not, unless specifically requested, to other associated companies or firms;
- (c) in responding to the qualification phase, Bidders should demonstrate their capabilities in accordance with Clause 7.1.1; and
- (d) in case the Bidder is a Consortium, each Member should substantially satisfy the qualification requirements to the extent specified herein.

6..1.3 *Change in composition of the Consortium*

6.1.3.1 Change in the composition of a Consortium will not be permitted by BCC during the Bidding Process.

6..1.4 *Number of Bids and costs thereof*

6.1.4.1 No Bidder shall submit more than one Bid for the Project. A Bidder applying individually or as a member of a Consortium shall not be entitled to submit another Bid either individually or as a member of any Consortium, as the case may be.

6.1.4.2 The Bidders shall be responsible for all of the costs associated with the preparation of their Bids and their participation in the Bid Process. The BCC, the PPP Commission and its agents will not be responsible or in any way liable for such costs, regardless of the conduct or outcome of the Bidding Process.

6..1.5 *Site visit and verification of information*

6.1.5.1 Bidders are encouraged to visit the Project site(s) and ascertaining for themselves the site conditions, construction materials, state of the infrastructure, location, surroundings, climate, availability of power, water and other utilities for construction, access to site, handling and storage of materials, weather data, applicable laws and regulations, and any other matter considered relevant by them before submitting their respective Bids.

6..1.6 *Acknowledgement by Bidder*

6.1.6.1 It shall be deemed that by submitting the Bid, the Bidder has:

- (a) made a complete and careful examination of the RFP;
- (b) received all relevant information requested from BCC;
- (c) accepted that they have not had to rely on the RFP or information furnished by or on behalf of BCC relating to any of the matters referred to in Clause 6.1.5 above;
- (d) agreed to be bound by the undertakings provided by it under and in terms hereof;
- (e) satisfied itself about all matters, things and information including matters referred to in Clause 6.1.5 hereinabove necessary and required for submitting an informed Bid, execution of the Project in accordance with the Bidding Documents and performance of all of its obligations there under; and

6.1.7 Right to accept or reject any or all Bids

6.1.7.1 Notwithstanding anything contained in this RFP, the PPPC reserves the right to accept or reject any Bid and to annul the Bidding Process and reject all Bids, at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefore. In the event that the PPPC rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder. Further, the PPPC reserves the right not to proceed with the Bidding Process at any time, without notice or liability, and to reject any Bid without assigning any reasons

6.1.7.2 The PPPC reserves the right to reject any Bid if:

- (a) at any time, a material misrepresentation is made or uncovered, or
- (b) the Bidder does not provide, within the time specified by the PPPC, the supplemental information sought by BCC for evaluation of the Bid.

If the Bidder is a Consortium, then the entire Consortium may be disqualified / rejected. If such disqualification / rejection occurs after the Bids have been opened and the technically qualified Bidder gets disqualified/ rejected, then BCC reserves the right to:

- (i) invite the remaining technically qualified Bidders; or
- (i) take any such measure as may be deemed fit in the sole discretion of BCC, including annulment of the Bidding Process.

6.1.7.3 In case it is found during the evaluation or at any time before signing of the PPP Agreement or after its execution and during the period of

subsistence thereof, including the Development & Operation right thereby granted by the PPPC, that one or more of the qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Successful bidder/investor either by issue of the LOA or entering into of the PPP Agreement, and if the Bidder/SPV has already been issued the LOA or has entered into the PPP Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by BCC to the Bidder, without BCC being liable in any manner whatsoever to the Bidder.

6.1.7.4 The PPPC reserves the right to verify all statements, information and documents submitted by the Bidder in response to the RFP. Any such verification or lack of such verification by the PPPC shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of BCC there under.

6.1.7.5 Any condition or qualification or any other stipulation contained in the Bid shall render the Bid liable to rejection as a non-responsive Bid.

6.1.7.6 The documents including this RFP and all attached documents, provided by the PPPC are and shall remain or become the property of BCC and are transmitted to the Bidders solely for the purpose of preparation and the submission of a Bid in accordance herewith. Bidders are to treat all information as strictly confidential and shall not use it for any purpose other than for preparation and submission of their Bid. The provisions of this Clause 5.1.7.6 shall also apply mutatis mutandis to Bids and all other documents submitted by the Bidders, and BCC will not return to the Bidders any Bid, document or any information provided along therewith.

6..2 DOCUMENTS

6.2.1 *Draft PPP Agreement*

The Draft PPP Agreement provided by the PPPC as part of the Bid Documents shall be deemed to be part of this RFP.

6.2.2 *Clarifications*

6.2.2.1 Bidders requiring any clarification on the RFP may notify the PPPC in writing or by fax and e-mail in accordance with Clause 5.2.8. They should send in their queries before the date specified in the schedule of Bidding Process contained in Table 1. The PPP Commission shall endeavor to respond to the queries within the period specified therein, but no later than 14 (fourteen) days prior to the Bid Due Date. The responses will be sent by

fax and/or e-mail. The PPPC will forward all the queries and its responses thereto, to all purchasers of the RFP without identifying the source of queries.

6.2.2.2 The PPPC shall endeavor to respond to the questions raised or clarifications sought by the Bidders. However, the PPPC reserves the right not to respond to any question or provide any clarification, in its sole discretion, and nothing in this Clause shall be taken or read as compelling or requiring the PPPC to respond to any question or to provide any clarification.

6.2.2.3 The PPP Commission may also on its own motion, if deemed necessary, issue interpretations and clarifications to all Bidders. All clarifications and interpretations issued by the PPPC shall be deemed to be part of the RFP. Verbal clarifications and information given by BCC or its employees or representatives shall not in any way or manner be binding on BCC.

6.2.3 Amendment of RFP

6.2.3.1 At any time prior to the Bid Due Date, BCC may, for any reason, whether at its own initiative or in response to clarifications requested by a Bidder, modify the RFP by the issuance of Addenda.

6.2.3.2 Any Addendum thus issued will be sent in writing to all those who have purchased the RFP. Bidders are advised to keep watch on PPPC website (www.pppc.mw) for any modification in RFP and other updates about the Project.

6.2.3.3 In order to afford the Bidders a reasonable time for taking an Addendum into account, or for any other reason, the PPPC may, in its sole discretion, extend the Bid Due Date.

6.2.4 PREPARATION AND SUBMISSION OF BID

6.2.4.1 Language

6.2.4.1 The Bid and all related correspondence and documents in relation to the Bidding Process shall be in English language. Supporting documents and printed literature furnished by the Bidder with the Bid may be in any other language provided that they are accompanied by translations of all the pertinent passages in the English language, duly authenticated and certified by the Bidder. Supporting materials, which are not translated into English, may not be considered. For the purpose of interpretation and evaluation of the Bid, the English language translation shall prevail.

6.2.5 Format and signing of Bid

6.2.5.1 The Bidder shall provide all the information sought under this RFP. The PPP Commission will evaluate only those Bids that are received in the required formats and complete in all respects. Incomplete and /or conditional Bids shall be liable to rejection.

6.2.5.2 The Bidder shall prepare 1 (one) original set of the Bid (together with originals / copies of documents required to be submitted along therewith pursuant to this RFP) and clearly marked "ORIGINAL". In addition, the Bidder shall submit Four (4) copies of the Bid, along with documents required to be submitted along therewith pursuant to this RFP, marked "COPY". The Bidder shall also provide 2 (two) soft copies on Compact Disc (CD) or memory stick. In the event of any discrepancy between the original and the copy, the original shall prevail.

6.2.5.3 The Bid and its copy shall be typed or written in indelible ink and signed by the authorised signatory of the Bidder who shall also initial each page in blue ink. In case of printed and published Documents, only the cover shall be initialed. All the alterations, omissions, additions or any other amendments made to the Bid shall be initialed by the person(s) signing the Bid. The Bid shall contain page numbers and shall be submitted in a hard bound form (hard bound implies binding between two covers through stitching whereby it may not be possible to replace any paper without disturbing the document - spiral bound form, loose form, etc. will be not accepted).

6.2.3 Sealing and Marking of Bids

6.2.3.1.1 The Bidder shall submit the Bid in the format specified at Appendix-I, together with the documents specified in Clause 6.2.3.1.1A and seal it in an envelope and mark the envelope as "**Technical Bid**". The Bidder shall submit the Financial Offer in the format specified at Appendix-V and seal it in another envelope and mark the envelope as "**Financial Bid**". Both the envelopes of the Technical Bid and the Financial Bid shall then be sealed in an outer envelope and mark the envelope as "**Bid – Theme Parks under a PPP Arrangement**". The Bidder shall seal the original and the copy of the Bid, together with their respective enclosures, in separate envelopes duly marking the envelopes as "ORIGINAL" and "COPY". The envelopes shall then be sealed in an outer envelope which shall also be marked.

(A) Each Technical Bid envelope shall contain:

- (i) Bid in the prescribed format (Appendix-I) along with Annexes and supporting documents;
- (ii) Power of Attorney for signing the Bid as per the format at Appendix-II;

- (iii) if applicable, the Power of Attorney for Lead Member of Consortium as per the format at Appendix-III;
- (iv) copy of the Joint Bidding Agreement, in case of a Consortium, substantially in the format at Appendix-IV;
- (v) copy of Memorandum and Articles of Association, if the Bidder is a body corporate, and if a partnership then a copy of its partnership deed;
- (vi) copies of Bidder's duly audited balance sheet and profit and loss account for the preceding five years;
- (vii) Payment Receipt towards the cost of the Bidding Documents as specified in Clause 6.3.4.1; and
- (viii) A copy of the Instruction to Bidders, Draft PPP Agreement with each page stamped and initialed by the person signing the Bid in pursuance of the Power of Attorney referred to in sub-clause (ii) hereinabove.

(B) Each Financial Bid envelope shall contain:

- (i) Financial Offer in the prescribed format (Appendix-V);

6.3.3.1 The final outer envelopes having the Original and Copy shall clearly bear the following identification:

Bid for: **“Development of Theme Parks in Blantyre City through a Public Private Partnership Arrangement”** and shall clearly indicate the name and address of the Bidder. In addition, the Bid Due Date should be indicated on the right-hand corner of each of the envelopes.

Each of the envelopes shall be addressed to:

ATTN. TO: The Chief Executive Officer
 INSTITUTION: The Public Private Partnership Commission
 ADDRESS: 2nd Floor, Livingstone Towers, Glyn Jones Road,
 P.O. Box 937, Blantyre, Malawi

E-MAIL ADDRESS: info@pppc.mw

WEBSITE: www.pppc.mw

PHONE NO: +265 1 823 655

FAX NO: +265 1 821 248

In addition to the bid submission as per Clause 6.3.3.1, the following additional options are available in view of COVID 19:

Option 1

The Bidder may send the bid by EM to their Embassy if they are willing to assist. The Embassy may print the bid from the scanned copy of the bid and submit the bid with a letter from the Embassy confirming authenticity of the bidder and the bid. The scanned copy with the letter from the Embassy will be accepted as original. The Bidder is responsible to submit the complete bid and the Employer bears no responsibility. Embassy should be advised to maintain confidentiality particularly when they are printing bids from multiple bidders.

Option 2

The Bidder may send the bid by EM to their local representative along with scanned copy of the authorization to sign (POA) the bid. The local representative could print and sign the bid based on the scanned copy of the authorization to sign (POA) the bid and submit. The scanned copy of authorization to sign will be accepted instead of original authorization to sign the bid.

Option 3

Submission of the bid by Electronic Email (EM): This should be the last option if the Bidder is not able to submit the bid as per Options 1 or 2.

The PDF copy of the Bid should be submitted by EM. The PDF copy should be encrypted, or password protected. The EM should not be encrypted but only the attachment shall be encrypted, or password protected. The procedure is:

- (a) The Zipped file to be sent to the following email: procurement@pppc.mw
- (b) Password or encryption key for Zipped file will be sent to following email: ekwatani@pppc.mw
- (c) Bidder will receive the confirmation email from the PPPC once the bid is received by EM.

The bidder should organize the PDF Copy of the bid as follows:

Folder 1

Folder Lot X Bid must be in ZIP format including encryption or password protection and submit to the emails as above.

Folder 1 consist of:

a. Folder 1.1

The folder with name of Lot X_PDF Bidders name consists of two sub-folders:

Folder 1.1.1

- the technical part together with the qualification part, includes all scanned files relating to technical and qualification part), name: Lot X_PDF Bidder's name Technical part

Folder 1.1.2

- commercial + financial part of the offer + including the excel part of the offer active file, included all scanned files relating to commercial and financial part name: Lot X PDF Bidders name Financial part. This folder should have a separate password. The folder should clearly be labelled "Financial Proposal".

b. Folder 1.2

Active files (word, excel spreadsheets, PDF files) should be placed in a separate folder named Lot X Active Bidders name

Further the bidder should,

- Scan the complete offer sections by section. The name for each section shall be: Lot X Sec _Bidders name (avoid only one file with all documents inside)
- The financial part must be scanned separately from the technical part.

- The technical and financial parts must be of different names and passwords.

Two folders = Lot X PDF Bidders name + Lot X Active Bidders name are placed in one folder named Lot X Bid_ Bidders.

The file organization as above is for general guidance. The bidder could organize the bid as they deemed fit.

Important Note:

- i. If the Bidder follows Option 1 or 3, even then, the bidder shall send the original bid through the address given in 6.3.3.1 above for Employer's record.
- ii. If the Bidder follows Option2, the bidder shall send the original authorization to sign the bid (Power of Attorney) for Employer's record
- iii. The bidders should keep the Original Bid hardcopy in a sealed envelope and addressed to the above address at any time and the bidder once awarded the contract shall submit the sealed envelope with the Original Bid when instructed by the employer.
- iv. The Bidder should ensure the bid documents are not corrupt or affected by any computer virus that may possibly deny an access to the files. The Employer shall not be responsible for such corrupt files which may deny access during the bid opening process.
- v. The Employer will evaluate the bids as opened at the time of bid opening. If there is any discrepancy between the bid opened at the time of bid opening and subsequent hard copy, the bid opened at the time of bid opening time shall prevail.
- vi. The maximum size of single email with attachment shall not exceed 10 MB. If the total bid size exceeds 10MB, the bid shall be divided in several portions with adequate size and content. The list of total number of emails with general content of each email shall be mentioned in first email. Each email shall contain one ZIP file, password protected. The passwords for all part of the same bid (which is divided) shall be the same for all files and shall be sent as per instructions given above.
- vii. Bidders may participate in Online bid opening Meeting.

viii. If bidder submits email bid and paper bid, then both bids will be opened. If there is discrepancy between paper-based bid and email bid, then paper-based bid shall prevail.

6.3.3.2 If the envelopes are not sealed and marked as instructed above, BCC, the PPP Commission and its agents assume no responsibility for the misplacement or premature opening of the contents of the Bid and consequent losses, if any, suffered by the Bidder.

6.3.4 Bid Due Date

6.3.4.1 Applications should be submitted at or before **14:00 pm Local Time** on the Application Due Date, at the address provided in Clause 6.3.3.1 in the manner and form as detailed in this RFP. A receipt thereof should be obtained from the person specified in Clause 6.3.3.1 or his authorised representatives.

6.3.4.2 BCC may, in its sole discretion, extend the Bid Due Date by issuing an Addendum in accordance with Clause 6.2.3.3

6.3.5 Late Bids

6.3.5.1 Bids received by BCC after the specified time on the Bid Due Date shall not be eligible for consideration and shall be summarily rejected.

6.3.6 Modifications/ substitution/ withdrawal of Bids

6.3.6.1 The Bidder may modify, substitute or withdraw its Bid after submission, provided that written notice of the modification, substitution or withdrawal is received by the PPPC prior to the Bid Due Date. No Bid shall be modified, substituted or withdrawn by the Bidder on or after the Bid Due Date.

6.3.6.2 The modification, substitution or withdrawal notice shall be prepared, sealed, marked, and delivered in accordance with Clause 6.3.3, with the envelopes being additionally marked "MODIFICATION", "SUBSTITUTION" or "WITHDRAWAL", as appropriate.

6.3.6.3 Any alteration / modification in the Bid or additional information supplied subsequent to the Bid Due Date, unless the same has been expressly sought for by the PPPC, shall be disregarded.

6.4. EVALUATION PROCESS

6.4.1 Opening and Evaluation of Bids

- 6.4.1.1 The PPPC shall open the Technical Bids at 14:00 hours Local Time on the Bid Due Date, at the **2nd Floor, Livingstone Towers, Public Private Partnership Commission Boardroom** and in the presence of the Bidders who choose to attend.
- 6.4.1.2 Bids for which a notice of withdrawal has been submitted in accordance with Clause 6.3.6 shall not be opened.
- 6.4.1.3 The PPPC will subsequently examine and evaluate Bids in accordance with the provisions set out in Section 7.
- 6.4.1.4 Bidders are advised that qualification of Bidders will be entirely at the discretion of the PPPC. Bidders will be deemed to have understood and agreed that no explanation or justification on any aspect of the Bidding Process or selection will be given.
- 6.4.1.5 Any information contained in the Bid shall not in any way be construed as binding on BCC, its agents, successors or assigns, but shall be binding against the Bidder if the Project is subsequently awarded to it on the basis of such information.
- 6.4.1.6 The PPP Commission reserves the right not to proceed with the Bidding Process at any time without notice or liability and to reject any or all Bid(s) without assigning any reasons.
- 6.4.1.7 If any information furnished by the Bidder is found to be incomplete, or contained in formats other than those specified herein, the PPP Commission may, in its sole discretion, exclude the relevant project from computation of the Eligible Score of the Bidder.
- 6.4.1.8 In the event that a Bidder claims credit for an Eligible Project, and such claim is determined by the PPP Commission as incorrect or erroneous, the PPP Commission shall reject such claim and exclude the same from computation of the Eligible Score, and may also, while computing the aggregate Experience Score of the Bidder, make a further deduction equivalent to the claim rejected hereunder. Where any information is found to be patently false or amounting to a material misrepresentation, the PPPC reserves the right to reject the Bid in accordance with the provisions of Clauses 6.1.7.2 and 6.1.7.3.

