



Ensuring Access to Quality Water Services for All

BULK WATER SUPPLY AGREEMENT

between

{X}.....Water Services Board

{Y}Water Service

&

{Z} Water Service Provider

Model BULK SUPPLY SPA

Category 4

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ACRONYMS

SPA:	Service Provision Agreement
UfW:	Unaccounted for Water
WAB:	Water Appeals Board
WSP:	Water Service Provider
WASREB:	Water Services Regulatory Board
WSS:	Water and Sanitation Services

AGREEMENT

THIS AGREEMENT is made on the day of 200.....

BETWEEN

1. _____ Water Services Board (Licensee) of P.O. Box a body corporate duly established under the water act 2002 and issued with a licence by the Water Services Regulatory Board to provide water services in its licensed area.
2. _____ bulk water supplier (“the BWS”) of P. O. Box a corporate entity established through and engaged in the business of abstracting and supplying water in bulk to other entities.

AND

3. _____ (“the Service Provider ”) a corporate entity established under Cap. _____ of the Laws of Kenya and of P.O. Box of the other part, and an agent under a Service Provision Agreement to provide water to consumers under the Water Act 2002.

WHEREAS:

1. Under section 57 the Licensee is authorised to provide water services in its licensed area
2. Under the section 66 of the Water Act 2002, the BWS is desirous to provide water supply in bulk
3. Under the same section the Service Provider wishes to purchase the bulk water from the BWS
4. Under section 66 the Water Services Regulatory Board should approve the provisions of the bulk water supply agreement before it becomes effective

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

Clause 1 Definitions and Interpretation

The following words and expressions shall have the meanings as signed hereto unless otherwise required by the context:

- a. **“Abstraction”** in relation to water contained in any source of supply, means the doing of anything whereby any portion of that water is removed from that source of supply, whether temporarily or permanently, including the doing of anything whereby the water is so removed for the purpose of being transferred to another source of supply.
- b. **“Act”** means the Water Act, 2002.
- c. **“Agreement Year”** means the year this SPA is signed.
- d. **“Amendment Request”** means a request to amend the SPA submitted in accordance with this SPA.
- e. **“Approved Business Plan”** means the Business Plan approved by the Licensee.
- f. **“Annual Report”** means the report the BWS is required to prepare according to the Relevant guidelines of the Regulatory Board.
- g. **“Annual Business Plan Update”** means the annual updates to the Business Plan prepared by the BWS detailing any changes to the Approved Business Plan.
- h. **“Assets”**, unless otherwise stated, means the fixed and other assets of the licensee or which the BWS has otherwise been able to acquire the use of, the use of which are to be granted to the BWS in accordance with this Agreement, and the fixed assets to be procured, constructed or provided by the BWS under the provisions of this agreement and includes inter alia, all buildings, Rights, mains, pipes, sewers, works, plant, and equipment associated with the management and administration of the services and abstraction and collection of raw water and the conveyance and treatment of sewage, the treatment, storage and distribution of potable water, plant, equipment and facilities used or intended to be used for the purposes of scientific analyses or for the measurement of water and sewage and for the avoidance of doubt includes all plans, records and associated information irrespective of the format in which such plans, records and associated information are maintained or otherwise stored.
- i. **“Bulk Water Supply”** means water sold by the BWS to a service provider for the service provider to distribute.
- j. **“Business Plan”** means the document which defines the operations of the BWS and is elaborated according to the relevant guidelines issued by the Regulatory Board.
- k. **“BW Service Obligations”** means the Obligations of the BWS within the BWS Area to provide the bulk Water Supply, as specified in the Schedule D.
- l. **“Capital Works”** means all new capital works and major rehabilitation works to be undertaken by or for the benefit of the BWS(whether by or through the Licensee or any other body, company, or organization, and includes also construction work and the procurement and installation of capital equipment to extend, rehabilitate or replace the facilities.

This includes all major work carried out on the water services system (production and purification installations; storage facilities; supply, distribution, evacuation networks; building and other installation; etc.) in order to maintain, improve and enlarge water service provision according to standards and regulation.

- m. **“Capital Works Plan”** means a plan for Capital Works prepared by the BWS and approved by the Licensee and WSRB in accordance with the guidelines and this SPA.
- n. **“Commencement Date”** means the day the parties assumes operations.
- o. **“Commissioning”** means setting the system used in the provision of water services to work under controlled conditions and monitoring that it is safe for continued operation.
- p. **“Conditions”** means the General Conditions and the Particular Conditions.
- q. **“Contingency Fund”** means the fund established by BWS to finance emergency repairs and rehabilitation to the BWS infrastructure.
- r. **“Cure Period”** means, in respect of a Default Notice given to the Provider/BWS and the period specified in the Default Notice (or if no such period is specified 10 Business Days from the date of the Default Notice).
- s. **“Cure Plan”** means a plan to rectify a default, as provided in this SPA.
- t. **“Customer”** means any Person or organization who has entered into or will enter into or is deemed to have entered into a Customer Agreement and to whom water is supplied or from whom Sewage (including sewage) is removed and discharged and who is so supplied or served by a Service Provider or who should be so supplied or served by the Service Provider pursuant to its Obligations, and who is or will be required to pay for such Services and is also a person previously referred to as a “Consumer.”
- u. **“Customer Tariff”** means the tariff charged by the Water Service Provider to Customers in accordance with the provisions of this Licence and the Service Provision Agreement and as approved by the Water Services Regulatory Board;
- v. **“Day”** means a calendar day and “year” means 365 or 366 days.
- w. **“Default”** means a failure by a Party to perform its Obligations under this Licence.
- x. **“Default Notice”** means a notice of Default given by one Party to the other in accordance with provisions of the Agreement.
- y. **“Delegated Works”** means Capital Works to rehabilitate, renew and extend the Facilities, which are the responsibility of the Licensee, but which the BWS delegates to the Provider to procure, manage and implement.
- z. **“Delegated Works Fee”** means an amount which the BWS is due to pay the Provider for managing or implementing the Delegated Works.
- aa. **“Dispute Resolution Process”** means the process for resolving disputes between the Parties set out in this SPA.
- bb. **“Drinking Water”** and **“Potable Water”** means water that is available or otherwise supplied and intended to be suitable for human consumption on the premises to which the water is supplied.
- cc. **“Effective Date”** is the day this SPA is Signed and approved by Water Services Regulatory Board and as given in the SPA Data Sheet.

- dd. **“Emergency Notice”** means a notice given when there is a breach of the SPA that threatens public health or safety.
- ee. **“Exclusivity”** means the exclusive right to provide services in a given area.
- ff. **“Expiration Date”** is the day this SPA shall expire and has been specified in the SPA Data Sheet.
- gg. **“Extensions”** means any expansion of the Facilities required to provide Services to new Customers including but not limited to the construction of abstraction, treatment and distribution systems for Water Services, and the collection and treatment systems for Wastewater Services.
- hh. **“Facilities”** means the infrastructure, facilities and assets the BWS uses to provide the Water Services.
- ii. **“Financial Year”** means a period of twelve continuous months as agreed between the parties which is deemed or agreed to be financial year of the Relevant party.
- jj. **“Financing”** means credits, grants or any other money provider by the Government of Kenya development, or Development Financial provider, Institution or any other Financial arrangement to be approved by the Government.
- kk. **“Force Majeure”** means an exceptional event or circumstance which is beyond the parties control such as war, rebellion, terrorism, riot, natural catastrophes.
- ll. **“Good Industry Practice”** means the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a skilled, experienced and prudent person engaged in the provision of services and the carrying out of operations, maintenance and administration pursuant to this agreement from time to time.
- mm. **“Government”** means the Government of Kenya.
- nn. **“Laws”** means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority in Kenya.
- oo. **“Licensee”** means the entity issued with a licence by Water Services Regulatory Board to provide water services in accordance with section 57 of the Water Act 2002.
- pp. **“Maintenance”** means those activities which are necessary, using good industry practice, to prolong the life of an asset, ensure its reliability, prevent the necessity for repairs, ensure the asset performs the function for which it is intended and preserve the materials from which the asset is constructed.
- qq. **“Mediator”** means a person appointed by the BWS and the Service Provider to mediate between the parties and to attempt an amicable settlement in the event of a dispute or difference arising out of or relating to this Agreement or any breach thereof.
- rr. **“Notice of Tariff Correction”** means the notification by the Regulatory Board when it determines that a tariff adjustment has not been made in accordance with the Regulatory Board Tariff Guidelines or other applicable rules and regulations.
- ss. **“Opening Facilities”** means those Facilities which were in existence at the Effective Date and are specified in the Schedules.
- tt. **“Operations and Maintenance (O&M) Plan”** means the document detailing the activities to be carried out over a years period including all needed resources such as staffing and investment and also included the monitoring arrangements in order to ensure that the

BWS meets Performance Targets specified in the Agreement. Any details of contingency funds for maintenance and rehabilitation are included in the O&M plan.

- uu. **“Other Business”** has the meaning of all business not covered under the provision of Water Services as defined by the Act.
- vv. **“Party”** means the BWS or the Water Service Provider , as the context so dictates.
- ww. **“Special Conditions”** means Conditions of this SPA which specify any modifications to the General Conditions.
- xx. **“Penalty”** means the amount that the either party must pay to the other for failure to achieve the Performance Targets.
- yy. **“Performance Incentives”** means the incentive payment which may be made to either party for exceeding its Performance Targets.
- zz. **“Performance Targets”** means the Targets in specified by the WSRB and
- aaa. **“Personnel”** means any and all persons employed by the party concerned, under whatever legal relationship, including but not limited to, full and part time employees, staff, advisors, agents, servants, representatives, and independent contractors, and such personnel shall at all times be treated and regarded as employees of the appropriate party.
- bbb. **“Proposed Capital Works Plan”** means the Capital Works Plan developed by the BWS and submitted to the Licensee.
- ccc. **“Provider”** means that Water Service Provider named as such in this Agreement and in the SPA Data Sheet and its legal successors in title.
- ddd. **“Provider’s Representative”** means the person appointed by the Service Provider as its authorised representative.
- eee. **“Public Assets”** means all assets used by the BWS for the provision of bulk water and which assets vest in the Licensee in trust for the Government and people of Kenya and which have to be managed as such under the existing Laws of Kenya.
- fff. **“Public Funds”** are as defined in the Public Procurement and Disposal Act 2005.
- ggg. **“Raw Water”** means untreated water which is or may be abstracted from sources of supply which is available for water supply purposes.
- hhh. **“Regulations”** means all regulations of the Republic of Kenya applicable directly or indirectly to water supply and sewerage services.
- iii. **“Rehabilitation Works”** means work undertaken on the network assets in order to restore them to a proper and effective condition.
- jjj. **“Repair”** means those activities which are necessary, in accordance with good industry practice, to restore an asset to being fully functional in the event of such asset failing to perform the function (in part or in full) for which it is intended and, where necessary, includes the complete replacement or renewal of the asset.
- kkk. **“Regulatory Board Guidelines”** are guidelines prepared by the Regulatory Board which are binding and will be circulated to the BWS and the Water Service Providers from time to time.
- lll. **“Regulatory Board”** means the Water Services Regulatory Board established by the Water Act, 2002.

- mmm. **“Renewals”** means the activities required to keep the assets within the Service Area in an acceptable conditions by replacing any assets that reaches the end of its normal working life.
- nnn. **“Revenue Requirement”** means the amount of revenue needed to meet full costs of the BWS including operations costs, maintenance costs, rehabilitation costs, capital development costs, financing costs, regulatory levies, profit margins, and other similar costs.
- ooo. **“Revenue Account”** means a bank account set up to receive funds collected from Customers.
- ppp. **“Revenue Surplus”** means any remaining funds in the Revenue account after the full payment of the Licensee remuneration, the BWS Remuneration, and any Penalties or Incentives payments.
- qqq. **“Schedules”** means the document(s) entitled schedules referred to in this SPA.
- rrr. **“Service Area”** means that area in which the BWS is to provide the Services, as required in Schedule C.
- sss. **“Services”** means the services to be provided by the BWS under the Agreement .
- ttt. **“Service Shortfall”** means the difference between the water and service coverage, quantity and quality which WSP would demand at the allowed tariff levels, and the level of such services which can be provided with the existing facilities.
- uuu. **“SPA”** means this Service Provision Agreement.
- vvv. **“SPA Data Sheet”** means the pages entitled Service Provision Data Sheet Registration Details.
- www. **“Sewage”** means foul or used water, soiled water, whether treated or not originating from any premises and includes any discharge from water closets and urinals and water containing excremental liquid or substance.
- xxx. **“Strategic Liaison Group”** means the forum to discuss material alterations to the SPA occasioned by factors exogenous to the parties.
- yyy. **“Subsidies”** means funds received from Government agencies, charitable organizations or international development agencies to cover some or all of the costs of provision of water and sanitation services.
- zzz. **“Tariffs”** means the charges levied on the consumption of bulk water provided.
- aaaa. **“Tariff Schedule”** means the schedule of tariffs charged per volume category.
- bbbb. **“Water Appeals Board”** means the Appeals Body established by the Water Act, 2002.
- cccc. **“Water Meter”** or **“Meter”** means an apparatus installed for the purpose of measuring the quantity of water or sewage flow through an identified pipe.
- dddd. **“Water Resources Management Authority”** (WRMA) means the Authority established by the Water Act, 2002
- eeee. **“Water Service”** means any services of or incidental to the supply of water or provision of sewerage.