6.4.2 Confidentiality

- 6.4.2.1 Information relating to the examination, clarification, evaluation, and recommendation for the Bidders shall not be disclosed to any person who is not officially concerned with the process or is not a retained professional advisor advising the PPPC in relation to or matters arising out of, or concerning the Bidding Process. The PPPC will treat all information, submitted as part of Bid, in confidence and will require all those who have access to such material to treat the same in confidence. The PPPC may not divulge any such information unless it is directed to

do so by any statutory entity that has the power under law to require its disclosure or is to enforce or assert any right or privilege of the statutory entity and/ or the or as may be required by law or in connection with any legal process.

6.4.3 Tests of Responsiveness

6.4.3.1 Prior to evaluation of Bids, the PPPC shall determine whether each Bid is responsive to the requirements of the RFP. A Bid shall be considered responsive only if:

- (a) it is received as per format at Appendix-I.
- (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 6.3.4.2;
- (c) it is signed, sealed, bound together in hard cover, and marked as stipulated in Clauses 6.3.2 and 6.3.3;
- (d) it is accompanied by the Power of Attorney as specified in Clause 6.1.2.5, and in the case of a Consortium, the Power of Attorney as specified in Clause 6.1.2.6 (c);
- (e) it contains all the information and documents (complete in all respects) as requested in this RFP;
- (f) it contains information in formats same as those specified in this RFP;
- (g) it is accompanied by the Payment Receipt towards the cost of the Bidding Documents
- (h) it is accompanied by the Joint Bidding Agreement (for Consortium), specific to the Project, as stipulated in Clause 6.1.2.6(g);
- (i) it does not contain any condition or qualification; and
- (j) it is not non-responsive in terms hereof;

6.4.3.2 The PPPC reserves the right to reject any Bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the PPPC in respect of such Bid.

6.4.4 Clarifications

6.4.4.1 To facilitate evaluation of Bids, the PPPC may, at its sole discretion, seek clarifications from any Bidder regarding its Bid. Such clarification(s) shall be provided within the time specified by the PPPC for this purpose. Any

request for clarification(s) and all clarification(s) in response thereto shall be in writing.

- 6.4.4.2 If a Bidder does not provide clarifications sought under Clause 6.4.4.1 above within the prescribed time, its Bid shall be liable to be rejected. In case the Bid is not rejected, the PPPC may proceed to evaluate the Bid by construing the particulars requiring clarification to the best of its understanding, and the Bidder shall be barred from subsequently questioning such interpretation of BCC.

6.5 QUALIFICATION AND BIDDING

6.5.1.1 *Technical Evaluation and Notification*

- 6.5.1.1 After the technical evaluation of Bids, the PPPC would announce a list of bidders as qualified for the financial evaluation. The PPP Commission will not entertain any query or clarification from Bidders who fail to qualify.

6.5.2 *Proprietary Data*

- 6.5.2.1 All documents and other information supplied by the PPPC, BCC and its agents or submitted by a Bidder to BCC and its associates shall remain or become the property of BCC. Bidders are to treat all information as strictly confidential and shall not use it for any purpose other than for preparation and submission of their Bid. BCC will not return any Bid or any information provided along therewith.

6.5.3 *Correspondence with the Bidder*

- 6.5.3.1 Save and except as provided in this RFP, BCC and the PPPC shall not entertain any correspondence with any Bidder in relation to the acceptance or rejection of any Bid.

6.5.3.1 *Validity of Bids*

- 6.5.4.1 The Bids shall be valid for a period of not less than 180 (one hundred and eighty) days from the Bid Due Date. The validity of Bids may be extended by mutual consent of the respective Bidders and the PPPC.

7 CRITERIA FOR EVALUATION

7.1 QUALIFICATION STAGE

7.1.1 Evaluation Parameters

7.1.1.1 Bidders have to meet the eligibility criteria specified in Clause 6.1.2. above and the evaluation would be as per this Section. Bids of entities/ consortia who do not meet these criteria shall be rejected.

7.1.1.2 The Bidder's competence and capability is proposed to be established by the following parameters:

(a) Technical Capacity; and

(b) Financial Capacity

7.1.2 Technical Capacity for purposes of Evaluation

7.1.2.1 Subject to the provisions of Clause 6.1.2, the following categories of experience would be assessed under the Technical Capacity and eligible experience (the "**Eligible Experience**") in relation to technical experience of the Bidder (*figures shown in the brackets are maximum points eligible for that category*):

- a. Experience in development, management, maintenance and operation of theme park facilities in developing countries (10%)
- b. Demonstrate experience in successfully sourcing finance for the previous projects (20%)
- c. Experience in developing theme parks within the region or in Africa. (10%)
- d. Experience of the proposed management team that will be involved in the operations management and maintenance of the system in operations of theme parks (30%)
- e. Soundness of the development, operations plan and the level of investment (15%)

7.1.3 Financial Information for purposes of Evaluation

- 7.1.3.1 The Bid must be accompanied by the Audited Annual Reports of the Bidder (of each Member in case of a Consortium) for the last 5 (five) financial years, preceding the year in which the Bid is made.
- 7.1.3.2 In case the annual accounts for the latest financial year are not audited and therefore the Bidder cannot make it available, the Bidder shall give an undertaking to this effect. In such a case, the Bidder shall provide the Audited Annual Reports for 5 (five) years preceding the year for which the Audited Annual Report is not being provided.
- 7.1.3.3 The Bidder must establish the minimum Net Worth specified in Clause 6.1.2.2 (B), and provide details as per format at Annex-III of Appendix-I. (*maximum points 15%*)
- 7.1.3.4 In case of foreign companies, a certificate from a qualified external auditor who audits the book of accounts of the Applicant or the Consortium Member in the formats provided in the country where the project has been executed shall be accepted, provided it contains all the information as required in the prescribed format of the RFP.

7.1.4 Eligibility for Financial Proposal Opening

- 7.1.4.1 The Bidders who meet the eligibility criteria set forth in above and attain a minimum score of 80% will be eligible for the Financial Proposal Evaluation Phase.

7.2 FINANCIAL OPENING

7.2.1 Opening and Evaluation of Financial Proposal

- 7.2.1.1 *The Bidders who are shortlisted as per Clause 7.1.4 will be informed about the opening date of the Financial Proposal in writing and the Financial Offer shall be opened in the presence of the shortlisted Bidders who choose to attend.*
- 7.2.1.2 *Financial bids shall be evaluated based on*
- a) *A fixed annual concession fee expressed in US\$ (United States Dollars)*
 - b) *Revenue sharing scheme expressed as a percentage of the gross revenue (To be shown in a financial projections) Please note that either a) or b) would be payable depending on which one is higher on due date.*
 - c) *Investment levels in the project in the first five years*

- 7.2.1.3 To facilitate evaluation of Bids, the PPP Commission may, at its sole discretion, may seek clarifications in writing from any Bidder regarding its Bid.

Given that the selection method is Quality and Cost Based Selection (QCBS), the highest evaluated Financial Proposal (Fh) will be given the maximum financial score (Sf) of 100 points. The financial scores (Sf) of the other Financial Proposals will be computed as indicated below and will be ranked according to their combined technical (St) and financial (Sf) scores using the weights (T = the weight given to the Technical Proposal; P = the weight given to the Financial Proposal; T + P

= 1) as indicated below: $S = St \times T\% + Sf \times P\%$. The firm achieving the highest combined technical and financial score will be invited for negotiations.

The formula for determining the financial scores is the following:

$Sf = 100 \times F / Fh$, in which Sf is the financial score, Fh is the highest evaluated financial proposal and F the financials of the proposal under consideration.

- 7.2.2.5 After acknowledgement of the LOA as aforesaid by the Successful Bidder, it shall cause the Successful bidder/investor to execute the PPP Agreement within the period prescribed in Table 1. Schedule of Bidding Process. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the PPP Agreement.

- 7.2.2.6 The Successful Bidder shall pay the PPPC an **entry fee** of **US\$40,000** on execution of the PPP Agreement for each Lot.

7.2.2 Contacts during Bid Evaluation

- 7.2.3.1 Bids shall be deemed to be under consideration immediately after they are opened and until such time the PPPC makes official intimation of award / rejection to the Bidders. While the Bids are under consideration, Bidders and/ or their representatives or other interested parties are advised to refrain, save and except as required under the Bidding Documents, from contacting by any means, BCC, the PPPC and / or their employees / representatives on matters related to the Bids under consideration.

7.3 .4 Payment Terms

7.2.4.1 The payment terms for entry fee and annual concession fee to be paid have been detailed in the PPP agreement.

8 FRAUD AND CORRUPT PRACTICES

8.1 The Bidders and their respective officers, employees, agents and advisers shall observe the highest standard of ethics during the Bidding Process and subsequent to the issue of the LOA and during the subsistence of the PPP Agreement. Notwithstanding anything to the contrary contained herein, or in the LOA or the PPP Agreement, the PPP Commission may reject a Bid, withdraw the LOA, or terminate the PPP Agreement, as the case may be, without being liable in any manner whatsoever to the Bidder or Successful bidder/investor, as the case may be, if it determines that the Bidder or Successful bidder/investor, as the case may be, has, directly or indirectly or through an agent, engaged in corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice in the Bidding Process.

8.2 Without prejudice to the rights of BCC under Clause 7.1 hereinabove and the rights and remedies which BCC may have under the LOA or the PPP Agreement, or otherwise if a Bidder or Successful bidder/investor, as the case may be, is found by BCC to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice during the Bidding Process, or after the issue of the LOA or the execution of the PPP Agreement, such Bidder or Successful bidder/investor shall not be eligible to participate in any tender or RFP issued by BCC during a period of 2 (two) years from the date such Bidder or Successful bidder/investor, as the case may be, is found by BCC to have directly or indirectly or through an agent, engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practices, as the case may be.

8.3 For the purposes of this Section, the following terms shall have the meaning hereinafter respectively assigned to them:

- (a) “**corrupt practice**” means (i) the offering, giving, receiving, or soliciting, directly or indirectly, of anything of value to influence the actions of any person connected with the Bidding Process (for avoidance of doubt, offering of employment to, or employing, or engaging in any manner whatsoever, directly or indirectly, any official of the Government of the Republic of Malawi, BCC, PPPC and associated entities who is or has been associated in any

manner, directly or indirectly, with the Bidding Process or the LOA or has dealt with matters concerning the PPP Agreement or arising there from, before or after the execution thereof, at any time prior to the expiry of one year from the date such official resigns or retires from or otherwise ceases to be in the service of BCC or the PPPC, shall be deemed to constitute influencing the actions of a person connected with the Bidding Process); or (ii) save and except as permitted under sub clause (d) of Clause 5.1.2.1, engaging in any manner whatsoever, whether during the Bidding Process or after the issue of the LOA or after the execution of the PPP Agreement and till the period of 1 (one) years from the date of signing of the PPP Agreement, as the case may be, any person in respect of any matter relating to the Project or the LOA or the PPP Agreement, who at any time has been or is a legal, financial or technical adviser of BCC in relation to any matter concerning the Project;

- (b) **“fraudulent practice”** means a misrepresentation or omission of facts or suppression of facts or disclosure of incomplete facts, in order to influence the Bidding Process;
- (c) **“coercive practice”** means impairing or harming or threatening to impair or harm, directly or indirectly, any person or property to influence any person’s participation or action in the Bidding Process;
- (d) **“undesirable practice”** means (i) establishing contact with any person connected with or employed or engaged by the PPP Commission with the objective of canvassing, lobbying or in any manner influencing or attempting to influence the Bidding Process; or (ii) having a Conflict of Interest; and
- (d) **“restrictive practice”** means forming a cartel or arriving at any understanding or arrangement among Bidders with the objective of restricting or manipulating a full and fair competition in the Bidding Process.

9 MISCELLANEOUS

9.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of Malawi and the Court system in Malawi shall have exclusive jurisdiction over all disputes arising under, pursuant to and/ or in connection with the Bidding Process.

9.2 The PPP Commission in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to;

- (a) suspend and/ or cancel the Bidding Process and/ or amend and/ or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto;
- (b) consult with any Bidder in order to receive clarification or further information;
- (c) qualify or not to qualify any Bidder and/ or to consult with any Bidder in order to receive clarification or further information;
- (d) retain any information and/ or evidence submitted to BCC and the PPPC by, on behalf of, and/ or in relation to any Bidder; and/ or
- (e) independently verify, disqualify, reject and/ or accept any and all submissions or other information and/ or evidence submitted by or on behalf of any Bidder.

9.3 It shall be deemed that by submitting the Bid, the Bidder agrees and releases the PPPC and BCC, its employees, agents and advisers, irrevocably, unconditionally, fully and finally from any and all liability for claims, losses, damages, costs, expenses or liabilities in any way related to or arising from the exercise of any rights and/ or performance of any obligations hereunder and the Bidding Documents, pursuant hereto, and/ or in connection with the Bidding Process, to the fullest extent permitted by applicable law, and waives any and all rights and/ or claims it may have in this respect, whether actual or contingent, whether present or in future.

9.4 The Bidders are required to submit a concept report with financial, operation, management and investment (rehabilitation) plan for the project.

APPENDICES

10 APPENDIX I

10.1.2 Letter Comprising the Bid

Dated: []

**The Chief Executive Officer
The Public Private Partnership Commission
2nd Floor, Livingstone Towers
Glyn Jones Road
P O Box 937
Blantyre
Malawi**

Sub: Bid for **“Development of Theme Parks in Blantyre City through a Public Private Partnership Arrangement”**

Dear Sir,

With reference to your RFP document dated [●], I/we, having examined the RFP document and understood its contents, hereby submit my/our Bid for the aforesaid project. The Bid is unconditional and unqualified.

1. I/ We acknowledge that BCC will be relying on the information provided in the Bid and the documents accompanying such Bid for selection of the service provider for the aforesaid project, and we certify that all information provided in the Bid and in Annexes I to V is true and correct; nothing has been omitted which renders such information misleading; and all documents accompanying such Bid are true copies of their respective originals.
2. This statement is made for the express purpose of our selection as Investor for the development, financing, rehabilitation, operation and maintenance of the aforesaid Project.
3. I/ We shall make available to BCC any additional information it may find necessary or require to supplement or authenticate the Bid.
4. I/ We acknowledge the right of BCC to reject our Bid without assigning any reason or otherwise and hereby waive to the fullest extent permitted by applicable law our right to challenge the same on any account whatsoever.
5. I/ We certify that in the last three years, we/ any of the Consortium Members or our/ their Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach on our part.

6. I/ We declare that:

- (a) I/ We have examined and have no reservations to the Bidding Documents, including any Addendum issued by BCC;
- (b) I/ We do not have any conflict of interest in accordance with Clauses 6.1.2.1(c) and 6.1.2.1(d) of the RFP document;
- (c) I/We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as defined in Clause 8.3 of the RFP document, in respect of any tender or request for proposal issued by or any agreement entered into with BCC or any other public sector enterprise or Government; and
- (d) I/ We hereby certify that we have taken steps to ensure that in conformity with the provisions of Section 4 of the RFP document, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice.
- (e) the undertakings given by us along with the Application in response to the RFP for the Project were true and correct as on the date of making the Application.

7. I/ We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 6.4.1.6 of the RFP document.

8. I/ We believe that we/ our Consortium/ proposed Consortium satisfy(s) the Net Worth criteria and meet(s) all the requirements as specified in the RFP document and are/ is qualified to submit a Bid.

9. I/ We declare that we/ any Member of the Consortium, or our/ its Associates are not a Member of a/ any other Consortium submitting a Bid for the project.

10. I/ We certify that in regard to matters other than security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.

11. I/ We further certify that in regard to matters relating to security and integrity of the country, we/ any Member of the Consortium or any of our/ their Associates have not been charge-sheeted by any agency of the Government or convicted by a Court of Law.

12. I/ We further certify that no investigation by a regulatory authority is pending either against us/ any Member of the Consortium or against our/ their Associates or against our CEO or any of our Directors/ Managers/ employees.
13. I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of the provisions of this RFP; we shall intimate BCC of the same immediately.
14. The Statement of Legal Capacity as per format provided at Annex-V in Appendix-I of the RFP document, and duly signed, is enclosed. The power of attorney for signing of Bid and the power of attorney for Lead Member of consortium, as per format provided at Appendix II and III respectively of the RFP, are also enclosed.
15. I/ We hereby irrevocably waive any right or remedy which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by the Authority in connection with the selection of the Bidder, or in connection with the selection/ Bidding Process itself, in respect of the above-mentioned Project and the terms and implementation thereof.
16. I/ We agree and undertake to abide by all the terms and conditions of the RFP document.
17. I/ We certify that in terms of the RFP, my/our Net worth is US\$.
..... (United States Dollars..... in words).
18. I/ We acknowledge and undertake that our Consortium is qualified on the basis of Technical Capacity and Financial Capacity in accordance with this RFP, of those of its Members who shall, for a period of 5 (five) years from the date of full commercial operation of the Project, hold equity share capital not less than: (i) 26% (Twenty Six per cent) of the subscribed and paid-up equity of the Investor;. I/We further agree and acknowledge that the aforesaid obligation shall be in addition to the obligations contained in the PPP Agreement in respect of Change in Ownership.
19. I/ We acknowledge and agree that in the event of a change in control of an Associate whose Technical Capacity and/ or Financial Capacity is taken into consideration for the purposes of qualification in accordance with this RFP, I/We shall inform BCC forthwith along with all relevant particulars and the Authority may, in its sole discretion, disqualify our Consortium or withdraw the Letter of Award, as the case may be. I/We further acknowledge and agree that in the event such change in control occurs after signing of the PPP Agreement but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed a breach thereof, and the PPP Agreement shall be liable to be terminated without B C C being liable to us in any manner whatsoever.
20. I/ We understand that the selected Bidder shall either be an existing Company incorporated under the Companies Act, or shall incorporate as such prior to execution of the PPP Agreement and any other addendums thereof.