In this SPA, except where the context requires otherwise:

- a) Words indicating one gender includes all genders.
- b) Words denoting the singular only shall include the plural and vice versa.
- c) Unless the context otherwise requires, reference to any Clause or schedule is to a Clause or schedule of or to this Agreement.
- d) The headings in this agreement are inserted for convenience only and shall not affect the construction hereof.
- e) Provisions including the word “agree”, “agreed” or “agreement” require the same to be decided upon by both parties and to be recorded in writing at the ‘Special Conditions’ to this SPA;
- f) “Written” or “in writing” means hand-written, type-written, printed or electronically made and resulting in a permanent record.

Clause 2 Nature and Purpose

- 2.1 This bulk water supply agreement establishes the commercial and operational arrangements under which the BWS supplies water to the WSP and the manner in which the licensee shall oversee the agreement.
- 2.2 This agreement is entered into in accordance with the requirements of the relevant sections of the Water Act 2002. Section 66 of the Act requires the arrangements to deal with and include:
 - i. Standard of quality of the water to be supplied
 - ii. Continuity of water supply
 - iii. Maintenance of adequate reserves of water by the BWS
 - iv. Cost to be paid by the WSP for the supply of water to it
- 2.3 The licensee hereby appoints the BWS to be bulk supplier in its service board area in accordance with the provisions of this SPA.
- 2.4 The BWS hereby contracts to the Service Provider to provide bulk Water Services to the Service Provider’s defined area subject to the conditions, covenants and terms stipulated herein.

2.5 Bulk Water Supply Operational Manuals

The agreement is supplemented by the bulk water supply operational manuals that have been developed by the Licensee, BWS and the WSP.

- 2.5.1 The bulk water supply operational manuals shall contain details of the operations and activities that will be undertaken by the BWS and the WSP in the delivery of treated water, including normal and abnormal operational procedures, planned and unplanned work, quality assurance, quality control, calibration and location of flow meters, access to assets and sharing and exchange of information and other matters as agreed.

2.5.2 The bulk water supply operational manuals must be reviewed at least once in the life of this agreement or when requested by either BWS or WSP.

2.6 Relationship of the Parties

Nothing in this agreement constitutes a partnership between the BWS and WSP, nor does it constitute one organisation the agent of the other and no organisation has any authority to bind the other organisation in any way except as expressly specified in this agreement.

No organisation enters into this agreement as an agent for any other person or for the benefit of any other person unless expressly specified in this agreement.

2.7 Safety and the Environment

In performing their obligations under this agreement, their respective operating licences and other legislative and regulatory requirements, the licensee, BWS and Service Provider are committed to the safety of employees, contractors and members of the public and will place safety first when performing their respective obligations. The Licensee, BWS and Service Provider will use reasonable endeavours to identify all material risks to the safety of persons, and damage to the environment, which may arise in relation to the performance of their obligations. Each organisation must inform the other of these risks and the practices adopted to eliminate or mitigate these risks. When performing their respective obligations under this agreement, each organisation must comply with the other's Operational Health and Safety procedures when on the other's land or premises.

General Conditions of the Service Provision Agreement (SPA)

Clause 3 Representations

3.1 General

- a) The Service Provider and the BWS confirm to each other that there is no litigation, actual or pending at the date of execution of this agreement, which relates to the parties and to which the Service Provider or the BWS is a party or of which the parties are aware which would materially affect the Service Provider or the BWS or ability to perform its Obligations under this agreement and the transactions contemplated hereby.
- b) Provided that the water service needs of the service providers along the bulk water network are met to the agreed proportions, the BWS will not, for the whole period of this agreement, retain, use or supply bulk water to another new Service Provider, unless such alternative provision has been agreed upon between the BWS and the Service Provider.

3.2 Parties' Representatives

- a) The licensee's Representative shall be the person so named in the SPA Data Sheet. The licensee shall appoint its Representative and shall give the Representative all authority necessary to act on the licensee's behalf under the SPA..
- b) The Service Provider's Representative shall be the person so named in the SPA Data Sheet. The Service Provider shall appoint its Representative and shall give the Representative all authority necessary to act on the Service Provider's behalf under the SPA.
- c) The BWS Representative shall also be the person so named in the SPA Data Sheet. Likewise, the BWS shall appoint its Representative and shall give the Representative all authority necessary to act on its behalf under the SPA..
- d) Either party may change its representative from time to time and shall give notice of such change to the other party at least seven (7) days before it comes into effect.

Clause 4 Conditions Precedent to the Commencement of SPA

4.1 Regulatory Conditions:

The Regulatory Board shall approve this Agreement after the BWS and the Service Provider have met all the conditions herein and any other applicable charges as per the Regulatory Board Guidelines.

- a) The licensee shall have appointed the Service provider in accordance with the water Act 2002.
- b) The BWS shall have been formally appointed as a bulk water supplier by the licensee.
- c) Subject to its water requirements, the bulk water supplier shall obtain a valid Extraction Permit giving it abstraction Rights commensurate with its water requirements from the Water Resources Management Authority.
- d) The licensee shall have finalised the operational manuals.
- e) The BWS shall submit to the Licensee a copy of a code of conduct Signed by all Members of its Board and the Senior Executive Manager/Managing Director/Chief Executive Officer-according to schedule H.

4.2 Operational Conditions

These precedent conditions shall be satisfied before the agreement can be operational.

4.3 Regulatory Board Guidelines and Recommendations

The guidelines of the Regulatory Board will be based on the provisions of the Water Act 2002 and shall be binding to the parties and therefore this SPA shall be interpreted in such a way as to be consistent with such guidelines. If the SPA is inconsistent with the guidelines, it shall be amended

by the parties so as to make it consistent. If the parties fail to reach an agreement on how to amend the SPA, the parties shall seek a resolution by following the Dispute Resolution Process.

Any amendments to this SPA based on new changes or amendments to the Regulatory Board's guidelines shall also be first approved by the Regulatory Board before they are implemented.

Clause 5 Obligations and Rights

5.1 BWS's Obligations

- a) To implement capital works to extend and rehabilitate the bulk supply.
- b) To prepare studies of demand forecast and expansion of the facilities if agreed upon between the licensee and the Regulatory board.
- c) To obtain and keep in force all licenses, permits and warranties outside the responsibility of the Service Provider.
- d) To ensure that it possesses and retains all the necessary expertise necessary to fulfil the technical, commercial, financial and administrative, social and environmental functions.
- e) To provide the services fully as per the supply proportion agreed.
- f) To meet all the required standards, guidelines and provisions of the WASREB.
- g) To maintain and manage its assets in good working order so as to achieve obligations under this agreement.
- h) To come up with proposals for improvement of the assets so as to enhance service delivery.

5.2 BWS Rights

- a) To disconnect services for non-payment of water.
- b) To take legal action for breach of obligations by Service Provider and others causing damage or adversely affecting the services.
- c) To ensure that appropriate measures for the protection of the environment are adhered to in line with appropriate legislations.
- d) To maintain, exercise all statutory powers within the area, in relation to works, assets, pipe work and appurtenances of the bulk water supply systems.
- e) To have access to land, property and water sources within the Service Provider's area subject to rules on public security.

5.3 Licensee Obligations

- a) To seek finance and or finance the capital works development for extension and rehabilitation of bulk supply.

- b) To obtain all necessary licenses, permits and warranties necessary to carry out its obligations in accordance with statutes in force.
- c) To incorporate into planning the outcome of consultations on improvement of service quality and other issues touching on bulk water service delivery
- d) To propose Tariff Adjustments to the Regulatory Board.
- e) To monitor the provisions of this agreement and provide good offices between the parties.

5.4 Service Provider Obligations

- a) To pay the tariffs charged for the services supplied at the agreed intervals
- b) To obtain all necessary licenses, permits and warranties necessary to carry out its obligations in accordance with statutes in force
- c) To ensure that it possesses and retains all the necessary expertise necessary to fulfil the technical, commercial, financial and administrative, social and environmental functions
- d) To prepare studies of demand forecast in its service area and discuss them with the BWS and the licensee

5.5 Performance Targets, Penalties

- a) The Performance Targets for the BWS and Service Provider are set out in the Schedule to this Agreement and in the sector guidelines. The BWS shall monitor its Performance against the Performance Targets and report as stated in this SPA and the Relevant guidelines.
- b) The Performance Penalties for the BWS and Service Provider will be those set out in the Special Conditions to this Agreement.
- c) If the BWS Performance falls below the Performance Targets and there is a Penalty for such under Performance, then the BWS will pay a penalty as provided in the Special Conditions.
- d) If the BWS exceeds its performance targets by a margin of then percentage of the surplus earned shall be paid as an incentive to the BWS.

Clause 6 Effective Date, Duration, Renewal & Extension of SPA

6.1 Effective Date

The SPA will become effective on the date of its signature by the BWS and the Service Provider after approval by the Regulatory Board.

6.2 Duration

Unless earlier terminated this SPA shall remain in effect until the Expiration Date, which shall be the number of years from the Effective Date specified in the SPA Data Sheet, Schedule A.

6.3 Renewal/Extension

The SPA may be renewed or modified with the consent of both parties, subject to written confirmation by both parties of the intent to renew this SPA at least six (6) months prior to the Expiration Date. The parties herein understand that any renewal and/or extension shall be subject to the approval of the Regulatory Board and shall not exceed the duration of the original Agreement.

Clause 7 Scope of Services

7.1 Service Area

The BWS shall supply water in bulk to that area described as such in the schedule

7.2 The BWS provides and delivers bulk treated water to Service Provider in accordance with:

- i. Bulk treated water quality specifications set out in Schedule D; and
- ii. Bulk treated water quality requirements specified in the relevant regulatory instruments
- iii. Bulk water quantity requirements of per day

7.3 The BWS and Service Provider will work in conjunction with WASREB in relation to any alterations to water quality and service standards.

7.4 The forum for discussion concerning any such alterations is the Strategic Liaison Group between, the concerned licensee, BWS and Service Provider and the Regulator.

7.5 Operational Considerations

The BWS must determine the optimal source of any bulk treated water it supplies to Service Provider, so that water of a quality most appropriate for consumption can be available at any time, having regard to:

- i. Available water quality information;
- ii. Licence requirements imposed by WASREB;
- iii. Long term maintenance of its pre-determined water storage objectives and criteria;
- iv. Quality and commercial optimisation of BWS water treatment processes; and
- v. Service Provider's contractual obligations under any agreements with the licensee or any other party as advised by Service Provider in writing to the BWS.

Clause 8 Tariffs, Income and Financial Arrangements

8.1. Measurement of Water Supplied

- a. The quantity of bulk treated water supplied by the BWS to Service Provider must be measured by flow meters located at points agreed to between the BWS and Service Provider and documented in the bulk water supply operational manuals.
- b. To ensure their accuracy, the flow meters will be tested and calibrated according to requirements documented in the bulk water supply manuals, or when requested by Service Provider or the BWS and shall also be in accordance with the relevant guidelines.
- c. All costs associated with such testing or calibration must be met by the BWS unless data and information obtained from flow meters are shared, in which case costs must be shared.
- d. The cost of any additional testing must be borne by the party making the request.
- e. Data and information from flow meters must be made available on an integrated basis to each organisation's telemetry and other relevant communications and monitoring systems.

8.2 Charges for the Supply of Water

- a. Service Provider will pay the BWS charges for the bulk treated water supplied to it by the BWS in accordance with the determinations of maximum prices made from time to time by the Water Services Regulatory Board and recorded in Schedule E.
- b. The Tariffs shall be determined as per BWS Business Plan appended to this Agreement and Business Plan revisions submitted annually to the Regulator. The tariffs shall be sufficient to cover the reasonable cost of providing the Services, maintaining the Facilities and to meet any other costs specified in this SPA such as providing new facilities, debt servicing on outstanding loans, asset renewal and development except where subsidies are provided.

8.3 Billing and Payment Arrangements

- a. The BWS must render to Service Provider an account for the bulk treated water supplied to Service Provider within twenty-one (21) days from the last day of the preceding calendar month or within any other agreed period.
- b. Service Provider must pay to the BWS the amount shown on the account within twenty one (21) calendar days of the account being rendered by the BWS or within any other agreed period.
 - i. The BWS will not charge for water supplied in circumstances where the supplies have been taken over to fight fire disasters.

- ii. Accounts may be adjusted under the following circumstances:
 - a. When the quantity of bulk treated water supplied has been incorrectly measured;
 - b. When Service Provider seeks to recover part or all of the cost of the water used in relevant fire fighting operations; or
 - c. When the BWS receives or would have received, but for a negligent act or omission, reimbursement as a result of an insurance claim arising from an event of force majeure (in accordance with clause 15).