21. In the event of my/ our being declared as the Selected Bidder, I/we agree to enter into a PPP Agreement in accordance with the Draft PPP Agreement that has been provided to me/us prior to the Bid Due Date. We agree not to seek any changes in the aforesaid draft and agree to abide by the same.
22. I/ We have studied all the Bidding Documents carefully and also surveyed the Project. We understand that except to the extent as expressly set forth in the PPP Agreement, we shall have no claim, right or title arising out of any documents or information provided to us by BCC or in respect of any matter arising out of or relating to the Bidding Process including the award of Concession.
23. The Payment Receipt towards the cost of Biding Documents as specified in Clause 4.2.1 is attached.
24. I/ We agree and understand that the Bid is subject to the provisions of the Bidding Documents. In no case, I/we shall have any claim or right of whatsoever nature if the Project / Development is not awarded to me/us or our Bid is not opened or rejected.
25. The entry fee and annual concession fee have been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft PPP Agreement, our own estimates of cost and traffic and after a careful assessment of the site and all the conditions that may affect the project cost and implementation of the Project.
26. We, the Consortium Members agree and undertake to be jointly and severally liable for all the obligations of the Investor under the PPP Agreement till occurrence of Financial Close in accordance with the PPP Agreement.}
27. I/ We shall keep this offer valid for 180 (one hundred and eighty) days from the Bid Due Date specified in the RFP.

In witness thereof, I/ we submit this Bid under and in accordance with the terms of the RFP document.

Yours faithfully,

Date

:

(Signature, name and designation of the Authorised Signatory)

Place:

Name and seal of the Bidder/ Lead Member

10.1.3 ANNEX-I

Details of Bidder

1.
 - (a) Name:
 - (b) Country of incorporation:
 - (c) Address of the corporate headquarters and its branch office(s), :
 - (d) Date of incorporation and/ or commencement of business:
2. Brief description of the Company including details of its main lines of business and proposed role and responsibilities in this Project:
3. Details of individual(s) who will serve as the point of contact/ communication for the Authority:
 - (a) Name:
 - (b)
Designation
 - : (c) Company:
 - (d) Address:
 - (e) Telephone Number:
 - (f) E-Mail Address:
 - (g) Fax Number:
4. Particulars of the Authorised Signatory of the Bidder:
 - (a) Name:
 - (b)
Designation
 - : (c) Address:
 - (d) Phone
Number: (e)Fax
Number:
5. In case of a Consortium:
 - (a) The information above (1-4) should be provided for all the Members of the Consortium.
 - (b) A copy of the Jt. Bidding Agreement, as envisaged in Clause 6.1.2.6 (g) should be attached to the Bid.
 - (c) Information regarding the role of each Member should be provided as per table below:

Sl. No.	Name of Member	Role {Refer Clause 6.1.2.6 (d)} [§]	Percentage of equity in the Consortium {Refer Clauses 6.1.2.6 (a), (c) & (g)}
1.			
2.			
3.			

6. A statement by the Bidder and each of the Members of its Consortium (where applicable) or any of their Associates disclosing material non-performance or contractual non-compliance in past projects, contractual disputes and litigation/ arbitration in the recent past is given below (Attach extra sheets, if necessary):

10.1.4 Annex - II

Technical Capacity of the Bidder (Details of Investors Experience)

1. List only previous similar assignments successfully completed in the last 5 years.
2. List only those assignments for which the investor or team member was legally contracted by the Client as a company or was one of the joint venture partners. Assignments completed by the investor's individual experts working privately or through other investing firms cannot be claimed as the relevant experience of the investor, or that of the investor's partners, but can be claimed by the Experts themselves in their CVs.

The Investor must be prepared to support the claimed experience by giving copies of relevant documents.

Duration	Assignment name/& brief description of main deliverables/outputs	Name of Client & Country of Assignment	Approx. value invested (in US\$ equivalent)/ Amount paid to your firm	Role on the Assignment
{e.g., Jan.2009–Apr.2019}	{e.g., “Improvement quality of.....”: designed master plan for rationalization of; }	{e.g., PPC of, country}	{e.g., US\$1 mill/US\$0.5 mill}	{e.g., Lead partner in a JV A&B&C}
{e.g., Jan 2008-May 2028}	{e.g., “Support to sub-national government.....”: drafted secondary level regulations on.....}	{e.g., municipality of....., country}	{e.g., US\$0.2 mil/US\$0.2 mil}	{e.g., sole investor}

10.1.5 Annex -III

Financial Capacity of the Bidder

(Refer to Clauses 6.1.2.2(B), 6.1.2.4 (ii) and 7.1.3 of the RFP)

Applicant type ^{\$}	Member Code [₹]	Proposed Equity Shareholding	Net Cash Accruals					Net Worth
			Year 1	Year 2	Year 3	Year 4	Year 5	
(1)	(2)		(4)	(5)	(6)	(7)	(8)	(9)
Single entity Applicant								
Consortium Member 1								
Consortium Member 2								
Consortium Member 3								
TOTAL								

Name & address of Bidder's Bankers:

A Bidder consisting of a single entity should fill in details as per the row titled Single entity Bidder and ignore the rows titled Consortium Members. In case of a Consortium, row titled Single entity Bidder may be ignored.

For Member Code, see instruction 4 at Annex-IV of this Appendix-I.

The Bidder should provide details of its own Financial Capability or of an Associate specified in Clause 6.1.2.9.

For conversion of other currencies into rupees, see note below Annex-II of Appendix-I.

Instruction:

1. The Bidder/ its constituent Consortium Members shall attach copies of the balance sheets, financial statements and Annual Reports for 5 (five) years preceding the Bid Due Date. The financial statements shall:
 - (a) reflect the financial situation of the Bidder or Consortium Members and its / their Associates where the Bidder is relying on its Associate's financials;
 - (b) be complete, including all notes to the financial statements; and
 - (c) correspond to accounting periods already completed and audited (no statements for partial periods shall be requested or accepted).
2. Net Cash Accruals shall mean Profit After Tax + Depreciation.
3. Net Worth shall mean (Subscribed and Paid-up Equity + Reserves) less (Revaluation reserves + miscellaneous expenditure not written off + reserves not available for distribution to equity shareholders).
4. Year 1 will be the latest completed financial year, preceding the bidding. Year 2 shall be the year immediately preceding Year 1 and so on. In case the Bid Due Date falls within 3 (three) months of the close of the latest financial year.
5. In the case of a Consortium, a copy of the Jt. Bidding Agreement shall be submitted.
6. The Bidder shall also provide the name and address of the Bankers to the Bidder.
7. The Bidder shall provide an Auditor's Certificate specifying the net worth of the Bidder and also specifying the methodology adopted for calculating such net worth.

10.1.6 Annex -V Statement of Legal Capacity

(To be forwarded on the letterhead of the Bidder/ Lead Member of Consortium)

Ref.

Date

To:

**The Chief Executive Officer
The Public Private Partnership
Commission
2nd Floor Livingstone Towers
Glyn Jones Road
P O Box 937
Blantyre
Malawi**

Dear Sir,

We hereby confirm that we/ our members in the Consortium (constitution of which has been described in the Bid) satisfy the terms and conditions laid out in the RFP document.

We have agreed that (insert member's name) will act as the Lead Member of our consortium.*

We have agreed that (insert individual's name) will act as our representative/ will act as the representative of the consortium on its behalf and has been duly authorized to submit the RFP. Further, the authorised signatory is vested with requisite powers to furnish such letter and authenticate the same.

Thanking you,

Yours

faithfully,

(Signature, name and designation of the authorized signatory) For and on

behalf of.....

**Please strike out whichever is not applicable.*

11 APPENDIX II

Power of Attorney for signing of Bid

Know all men by these presents, We.....
(name of the firm and address of the registered office) do hereby irrevocably
constitute, nominate, appoint and authorise Mr/ Ms (name),
..... son/daughter/wife of
..... and presently residing at, who is
presently employed with us/ the Lead Member of our Consortium and holding
the position of
..... , as our true and lawful attorney (hereinafter referred
to as the
“Attorney”) to do in our name and on our behalf, all such acts, deeds and things
as are necessary or required in connection with or incidental to submission of
our Bid for the “Development of Theme Parks in Blantyre City through a
Public Private Partnership Arrangement” the Project proposed by BCC
including but not limited to signing and submission of all bids and other
documents and writings, participate in pre-bids and other conferences and
providing information/ responses to BCC, presenting us in all matters before
BCC, signing and execution of all contracts including the PPP
Agreement and undertakings consequent to acceptance of our bid, and
generally dealing with BCC in all matters in connection with or relating to or
arising out of our bid for the said Project and/ or upon award thereof to us and/or
till the entering into of the PPP Agreement with BCC.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all
acts, deeds and things done or caused to be done by our said Attorney pursuant
to and in exercise of the powers conferred by this Power of Attorney and that
all acts, deeds and things done by our said Attorney in exercise of the powers
hereby conferred shall and shall always be deemed to have been done by us.

IN WITNESS WHEREOF WE,, THE ABOVE NAMED
PRINCIPAL HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS
..... DAY OF 2.....

(Signature, name, designation and address) Witnesses:

- 1.
2.

For

(Notarised) Person identified by me/
personally appeared before me / signed before me/ Attested / Authenticated*
(* Notary to specify as
applicable) (Signature, Name and
Address of the Notary)

Seal of the Notary

Registration Number of the Notary

Date: _____

Accepted

.....

(Signature)

(Name, Title and Address of the Attorney)

Notes:

- The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders' resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*

12 APPENDIX III

Power of Attorney for Lead Member of Consortium

Whereas BCC has invited Bids from interested parties for the **“Development of Theme Parks in Blantyre City through a Public Private Partnership Arrangement”** (the “Project”) and

Whereas,,,

and (collectively the “Consortium”) being Members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of the Request for Proposal document (RFP) and other connected documents in respect of the Project, and

Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member in accordance with the terms and conditions of the Request for Proposal document (RFP) and other connected documents in respect of the Project 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 and its execution and be held responsible for the same.

NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS

We, having our registered office at, M/s.

..... having our registered office at, M/s.

..... having our registered office at and,

..... having our registered office at, (hereinafter collectively referred to as the “Principals”) do hereby irrevocably designate, nominate, constitute, appoint and authorise M/s

..... having its registered office at, being one of the Members of the Consortium, as the Lead Member and

true and lawful attorney of the Consortium (hereinafter referred to as the “Attorney”). We

hereby irrevocably authorise the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the concession/contract, during the execution of the Project and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the pre-qualification of the Consortium and submission of its bid for the Project, including but not limited to signing and submission of all , bids and other documents and writings, participate in bidders and other conferences, respond to queries, submit

information/ documents, sign and execute contracts and undertakings consequent to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with BCC, and/ or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium's bid for the Project and/ or upon award thereof till the PPP Agreement is entered into with BCC.

AND hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us/ Consortium.

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS DAY OF 2.....

For
(Signature)

.....
(Name & Title)

For
(Signature)

.....
(Name & Title)

For
(Signature)

.....
(Name & Title)

Witnesses:

- 1.
- 2.

.....
(Executants)

(To be executed by all the Members of the Consortium)

(Notarise
d) Person indentified by me/ personally
appeared before me / signed before me/
Attested / Authenticated*
(* Notary to specify as
applicable) (Signature, Name and
Address of the Notary)

Seal of the
Notary Registration Number
of the Notary Date : ____

Notes:

- The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.*
- Also, wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders' resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*

13 APPENDIX IV

Joint Bidding Agreement

(Refer Clause 6.3.3.2 A)

(To be executed on Stamp paper of appropriate value)

THIS JOINT BIDDING AGREEMENT is entered into on this the day of

.....
20...

**AMONGS
T**

1. {..... Limited, a company incorporated under the Companies Act, 1956} and having its registered office at (hereinafter referred to as the **“First Part”** which expression shall, unless repugnant to the context include its successors and permitted assigns)

AND

2. {..... Limited, a company incorporated under the Companies Act,} and having its registered office at (hereinafter referred to as the **“Second Part”** which expression shall, unless repugnant to the context include its successors and permitted assigns)

AND

3. {..... Limited, a company incorporated under the Companies Act, and having its registered office at (hereinafter referred to as the **“Third Part”** which expression shall, unless repugnant to the context include its successors and permitted assigns)}

WHEREAS

- A. BCC having its principal office at Livingstone Towers, Blantyre has invited Bids (the **Bids**) by its Request for Proposal No. dated(the **“RFP”**) for **“Development of Theme Parks in Blantyre City through a Public Private Partnership Arrangement”** (the **“Project”**).
- B. The Parties are interested in jointly bidding for the Project as members of a Consortium and in accordance with the terms and conditions of the RFP document and other bid documents in respect of the Project, and
- C. It is a necessary condition under the RFP document that the members of the Consortium shall enter into a Joint Bidding Agreement and furnish a copy thereof with the Bid.

NOW IT IS HEREBY AGREED as follows:

1. Definitions and Interpretations

In this Agreement, the capitalised terms shall, unless the context otherwise requires, have the meaning ascribed thereto under the RFP.

2. Consortium

2.1 The Parties do hereby irrevocably constitute a consortium (the “**Consortium**”) for the purposes of jointly participating in the Bidding Process for the Project.

2.2 The Parties hereby undertake to participate in the Bidding Process only through this Consortium and not individually and/ or through any other consortium constituted for this Project, either directly or indirectly or through any of their Associates.

3. Covenants

The Parties hereby undertake that in the event the Consortium is declared the selected Bidder and awarded the Project, it shall incorporate a special purpose vehicle (the “**SPV**”) under the Companies Act for entering into a PPP Agreement with the PPPC and for performing all its obligations as the Investor in terms of the PPP Agreement for the Project.

4. Role of the Parties

The Parties hereby undertake to perform the roles and responsibilities as described below:

(a) Party of the First Part shall be the Lead member of the Consortium and shall have the power of attorney from all Parties for conducting all business for and on behalf of the Consortium during the Bidding process and until the Agreement Date under the Development Agreement when all the obligations of the SPV shall become effective;

(b) Party of the Second Part shall be {the Technical Member of the Consortium;}

(c) Party of the Third Part shall be the Financial Member of the Consortium/ Operation and Maintenance Member/ Other Member; and

5. Joint and Several Liabilities

The Parties do hereby undertake to be jointly and severally responsible for all obligations and liabilities relating to the Project and in accordance with the terms of the RFP and the PPP Agreement, till such time as the Financial Close for the Project is achieved under and in accordance with the Development Agreement.

6. Shareholding in the SPV

6.1 The Parties agree that the proportion of shareholding among the Parties in the SPV shall be as follows:

First Party:

Second Party:

{Third Party:}

6.2 The Parties undertake that a minimum of 51% (fifty one per cent) of the subscribed and paid up equity share capital of the SPV shall, at all times till the second anniversary of the date of full commercial operation of the Project, be held by the Parties of the First, {Second and Third} Part whose experience and net worth have been reckoned for the purposes of qualification and short-listing of Bidders for the Project in terms of the RFP.

6.3 The Parties undertake that they shall comply with all equity lock-in and any other requirements set forth in the PPP Agreement and RFP.

7. Representation of the Parties

Each Party represents to the other Parties as of the date of this Agreement that:

- (a) Such Party is duly organised, validly existing and in good standing under the laws of its incorporation and has all requisite power and authority to enter into this Agreement;
- (b) The execution, delivery and performance by such Party of this Agreement has been authorised by all necessary and appropriate corporate or governmental action and a copy of the extract of the charter documents and board resolution/ power of attorney in favour of the person executing this Agreement for the delegation of power and authority to execute this Agreement on behalf of the Consortium Member is annexed to this Agreement, and will not, to the best of its knowledge:
 - (i) require any consent or approval not already obtained;
 - (ii) violate any Applicable Law presently in effect and having applicability to it;
 - (iii) violate the memorandum and articles of association, by-laws or other applicable organizational documents thereof;
 - (iv) violate any clearance, permit, Development, grant, license or other governmental authorization, approval, judgment,

order or decree or any mortgage agreement, indenture or any other instrument to which such Party is a party or by which such Party or any of its properties or assets are bound or that is otherwise applicable to such Party; or

- (v) create or impose any liens, mortgages, pledges, claims, security interests, charges or Encumbrances or obligations to create a lien, charge, pledge, security interest, encumbrances or mortgage in or on the property of such Party, except for encumbrances that would not, individually or in the aggregate, have a material adverse effect on the financial condition or prospects or business of such Party so as to prevent such Party from fulfilling its obligations under this Agreement;
- (c) this Agreement is the legal and binding obligation of such Party, enforceable in accordance with its terms against it; and
- (d) there is no litigation pending or, to the best of such Party's knowledge, threatened to which it or any of its Affiliates is a party that presently affects or which would have a material adverse effect on the financial condition or prospects or business of such Party in the fulfillment of its obligations under this Agreement.