8.4 Recovery of Costs Incurred as a Result of Negligent or Intentional Acts or Omissions

- a. Costs may be recovered by Service Provider or the BWS according to the indemnity provided by clause 24 of this agreement when:
 - i. Costs or expenses have been incurred in responding to an incident that resulted from a breach of this agreement, a negligent or intentional act or omission by the other organisation
 - ii. The BWS commits a negligent or intentional act or omission that results in the provision of bulk treated water that does not meet the water quality standards in Schedule D and Service Provider incurs costs as a result of:
 - a) “Flushing” its distribution system to remove contamination; or paying redress to its customers for failing to meet water quality standards contained in relevant regulatory instruments;
 - b) Service Provider breaches this agreement or commits a negligent or intentional act or omission and the BWS incurs costs as a result of these Service Provider actions that directly prevent the BWS from complying with Schedule 1.

8.5 Subsidies

Subsidies received during the existence of this Agreement must be made known by the BWS to the Regulatory Board and which may lead to a tariff review if the Regulatory Board decides so. Any amount of subsidy received shall be indicated in the special conditions and at all tariff adjustment proposals.

8.6 Contingency Fund

BWS shall set apart a percentage of its monthly income agreed with the licensee and recorded in schedule E in a separate account known as contingency fund which shall be used exclusively for emergency repairs. The method of drawing down and reporting on the fund shall be recorded in the operating manuals.

Clause 9 Regulatory Levy:

The Service Provider is obliged to pay the Regulatory Levy approved by the Regulatory Board and issued by the Minister in accordance with the service provision agreement it has with its Licensee. BWS shall not pay the regulatory levy of 1%.

Clause 10 Asset Maintenance, Management and Development

10.1 Asset Maintenance and Management

- a. Where this Agreement relates to the operations of an already existing and functional operator, a detailed asset register of existing assets, including a full inventory and value shall be attached to the SPA, including the lease agreement (if any) to use the assets.
- b. Where the Agreement applies to a newly set up BWS or value of assets is not available, the BWS will, within a period of six months, prepare and submit an inventory and value of the Assets which it will use in the provision of bulk Water services. This shall include a lease agreement(if any) to use the assets.
- c. All significant changes in the value of assets shall be recorded in the inventory of assets according to the rules and regulations of the Regulatory Board.
- d. The BWS shall implement appropriate asset management techniques and indicate all replacement, rehabilitation and maintenance works carried out.
- e. The BWS may access any available grants or credits for infrastructure development in agreements with the licensee.
- f. The BWS has the obligation to make any debt service and interest payments on loans taken by it.

10.2 Asset Development

- a. The BWS shall subject to agreement with the licensee carry out asset development by providing funds, additional facilities or carrying out works in agreement with the Licensee. Both parties shall agree on the percentage contribution of the parties to the cost of development and the share of assets held.
- b. The BWS shall consult with the Licensee in developing additional Facilities, and the licensee shall cooperate with the BWS in planning , financing and construction of such new facilities.
- c. Where an international or bilateral financial institution or any third person has provided finance to the Licensee either by way of loan or by grant aid, the BWS shall comply with any conditions agreed upon by the Licensee in respect of carrying out and commissioning the works. All BWS owned and held assets are Public Assets and the BWS has the obligation to ensure that such public assets are managed and maintained accordingly and to the interest of the public.

10.3 Access to Assets

Each organisation is to give the other sufficient access to their lands and assets to enable the other organisation to discharge their responsibilities under their Act, Operating Licence and any other legislation and regulatory instruments.

Procedures to allow access to the assets are contained in the bulk water supply operating manuals.

Clause 11 Maintenance of Adequate Reserves of Water by the BWS

11.1 Optimisation of Available Water

The BWS shall manage its bulk treated water storage and supply system to optimise water availability, having regard to:

- i. Quality of available water in individual storages;
- ii. Storage and catchment capacities of the individual supply systems;
- iii. Climatic variability of the individual systems;
- iv. Need to optimise its water entitlement undercatchments area
- v. Environmental aspects of its use of run-of-river transfer systems.

11.2. Daily Supply of Water

- a) The BWS must provide bulk water to Service Provider at the metered supply points agreed with Service Provider. The BWS must ensure that its supply of bulk treated water to Service Provider satisfies the agreed volume as agreed by the licensee and service provider.
- b) The BWS will operate its supply system so as to provide volumes of bulk treated water in accordance with the relevant WSRB standards and guidelines and also the bulk water supply operational manuals.

11.3. Annual Supply of Water

The BWS must supply bulk treated water to Service Provider in accordance with:

- i. Any environmental and riparian flow release requirements set out in its water resource management permit, or any other licence or approval under the Water Act 2002;
- ii. Any other operating requirements arising out of legislation or regulatory instruments; and
- iii. Agreed drought response and contingency plans at a sub-system level.

11.4. Drought Management

The Licensee, BWS and Service Provider will have arrangements to manage and mitigate the impact of drought, in accordance with the requirements of legislation and relevant regulatory instruments.

In the event of drought the Licensee, BWS and Service Provider are to cooperate with each other to achieve an optimal response that minimises inconvenience to Service Provider's customers and any other customers of the BWS.

11.5. Water Supply Planning

- a) The Licensee, BWS and Service Provider are to work with each other the WSRB and other government agencies in monitoring the demand for water and the development of future water supply strategies for the whole service area and regional catchment area.
- b) The BWS and Service Provider are to liaise as appropriate in relation to the operational aspects of water supply planning.

Clause 12 Continuity of the Water Supply

12.1 Incident Management Planning

The BWS and Service Provider are each to prepare and maintain incident response and contingency plans for possible major incidents or emergencies, including asset failures, floods and bushfires, which have the potential to or will impact on the other organisation.

These plans are to be made in accordance with:

- i. Water Act 2002;
- ii. Environmental Management and Coordination Act;
- iii. Any other relevant or appropriate legislation and regulatory instruments.

Plans for incidents that have the potential to or will impact on the other organisation must be prepared in consultation with the other organisation and copies of each plan and any revisions are to be made available to the other organisation and to the Licensee.

12.2. Rights and Obligations when an Incident Occurs

- a) In the event of a major incident or emergency that has the potential to or will impact on the other organisation, each organisation is to:
 - i. Act in accordance with the appropriate plans and manuals ; and
 - ii. Cooperate with the other to achieve an optimal response that minimizes inconvenience to Service Provider 's customers and any other customers of the BWS.

- b) In the event of such a major incident or emergency, each organisation grants to the other, its employees and agents, the right at any time during the incident to enter its works, assets and lands to take such steps as are reasonably necessary to overcome the cause or consequences of the incident.
- c) If an incident arises out of or as a consequence of a breach of this agreement, or from any negligent or intentional act or omission, then the organisation responsible for the breach or negligent or intentional act or omission must pay the reasonable costs and expenses incurred by the other organisation.