8. Termination

This Agreement shall be effective from the date hereof and shall continue in full force and effect until the Financial Close of the Project is achieved under and in accordance with the PPP Agreement, in case the Project is awarded to the Consortium. However, in case the Consortium is either not pre-qualified for the Project or does not get selected for award of the Project, the Agreement will stand terminated in case the Bidder is not pre-qualified as the case may be.

9. Miscellaneous

- 9.1 This Joint Bidding Agreement shall be governed by laws of Malawi.
- 9.2 The Parties acknowledge and accept that this Agreement shall not be amended by the Parties without the prior written consent of BCC.

IN WITNESS WHEREOF THE PARTIES ABOVE NAMED HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.

SIGNED, SEALED AND DELIVERED
DELIVERED For and on behalf of
LEAD MEMBER by:

SIGNED, SEALED AND
SECOND PART

(Signature)
(Name)

(Signature)
(Name)

(Designation)

n (Address)

(Designatio

(Address)

SIGNED, SEALED AND DELIVERED

DELIVERED For and on behalf of
THIRD PART

(Signature)
(Name)
(Designation)

n (Address)

SIGNED, SEALED AND

For and on behalf of
FOURTH PART

(Signature)
(Name)

(Designatio
(Address)

SIGNED, SEALED AND DELIVERED
DELIVERED For and on behalf of
FIFTH PART

(Signature)
(Name)
(Designation)

n
(Address)

SIGNED, SEALED AND
For and on behalf of
SIX PART

(Signature)
(Name)

(Designatio
(Address)

In the presence of:

1.

2.

(Notarised)

Person identified by me/ personally
appeared before me / signed before me/
Attested / Authenticated* (* Notary to
specify as applicable)
(Signature, Name and Address of the Notary)

Seal of the Notary

Registration Number of the Notary

Date : _____

Notes:

1. *The mode of the execution of the Joint Bidding Agreement should be in accordance with the procedure, if any, laid down by*

the Applicable Law and the charter documents of the executant(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.

2. *Each Joint Bidding Agreement should attach a copy of the extract of the charter documents and documents such as resolution / power of attorney in favour of the person executing this Agreement for the delegation of power and authority to execute this Agreement on behalf of the Consortium Member.*

14 APPENDIX V

Letter Comprising the Financial Offer

To,

**The Chief Executive Officer
The Public Private Partnership Commission
2nd Floor, Livingstone Towers
Glyn Jones Road
P O Box 937
Blantyre
Malawi**

Sub Bid for **“Development of Theme Parks in Blantyre City through a Public Private Partnership Arrangement” – Financial Offer**

Dear Sir,

With reference to your RFP document dated -----, I/we, having examined the Bidding Documents and understood their contents; hereby submit my/our Financial proposal for the aforesaid Project. The Financial Proposal is unconditional and unqualified.

1. I/We hereby submit our Bid and we agree to pay US\$ _____ (in words) as the fixed annual concession fee for undertaking the aforesaid Project in accordance with the Bidding Documents and the PPP Agreement.
2. I/We hereby declare that the annual concession fee quoted above is fixed, inclusive of all applicable taxes and shall be interpreted and evaluated as per the other clauses of the Bidding Document
3. I/ We hereby declare to undertake the aforesaid Project in accordance with the terms and conditions of the PPP Agreement and the Bidding documents.

In witness thereof, I/we submit this Financial Proposal under and in accordance with the terms of the RFP and the Bidding documents.

Yours faithfully,

Date: (Signature, name and designation of the Authorised signatory)

Place:

Name and seal of Bidder/Lead Member

AGREEMENT

PUBLIC PRIVATE PARTNERSHIP (PPP) AGREEMENT

BETWEEN

,

BLANTYRE CITY COUNCIL (BCC)

AND

[NAME OF THE PROJECT COMPANY TO BE CONFIRMED] [OF THE OTHER PARTY]

**RELATING TO THE MANAGEMENT, OPERATION AND MAINTENANCE OF
RANGELEY PARK AND JUBILEE PARK**

Contents

1.	<u>DEFINITIONS</u>	77
2.	<u>INTERPRETATION</u>	82
3.	<u>CONTRACT DOCUMENTS</u>	84
4.	<u>CONDITIONS PRECEDENTS</u>	84
5.	<u>GRANT OF CONCESSION RIGHTS</u>	85
6.	<u>PAYMENT OF CONCESSION FEE BY THE PROJECT COMPANY</u>	85
7.	<u>CONTRACT PERIOD</u>	86
8.	<u>DURATION OF THE CONTRACT</u>	86
9.	<u>MANAGEMENT OF THE CONTRACT, GENERAL DUTIES AND FUNCTIONS OF THE PARTIES</u>	86
10.	<u>PROJECT LAND</u>	88
11.	<u>DESIGN AND CONSTRUCTION</u>	92
12.	<u>DESIGN RESPONSIBILITY AND APPROVAL</u>	92
13.	<u>CONSTRUCTION PERIOD AND INVESTMENT PLAN</u>	93
14.	<u>CONSTRUCTION COMPLETION CERTIFICATE</u>	94
15.	<u>CONSTRUCTION INSPECTIONS</u>	95
16.	<u>SERVICE COMMENCEMENT</u>	96
17.	<u>SERVICE RESPONSIBILITY AND STANDARDS</u>	96
18.	<u>MAINTENANCE OF THE PROJECT FACILITY</u>	96
19.	<u>COUNCIL TO MONITOR PERFORMANCE</u>	97
20.	<u>UNDERTAKINGS OF THE PROJECT COMPANY</u>	97
21.	<u>WARRANTIES BY THE PROJECT COMPANY</u>	98
22.	<u>WARRANTIES AND UNDERTAKING BY THE COUNCIL</u>	100
23.	<u>PROJECT COMPANY WARRANTY ON COMPANY OWNERSHIP AND/OR CONTROL</u>	101
24.	<u>DISPUTE RESOLUTION PROCEDURE</u>	101
25.	<u>REFERENCE OF DISPUTE</u>	102
26.	<u>APPOINTMENT OF THE ARBITRATOR</u>	102
27.	<u>PROCEDURE FOR THE ARBITRATION</u>	104
28.	<u>THE ARBITRATOR'S DECISION</u>	105
29.	<u>COSTS AND IMMUNITY</u>	105
30.	<u>INVOLVEMENT IN ARBITRATION</u>	105
31.	<u>EFFECT OF THE ARBITRATOR'S DECISIONS</u>	106
32.	<u>PERFORMANCE TO CONTINUE DURING DISPUTE</u>	106

<u>33.</u>	<u>CONFIDENTIALITY</u>	106
<u>34.</u>	<u>GOVERNING LAW</u>	108
<u>35.</u>	<u>CHANGE IN LAW</u>	109
<u>36.</u>	<u>CHANGE IN CONTROL</u>	110
<u>37.</u>	<u>TERMINATION PROCEDURE</u>	110
<u>38.</u>	<u>TERMINATION ON FORCE MAJEURE</u>	112
<u>39.</u>	<u>TERMINATION COMPENSATION</u>	112
<u>40.</u>	<u>DELIVERY OF POSSESSION AND OTHER DOCUMENTATION ON EXPIRY OF THE CONCESSION PERIOD OR EARLIER TERMINATION</u>	113
<u>41.</u>	<u>FORCE MAJEURE</u>	114
<u>42.</u>	<u>CONSEQUENCES OF FORCE MAJEURE EVENTS</u>	114
<u>43.</u>	<u>RELIEF AND COMPENSATION EVENTS</u>	115
<u>44.</u>	<u>INSURANCE COVER</u>	116
<u>45.</u>	<u>INSURANCE COVER NOT A SUBSTITUTE FOR OBLIGATIONS</u>	117
<u>46.</u>	<u>AMENDMENTS</u>	118
<u>47.</u>	<u>PERFORMANCE MONITORING</u>	118
<u>48.</u>	<u>REPAIR AND MAINTENANCE</u>	119
<u>49.</u>	<u>ASSIGNMENT</u>	119
<u>50.</u>	<u>RESPONSIBILITY OF THE PROJECT COMPANY</u>	120
<u>51.</u>	<u>REVIEW OF THE AGREEMENT</u>	120
<u>52.</u>	<u>SEVERABILITY OF THIS AGREEMENT</u>	120
<u>53.</u>	<u>FIXED ASSETS</u>	121
<u>54.</u>	<u>STEP-IN RIGHTS BY THE COUNCIL</u>	121
<u>55.</u>	<u>COMPLETENESS OF THIS AGREEMENT</u>	122
<u>56.</u>	<u>ENTIRETY OF AGREEMENT</u>	123
<u>57.</u>	<u>WAIVER</u>	123
<u>58.</u>	<u>PROJECT COMPANY'S INDEMNITIES TO THE COUNCIL</u>	123
<u>59.</u>	<u>THE COUNCIL'S INDEMNITY TO THE PROJECT COMPANY</u>	124
<u>60.</u>	<u>REPORTS AND RECORDS</u>	124
<u>61.</u>	<u>NOTICES</u>	125

THIS PARTNERSHIP AGREEMENT is made this Day of 2022 between **BLANTYRE CITY COUNCIL** of Private Bag 67, Blantyre (hereinafter referred to as The Council) and **XXX of** which shall where the context admits, include its successors in title, administrators and assignees. The Council and **XXX** are hereinafter collectively referred to as the “Parties”.

WHEREAS-

- A. Blantyre City Council is local authority with legal mandate to govern and develop the City of Blantyre
- B. BCC wishes to acquire services for the management, maintenance and operation of Rangeley Park and Jubilee Park.
- C. The underlying contract of the services to be provided shall be in the form of a design, Build, operate, maintain and transfer arrangement.
- D. It is recognized that the Council is legally allowed to enter into agreements with a private entity to perform the functions stipulated in this Agreement on behalf of the Council;
- E. The Council through the Public Private Partnership Commission (the “Commission”) issued a tender inviting proposal to enter into a public-private partnership agreement to design, build, finance, operate and maintain Rangely Park and Jubilee park in Blantyre as described in more detail under schedule I including associated facilities and developments in accordance with the terms of this Agreement (the “Project”);
- F. **XXX** is the successful bidder to enter into the public-private partnership agreement (The Bidder)

- G. This Agreement has been approved by all relevant authorities; including the Commission, the Ministry of Finance and Economic Affairs and the Ministry of Justice and Constitutional Affairs and;
- H. The Public Private Partnership Act and all laws, regulations and procedures relating to public private partnerships have been complied with
- I. Pursuant to the requirements of the Public Private Partnership Act, the Bidder has incorporated the Project Company, in accordance with the Companies Act, as a special purpose company which shall be responsible for the obligations under this Agreement, and the Bidder has provided or shall before the Effective Date provide a letter of undertaking to provide initial capital for the design and construction of the Project Facility;
- J. It is hereby expressly acknowledged that the Articles of Association of the Project Company and any agreement by shareholders of the Project Company shall not be inconsistent with the provisions of this Agreement and that if there is any such inconsistency, the Parties shall procure that the provisions of this Agreement prevail;
- K. **AND WHEREAS** it is the Parties' desire to record in writing the terms and conditions of this Agreement, together with the following schedules to the Agreement-

Schedule 1. Location and description of the protected areas

Schedule 2. Specifications for infrastructures and facilities at the protected areas

Schedule 3. Visitor activities and resource management

Schedule 4. Technical proposal and development schedule

Schedule 5. Financial proposal and schedule of fees

Schedule 6. Performance Indicators,

Schedule 7. Investment Plan

schedule 8: Conditions Precedent Documents

IT IS THEREFORE AGREED as follows-

1. DEFINITIONS

“Abandonment” means:

(a) in respect of any of the construction, that no progress other than design, planning approval or trivial or incidental construction activities which do not demonstrate a continuing intention to carry out the works has been made for:

- i. a continuous period of 90 days; or
- ii. a combined period of 136 days (whether continuous or not) after the Effective Date, and the lack of progress is not due to a Compensation Event; Relief Event or Force Majeure Event; and

(b) in respect of the provision of Services, a failure to provide substantially all of the Services for a continuous period of 30 days, which failure is not due to a Compensation Event, Relief Event or Force Majeure Event and the term “Abandoned” shall be interpreted accordingly;

“Agreement” means this Partnership Agreement concluded between XXX and the Council as well as any annexure, appendices, extensions or amendments thereto entered into by the Parties

“Arbitration” means arbitration in accordance with Article 25.2 .

“Arbitration Notice” has the meaning given to it in Article 25.2.

“Bidder” has the meaning given to it in the Recitals;

“Bidding Documents” means documents submitted by the Bidder when bidding for the Project together with such further detail and specifications as shall be negotiated and agreed between the Parties at Commercial Closure;

“Company” means a special purpose company to be established for the management, operation and maintenance of the Protected Areas.

“Change in Control” means, a change in direct or indirect legal or beneficial ownership of the majority of the issued share capital or (if it is convertible into shares), of the debt capital of the Project Company that results in acquisition of Control of the Project Company, but-

- i. any transfer of shares or of any interest in shares by the Project Company to its Associated Company;
- ii. any transfer of shares or of any interest in shares by way of security under the Financing Agreement or by way of enforcement of such security;
- iii. a reorganisation for bona fide fiscal purposes where the ultimate control of the Project Company does not change, shall not be construed as a Change in Control.

“Change in Law” means any change in a Law, including any change in the interpretation of a law;

“Commencement Date” means the date of execution of this Agreement;

“Commercial Closure” means fulfilment by the Parties of the obligations under Article 4

“Commercial Closure Condition Precedent Documents” means the documents listed in schedule 8, Part A (Commercial Closure Conditions Precedent Documents);

“Commission” means the Public Private Partnership Commission established under the Public- Private Partnership Act, Cap: 46:07 of the Laws of Malawi;

“Companies Act” means the Companies Act [Cap. 46:03 of the Laws of Malawi], as amended from time to time;

“Compensation Event” means each of:

- i. any change to the Works at the request of the Council which results in completion delays and/or an increase in the cost of the Project.

- ii. Change in Law that has the effect of increasing construction or operation costs of the project and it is not of general application and was not in the public domain at the Commencement Date;
- iii. any delay or obstruction by the Council which prevents the Project Company, its employees, directors, Sub-Contractors or agents from accessing the Project Land
- iv. any breach of this Agreement or any Council Document by the Council which directly prevents the Project Company from completing the Works by the Target Completion Date or which directly prevents the Project Company from providing the Services;
- v. any event within the control of the Council, which prevents the Project Company from realising its fees from the Users;
- vi. strikes or Industrial Action by Council employees;
- vii. any damage to the Project Facility caused by Council employees or anyone on the Project Land at the express or implied invitation by the Council or Council employees; or
- viii. any other event or circumstance specifically set out in this Agreement as a “Compensation Event”.

“Conditions Precedent” means the requirements set out in Article 4

“Construction” means the construction, completion, testing, commissioning and defect correction of any part of the Works (and, where appropriate, the Additional Works, the Renewal Works and/or any works forming part of the Operations);

“Construction Period” means the period of 2 years from effective date

“Construction Completion Certificate” means a certificate issued in accordance with Article 14

“Construction Schedule” means a schedule setting out the dates when completion of each phase of the Construction is due in full and sufficient detail and submitted by the Project Company to the Council;

“Construction inspections” has the meaning given to it in Article 15;

“Contract Period” means the period commencing on the Effective Date and expiring on the Expiry Date or the Termination Date;

“Dispute” means a difference or dispute of whatever nature between the Parties arising under, out of or in connection with this Agreement (including, without limitation, any question of interpretation of this Agreement);

“Effective Date” means the date on which the last Condition Precedent is satisfied or the date on which all outstanding Conditions Precedent are waived by the Commission;

“Encumbrance” means any mortgage, pledge, lien, charge, assignment, hypothecation or security interest, or any other agreement or arrangement having the effect of conferring security, together with any option, right of pre-emption, right to acquire or preferential right or arrangement in relation to an asset (or assets) of a person, and any other equity or preferential right or any agreement or arrangement to create any of them;

“Fixed assets” means all buildings or structures on land that are fixed to the ground within the protected areas

“Financing Agreements” means all agreements and documents from time to time and entered into by, or on behalf of, the Lenders and the Project Company in connection with the financing or, as the case may be, the refinancing of the Project Company’s obligations under this Agreement including, for the avoidance of doubt, direct agreements, security agreements and guarantees, if any;

“Financial Closure” means a legally binding commitment of equity holders and debt financiers to provide or mobilise funding for the Project. Such funding must account for a significant part of the Project cost which should not be less than 90 per cent of the Projected Total Project Cost securing the operations and management of the project facility.

“Financial Closure conditions precedent” means the conditions precedent for Financial Closure set out in Schedule 8, Part B.

“Force Majeure Event” means any of the events referred to in Schedule 9 (Force

Majeure Events);

“**Infrastructure**” means all buildings and other structures affixed to the land;

“**Investment Plan**” means investment plan developed by the Concessionaire and attached hereto as **Schedule 7**.

“**Industry Good Practice**” means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a skilled and experienced practitioner within the relevant industry

“**Law**” means any law applicable in Malawi and includes (without limitation) common law, statute, statutory instrument, by-law, directive, decree, decision, regulation, rule, order, notice, code of practice, code of conduct or court decision;

“**Local Communities**” means the communities living in the areas immediately adjacent to the Protected Areas

“**Major maintenance**” means major repair and maintenance of assets building(s) and any other repairs and maintenance that are structural in nature.

“**Minor maintenance**” means minor dethatching of the structures in the protected areas, repair of electrical and water faults, replanting of flowers (shrubs) or trees, maintenance of pavement cracks and any other similar repairs and maintenance.