12.3. Water Quality Planning and Risk Management

- a) The BWS and Service Provider will work together on water quality planning and risk management in accordance with the requirements of the Water Act 2002, WSRB standards and guidelines and any other related laws and the regulatory instruments under these Acts.
- b) The BWS and Service Provider will have a transparent approach to the minimisation of risk to public health, through the management of water quality from the catchment to the consumers' tap.

Clause 13 Notices

- 13.1 Every notice, consent, approval, demand or other communication of any nature whatsoever required to be served, given or made under or arising from this agreement:
- i. Must be in writing in order to be valid unless some other form of notice is specifically provided for in the bulk water supply protocols; and
 - ii. Must be:
 - a. Left at the address of the addressee; or
 - b. Sent by prepaid ordinary post to the address of the addressee;
 - c. Sent by facsimile to the facsimile number notified by the addressee from time to time; or
 - d. Sent by email to the email address notified by the addressee.

Clause 14 Planning, Reporting and Record Keeping

14.1 Operation and Maintenance Plan

The BWS shall in its Business plan prepare and annually update a simplified Operation and Maintenance Plan including the proposed tariffs and investments. The plan shall be

prepared according to the Relevant guideline issued by the Regulatory Board. With the updated plan the BWS shall submit an annual budget to the Licensee at least two months before beginning of the financial year. The Licensee shall review the Draft Plan and in consultation with the Service Provider , suggest adjustments and agree on the Final Plan with BWS.

14.2 Short and Long Term Development Plan

In its business plan the BWS shall prepare Short and Long Term Development Plans according to the Relevant guideline issued by the Regulatory Board for the development and improvement of assets and facilities used in bulk water services provision.

14.3 Annual Reports by BWS

The BWS shall prepare each year an Annual Report according to the reporting guidelines of the Regulatory Board. A copy of the report shall, be submitted to the Regulator. The Annual Report shall be submitted within three months of the end of the year to which it relates.

14.4 Daily Reports

The BWS shall submit daily water volume reports to the Service provider. The reports shall also include where relevant any incidents on the infrastructure likely to affect the delivery of services.

14.5 Record Keeping and Inspections

- a. The BWS and Service Provider shall keep records in accordance with set regulations, standards and guidelines. The BWS and Service Provider shall use or create registers, books and records and other means of recording information in the quality and quantity required for facilitating efficient management and supervision of this agreement, for providing information to the Licensee and third parties about service quality and performance.
- b. The BWS and the Service Provider shall establish and maintain suitable accounting records in accordance with best international practice and relevant WSRB guidelines. All registers, books, records and other recorded information shall be in English.
- c. For the purposes of this agreement the BWS and Service Provider shall allow the Licensee and the Regulatory Board access to its records at any time for inspection.
- d. The BWS and service provider shall respond to requests for information within 2 weeks or within the time specified by the request.

Clause 15 Default and Force Majeure

15.1 Notification of Default and Cure Plan

If a default occurs, the party not in default may, in addition to any other remedies it has, give the defaulting party a Default Notice by indicating that it requires the defaulting party to provide to it a written Cure Plan which specifies the reason the default occurred, how the defaulting party intends to remedy the default and the time that the defaulting party will require to remedy the default including additional information on such matters as the party not in default requires. A reasonable time shall be set by which the defaulting party must provide the Cure Plan. All parties shall agree on the Cure Plan and if no agreement can be reached, the parties shall refer the matter to the Regulatory Board for a resolution.

15.2 Failure to Cure

If the default has not been cured or remedied as agreed in the Cure Plan, or the defaulting party does not submit an acceptable Cure Plan or does not implement any cure plan diligently, the party not in default may, without prejudice to any of its other Rights with respect to the default, terminate this SPA with the prior written consent of the Regulatory Board.

15.3 Damages

If the Service Provider fails to pay for the Services or otherwise to comply with this SPA, then to the extent that the failure does not result from an unavailability of the Facilities or other fault of the BWS, the Provider shall be liable to compensate the BWS for losses suffered by the BWS as a result of the Provider's failure.

15.4 Force Majeure

- a) Force Majeure means circumstances arising and completely outside of the control and beyond the contemplation of the parties to this SPA which renders its Performance impossible and frees the parties hereto from respective Obligations under this SPA, these shall include but shall not be limited to:
- a. Any act of war, declaration of hostilities or belligerence, blockade or revolution;
 - b. Insurrection, public disorder or riot;
 - c. Explosion, fire, earthquake, excessive and extraordinary floods and volcanic eruption;
 - d. Pollution of Raw Water where such pollution has not been caused by an act or omission of the party invoking such an event and where such pollution cannot be rectified by the exercise of sound water and sewerage engineering practices;

- e. With respect to the BWS , any significant shortage of Raw water where such shortage is caused by circumstances outside of the reasonable control of the BWS; and
- b) The party encountering an event of Force Majeure shall as soon as it appears, give written notice to the other party of the occurrence of the event and also promptly inform the Regulatory Board. The said notice shall include information about the circumstances, if known, the extent to which the affected party will be prevented from or impeded in carrying out any of its Obligations under this SPA and a statement of steps necessary to remedy such an occurrence.
- c) Each Party shall at all times use all reasonable endeavors to minimize any delay in the Performance of the SPA as a result of Force Majeure. This Agreement may be terminated in the event of a Force Majeure but only with the prior written approval of the Regulatory Board. The affected Party shall give notice to the other Party when it ceases to be affected by the Force Majeure.

Clause 16 Dispute Resolution Process

16.1 Dispute Resolution

Disputes between the parties that cannot be resolved amicably or through orders issued by the Regulatory Board or mediation by an independent person appointed by the parties shall be referred to the Water Appeal Board or appointed on their behalf by the Water Appeal Board.

A dispute shall be declared as such in writing after giving a notice of 30 days.

The Decision of the WAB over the dispute shall be final but in the event that the WAB shall be considered to have erred in law, an appeal on its decision may be made to the High Court of Kenya.

16.2 Severability

The provisions of this clause stand alone (are severable) from the rest of this contract and shall remain in effect even after this contract is terminated for any reason.

16.3 Waiver of Litigation

The parties irrevocably consent to comply with the provisions of this clause and neither party shall be entitled to withdraw from or claim at any such proceedings that it is not bound by these provisions or by any ruling or procedure laid down in terms of such provisions. The parties agree that they shall not commence any litigation procedures in respect of a dispute arising in terms of this contract.

16.4 Continuing of Obligations

No dispute arising from this contract shall entitle the other party to discontinue or suspend the execution of any of its powers, rights, duties and/or obligations in terms of this contract, pending the settlement of the dispute.

16.5 Effect of Validity of a Clause

No waiver or cancellation of a clause, or its declaration to be ultra vires shall affect the validity and enforceability of the rest of the provisions of the Agreement and they shall continue to be observed as binding conditions.