“**Moveable assets**” means all moveable equipment, for example, vehicles that are the property of the concessionaire or its employees or directors;

“**Period**” means the period to which this Agreement relates as specified in **article 18** herein;

“**Project**” means the development, operation and maintenance of the Protected Areas

“**Project Entry Fee**” means the project entry fee payable to the Commission as a condition precedent to Financial Closure as disclosed to the Project Company during the bidding process;

“Project Land” means the land licensed to the Project Company by the Commission under Article 10 the construction of the Project Facility, as may be amended from time to time to reflect any area of land added to or excluded;

“Protected Areas” means Rangeley Park and Jubilee Park

“New development” means the development of new infrastructure on top of the existing ones

“Stakeholders” means Government, Concessionaire, local community and tourists

2. INTERPRETATION

2.1. Save to the extent that the context or the express provisions of this Agreement otherwise requires:

- a. headings and sub-headings are for ease of reference only and shall not be taken into consideration in the interpretation or construction of this Agreement;
- b. all references to articles and Schedules are references to articles of and schedules to this Agreement and all references to Parts, Sections, paragraphs, Annexes or Appendices are references to Parts, Sections and paragraphs contained in and Annexes and Appendices to the Schedules;
- c. the Schedules are an integral part of this Agreement and reference to this Agreement includes reference to the Schedules and reference to any Schedule includes reference to any Annex or Appendix to the Schedules;
- d. all references to any agreement (including, without limitation, this Agreement), document or other instrument include (subject to all relevant approvals and any other provision of this Agreement expressly concerning such agreement, document or instrument) a reference to that agreement, document or instrument as amended, supplemented, substituted, novated or assigned.
- e. all references to any statute or statutory provision (including any subsidiary legislation) shall include references to any statute or statutory provision which amends, extends, consolidates or replaces the same or which has been amended, extended, consolidated or replaced by the same and shall include, without

limitation, any statutory instrument, proclamation, by-law, directive, decision, regulation, rule, order, notice, codes of practice, code of conduct, rule of court, instrument or delegated or other subsidiary legislation made under the relevant statute

- f. any reference to “requirements” or “obligations” shall be to the requirements or obligations as may be subsequently altered or supplemented in accordance with the terms of this Agreement;
- g. a word importing the singular includes the plural and vice versa;
- h. a word importing a particular gender includes all genders;
- i. reference to a public organization or representative is deemed to include a reference to any successor to such public organization or representative or any organization or entity or representative which has taken over the functions or responsibilities of the public organization or representative;
- j. reference to the Commission is deemed to include a reference to the Commission’s advisers, consultants, employees, contractors and/or agents
- k. reference to writing includes e-mail, but does not include facsimile; and
- l. unless the context expressly provides, obligations, rights and undertakings which by virtue of this Agreement vests in the Commission, shall jointly and severally vest in the Government

2.2. The language of this Agreement is English.

- a. All correspondence, drawings, Design Data, test reports, certificates, specifications and information shall be entirely in English
- b. Except where specifically provided for within this Agreement or otherwise required by Law (in which case the relevant language shall be the language so provided or required), all operating and maintenance instructions, identification labels and other written and printed matter required for the Project shall be in English.

- c. Instructions and notices to the public and staff and all other signage and information notices provided in relation to the Project shall be available in English as required by the Commission from time to time

2.3. In the case of ambiguity or discrepancy

- a) between the provisions in this Agreement (including the Schedules) and the provisions of the Lenders' Direct Agreement, the provisions of the Lenders' Direct Agreement shall prevail; or
- b) between the provisions in this Agreement (excluding, for this purpose, the Schedules) and the provisions of any Schedule or any other agreements other than the Lenders' Direct Agreement, the provisions of this Agreement (excluding, for this purpose, the Schedules) shall prevail; or
- c) between the provisions of particular Schedules, the interpretation which provides the safest and most conservative result or the highest standard of work or service, as determined by the Commission, shall prevail.

PART II: THE CONCESSION

3. CONTRACT DOCUMENTS

The following documents shall form part of this Agreement:

- a. The request for proposal
- b. The bidders approved proposal
- c. Implementation plan
- d. Service level agreement
- e. Approved designs
- f. All schedules

4. CONDITIONS PRECEDENTS

- 4.1. Within 120 Working Days after Commencement date, the Parties shall
- a. unless the requirement is waived by the Parties by written notice to each other, deliver to each other the documents listed in schedule 8 duly executed.
 - b. in the case of the Project Company, achieve, at its own risk and cost, Financial Closure and, within 15 working days thereof, submit to the Council one set of the Financing Documents;
 - c. in the case of the Project Company undertake best endeavours to obtain the necessary building consents and Planning Approvals;
 - d. in the case of the Project Company, pay to the Public Private Partnership Commission, a Project Entry Fee of XXX as disclosed by the Public Private Partnership Commission during the bidding process

5. GRANT OF CONCESSION RIGHTS

- 5.1. Subject to and in accordance with the terms and conditions set forth in this Agreement, the Council hereby grants the Project Company the right to design, build, finance, operate and maintain the Protected Areas and to exercise and/or enjoy the rights, powers, benefits, privileges, authorisations and entitlements set forth in this Agreement from the date of this Agreement until the Termination Date in accordance with the terms of this Agreement.
- 5.2. The Council shall not develop or permit to be developed, any future project of a similar nature or any development that may directly compete with the business of the Project Company.

6. PAYMENT OF CONCESSION FEE BY THE PROJECT COMPANY

- 6.1. The Project Company shall pay XXX share of gross revenue to the Commission but until the Service Commencement Date, no concession fee shall be payable by the Project Company.

7. CONTRACT PERIOD

Subject to the contract being terminated earlier, the Parties' rights and obligations under this Agreement shall terminate automatically on the Expiry Date unless and to the extent previously terminated in accordance with this Agreement.

8. DURATION OF THE CONTRACT

- 8.1. This Agreement shall be valid for a period of fifteen (15) years for each Lot and a construction period of 2 years from the commencement Date.
- 8.2. At the expiry of this Agreement, the concessionaire shall have the right of first refusal to continue managing the Protected Areas before the concession is offered for competitive bidding. If the Concessionaire wishes to renew the agreement, they shall be required to express interest to renew 2 years prior to the expiry of the agreement.

PART III

9. MANAGEMENT OF THE CONTRACT, GENERAL DUTIES AND FUNCTIONS OF THE PARTIES

- 9.1. Each Party shall appoint a competent and qualified officer to act as its contract compliance and liaison officer and agent in connection with this Agreement and such officers shall be the Parties' Representatives.
- 9.2. Without derogating from the general and express duties and functions provided under this Agreement, the duties and functions of the Parties shall be to:
 - 9.2.1. in the case of the Project Company, at its own cost:

- a. design, obtain all necessary approvals, construct, furnish, manage, provide security for, insure, maintain, operate and undertake any associated activities in relation to the Project Facility;
- b. secure relevant permits for the Works;
- c. secure work permits for employees of the Project Company that may require such permits;
- d. comply with legal and regulatory provisions;
- e. obtain and comply with all other necessary permits and approvals in accordance with any applicable laws and regulations for the implementation of the Project;
- f. source finance for the construction, design and furnishing operations of the Project Facility;
- g. connect and maintain all utility facilities including relevant back-up facilities and pay the utility bills within the Project premises;
- h. secure city waste collection and fire- fighting services within the Project premises;
- i. set User Charges from time to time, as shall be approved by the Council in accordance with this Agreement;

9.2.2. in the case of the Council:

- a. grant of leasehold rights of Land to the Project Company free from any encumbrances unless disclosed in writing to the Project Company prior to commencement of the construction;
- b. allow unrestricted access for the Project Company to commence with the Works from the Commencement Date,
- c. assist the Project Company in obtaining, and/or facilitate the provision of, consents, permits and all other legal and regulatory requirements necessary for the Project Company to execute its obligations under this Agreement; and

- d. in accordance with the procedure set out under this Agreement, monitor the performance of the Project Company with regard to execution of the Project Company's obligations under this Agreement;
- e. obtain regulatory approvals for the Project Land to be used for the Project;
- f. provide rights to the Project Company for collection of User charges, parking fees and rentals from commercial agreements with third parties;
- g. Provide assistance in getting all clearances required for construction of the Project;

9.3. The Project Company may, upon application, consideration and approval by the relevant Tax Authorities, be granted full Tax Exemptions on the following;

- b. Property Rates and Taxes
- c. Value Added Tax (VAT)
- d. Import Duty
- e. Income Tax
- f. Tax on Interest paid to the Lenders
- g. Tax on Dividends paid to equity providers
- h. Withholding Tax on non-resident Subcontractors
- i. Stamp duty

9.4. Without assumption of any liability, the Council shall provide all necessary and feasible support within its available powers, required by the Project Company in obtaining the tax exemptions in line with this clause.

10. PROJECT LAND

10.1. Notwithstanding Clause 9.2.2 (a) The physical possession of the Project Land and Off-Site Areas shall, on Commencement Date and by virtue of this Agreement be deemed to have been transferred to the Project Company for the purpose of implementing the Project with all rights and privileges necessary for the implementation of the Project

- 10.2. The Project Land and the Off-Site Areas shall be transferred free from Encumbrances, together with the necessary land rights and land obligations under Law.
- 10.3. The Council warrants that the Project Land is not subject to any undisclosed lien, pledge, bond, option or any other encumbrance in favor of a third party which prevents the Project Company from having undisturbed occupation and use of the Project Land for purposes of the Works.
- 10.4. The Project Land shall be kept free of any land invaders and that if any invaders do settle or have settled on the Project Land, the Council shall forthwith and without delay, take all and any such steps as may be reasonably necessary in order to secure their eviction from the Project Land. The Council's undertaking in accordance with this clause is a material obligation.
- 10.5. The Council has a duty to reveal to the Project Company any latent defects and the Council hereby confirms that it has no knowledge and/or belief of the existence of any latent defects as at the Commencement date.
- 10.6. The boundaries of the Project Land shall be as described in Schedule I.
- 10.7. If, as a result of implementing a variation, any area of land becomes required for the Project, the Council may, by notice to the Project Company, specify that such area of land shall be added to the Project Land together with the effective date of such addition, and in such circumstances, the area of land so specified shall be added to the Project Land with effect from the effective date of such addition.
- 10.8. Upon possession of the Project Land, the Project Company shall, subject to any restriction of the land, have the right to enter upon, occupy and use the Project Land (or parts thereof) delivered to it by the Council, and to make, at its own cost, investigation, development and improvements in the Project Land as may be necessary or appropriate to implement the Project in accordance with the provisions of this Agreement.

- 10.9. The Project Company shall have the right to the use of the Project Land in accordance with the provisions of this Agreement and for this purpose it may regulate the entry and use of the Project Land by third parties.
- 10.10. The Project Company shall not part with or create any Encumbrance over the whole or any part of the Project Land save and except as set forth and permitted under this Agreement.
- 10.11. The Project Company shall not, without the prior written consent or approval of the Council, use the Project Land for any purpose other than for the purpose of the Project.
- 10.12. The Project Company shall allow access to and use of the Project Land and Off-Site Areas to any person or persons for public purposes under any Law or as the Council may specify, but where any such access results in a Material Adverse Effect this shall constitute a Compensation Event. The Council shall, in the event of any physical damage to the Project Land or the Project Facility on account of such access, ensure that the Project Land or Project Facility is promptly restored at the Council's own cost and expense.
- 10.13. To the extent that the public access and use under any Law or as allowed by the Council affects the performance of any obligation of the Project Company under this Agreement, the Project Company shall not be deemed or construed to be in breach of its obligations nor shall it incur or suffer any liability on account thereof. To the extent that the Council, as freehold owner and regulator of the Project Land, has rights that the Project Company does not have as lessee, and the exercise of such rights is necessary to ensure the efficient delivery of Works and Services under this Agreement, the Council shall exercise such rights upon the reasonable request of the Project Company.
- 10.14. The condition of the Project Land shall be the sole responsibility of the Project Company from the date of possession by the Project Company. Accordingly (without prejudice to any other obligation of the Project

Company under this Agreement), the Project Company shall be deemed to have:

- A. inspected and examined the Project Land and its surroundings and (where applicable) any existing structures or works on, over or under the Project Land;
- B. satisfied itself as to the nature of the Project Land, its condition, and other relevant properties of the Project Land, the risk of injury or damage to property affecting the Project Land, the nature of the materials (whether natural or otherwise) to be removed or excavated and the nature of the design, work and materials necessary for the execution of the Works;
- C. satisfied itself as to the adequacy of the rights of access to and through the Project Land for the purposes of fulfilling its obligations under this Agreement (including, without limitation, the adequacy of any rights obtained over land outside the Project Land);
- D. satisfied itself as to the possibility of interference by persons of any description whatsoever (other than the Council), with access to or use of, or rights in respect of, the Project Land, with particular regard to the owners of any land adjacent to the Project Land; and
- E. Satisfied itself as to the precautions, times and methods of working necessary to prevent any nuisance or interference, whether public or private, being caused to any third parties.

10.15. For the avoidance of doubt, the Project Company accepts full responsibility for all matters related to the Project Land.

10.16. To the extent that unforeseen conditions exist in any parts of the Project land, which, for other reasons, were not practical for the Project Company to investigate or survey, the Project Company shall not be responsible for the conditions, unless they should reasonably have been discovered if the investigation had been properly carried out. If the Project Company is not responsible to make good such conditions then the Council shall be so responsible to make good such conditions at its own expense.

11. DESIGN AND CONSTRUCTION

11.1. The Project Company shall be responsible for the design, preparing and submitting all Planning Applications, obtaining all relevant Planning Approvals and the construction of the Project Facility, which shall be carried out in accordance with this Agreement and bid requirements.

11.2. The Project Company shall construct the Project Facility in a manner that is not likely to cause any damage to property, unreasonable nuisance, annoyance, inconvenience or disturbance to, or unreasonable interference with, members of the public, the owners, the occupiers and the users of adjoining buildings or lands, or any other persons, or the environment.

11.3. The Project Company shall be responsible for the quality, soundness, durability and safety of the Project Facility and its compliance with any legal requirements, notwithstanding the appointment by it of one or more Sub-Contractors.

12. DESIGN RESPONSIBILITY AND APPROVAL

12.1. The Project Company warrants that it has used, and shall continue to use, the degree of skill and care in the design of the Project Facility that would reasonably be expected of a competent professional designer experienced in carrying out design activities of a similar nature, scope and complexity to the Project Facility.

12.2. The Project Company warrants that it will comply with, and the Project will be carried out in conformity with, the Construction Requirements (including, without limitation, the standards specified therein), all Laws including the

Environmental Management Act and shall use equipment and materials which are of suitable quality for the purpose and uses intended, and free of defects and deficiencies.

- 12.3. The Council confirms that, as at the date of this Agreement, it has reviewed the Project Company Proposal and that, subject to any qualifications and/or comments notified by the Council to the Project Company in writing, such proposals satisfy the Council's requirements in respect of the Project Facility, so far as can reasonably be determined given the level of detail of Design Data which has been disclosed to the Council.
- 12.4. The Project Company shall develop and finalise the designs and specifications of the Project Facility and the Council shall review the designs and the specifications before commencement of the construction. If the Council is satisfied that the designs are in conformity with the Council's requirements, the Council shall issue a formal approval to the Project Company.
- 12.5. The designs and specifications will be deemed to have satisfied the Council's requirement from the date on which they are approved by the Council in line with the Project Company's Proposal.

13. CONSTRUCTION PERIOD AND INVESTMENT PLAN

- 13.1. The Project Facility shall be constructed through a phased-out approach but in any case, within a period of one year from the approval of the Designs and Construction Schedule provided that should a unit be completed before the end of the construction period, the Project Company shall be at liberty to commence provision of the Services.
- 13.2. The Project Company shall, within a period of 30 Working Days after gaining possession of the Project Land, submit to the Council the proposed design together with the Construction Schedule.
- 13.3. The proposed design and the Construction Schedule shall reflect and be in accordance with the terms of the Bidding Documents.

- 13.4. The Council shall consider the proposed designs and the Construction Schedule and, within 10 Working Days from submission, communicate to the Project Company in writing whether the Designs and the Construction Schedule are acceptable or not (the “Communication”).
- 13.5. Where the Construction Schedule or the designs have not been accepted, the Council shall, in the Communication, explain the reasons for the non-acceptance and shall require the Project Company to submit a revised Construction Schedule or design (as the case may be) within 10 Working Days from the date of the Communication. Following the resubmission of the designs or Construction Schedule, as the case may be, the Council shall consider it and, within 7 Working Days from the resubmission, communicate to the Project Company, in writing, whether the design or Construction Schedule are acceptable.
- 13.6. If the design or the Construction Schedule are not acceptable after resubmission, the matter shall be considered a dispute and shall be referred for dispute resolution by either Party.
- 13.7. The investment plan and investment amount shall be in accordance with the bidding documents as stipulated in schedule 7.

14. CONSTRUCTION COMPLETION CERTIFICATE

- 14.1. 14 days prior to Completion, the Project Company shall issue to the Council a notice to that effect together with a list of known outstanding items if any.
- 14.2. The Council shall, within five Working Days after Completion, inspect the Project Facility and, within seven Working Days after the inspection, produce and submit to the Project Company, an inspection report.
- 14.3. The Council shall either:
 - a. to the extent that the Council is satisfied that Completion has occurred in accordance with the

requirements of the Council as stipulated in the bidding documents or where the Council and the Project Company agree on the list of known outstanding items, issue a Construction Completion Certificate, to which shall be attached a list of known outstanding items (if any), to the Project Company; or

- b. Notify the Project Company that, in its opinion, Completion has not occurred. In that event the Council shall state in such notice grounds for its decision.

- 14.4. In the event of any disagreement under Article 21, either Party may refer the matter for dispute resolution

15. CONSTRUCTION INSPECTIONS

- 15.1. For the purposes of determining that construction is being undertaken in accordance with the Council's requirements, the Council shall, with due diligence, carry out all necessary and periodical inspections. The Council shall maintain proper record of such inspections and the remedial measures taken to cure defects or deficiencies.
- 15.2. The Council may, by written notice stating grounds, require the Project Company to suspend the whole or any part of the work if in its reasonable opinion the same is being carried on in a manner that is not in conformity with the Council's requirements and Industry Good Practice (a "Construction Suspension").
- 15.3. The Parties shall, immediately after the notice of the Construction Suspension and in any case within five Working Days therefrom, convene a meeting to consider the Construction Suspension and agree remedial measures that shall ensure conformity with the Council's requirements and

Industry Good Practice. The Project Company shall then promptly resume the construction, including the agreed remedial measures.

16. SERVICE COMMENCEMENT

16.1. The Project Company shall commence delivery of the Services within 30 Working Days from the Completion Certificate.

17. SERVICE RESPONSIBILITY AND STANDARDS

17.1. The Project Company shall at all times procure that the Services are performed by appropriate personnel and in accordance with:

- a. the terms of this Agreement;
- b. any applicable Laws and regulatory requirements;
- c. Industry Good Practice;
- d. the Project Company Proposal
- e. the Service Requirements,

such that the legal mandate of the Council is satisfied and that the Services are available in accordance with this Agreement.

17.2. In the provision of the Services, the Project Company shall develop its own rules and practices. The rules and practices or any subsequent amendments thereof shall be approved by the Council before implementation.

17.3. The Parties agree that the rules and the practices developed shall only be those necessary for the proper provision of the Services. Any rule or practice that unreasonably infringes freedoms and rights of the Users, the Council or any other person shall not be allowed.

18. MAINTENANCE OF THE PROJECT FACILITY

18.1. The Project Company shall ensure that the Project Facility is maintained on a continuing basis so as to ensure that:

- a. the Services are available in accordance with the requirements of this Agreement;
- b. the Project Facility achieves its full Serviceable Life; and

- c. the Project Facility is handed back to the Council on the Expiry Date in a good and useful condition
- 18.2. All goods, equipment and materials used in the provision of the Works and Services, and the waste management thereof, shall be of satisfactory quality and in accordance with Industry Good Practice and relevant Laws and regulations.

19. COUNCIL TO MONITOR PERFORMANCE

- 19.1. The Council shall, at its own cost, undertake regular Performance Monitoring Exercise during the construction and the service period. The Project Company shall use all reasonable endeavors to assist the Council in such Performance Monitoring Exercise.
- 19.2. The Parties shall meet, at which meeting the Council shall notify the Project Company of the outcome of the Performance Monitoring Exercise. The Project Company shall have due regard to the Council's comments in relation to the future provision of the Services.
- 19.3. The Performance Monitoring Exercise during the service period shall take into account the Service Level Agreement mutually developed by the Parties.
- 19.4. For purposes of this Clause, the Council shall form a monitoring committee comprising of the Commission, the Council and other relevant stake holders.

20. UNDERTAKINGS OF THE PROJECT COMPANY

- 20.1. The Project Company undertakes and warrants that it has the necessary capacity and expertise to undertake the Project.
- 20.2. Subject to, and in accordance with, the provisions of this Agreement, the Project Company undertakes to perform its duties under this Agreement at its own cost and risk without recourse to the Council except as otherwise

expressly provided in this Agreement. The Council shall not provide any guarantee or support to the Project Company except as otherwise specifically provided herein or as provided in law.

- 20.3. Without derogating from the generality of Article 41 the Project Company shall be solely responsible for procuring that the obligations are at all times performed:
- a. where in relation to a matter, there is no express obligation or standard imposed on the Project Company under this Agreement, in accordance with Industry Good Practice;
 - b. in a manner consistent with the Project Company Proposal;
 - c. in a manner that is not likely to be injurious to human health, life, environment, or to cause damage to property;
 - d. in a manner consistent with the Council discharging its statutory duties and other functions undertaken by it as the same may be notified to the Project Company from time to time; and
 - e. in compliance with all applicable Laws and regulations.

21. WARRANTIES BY THE PROJECT COMPANY

- 21.1. As at the date of this Agreement, the Project Company represents and warrants to the Council that:
- a. it is duly organized, validly existing and in good standing under the laws of Malawi;
 - b. it is a special purpose company set up solely for the purpose of designing, constructing and operating the Project Facility in accordance with the terms of this Agreement and that it will not during the subsistence of this Agreement undertake any project or business activity unrelated to the Project;

- c. it has full power and capacity to execute, deliver and perform its obligations under this Agreement;
- d. it has taken all necessary corporate and other action under applicable Laws and its constitutional documents to authorize the execution, delivery and performance of this Agreement;
- e. it has the financial standing and capacity or is able to mobilize the financial standing and capacity within a period as agreed by the Parties to undertake the Project;
- f. this Agreement constitutes legal, valid and binding obligations enforceable against it in accordance with the terms hereof;
- g. it is subject to the civil and commercial laws of Malawi with respect to this Agreement;
- h. there are no actions, suits, proceedings or investigations pending or (to the Project Company's knowledge) threatened against it before any court or before any other judicial, quasi-judicial or other panel, the outcome of which may, individually or in the aggregate, have a Material Adverse Effect
- i. it has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any legally binding order of any Council body which may, individually or in the aggregate, have a Material Adverse Effect;
- j. no representation or warranty by the Project Company contained herein or in any other document furnished by it to the Council or to any Council body in relation to applicable permits contains or shall contain any untrue statement of material fact or omits or shall omit to state a material fact.

21.2. Throughout the Contract Period, the Project Company represents and warrants to the Council that subject to receipt by the Project Company from the Council of any amount due under any of the provisions of this Agreement, in the manner and to the extent provided for under the applicable provisions of this Agreement, including early termination compensation, all rights and interests, including assets, of the Project

Company in and to the Project Facility shall for the purposes of the Project pass to and vest in the Council on the Termination Date free and clear of all Encumbrances without any further act or deed on the part of the Project Company or the Council.

22. WARRANTIES AND UNDERTAKING BY THE COUNCIL

22.1. As at the date of this Agreement, the Council undertakes and warrants to the Project Company that:

- a. the Council has full power and capacity to enter into this Agreement;
- b. the Council has complied with all legal requirements necessary for the execution, delivery and performance of this Agreement;
- c. this Agreement constitutes legal, valid and binding obligations enforceable against the Council in accordance with the terms hereof;
- d. there are no suits or other legal proceedings pending or (to the Council's knowledge) threatened against the Council in respect of the Project Land or the Project which have a Material Adverse Effect; and
- e. it has good title to the Project Land.

22.2. Throughout the Contract Period, the Council undertakes and warrants to the Project Company that:

- a. it shall comply with all Laws, regulations and consents applicable to it which relate to the Project;
- b. it shall not willfully impede the Project Company in the performance of its obligations under this Agreement (having regard always to the interactive nature of the activities of the Council and of the Project Company and to the Council's use of the Project Facility to perform statutory functions of the Council); and

- c. it shall inform the Project Company as soon as reasonably practicable if at any time it becomes unable to meet any of its obligations under the Agreement and in such case inform, and keep the Project Company informed, of any course of action to remedy the situation.

22.3. If this Agreement becomes invalid for failure by the Council (including any of their agents) to comply with the provisions of the PPP Act and Procedures or any other relevant Law, such invalidation shall be construed as the Council's Default.

22.4. Nothing in this Clause shall in any way fetter the discretion of the Council in fulfilling its statutory functions.

23. PROJECT COMPANY WARRANTY ON COMPANY OWNERSHIP AND/OR CONTROL

23.1. The Project Company warrants and represents to the Council that the legal and beneficial ownership and control of the Project Company is as stated at the Commencement Date.

PART V: DISPUTE RESOLUTION

24. DISPUTE RESOLUTION PROCEDURE

24.1. Except as otherwise expressly provided by this Agreement, all Disputes shall be resolved in accordance with the provisions set out under this Part V.

24.2. If any Dispute arising under this Agreement between the Parties is substantially the same as, or connected with or relates to, issues raised in a related difference, dispute, claim or question between the Project Company and a Sub-Contractor or any other agent of the Project Company that is subsequently referred to the dispute resolution procedure under the relevant Principal Sub-Contract (the "Related Dispute"), then the Council or the Project Company may propose that the Parties require that such Dispute

and the Related Dispute be consolidated and determined such that the Dispute is dealt with jointly with the Related Dispute.

24.3. Where a Related Dispute is dealt with pursuant to the Dispute Resolution Procedure, the costs of reference of the Related Dispute shall be borne as determined pursuant to the Dispute Resolution Procedure or, in default, equally among the parties to the Related Dispute.

24.4. The Project Company shall procure that any party that is party to a Related Dispute shall comply with the provisions of this Part V

25. REFERENCE OF DISPUTE

25.1. The Parties hereby acknowledge that it is in their best interest and that of the Agreement that Disputes be resolved through mediation. The Parties shall endeavor to resolve any Dispute through mediation within a reasonable time and, in any case, within 14 Working Days from the date that one Party notifies the other of the Dispute (**the “Mediation Notice”**).

25.2. Where mediation fails to resolve the Dispute, either Party may at any time notify the other of an intention to refer a Dispute (the “Arbitration Notice”) to an arbitrator (the “Arbitrator”). The Arbitrator shall act impartially and independently. The Arbitrator shall perform his or her duties and reach a decision in accordance with the terms of this Agreement and the Law (the “Arbitration”).

25.3. The Arbitration Notice and the Mediation Notice shall set out:

- a. the nature and a brief description of the Dispute;
- b. the names and addresses of the third parties involved
- c. the nature of the relief sought.

26. APPOINTMENT OF THE ARBITRATOR

- 26.1. The Arbitrator shall be selected by agreement between the Parties within 14 Working Days of service of the Arbitration Notice.
- 26.2. If no agreement is reached within such time, the Party referring the Dispute for Arbitration shall apply for the appointment of an Arbitrator, to a President of a relevant professional body, considering the nature of the Dispute.
- 26.3. When requesting the selection of an Arbitrator, the referring Party shall supply a copy of the Arbitration Notice to the President, who shall have regard to the nature of the Dispute which is referred for Arbitration when selecting the Arbitrator.
- 26.4. Unless both Parties agree, no person shall be appointed as an Arbitrator who at the time of appointment is (or within two years before such appointment has been):
- a. a director, officeholder or employee of, or is or has been (within such time) personally engaged in providing services or as a consultant to any Party; or
 - b. any person associated with the any of the parties.
- 26.5. The Arbitrator shall be under a continuing duty to disclose in writing to each Party (i) any circumstance as may arise during the period of the Arbitrator 's appointment or (ii) any other fact or circumstance which might call into question his impartiality or independence.
- 26.6. The Arbitrator shall immediately resign his appointment if (i) both Parties agree or (ii) on application by a Party to the President, the President directs the Arbitrator to resign.
- 26.7. A replacement Arbitrator shall be appointed in accordance with the provision of this Clause

27. PROCEDURE FOR THE ARBITRATION

- 27.1.** As soon as possible following agreement upon, or receipt of notification of, the appointment of the Arbitrator, and in any case within seven Working Days, the Party referring the Dispute for Arbitration shall send a copy of the Arbitration Notice and its written statement of the Dispute to the Arbitrator accompanied by copies of any documents upon which the Party wishes to rely and, at the same time, shall send a copy of all such materials to the other Parties.
- 27.2.** The other Parties shall have the right to submit a written response within 14 Working Days of receipt of the documents referred to in clause 27.1., together with copies of any documents upon which they wish to rely, to the Arbitrator, and shall, at the same time, send a copy of all such materials to the other Parties.
- 27.3.** The Arbitrator shall have full power to take the initiative in ascertaining the facts and the law. In particular, the Arbitrator shall have power to:
- a.** request clarification or additional information from either or both of the Parties;
 - b.** conduct inspections where he deems appropriate
 - c.** convene meetings upon reasonable notice to the Parties at which both Parties shall be entitled to be present;
 - d.** appoint his own advisers to advise on matters of legal interpretation or expertise outside his own area of expertise;
 - e.** request the production of evidence and witness statements; and
 - f.** make use of his own specialist knowledge.
- 27.4.** Without prejudice to such powers, a meeting shall be held at the request of any Party to give the Parties the opportunity to make oral submissions.
- 27.5.** If either Party fails to submit any written statement or respond to any request for clarification or information, or fail to attend any meetings convened by the Arbitrator, the Arbitrator shall proceed with the Arbitration on the basis

of the information supplied by the other Parties. Any communications passing between a Party and the Arbitrator shall be copied to the other Parties.

28. THE ARBITRATOR'S DECISION

- 28.1. The Arbitrator shall reach his decision within 30 Working Days of receipt by him of the Arbitration Notice or other period as is agreed by the Parties in consultation with the Arbitrator.
- 28.2. If the Arbitrator fails to reach a decision within the applicable timeframe, his appointment shall cease and a replacement Arbitrator shall be appointed in accordance with the provisions of Clause
- 28.3. The Arbitrator's decision shall be in writing and shall set out the reasons for his decision.

29. COSTS AND IMMUNITY

- 29.1. Each Party shall bear its own costs in relation to any reference of a Dispute for Arbitration. The reasonable fees, costs and expenses of the Arbitrator in carrying out the Arbitration shall be borne by both parties.
- 29.2. The Parties agree that the Arbitrator shall not be liable for any action or omission done or omitted in the discharge or purported discharge of his functions as Arbitrator unless the act or omission is in bad faith. Any employee or agent of the Arbitrator shall be similarly protected from liability.

30. INVOLVEMENT IN ARBITRATION

30.1. Where the Arbitrator resigns or is removed, the Parties agree that the Arbitrator shall not be called as a witness to give evidence concerning the Dispute in subsequent arbitration proceedings.

31. EFFECT OF THE ARBITRATOR 'S DECISIONS

31.1. The Arbitrator 's decision shall be final and binding.

31.2. Either Party may apply to the courts to enforce the Arbitrator 's decision.

31.3. Nothing in this **Clause** shall prevent either Party at any time seeking any interim declaratory or interlocutory relief in aid of an Arbitration or in connection with enforcement proceedings including proceedings to enforce an Arbitrator 's award.

32. PERFORMANCE TO CONTINUE DURING DISPUTE

32.1. Unless this Agreement has been terminated, the Parties shall continue to perform their obligations under this Agreement whilst the Dispute Resolution Procedure is in operation regardless of the nature of the Dispute.

Part VI: CONFIDENTIALITY

33. CONFIDENTIALITY

33.1. Each Party agrees, for itself and its officers, directors, servants, agents, professional advisers and Sub-Contractors, to keep confidential and not to disclose to any person any of the terms of this Agreement which are of a confidential nature or any confidential or proprietary information provided to, or arising from or acquired by, it pursuant to the terms or performance of this Agreement (including without limitation any such documents or information supplied in the course of proceedings under the Dispute Resolution Procedure) (together the "**Confidential Information**").

33.2. A Party may disclose the whole or any part of the Confidential Information:

- A. to its officers, directors, servants, Sub-Contractors, agents, or professional advisers to the extent necessary to enable it to perform (or to cause to be performed) or to enforce any of its rights or obligations under this Agreement;
- B. when required to do so by any legal requirement or by or pursuant to the rules or any order having the force of law of a court, association or agency of competent jurisdiction or any governmental agency;
- C. in the case of the Project Company, to any reputable bank, financial institution or other potential investor in the Project (and their respective advisers) from whom it is seeking or obtaining finance in connection with the Project, including the Lenders and their advisers;
- D. to the extent that the Confidential Information has, except as a result of breach of confidentiality by that Party, become publicly available or generally known to the public at the time of such disclosure;
- E. to the extent that the Confidential Information is already lawfully in the possession of the recipient or lawfully known to it prior to disclosure by another Party;
- F. to the extent that it has acquired the Confidential Information from a third party who is not in breach of any obligation as to confidentiality to the disclosing Party;
- G. to the extent required to enable a determination to be made under the Dispute Resolution Procedure;
- H. to the extent necessary to allow for the registration of any consents necessary to carry out the Party's obligations under this Agreement; or
- I. for the purpose of publishing such information (including payment structure) about the Project (other than financial and/or economic information relating to the Project Company, which the Project Company (acting reasonably) indicates is

commercially sensitive information) as the Council may deem appropriate from time to time.

33.3. At the end of the Contract Period, each Party shall return to the other such Confidential Information within its possession or control as may belong to the other Parties, save that this Article 25.3 shall not apply, in the case of the Council, to Confidential Information belonging to the Project Company which is necessary for the Design, the Works or the carrying out of any other obligation under this Agreement, which Confidential Information may be so used or applied by the Council in relation to the Design, the Works or the carrying out of any other obligation under this Agreement;

33.4. Without prejudice to any other rights and remedies that the other Parties would have, each of the Parties agrees that damages may not be an adequate remedy for any breach of this Article 25 and that the other Parties shall be entitled to the remedies of injunction, specific performance and/or other equitable relief for any threatened or actual breach of this Article 25.

33.5. The Project Company undertakes to include in any agreement with its Sub-Contractors, Credit Providers or Credit Provider Agents articles which adequately protect the Project Company in terms of its obligations to the Council under this Article 25.