Clause 17 Amendment of the Agreement

- 1) The Parties acknowledge that circumstances, objectives and available information will change over the duration of the SPA and commit to work together in good faith to amend the SPA where such amendment would better serve the interests of Customers and Potential Customers but subject to approval by the Regulatory Board.
- 2) If the Parties cannot agree on an amendment, but one Party nevertheless considers that an amendment is necessary, the matter shall be resolved through the Dispute Resolution Process.

Clause 18 Termination of the Agreement

18.1 Termination by Mutual Agreement

- a) This SPA may be terminated by mutual agreement by either party giving to the other a three (3) months notice of the intention to terminate or not to renew the Agreement.
- b) The Regulatory Board shall receive a copy of such notice from the BWS without delay and shall approve the premature termination by mutual agreement of the SPA.
- c) In the event that either party wishes not to renew this SPA at its expiry, prior notice shall be given at least three (3) months before expiry of this SPA.
- d) Following notice of the intention to terminate or not to renew the SPA, the parties shall enter into negotiations with a view to making appropriate arrangements, including and where applicable financial compensation for the transfer of ownership of assets and so as to allow the BWS/Service Provider to make alternative arrangements for the provision of water services within the area of supply of the Service Provider and thus ensure continuity of service.

18.2 Termination of this SPA by Cause

18.1.1 Termination by the BWS

The BWS shall be entitled to terminate the SPA for cause, by giving a Three (3) Months notice to the Service Provider, if the Service Provider :

- a) Is in serious and sustained default on its Obligations under this SPA and does not show willingness to implement measures within an agreed timeframe to achieve compliance.
- b) Plainly demonstrates the intention not to continue Performance of its Obligations under the SPA.
- c) Are not able to cope adequately with emergencies such as imminent or direct threat to public health or safety, droughts etc. or gives indication that he will not follow the directions of an emergency notice in accordance with the provisions of this SPA.
- d) Becomes bankrupt or insolvent.
- e) Goes into liquidation.
- f) Has a receiving or administration order made against it.
- g) Carries on business under a receiver, trustee or manager for the benefit of its creditors.
- h) Engages in any corrupt or fraudulent practice.
- i) Fails to obtain a Service Provision Agreement from the licensee.

18.1.2 Termination by the Service Provider

The Service Provider shall be entitled to terminate this SPA for cause, by giving a Three (3) Months notice to the BWS, if the BWS:

- a) Fails to pay any money it owes to the Service Provider within Six (6) months of its falling due
- b) Substantially fails to perform its Obligations under the SPA in such manner as to materially and adversely affect the ability of the Service Provider to perform its Obligations under this SPA
- c) Becomes bankrupt or insolvent.
- d) Goes into liquidation.
- e) Has a receiving or administration order made against it.
- f) Carries on business under a receiver, trustee or manager for the benefit of its creditors.
- g) Engages in any corrupt or fraudulent practice.
- h) If any act is done or event occurs which has a similar effect to any of the Acts or events stated above.

The Service Provider's decision to terminate the SPA shall not prejudice any other Rights of the Service Provider under the SPA or otherwise.

18.3 Intended Termination

Any intended termination of the Agreement shall take into account the need not to prejudice the ability of the Service Provider to discharge outstanding financial Obligations, if any, entered into by the Service Provider for purposes of enabling it to implement its commitments under the approved Business Plan.

18.4 Upon Termination or Expiry of this SPA

- 1) Both parties shall ensure that each party is paid the remuneration due to it.
- 2) In case of termination for cause, the defaulting party shall not make any claim for lost or foregoing profits, revenue, consequential damages or any other costs, damages, expenses or losses of any kind as a result of or in connection with the termination of this SPA.
- 3) In the event of termination due to prolonged Force Majeure, neither party shall make any claim for lost or foregone profits, revenues, consequential damages or any other costs, damages, expense or losses of any kind as a result of or in connection with the termination of this SPA.
- 4) The Service Provider shall seek to ensure the smooth continuation and provision of the services throughout the period from receipt of any notice of termination of this agreement till the expiry date of such notice, or during the last six (6) months of the period of the agreement (if no such notice is served).

18.5 Surrender of Information, Documents and Assets on Termination of the SPA

- 1) The Service Provider or BWS shall, on the expiry or early termination of this Agreement immediately provide to the BWS/Service Provider all information and documents held or used by the Service Provider .

Clause 19 Emergency

19.1 Emergency Notice

Where a breach of the SPA by the Service Provider seriously threatens public health or safety, or the safety of the facilities, the BWS may issue an emergency notice to the Service Provider and a copy thereof is given to the Regulatory Board without delay. The notice shall specify the breach, and the health or safety issues which led the BWS to issue the notice. While an emergency notice is in place, the Service Provider shall comply fully with the directions of the BWS, and shall ensure that its staff and sub-contractors also comply with the BWS's directions.

19.2 Withdrawal of Notice

The BWS shall withdraw the emergency notice once the threat to public health or safety, or the safety of the facilities is no longer serious and shall copy it to the Regulatory Board.

19.3 Emergency Termination

The BWS shall have the right to terminate this SPA in an emergency within fourteen (14) days with the written approval of the Regulatory Board if the Service Provider does not comply with the Emergency Notice and if no immediate improvement can be foreseen.

Clause 20 Transparency

The BWS shall make copies of the SPA and all amendments available to the Public upon request at no charge and by posting it on a suitable website. It shall also provide notices in the mass media within the service area.

Clause 21 Compliance with Laws

- 21.1 Each organisation must discharge its responsibilities and carry out its rights under this agreement in accordance with all applicable laws.
- 21.2 Nothing in this agreement is to be read in diminution of the responsibility of the BWS under common law or statute law, for:
- i. The quality of water supplied to Service Provider ; and
 - ii. Notifying Service Provider of any defects, contamination or dangers in the water; and
 - iii. Taking action to rectify such faults, defects, contamination or dangers found in the water.
- 21.3 Each Party shall, in performing its tasks under the SPA comply with all applicable Laws of Kenya.
- 21.4 The Service Provider shall give all notices, pay all taxes, duties and fees, and obtain all permits, licenses and approvals, as required by the Laws in relation to the execution and provisions of the Services
- 21.5 Wherever public or Government funds or other financiers' funds are provided, the related rules, regulations and statutory provisions will be adhered to for procurement purposes.

Clause 22 Separate Liabilities

This Agreement does not create joint liability of the parties and each party shall be separately liable for its own acts of omission or commission. Each party shall indemnify the other against any losses incurred as a result of the actions of the other.

Clause 23 Insurance

Each party shall be responsible for the insurance of its own assets.