PART VII: GOVERNING LAW

34. GOVERNING LAW

34.1. This Agreement shall be governed by, and construed in all respects in accordance with, the Laws of Malawi.

34.2. Subject to the provisions of Part V (Dispute Resolution Procedure), the Parties agree to submit to the exclusive jurisdiction of the Courts as regards any claim or matter arising out of or in relation to this Agreement (including non-contractual claims).

35. CHANGE IN LAW

- 35.1. In the event that there is a Qualifying Change in Law, the affected Party may notify the other Party.
- 35.2. In the notification, the Party presenting the notification shall provide the following details:
- a. any necessary change to the Works and/or to the Operations or to the provision of Services as a result of the Qualifying Change in Law;
 - b. whether any changes are required to the terms of this Agreement to deal with the Qualifying Change in Law;
 - c. whether relief from compliance with obligations is required, including the obligation of the Project Company to achieve the Services Commencement Date and/or meet the Service Requirements;
 - d. any loss of revenue that shall result from the Qualifying Change in Law;
 - e. any estimated change in the cost of the Project that directly results from the Qualifying Change in Law; and
 - f. any Capital Expenditure that is required or no longer required as a result of the Qualifying Change in Law, in each case giving in full detail, the procedure for implementing the change in the Works and/or Services.
- 35.3. The Parties shall, as soon as practicable after receipt of the notification, but in any event not more than fifteen (15) Working Days after receipt of the notification, meet to agree on whether and to what extent:
- a. this Agreement and/or the Five Year Management Plan and or the Annual Performance Targets must be amended;

- b. the Party must be compensated; and
- c. the Project Company must be allowed to source necessary financing to ensure that the Parties derive the same economic benefit from the exercise of their rights and obligations following such Qualifying Change in Law as it would have derived had there been no such Qualifying Change in Law;

35.4. In the event that the Parties fail to reach any agreement, either Party may treat the matter as a Dispute to be resolved in accordance with this Agreement.

35.5. The Arbitrator, as the case may be, shall determine whether the Agreement must be amended or one Party must be compensated by the other Parties, and the extent of such amendment or compensation.

36. CHANGE IN CONTROL

36.1. The Project Company shall be obliged to seek prior written consent of the Council, which consent shall not be unreasonably withheld, prior to a Change in Control of the Project Company during the Contract Period.

36.2. The Parties agree that it shall be reasonable for the Council to refuse its consent if a proposed Change in Control may in the opinion of the Council, affect the performance of the Services under this Agreement.

36.3. The Project Company shall inform the Council as soon as reasonably practicable and, in any event, 60 Working Days prior to any proposed Change in Control of the Project Company.

PART VIII: TERMINATION

37. TERMINATION PROCEDURE

37.1. This Agreement may be terminated earlier by either party by giving to the other, six months written notice of termination prior to the date of the intended termination.

37.2. Notwithstanding sub-article 1 above, this Agreement may be terminated on short notice, subject to a minimum of 30 (Thirty) days' notice, in any one of the following events, that is if-

- a. the other party commits a material breach of its undertakings in this Agreement and fails to rectify the same after been given a written notice to do so by the innocent party within a period of three (3) months from the date of the notice.
- b. a distress order or warrant of execution, process or decree by a Court of competent jurisdiction is levied or enforced upon or against any assets of the Protected Areas
- c. an effective resolution is passed for the winding up of the Project company (other than for purposes of reconstruction or amalgamation);
- d. the Project Company ceases to carry on business as agreed under this Agreement;
- e. the Project Company is adjudged insolvent by a court of competent jurisdiction.
- f. either Party fails to comply with any final dispute resolution decision reached in accordance with this Agreement within a period specified in the final decision;
- g. Government expropriates, compulsorily acquires the Protected Areas or any part of the Protected Areas
- h. any applicable Law is introduced or amended with the effect that it becomes unlawful for the Concessionaire's Company to make or receive any payment, to perform any material obligation or to enjoy or enforce any material right under this Agreement; or any such payment, the performance of any such material obligation or the enjoyment or enforcement of any such material right becomes unenforceable, invalid or void, *provided* that no such event shall not be considered as the Government breach if it occurs as a result of a Force Majeure Event or default by the Concessionaire of this Agreement.

37.3. Notwithstanding the foregoing, this Agreement shall not be terminated on the grounds of the occurrence of the events set out, if the same arise from a bona-fide dispute between the Parties which has been submitted to Arbitration as hereinafter provided.

38. TERMINATION ON FORCE MAJEURE

38.1. Where a Force Majeure Event has rendered financially or practicably impossible the performance of this Agreement so as to have a fundamental effect on the rights or obligations of any Party, and the Force Majeure Event continues (or is in the reasonable judgement of the Parties likely to continue) beyond a period of 120 days, then any Party may terminate this Agreement.

38.2. During the suspension of the provision of the Services:

- a. in the case of a Non-Political Force Majeure Event, each Party shall bear its own expenses; and
- b. in the case of a Political Force Majeure Event, the Council shall bear the expenses of the Parties excluding loss of revenue.

38.3. In the event that this Agreement is terminated as a result of a Force Majeure by the Project Company or, as the case may be, by the Council, then the following shall apply:

- a. In the case of a Non-Political Force Majeure Event, no compensation shall be paid
- b. In the case of Political Force Majeure Event the provisions of Clause 38.1 shall apply.

39. TERMINATION COMPENSATION

- 39.1. Where earlier termination has taken place due to the breach by Council of this Agreement or change of Council policy or applicable law, the Project Company shall be compensated based on independent valuation by a qualified engineer on the basis of current market values of similar properties in Malawi.
- 39.2. The parties shall mutually appoint the valuer who shall determine the level of the compensation taking into account the capital investment carried out by the Project Company and the number of years left in the Concession period.
- 39.3. The Council shall take into account any outstanding claims including loss of revenue against the Project Company at the date of termination when paying the compensation.

40. DELIVERY OF POSSESSION AND OTHER DOCUMENTATION ON EXPIRY OF THE CONCESSION PERIOD OR EARLIER TERMINATION

- 40.1. On the Expiry Date or upon earlier termination, the Project Company shall within 15 days after the earlier termination or Expiry Date or within a period otherwise agreed between the Parties but in any case not more 45 days, deliver to the Council the following:
- a. vacant possession of the premises and any other immovable property connected thereto;
 - b. all books of accounts and financial records;
 - c. deeds and documents relating to the Project Facility, if any;
 - d. any other documentation pertaining to the management or operation of the Project Facility.
 - e. Software used by the company in provision of services under the project
- 40.2. Upon termination of this Agreement, the Project Company hereby expressly and irrevocably undertakes to comply with the provisions of this Clause and undertakes to take all such steps as are necessary to vest complete ownership, control of the undertaking and business of the Project Facility in

the Council or as the Council shall direct within the period stated in Clause 40.1.

- 40.3. At the option of the Council, the Project Company shall assign to the Council contracts that are in force and necessary for the running of the Project Facility.

41. FORCE MAJEURE

- 41.1. Notwithstanding any provision in this Agreement, the Parties shall not be liable for breach of this Agreement, or delay or failure to perform their obligations under this Agreement if the breach, delay or failure is a result of an event of force majeure.
- 41.2. For purposes of this clause, “force majeure” means an event beyond the control of the Parties, and not involving negligence or fault on their part and not foreseeable. Such events may include acts of the Government in its sovereign capacity, wars, revolutions, lightning, floods, freight embargoes, epidemics and quarantine restrictions.
- 41.3. If a force majeure event occurs, the Party whose performance is affected shall notify the other Party in writing of such condition and the cause thereof, and shall to the extent possible, continue to perform its obligations under this Agreement.
- 41.4. In the event that this agreement is terminated as a result of a force majeure event that continues for a period of 180 days by either party, the Concessionaire shall be compensated.

42. CONSEQUENCES OF FORCE MAJEURE EVENTS

- 42.1. If the Parties agree or it is determined by the Dispute Resolution Procedure that a Force Majeure Event:

- a. has delayed the Project Company in completing the construction prior to the issue of the Construction Completion Certificate, then the Target Completion Date shall be extended by a period equal to the period of such delay;
- b. has delayed the Project Company in beginning to provide the Services, then the Target Services Commencement Date shall be extended by a period equal to the period of such delay;
- c. has resulted in the substantial suspension of the Operations after the issue of the Construction Completion Certificate, then the Contract Period shall be extended by a period equal to the period of such delay or suspension; or
- d. has caused damage to the Construction elements, then:
 - (a) the Project Company shall give notice to the Council, together with details of the effect thereof, and the proposed steps to rectify the damage and the costs thereof
 - (b) the Parties shall enter into discussions concerning the Force Majeure Event and the damage with the intent that, as soon as possible after the cessation of the Force Majeure Event, rectification work can be commenced.

43. RELIEF AND COMPENSATION EVENTS

- 43.1. The Project Company shall be entitled to request relief from any right of the Council to terminate this Agreement due to a Project Company Default, to the extent that its ability to perform its obligations under this Agreement is adversely affected by any Relief Event. Any such request shall be made by notice to the Council within 30 Working Days of the Project Company

becoming aware of the relevant Relief Event or, if later, of its failure to perform.

43.2. If, as a direct result of a Compensation Event:

- a. the construction is or is likely to be delayed;
- b. the Project Company is or is likely to be unable to comply with its obligations under this Agreement; and/or
- c. the Project Company incurs or is likely to incur additional costs or losses or is likely to lose revenue,

then, subject to Clause 26.2. the Project Company shall be entitled to apply for relief from its obligations and/or claim compensation.

43.3. to obtain relief and/or compensation for a Compensation Event under this Project Company must:

- a. as soon as practicable and in any event within 30 Working Days after it becomes aware that a Compensation Event has caused or is likely to cause:
- b. delay; and/or
- c. breach of an obligation under this Agreement; and/or
- d. the Project Company to incur costs or lose revenue,

give to the Council a notice of its claim for the payment of compensation and/or relief from its obligations under this Agreement together with details of any estimated Change in Project Costs.

44. INSURANCE COVER

44.1. The Project Company shall take out and maintain in force, and shall procure that each Sub-Contractor takes out and maintains in force, relevant insurance as shall be agreed between the Parties throughout the Contract Period.

44.2. Any Insurance shall be:

- a. provided by insurers approved by the Council (such approval not to be unreasonably withheld or delayed);
- b. on terms and conditions which would be obtained by prudent owners and operators of projects of similar scope and magnitude as the Project;
- c. upon terms approved by the Council.

44.3. Unless not required due to the nature of the insurance policy, the Council shall be endorsed as third-party beneficiary of the insurance policy.

44.4. The Project Company shall not be in breach of this Agreement in case of Uninsurable Risks which have been identified and notified to the Council. In such situations, the occurrence of the uninsurable risk shall be treated as a Force Majeure.

45. INSURANCE COVER NOT A SUBSTITUTE FOR OBLIGATIONS

45.1. Full compliance with the insurance provisions of this Agreement shall not limit or relieve the Project Company of its liabilities and obligations under this Agreement and, in particular, the Project Company's obligation to hold the Council harmless in compliance with any indemnity provisions contained in this Agreement.

45.2. Unless approved by the Council in writing (such approval not to be unreasonably withheld or delayed), the supply to the Council of any draft insurance policy or certificate of insurance or other evidence of compliance with this Agreement shall not imply (i) acceptance by the Council that the extent of insurance cover is sufficient or (ii) that the terms and conditions thereof are satisfactory, in either case for the purposes of this Agreement.

PART IX: MISCELLANEOUS

46. AMENDMENTS

(1)

- 46.1. No amendment, alteration or any other means of addition or subtraction from the content of this Agreement shall take effect without the prior, express and written consent of both parties.
- 46.2. A Party who wishes to have this Agreement amended or modified in any manner, shall put its proposed changes in writing replete with reasons thereof and shall bring the same to the notice of the other party for the written comments of the latter party.
- 46.3. Where following any proposed changes to this Agreement, the Parties mutually agree to have the Agreement so changed, this Agreement shall be modified in the manner agreed by the parties and any such modification shall operate as if it had always been part and parcel of this Agreement.

47. PERFORMANCE MONITORING

- 47.1. The Parties shall use their best endeavors to facilitate the attainment and fulfilment of the objectives and goals of this Agreement.
- 47.2. The Parties shall within three months after a financial year, hold annual monitoring meetings to review the progress made by the Concessionaire in the implementation of the Development and Investment Plan and the general performance of the Concessionaire with respect to the management of the Protected Areas
- 47.3. During the monitoring meetings, the Concessionaire shall present a progress report on the developments and investments made with respect to the Protected Areas, general business performance and any other relevant information requested by the Government. The information presented shall be with respect to the period under review.
- 47.4. Where, following the Concessionaire's presentation in Clause 20.3 the Government forms the opinion that the Development and Investment Plan

has not been implemented in the manner set out in this Agreement, it shall state its opinion in writing requiring the Concessionaire to remedy the situation within a period of 90 days from the date of the letter or within any other reasonable period as may be agreed by the Parties.

47.5. Where the Concessionaire does not agree with the assessment of the Government, it shall, within 30 days from the date of receipt of the same, make a written statement of disagreement, stating the specific issue being disputed and its reasons.

47.6. In the event that the Concessionaire disputes the opinion of the Government or fails to submit a proposal for remedying the situation, the Parties shall refer the matter for dispute resolution.

47.7. For purposes of this Clause, the Government shall form a monitoring committee

48. REPAIR AND MAINTENANCE

48.1. Without derogating from the general obligations of the Concessionaire under the Agreement, the Concessionaire hereby expressly agrees and undertakes, at his own expense, to keep and maintain the main structures and the interior and exterior of the buildings in the protected areas in good and substantial repair and decoration at all material times during the subsistence of this Agreement.

48.2. The Concessionaire expressly accepts that it is a material breach of this Agreement to let or suffer the main structure, the interior and exterior of the protected areas to fall into a state of disrepair, derelict and waste during the subsistence of this Agreement

49. ASSIGNMENT

(2)

49.1. The Project Company shall not in any such case without the prior consent of the Council, assign, transfer, create or allow to subsist any Encumbrance

or interest in this Agreement (or its rights under this Agreement) save for such Encumbrances or interests as may arise by operation of law and in the ordinary course of business, or as are expressly permitted herein; and

- 49.2. The provisions of this Clause shall not apply in relation to the creation of any Encumbrance over the benefit of, or any permitted assignment, novation or transfer of, any of the agreements referred to under this Clause by way of security in accordance with the Financing Agreements, provided that, in the case of an assignment of the benefit of this Agreement (or any part of it), interest in the Agreement any assignee shall have entered into the Lenders' Direct Agreement or such other similar agreement with the Council in relation to the exercise of its rights as the Council shall require.

50. RESPONSIBILITY OF THE PROJECT COMPANY

- 50.1. The Project Company shall be responsible for safety and security of the Project facilities. The Project Company shall have full regard for the safety of all persons affected by the implementation of the Project from the Commencement Date until the expiry of the Contract Period.

51. REVIEW OF THE AGREEMENT

- 51.1. This Agreement shall be (need for a review) comprehensively reviewed every three (3) years after the date of signature. Such reviews will, inter alia, adjust the operating conditions of the concession, if necessary and mutually agreed between the two Parties, including the fee structure. In the event that a mutual Agreement cannot be reached, independent arbitration will be sought, the cost of which will be borne by the aggrieved party.

52. SEVERABILITY OF THIS AGREEMENT

- 52.1. Where any part of this Agreement is found by any court of competent jurisdiction to be invalid, unlawful or unenforceable, then such part shall be

severed from the rest of the Agreement and the remainder shall continue to apply with the same validity and enforceability in law.

53. FIXED ASSETS

53.1. Fixed assets erected during the Concession Period belong to Government for free at the expiry of the Period. The Concessionaire shall only be compensated on the constructed fixed assets in circumstances of earlier termination and in accordance with this Agreement.

54. STEP-IN RIGHTS BY THE COUNCIL

54.1. Without prejudice to the rights of the Council, where the Council reasonably believes that it needs to take action in connection with the Service because a serious risk exists to the health or safety of persons or property or to the environment and/or to discharge a statutory duty, then the Council shall be entitled to take action in accordance with this Clause.

54.2. If the Council wishes to take action stipulated under Clause 54.1, the Council shall notify the Project Company and the Lenders in writing of the following:

- a. the action it wishes to take;
- b. the reason for such action;
- c. the date it wishes to commence such action;
- d. the time period which it believes will be necessary for such action; and
- e. to the extent practicable, the effect on the Project Company and its obligation to provide the Service during the period such action is being taken

54.3. Following service of such notice, the Council shall take such action as notified under paragraph (b) above and any consequential additional action as it reasonably believes is necessary (the "Required Action") and the Project Company shall give all reasonable assistance to the Council while it is taking such Required Action.

54.4. If the Project Company is not in breach of its obligations under the Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Project Company from providing any part of the Service:

- a. the Project Company shall be relieved from its obligations to provide such part of the Service; and
- b. in respect of the period during which the Council is taking the Required Action and provided that the Project Company provides the Council with reasonable assistance, such assistance to be at the Project Company's cost, the project Company shall be entitled to the revenues from the Project Facility as if it were satisfying all its obligations and providing the Service affected by the Required Action in full over that period.

54.5. If the Required Action is taken as a result of a breach of the obligations of the Project Company under the Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Project Company from providing any part of the service, the Project Company shall be relieved of its obligations to provide such part of the Service, and in respect of the period in which the Council is taking Required Action, the Project Company shall not be entitled to the full revenues from the Project Facility. The Parties shall agree on the percentage of the revenues that shall accrue to the Council based on the nature of the breach and the extent of work to be executed by the Council to remedy the breach

55. COMPLETENESS OF THIS AGREEMENT

55.1. This Agreement is the complete and exclusive statement of the Agreement between the Parties concerning the subject matter hereof and it supersedes and merges all prior and simultaneous proposals, understanding and all other agreements, oral and written, between the Parties relating to the subject matter hereof.

55.2. Where the provisions of this Agreement run in conflict with any other agreement, arrangement, proposal, understanding, undertaking whether written or oral, the terms and provisions of this Agreement shall take precedence

56. ENTIRETY OF AGREEMENT

56.1. The terms and conditions contained in this Agreement and any appendices hereto supersede all other terms, conditions, representations or undertakings made by the Parties hereto and nothing said or written during the course of negotiations between the Parties hereto shall have contractual or other legal effect unless expressly incorporated in this Agreement or incorporated by reference

57. WAIVER

57.1. No delay or failure by either Party to exercise any of its rights, powers or legal remedies under this Agreement shall operate as a waiver thereof.

57.2. Where a Party opts to waive any breach of this Agreement committed by the other Party, it shall not be deemed or in any way construed as a waiver of any subsequent breach of that term or any other provision of the Agreement.

58. PROJECT COMPANY'S INDEMNITIES TO THE COUNCIL

58.1. The Project Company shall indemnify and keep the Council indemnified at all times from and against all losses sustained by the Council in consequence of:

- a. any claim for, or in respect of, death and/or personal injury of any employee of, or person engaged by, the Project Company notwithstanding any act or omission of the Council;
- b. any claim for, or in respect of, death and/or personal injury of any third party arising out of, or in the course of, the operations, save to the extent caused (or contributed

to) by a breach of any express provision of this Agreement by the Council or any deliberate act or omission of the Council;

- c. damage to the Council's assets arising by reason of any act or omission of the Project Company or a Sub-Contractor, save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Council or any deliberate act or omission of the Council; and
- d. any loss of, or damage to, property or assets of any third party arising by reason of any act or omission of the Project Company; save to the extent that such loss or damage arises out of the breach of any express provision of this Agreement by the Council; or any deliberate act or omission of the Council.

58.2. Nothing in this Clause shall require the Project Company to indemnify the Council for losses suffered due to any fraudulent act of the Council, its officers or employees.

59. THE COUNCIL'S INDEMNITY TO THE PROJECT COMPANY

59.1. The Council shall indemnify, defend and hold harmless the Project Company against any and all proceedings, actions, third party claims for loss, damage and expense of whatever kind and nature arising out of breach by the Council under this Agreement, except to the extent that any such Claim has arisen due to breach by the Project Company of any of its obligations under this Agreement.

59.2. Nothing in this Clause shall require the Council to indemnify the Project Company for losses suffered due to any fraudulent act of the Project Company, its Officers or employees

(3) 60. REPORTS AND RECORDS

The project Company shall keep records, and shall make reports to the Council as stipulated in Schedules 11 and 12 respectively.

61. NOTICES

(4)

- a. Any notice shall be communicated in writing and sent out by registered post, facsimile transmission, electronic mail or hand delivered as the case may be to the representative of the Government or the Concessionaire at the address below:

On behalf of the Government:

On behalf of the Concessionaire:

SCHEDULE 1: LOCATION AND DESCRIPTION OF PROTECTED AREAS

**SCHEDULE 2: SPECIFICATIONS FOR INFRASTRUCTURE AND FACILITIES AT THE
PROTECTED AREAS**

SCHEDULE 3: VISITOR ACTIVITIES AND RESOURCE MANAGEMENT

SCHEDULE 4: TECHNICAL PROPOSAL AND DEVELOPMENT SCHEDULE

SCHEDULE 5: FINANCIAL PROPOSAL AND SCHEDULE OF FEES

SCHEDULE 6: PERFORMANCE INDICATORS

SCHEDULE 7: INVESTMENT PLAN

SCHEDULE 8: Condition Precedent Documents

PART A: List of Condition Precedents Documents to Commercial Closure

The following are the Commercial Closure Condition Precedent Documents:

- (5) The Bidding Documents and the Project Company Proposals (to the extent any further details, specifications or other changes to such documents are agreed between the Parties);
- (6) Construction Contract;
- (7) Shareholders Agreement between the shareholders of the Project Company;
- (8) Articles of association and memorandum of association of the Project Company;
- (9) Resolution of the Board of the Project Company authorising the undertaking of the Project;
- (10) Resolution of the Council authorising the undertaking of the Project;
- (11) Confirmation of the insurance terms
- (12) contracts for Professional Consultants

PART B: List of Conditions Precedents to Financial Closure

The following are the Financial Closure Condition Precedents:

1. duly executed copies of the Commercial Closure Condition Precedent Documents;
2. payment by the Project Company to the Public Private Partnership Commission of.... USD Dollars, payable in Malawi Kwacha as Project Entry Fee;
3. duly executed copies of the Financing Agreements;
4. duly executed copy of the Lenders' Direct Agreement;
5. final Planning Approval;
6. The level, if any, of the Contract Fee Payable under Article 15

SCHEDULE 9: FORCE MAJEURE EVENTS

1. Definition

1.1 A Force Majeure Event shall mean any event or circumstance or combination of events or circumstances (each an "Event") that is beyond the reasonable control of a Party and which, or the effect of which, materially and adversely affects the performance of that Party of its obligations or the exercise of its rights under or pursuant to this Agreement; provided that any such Event shall not constitute a Force Majeure Event if its effects could have been prevented by the affected Party through the exercise of reasonable diligence and care

1.2 Reasonable diligence and care includes acts or activities to protect the Project or the Project Facility from a Force Majeure Event which are reasonable in light of the likelihood of such Event, the probable effect of such Event if it should occur, and the likely efficacy, cost and cost-effectiveness of protection measures.

2. Classification

Force Majeure Events shall be classified into as Non-Political Force Majeure Events and Political Force Majeure Events, and shall include:

(a) Non-Political Force Majeure Events:

(i) acts of God such as storm, lightning, cyclone, tornado, hurricane, typhoon, earthquake, volcanic eruption, flood, tsunami, exceptionally adverse weather conditions or landslide;

(ii) fire or explosion (to the extent such fire or explosion is caused by a person not being the affected Party or an Associated Person of the affected Party, or any of its employees or agents or any of their contractors or Sub-Contractors or any of their respective employees or agents, and not being due to inherent defects of the Project Facility or any part thereof or the failure of the Project Company properly to design, construct, develop, operate and rehabilitate or maintain the Project Facility or any part thereof, or the failure

of the Project Company to exercise reasonable care in providing the Services or in performing any other action required by or in furtherance of the Project);

(iii) epidemic, pandemic, famine or plague;

(iv) radioactive contamination, nuclear blast or ionising radiation not due to an act of war;

(v) material accidental loss or damage to the Works or the roads servicing the Works;

(vi) material delay by the relevant Local Authority in completion of any works required under the detailed planning permission for connection of the Project Facility to any Utility, save to the extent that the delay is caused or extended by the act, omission or default of the Project Company or any of its Sub-Contractors, officers, directors, agents or employees;

(vii) material failure or shortage of power, fuel or transport;

(viii) failure by any statutory undertaker, Utility Company, Local Authority or like body to carry out works or provide services;

(b) **Political Force Majeure Events**

(i) acts of war (whether declared or undeclared), invasion, armed conflict or acts of a foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action, civil commotion, acts or campaigns of terrorism or politically motivated sabotage, acts of a political nature, including actions realised directly or indirectly against the Concessionaire or any of its contractors or Sub-Contractors whether or not as part of a pattern of actions against companies or installations with foreign ownership or management;

(ii) Industrial Action interrupting supplies and services to the Project (other than those involving the Project Company, its employees, agents or Sub-Contractors or any of their respective employees or agents or any strike or lockout attributable to any unfair policy or practice of the aforementioned persons);

(iii) expropriation or compulsory acquisition by any agent of the Council or the Government of any material assets or rights of the Project Company or its contractors or agents except to the extent that it constitutes a remedy or sanction lawfully exercised by

the Council as a result of any breach by the Project Company, its contractors or agents of any Law;

(iv) any Change in Law which renders this Agreement or its performance by any Party wholly or substantially illegal;

Schedule 10: Relief Events

1. Causes of a Relief Event

The following events shall constitute Relief Events:

- a. fire, explosion, lightning, storm, flood, bursting or overflow of water tanks apparatus or pipes, earthquake (falling short of a Force Majeure Event) and civil commotion;
- b. failure by any statutory undertaker, Utility Company, Local Council or like body to carry out works or provide services;
- c. material accidental loss or damage to the Works or the roads servicing the Works;
- d. material failure or shortage of power, fuel or transport; material blockade or embargo falling short of a Force Majeure Event; exceptionally adverse weather conditions; material change in Law with direct impact on the Project; material notifiable disease that requires closure of the Project Facility or Project Land or any part of it Industrial Action; material delay by the relevant Local Council in completion of any works required under the detailed planning permission for connection of the Project Facility to any Utility, save to the extent that the delay is caused or extended by the act, omission or default of the Project Company or any of its Sub-Contractors, officers, directors, agents or employees; and any Industrial Action which inhibits, prevents or otherwise impedes the provision of the Services.

Schedule 11: Records

The records listed below shall be supplied by the Project Company and copies retained in a single location approved by the Implementing Council for the periods indicated-

- a. All materials relating to the Design
- b. Records of the Construction methods, and any changes or any remedial works undertaken during Construction
- c. A full set of the drawings produced in preparation for Construction.
- d. The full specification issued for Construction together with detailed records of any and all revisions made thereof
- e. A full set of all certificates relating to the Design issued in accordance with the Law
- f. All records of all Planning Applications, compliance certificates, Planning Approvals, appeals relating to a decision to refuse any Planning Application, refusals of any Planning Application.
- g. A full set of Construction site records relating to the progress of Construction, testing of materials, monitoring of standards of workmanship and instructions issued.
- h. Records relating to all changes made to the Design and all remedial works undertaken during Construction.
- i. All correspondence relating to the Design
- j. A full set of all certificates relating to Construction issued in accordance with the Law
- k. A full set of survey reports relating to the Project Land, including ground, topographical, environmental reports
- l. A full set of geotechnical reports relating to the Project Land which were prepared during Construction
- m. Full records of all incidents and accidents that have affected the Operations and/or maintenance of the Project Facility
- n. Full records of any audit, inspection or surveys of the Project Facility and the result of such audits, inspection or survey, including photographs where applicable
- o. Full details of all works of repair and/or replacement relating to the Project Facility, including photographs, drawings and other documents.
- p. All maintenance manuals, structure registers and structure files for all structures on the Project Facility
- q. A full set of all certificates relating to the operations and provision of Services

- r. Full records of any third party claims in respect of the Project
- s. Full records of any Defect identified together with details of the action taken
- t. The quarterly register relating to queries and complaints received concerning the Project Facility
- u. A full set of the land ownership boundary plans relating to the Project Land
- v. All records relating to the maintenance of electrical and electronic equipment at the Project Facility
- w. The health & safety file for the Project Facility

Records required under this Schedule shall be kept in the most appropriate form taking into account the nature of the record with sufficient back-ups

Schedule 12: Reports

1. Reports during the Design and Construction Period.

During the Design and Construction Period, the Project Company shall submit to the Council within seven Working Days of each quarter three copies of quarterly report (the "Quarterly Report") covering all relevant aspects of the Works, including without limitation:

- a. the Project Company's progress in delivering the Project measured against the Construction Schedule;
- b. the value of the Works completed;
- c. any notable events that have taken place in relation to the Project since the previous report;
- d. all actual or potential departures from the requirements of this Agreement since the previous report including without limitation the Construction Requirements and any measures taken by the Project Company to remedy the departure;
- e. all grounds for a Dispute that have occurred since the previous Quarterly Report or that may reasonably be foreseen as likely to occur, together with the status of each Dispute and the measures taken to resolve the same;
- f. information relating to quality and environmental management;
- g. all substantial disagreements that have arisen between the Project Company, its Sub-Contractors since the previous Quarterly Report which are material to the Design or the Construction of the Works and how (if applicable) any such disagreement has been resolved
- h. where the original Construction Schedule has been changed, the updated Construction Schedule;
- i. the condition of the Works and whether or not the condition satisfies the requirements specified by the Implementing Council;

- j. details of all legal consents, approvals and certifications required since the previous Quarterly Report, whether the same were complied with or not and, if not, an explanation for non-compliance together with details of how the Project Company intends to comply; and
- k. details of any accidents and/or third party claims that have arisen in respect of the Project Facility since the previous Quarterly Report, or which, having arisen previously, have undergone any material development since the previous Quarterly Report.
- l. The Project Company shall also submit to the Council such other reports as the Council may reasonably require.
- m. The Project Company shall submit all reports required by relevant authorities.

2. Reports during the Service Period

2.1. Within seven Working Days after the end of each quarter which falls within the period from Services Commencement Date to the Termination Date; the Project Company shall provide to the Council three copies of a quarterly report (the "Quarterly Report") containing the following information in respect of the immediately preceding quarter:

- a. an assessment of its performance
- b. a summary of any service failures, the reasons for them and remedies effected;
- c. its operating expenditures and income;
- d. details of maintenance activities undertaken at the Project Facility;
- e. details of the costs of maintenance undertaken;
- f. information concerning its industrial relations;
- g. the condition of the Project Facility and whether it satisfies the requirements of this Agreement;
- h. all actual or potential departures from the requirements of this Agreement since the previous Quarterly Report and measures taken by the Project Company to remedy the departure;
- i. information relating to quality and environmental management
- j. all grounds for a Dispute that have occurred since the previous Quarterly Report or that may reasonably be foreseen as likely to occur, together with the status of each Dispute and the measures taken to resolve the same;
- k. details of any accidents and/or third party claims that have arisen in respect of the Project Facility since the previous Quarterly Report, or which, having arisen

previously, have undergone any material development since the previous Quarterly Report;

- i. details of Defects which have been identified since the previous Quarterly Report;
- m. an account of the number and type of complaints received from Users and others in respect of the Project Facility and the general status of the Services; and
- n. any other information that may be required to be reported by relevant authorities.

2.2. The Project Company shall submit all reports required by relevant authorities.

3. Accident Reports

3.1. During the Contract Period, within three hours of any accident that:

- a. results in damage to property of a more than merely trivial nature;
- b. results in any damage to wildlife or environment; or
- c. results in injury to any person,

in the Project Facility, Project Land or Off-Site Areas, or which is otherwise related to the Project, the Project Company shall submit to the Council an accident report (the "Accident Report").

3.2. The Project Company shall, within three days after the accident, report to the Council any additional details of such accident or its causes which become known to the Project Company.

3.3. The Accident Reports are in addition to and do not replace any statutory obligations of the Project Company.

3.4. Any Accident Report shall contain, as a minimum:

- a. the time and date of the accident;
- b. the location of the accident (marked on a scale plan, if possible);
- c. a brief description of the circumstances of the accident, including photographs and any CCTV videotape recording of the area;
- d. the full names, next of kin contact details, gender, age and the nature of injuries suffered by each individual involved
- e. copies of any paramedic, medical, police or other report available in relation to the accident;
- f. any casualties involved; and

g. any other relevant information.

3.5. Where any information in paragraph 3.4 of this Schedule 12 (Reports) is not available at the time when the Accident Report is submitted by the Project Company to the Council, such information shall be submitted by the Project Company to the Council as soon as it becomes available to, or known by or accessible to, the Project Company, using its best endeavors.

3.6. The Project Company undertakes to require similar accident reporting obligations from any of its Sub-Contractors in relation to any product or services provided to or in connection with the Project.

4. Annual Report

4.1. As soon as reasonably practicable and in any event not later than 60 Working Days following the end of each Contract Year, the Project Company shall provide to the Council three copies of an Annual Report in respect of that Contract Year.

4.2. An Annual Report shall contain:

- a. summaries of the Quarterly Reports and/or Quarterly Reports for that Contract Year;
- b. any updates required to those Quarterly Reports and/or Quarterly Reports in the light of subsequent developments to ensure that they remain accurate and complete;
- c. details of the performance of the Project Company in such Contract Year

4.3. If the Council so requires, the Project Company shall publish the Annual Report and/or provide a copy free of charge to all relevant interested parties.

4.4. The Council may incorporate all or any part of the Annual Report or any other report prepared by the Project Company in any annual or other report published by the Council, and for this purpose the Project Company grants the Council a royalty-free, non-exclusive licence to use its intellectual property in all such reports, together with the right to grant sub-licences.

5. Accounts

5.1. The Project Company shall provide to the Council:

- a. as soon as possible and in any event within 15 days after the end of each of its financial years, certified true copies of unaudited accounts of the Project Company and, if appropriate, consolidated accounts of the Project Company in respect of that financial year; and
- b. as soon as the accounts of the Project Company shall have been finalized but no later than 90 days after the end of each of its financial years, a copy of the audited accounts of the Project Company and, if appropriate, consolidated accounts of the Project Company in respect of that financial year, together with copies of all related directors' and auditors' reports.

6. Auditors' Report

If at any time after the provision to the Council of the documents referred to in Paragraph 5 of this Schedule 12 (Reports) the Council notifies the Project Company of any matter of concern in connection with anything in such documents, the Project Company shall instruct its auditors to prepare as soon as is reasonably practicable a Report on that matter, giving such further information, amplification or explanation as is reasonable having regard to the contents of the Council's notification; and the Project Company shall provide the Council with a copy of the auditors' Report within seven days of the Project Company's receipt of it from its auditors.