Clause 24 Indemnities

- 24.1 The Service Provider hereby covenants to indemnify and hold harmless the BWS and its personnel and keep it and them fully and effectively indemnified from and against all liability and expenditure, whether arising during the continuance or after the period of this Agreement, including, and without prejudice to the generality of the foregoing, all costs, charges, demands, fines, legal fees, Penalties and proceeding and expenses incurred in disputing any action, proceeding or claim of any nature and any damages, payments, claims or other liabilities suffered or incurred by the Service Provider and its Personnel arising as a result of or in connection with any loss, injury, including death or damage to any member of the public or any personnel or other workman or other person in the employment of, or seconded to, the Service Provider .
- 24.2 Save to the extent provided above, the BWS covenants to indemnify and hold harmless the Service Provider and its personnel and keep it and them fully and effectively indemnified from and against all liability and expenditure for which it is responsible whether from the public or the private sector, and whenever arising, namely before, during or after the continuance of the provisions of this Agreement, including all costs, charges, demands, fines, legal fees, Penalties proceedings and expenses incurred in disputing any action, proceeding or claim.

Clause 25 Ownership of Information

Unless the BWS and Service Provider otherwise agree in writing, the ownership of information (including data) which is legally capable of being owned:

- i. Vests in the organisation which has created that information; and
- ii. If the information has been jointly created, vests in the BWS and Service Provider equally.

The sharing of information does not of itself confer or vest ownership in an organisation.

Clause 26 Application Fee

The Regulatory Board shall charge an Application Fee towards the cost of processing and approval of the SPA of such amount or shall be determined by the Regulatory Board as its sole discretion.

AGREEMENT FORM

IN WITNESS WHEREOF, the Parties hereto have affixed their respective seals and executed this Agreement on the day and year before written.

Sealed, Signed and Delivered by..... **Licensee**

Common Seal

Name and Signature:

Chief Executive Officer

Sealed, Signed and Delivered by **BWS**

Common Seal

Name and Signature:

Chief Executive Officer

In the Presence of

Name and Signature:

Chairman

Sealed, Signed and Delivered by **WATER SERVICE PROVIDER**

Common Seal

Name and Signature:

Chief Executive Officer

In the Presence of

Name and Signature:

Chairman

OPERATIONAL MANUALS

To be prepared by Licensee in agreement with BWS and Service Provider.



Schedule A:

Service Providers Data Sheet & Registration Details

Conditions	Sub-Clause	Data
license 's name and address		
Licensee representative		
BWS address for communication		
Service Provider 's address for communication		
BWS's Representative		
Service Provider 's Representative		
Effective Date		
Period of SPA		
Expiration Date		
Copy of Registration Details Attached		
Commencement Date		

Schedule B:

BWS's Service Area

Definition of Service Area [insert map or description]

Definition of specific sub-areas [insert map or description for each area]

Schedule C:

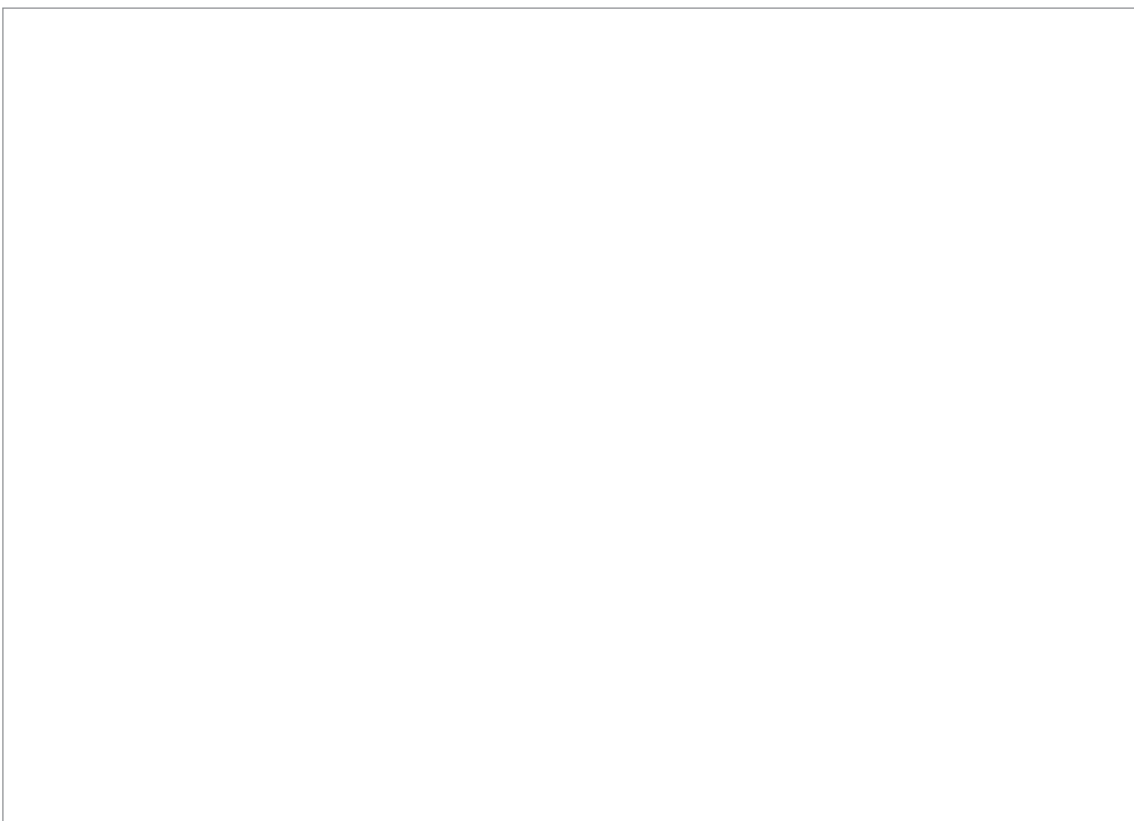
Constitution or Memorandum and Articles of Association of BWS



Schedule D:

BWS's service obligations

- Water quality standard table
- Water volume per day (m3)
- Hours of supply



Schedule E:

Agreed Water and Sanitation Tariff

Schedule F:

BWS Profile (Details of Board Members)

Details of Chairman and committee Members:

Name and profession of members starting with the chairman of the committee

Name	Position within Organization	Academic Qualifications	Professional Qualifications	Current Occupation	Age	Sex

You may attach additional separate sheet

Details of Key Management Staff:

This list should include manager and all key staff

Name	Position within Organization	Academic Qualifications	Professional Qualifications	Age	Sex

You may attach additional separate sheet

Schedule G:

Business Plan

Schedule H:

Copy of Water Permit



Schedule I:

Copy of code of conduct of Chairman and
Board Members of BWS



Notes: