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Fédération International des Ingénieurs-Conseils
International Federation of Consulting Engineers
Internationale Vereinigung Beratender Ingenieure
Federación Internacional de Ingenieros Consultores

Conditions of Contract for **Design, Build and Operate Projects**

GENERAL CONDITIONS
PARTICULAR CONDITIONS
SAMPLE FORMS



FIDIC is an international federation of national Member Associations of consulting engineers.

FIDIC was founded in 1913 by three national associations of consulting engineers within Europe. The objectives of forming the Federation were to promote in common the professional interests of the Member Associations, and to disseminate information of interest to their members. Today, FIDIC membership covers more than 70 countries from all parts of the globe and encompassing most of the private practice consulting engineers.

FIDIC is charged with promoting and implementing the consulting engineering industry's strategic goals on behalf of Member Associations. Its strategic objectives are to: represent world-wide the majority of firms providing technology-based intellectual services for the built and natural environment; assist members with issues relating to business practice; define and actively promote conformance to a code of ethics; enhance the image of consulting engineers as leaders and wealth creators in society; promote the commitment to environmental sustainability.

FIDIC arranges seminars, conferences and other events in the furtherance of its goals: maintenance of high ethical and professional standards; exchange of views and information; discussion of problems of mutual concern among Member Associations and representatives of the international financial institutions; development of the consulting engineering industry in developing countries.

FIDIC members endorse FIDIC's statutes and policy statements and comply with FIDIC's Code of Ethics which calls for professional competence, impartial advice and open and fair competition.

FIDIC, in the furtherance of its goals, publishes international standard forms of contracts for works and for clients, consultants, sub-consultants, joint ventures and representatives, together with related materials such as standard pre-qualification forms.

FIDIC also publishes business practice documents such as policy statements, position papers, guides, guidelines, training manuals and training resource kits in the areas of management systems (quality management, risk management, business integrity management, environment management, sustainability) and business processes (consultant selection, quality based selection, tendering, procurement, insurance, liability, technology transfer, capacity building).

FIDIC organizes an extensive programme of seminars, conferences, capacity building workshops and training courses.

FIDIC publications and details about events are available from the Secretariat in Switzerland. Specific activities are detailed in an annual business plan, and the FIDIC website, www.fidic.org, gives extensive background information.

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INTRODUCTION

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**DESIGN, BUILD AND OPERATE
PROJECTS**

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SAMPLE FORMS

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FEDERACION INTERNACIONAL DE INGENIEROS CONSULTORES



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The preparation was carried out under the general direction of the FIDIC Contracts Committee which comprised Axel-Volkmar Jaeger, Consulting Engineer, Germany (Chairman); Christopher Wade, Consulting Engineer, UK (Former Chairman); Philip Jenkinson, Atkins, UK; Nael Bunni, Chartered Engineer, Ireland; Legal Adviser Christopher Seppala, White and Case LLP, France; and Special Adviser Michael Mortimer-Hawkins, Consulting Engineer, UK and Sweden.

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The ultimate decision regarding the wording of the clauses and format of the document rests with FIDIC, and acknowledgement of the reviewers does not mean that they concur with or approve the wording of all clauses.



FOREWORD

In 1999, the Fédération Internationale des Ingénieurs-Conseils (FIDIC) published a new series of Conditions of Contract: (a) for Construction; (b) for Plant and Design-Build; and (c) for EPC/Turnkey Projects. This was followed by the *Short Form of Contract* for lower value or less complex projects, and the *Form of Contract for Dredging and Reclamation Works*. Following their publication, it became clear that there was a growing need for a document which combined a design-build obligation with a long-term operation commitment.

Whilst it is recognised that there are alternative scenarios encompassing the Design, Build and Operate (DBO) concept – for example the "green field" scenario of Design-Build-Operate, and the "brown field" scenario of Operate-Design-Build – it was also recognised that different scenarios required different contract conditions. Moreover, the conditions applicable to short-term operation differed considerably to those applicable to long-term operation. A further consideration was whether it was best to approach a DBO project as a single long-term contract or as two separate or linked contracts.

FIDIC has chosen to adopt the green-field Design-Build-Operate scenario, with a 20-year operation period, and has opted for a single contract awarded to a single contracting entity (which will almost certainly be a consortium or joint venture) to optimise the coordination of innovation, quality and performance, rather than award separate contracts for design-build and for operation. The Contractor has no responsibility for either financing the project or for its ultimate commercial success. This is the basis upon which this document has been prepared.

The document, as written, is not suitable for contracts which are not based on the traditional Design-Build-Operate sequence, or where the Operation Period differs significantly from the 20 years adopted.

The document is recommended for general use where tenders are invited on an international basis.



NOTES

When preparing these Conditions of Contract for Design, Build and Operate Projects, the drafting task group has attempted to include all conditions of a general nature, which are likely to apply to the majority of DBO contracts, into General Conditions. However, it was recognised that there are many essential provisions which are particular to each individual project. These are to be included as Contract Data and are to be found in the Particular Conditions Part A – Contract Data.

In addition, it was recognised that many Employers or governments, or even different jurisdictions, particularly if the General Conditions were to be used on domestic contracts, may require special conditions of contract, or indeed particular procedures, which differ from those included in the General Conditions. For this reason, the document also allows for Particular Conditions Part B – Special Provisions which includes advice to drafters of contract documents who may wish to add Special Provisions to replace or supplement the clauses to be found in the General Conditions.

Users who wish to adopt these conditions for use on a different scenario or with an operation period significantly different to the 20-year period assumed, are referred to the *FIDIC DBO Contract Guide* (planned for publication by FIDIC at a later date), which identifies the areas which will require amending and gives comprehensive guidelines and suggestions on how they should be addressed. However, the Guide will not claim to address all issues requiring attention, and users should seek expert advice from FIDIC before attempting to make any significant changes to the document via Particular Conditions Part B – Special Provisions.

Drafters of contract documents are reminded that the General Conditions of all FIDIC contracts are protected by copyright and trademark and may not be changed without specific written consent, usually in the form of a licence to amend, from FIDIC. If drafters wish to amend the provisions found in the General Conditions, the place for doing this is in the Particular Conditions Part B – Special Provisions, as mentioned above, and not by making changes in the General Conditions as such.

FIDIC also recognises that the successful performance of a long-term DBO contract requires that the Parties understand the overall time framework and the need for a long-term commitment by both the Employer and the Contractor. In trying to achieve this understanding and commitment, it has been necessary to introduce new procedures and new terminology which are not to be found in the other FIDIC forms of contract.

The document also includes a number of sample forms to help both Parties have a common understanding of what is required by third parties such as providers of securities and guarantees, and what is considered to be accepted good practice by FIDIC and the major international funding agencies. While copyrighted, these forms are expressly provided to users of the Conditions of Contract for completion by users. Users are warned that if these forms are changed in any significant way, there is a great risk that the balance of the contract and the specific wording of the Clauses may be compromised.

The document begins with a series of comprehensive flow charts which show, in visual form, the critical sequences of activities which are specific and unique to the

DBO form of contract. These have been included by the drafting task group to facilitate an understanding of the new procedures and new terminology found in these *FIDIC Conditions of Contract for Design, Build and Operate Projects*.

These flow charts cover:

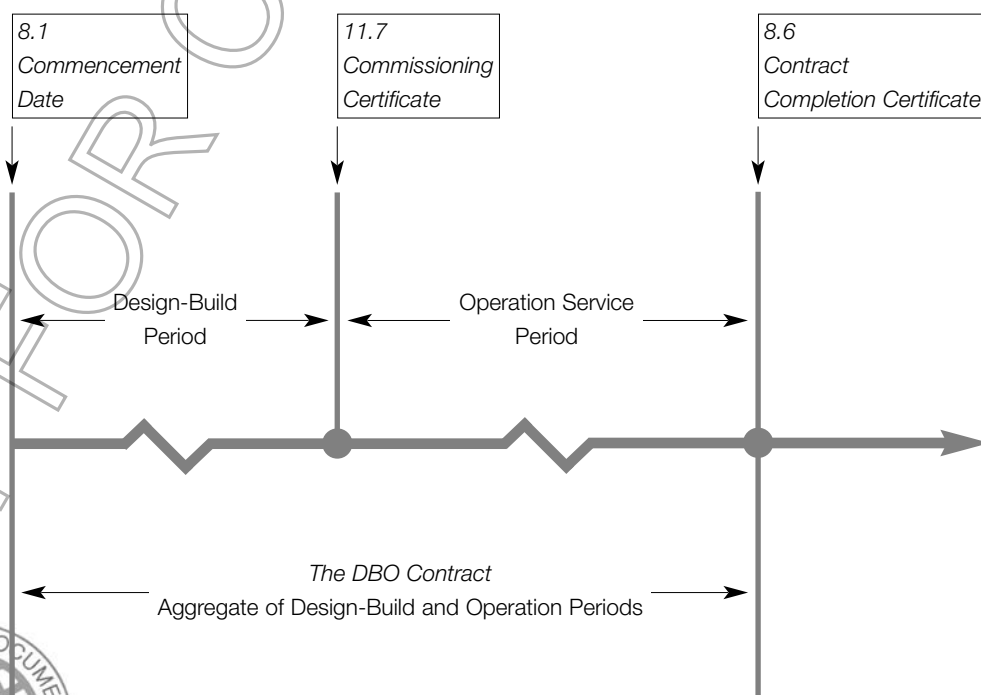
- The Overall Contract Period
- The Design-Build Period
- Commencement to Design-Build Commissioning
- The Operation Service Period
- Payment during the Design-Build Period
- Payment during the Operation Service Period
- Determinations by the Employer's Representative
- Contractor's Claims – Submission
- Contractor's Claims – Determination
- Settlement of Disputes

These charts are illustrative and must not be taken into consideration in the interpretation of the Conditions of Contract.



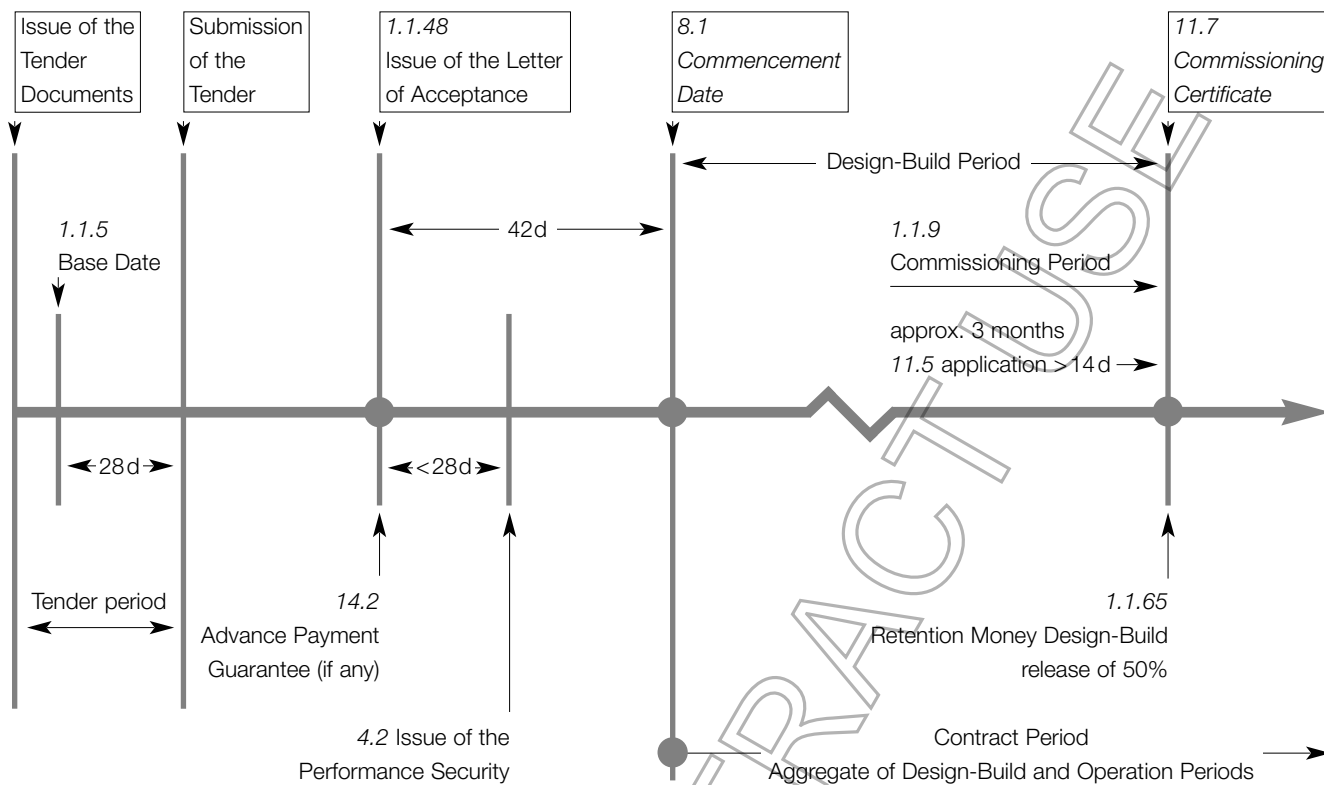
FLOW CHARTS

The Overall Contract Period
 The Design-Build Period
 Commencement to Design-Build Commissioning
 The Operation Service Period
 Payment during the Design-Build Period
 Payment during the Operation Service Period
 Determinations by the Employer's Representative
 Contractor's Claims – Submission
 Contractor's Claims – Determination
 Settlement of Disputes

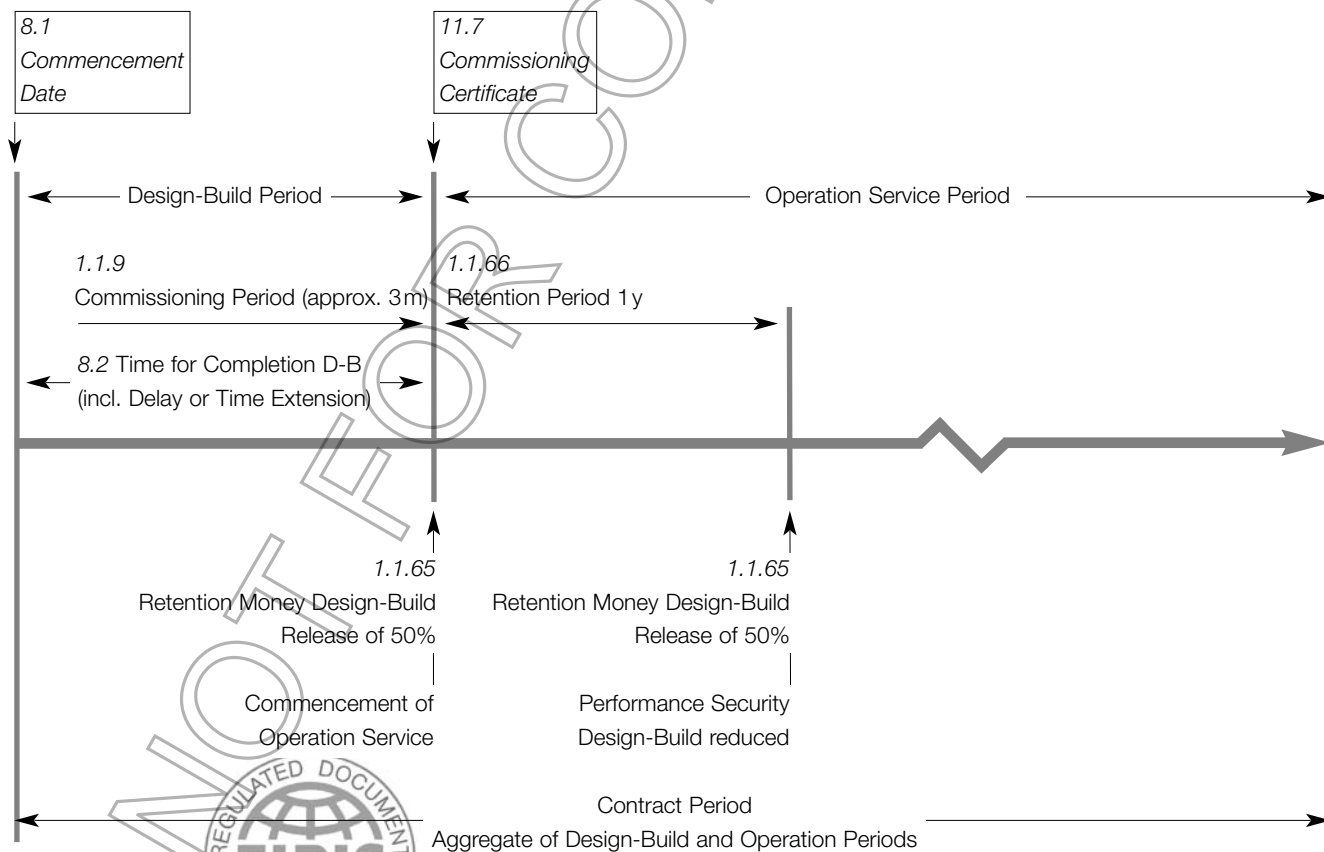


The Overall Contract Period

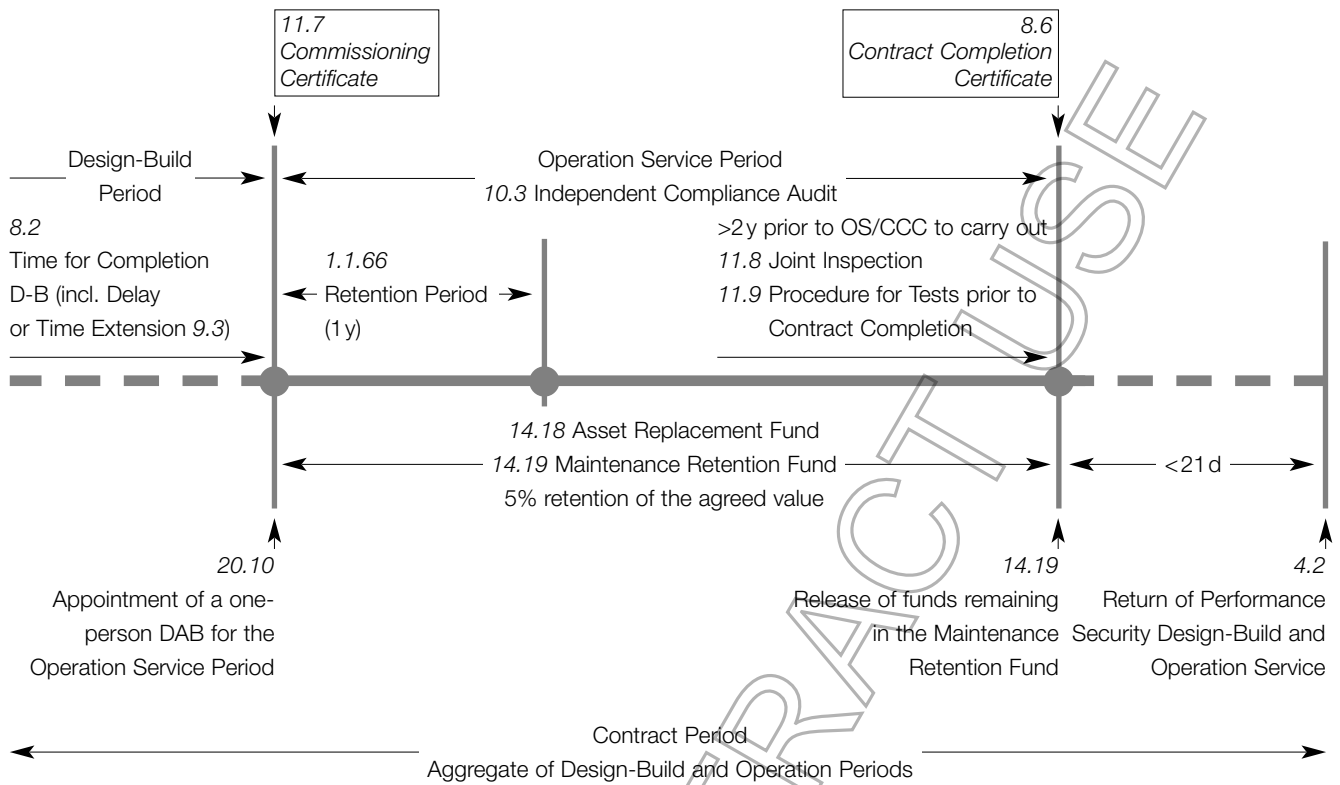




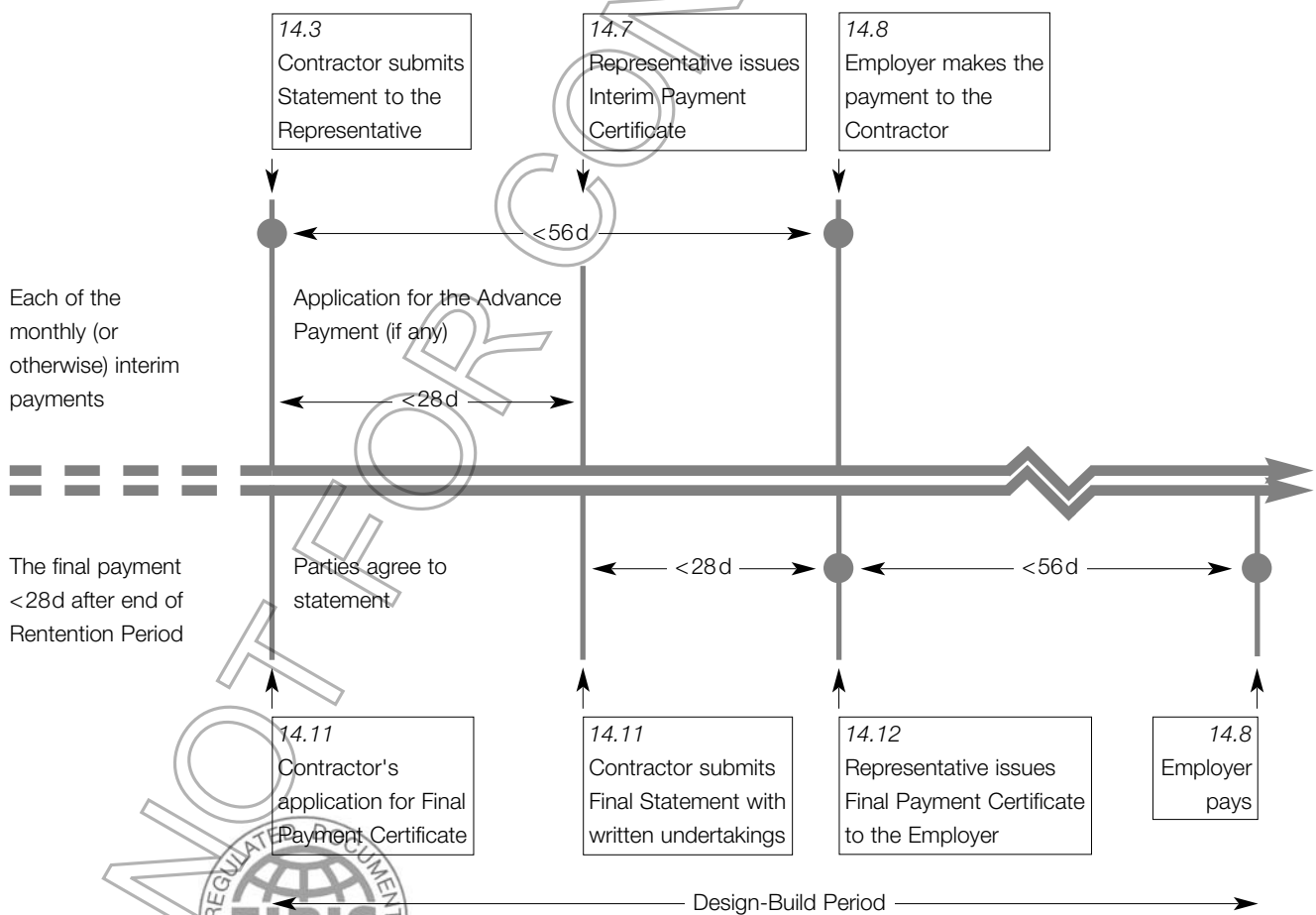
The Design-Build Period



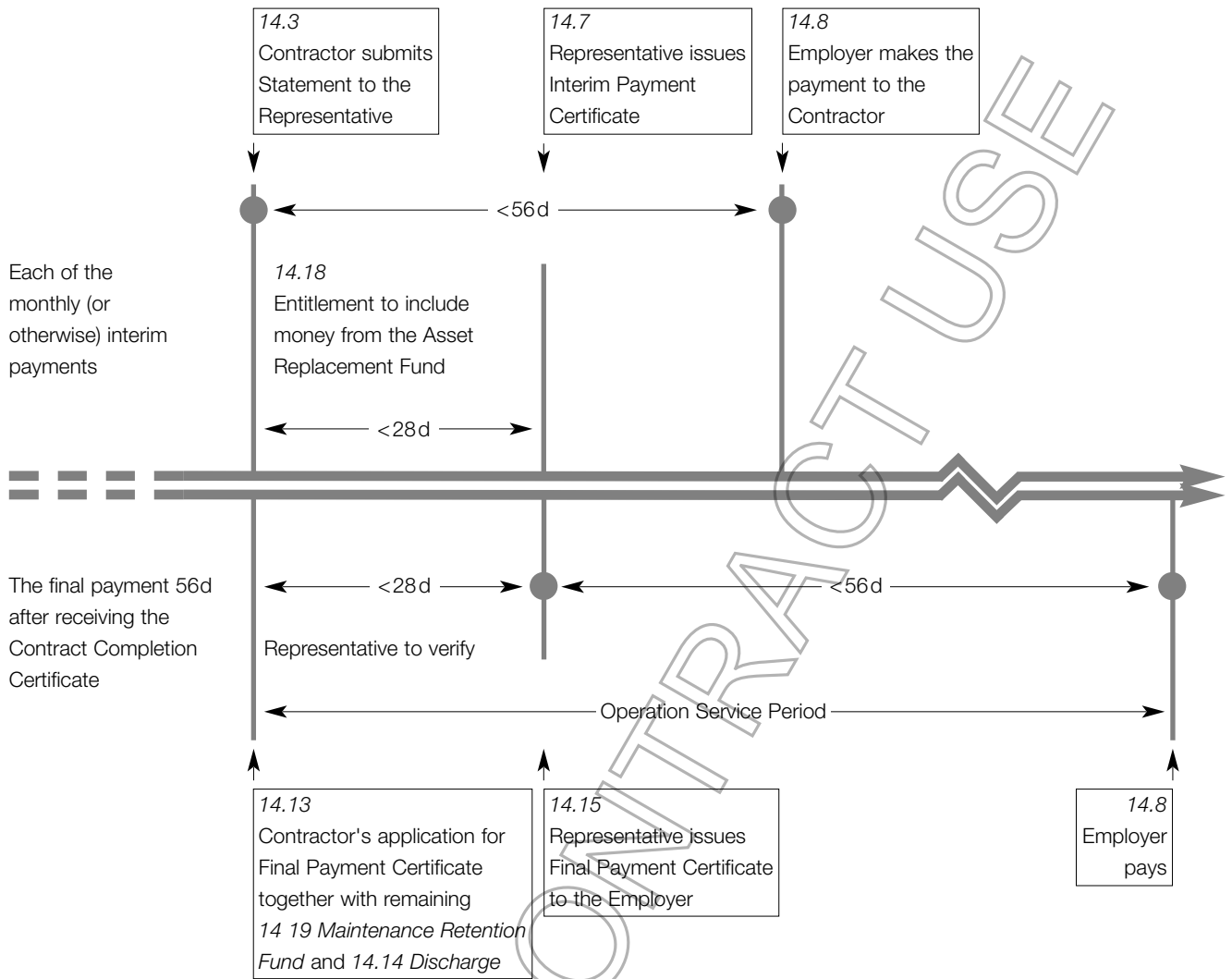
Commencement to Design-Build Commissioning



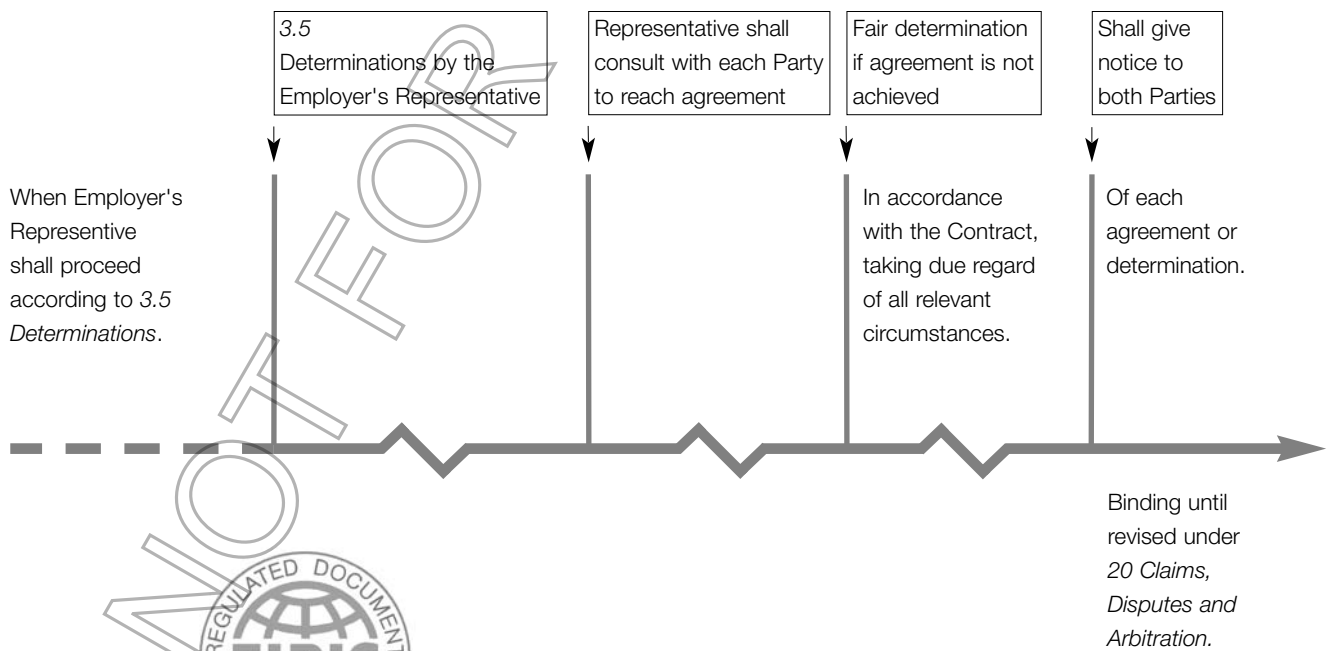
The Operation Service Period



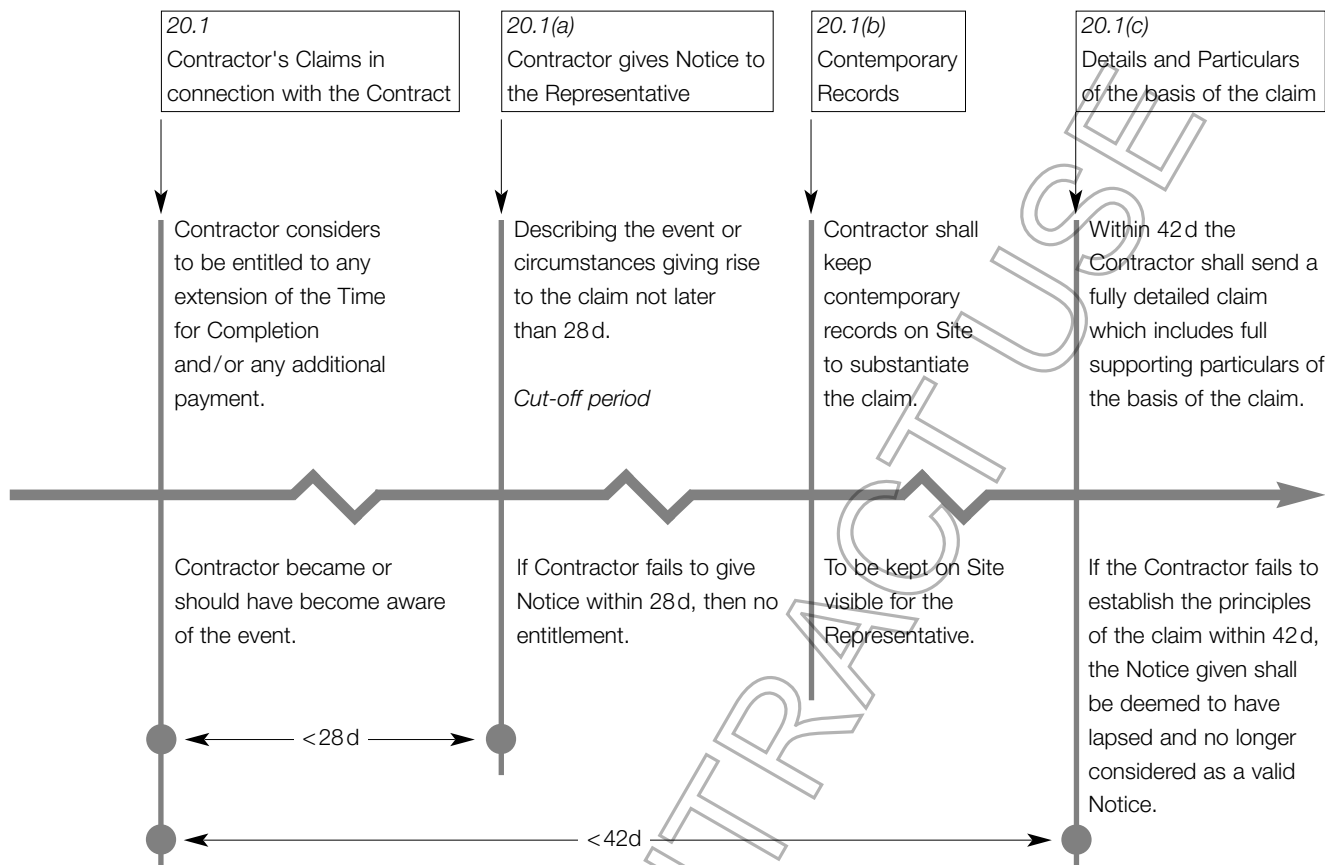
Payment during the Design-Build Period



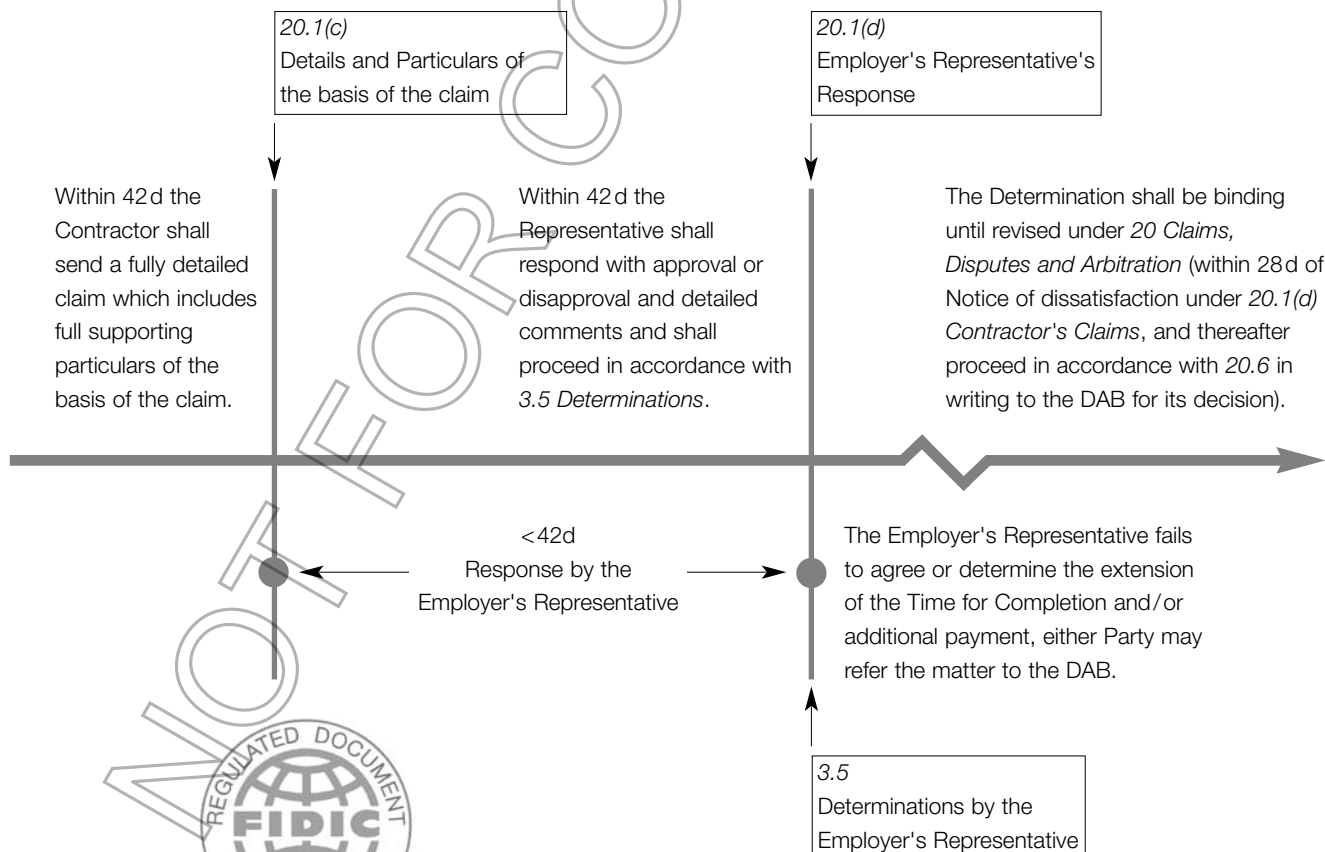
Payment during the Operation Service Period



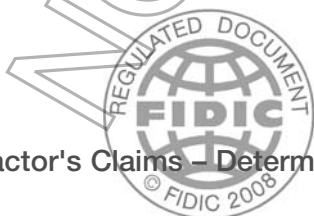
Determinations by the Employer's Representative



Contractor's Claims – Submission



Contractor's Claims – Determination



20.3
Appointment of the Dispute Adjudication Board

Parties shall jointly appoint DAB by the date stated in the Contract Data.
20.4
Failure to Agree Dispute Adjudication Board:
if the Parties fail to agree, then appointment made by the entity or official named in the Contract.

20.5
Avoidance of Disputes (If Parties so agree)

Parties may jointly refer to the DAB to provide assistance to resolve any disagreement. Parties are not bound by any advice given.

20.6
Obtaining Dispute Adjudication Board's Decision

Either Party may refer a Dispute arising under 20.1 *Contractor's Claims* or 20.2 *Employer's Claims* within 28 d to the DAB in writing.

Either Party may issue a Notice of dissatisfaction within 28 d after receiving the DAB decision.

20.6
Obtaining Dispute Adjudication Board's Decision

Both Parties shall attempt to settle the Dispute amicably before commencement of arbitration.

20.7
Amicable Settlement (After Notice of dissatisfaction)

Arbitration may not be commenced until 56 d after the Notice of dissatisfaction is issued.

20.8
Arbitration (Final settlement by international arbitration)

Settlement of Disputes



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General Conditions

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GENERAL CONDITIONS OF CONTRACT

1 General Provisions

1.1

Definitions

In the Conditions of Contract ("these Conditions"), which include Particular Conditions and these General Conditions, the following words and expressions shall have the meanings stated. Words indicating persons or parties include corporations and other legal entities, except where the context requires otherwise.

1.1.1 **"Accepted Contract Amount"** means the amount accepted in the Letter of Acceptance for the Design-Build of the Works and the provision of the Operation Service, including the amount of the Asset Replacement Fund.

1.1.2 **"Asset Replacement Fund"** means the fund provided for under Sub-Clause 14.18 [*Asset Replacement Fund*].

1.1.3 **"Asset Replacement Schedule"** means the schedule referred to in Sub-Clause 14.5 [*Asset Replacement Schedule*] prepared by the Contractor covering the identification and timing of asset replacements.

1.1.4 **"Auditing Body"** means the independent and impartial body appointed to conduct the Independent Compliance Audit in accordance with Sub-Clause 10.3 [*Independent Compliance Audit*].

1.1.5 **"Base Date"** means the date 28 days prior to the latest date for submission of the Tender.

1.1.6 **"Commencement Date"** means the date notified under Sub-Clause 8.1 [*Commencement Date*].

1.1.7 **"Commercial Risk"** means a risk which results in financial loss and/or time loss for either of the Parties, where insurance is not generally or commercially available.

1.1.8 **"Commissioning Certificate"** means the certificate issued by the Employer's Representative to the Contractor under Sub-Clause 11.7 [*Commissioning Certificate*] marking the end of the Design-Build Period under Sub-Clause 9.12 [*Completion of Design-Build*] and the commencement of the Operation Service Period.

1.1.9 **"Commissioning Period"** means that period of time when commissioning tests are being carried out.

1.1.10 **"Contract"** means the Contract Agreement, the Letter of Acceptance, the Letter of Tender, these Conditions, the Employer's Requirements, the Schedules, the Contractor's Proposal, the Operating Licence, and the

further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance.

- 1.1.11 "**Contract Agreement**" means the Contract Agreement (if any) referred to in Sub-Clause 1.6 [*Contract Agreement*].
- 1.1.12 "**Contract Completion Certificate**" means the certificate issued by the Employer's Representative under Sub-Clause 8.6 [*Contract Completion Certificate*].
- 1.1.13 "**Contract Completion Date**" means the date contained in the Contract Completion Certificate as being the date on which the Operation Service has been completed.
- 1.1.14 "**Contract Data**" means the pages completed by the Employer entitled Contract Data which constitute Part A of the Particular Conditions.
- 1.1.15 "**Contract Period**" means the Design-Build Period plus the Operation Service Period.
- 1.1.16 "**Contract Price**" means the price defined in Sub-Clause 14.1 [*The Contract Price*], and includes adjustments in accordance with the Contract.
- 1.1.17 "**Contractor**" means the person named as Contractor in the Letter of Tender accepted by the Employer and the legal successors in title to this person.
- 1.1.18 "**Contractor's Equipment**" means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Contractor's Equipment excludes Temporary Works, Employer's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Works.
- 1.1.19 "**Contractor's Documents**" means the calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature supplied by the Contractor under the Contract; as described in Sub-Clause 5.2 [*Contractor's Documents*].
- 1.1.20 "**Contractor's Proposal**" means the document entitled proposal, which the Contractor submitted with the Letter of Tender, as included in the Contract.
- 1.1.21 "**Contractor's Personnel**" means the Contractor's Representative and all personnel whom the Contractor utilises on Site, including the staff, labour and other employees of the Contractor and of each Subcontractor, and any other personnel assisting the Contractor in the execution of the Works and provision of the Operation Service.
- 1.1.22 "**Contractor's Representative**" means the person named as such by the Contractor in the Contract or appointed from time to time by the Contractor under Sub-Clause 4.3 [*Contractor's Representative*] who acts on behalf of the Contractor.
- 1.1.23 "**Cost**" means all expenditure reasonably incurred (or to be incurred) by



the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.

- 1.1.24 **"Cost Plus Profit"** means Cost plus the applicable percentage agreed and stated in the Contract Data. Such percentage shall only be added where the Sub-Clause states that the Contractor is entitled to Cost Plus Profit.
- 1.1.25 **"Country"** means the country in which the Site (or most of it) is located, where the Permanent Works are to be executed.
- 1.1.26 **"Cut-Off Date"** means the date, at the end of a specified period stated in the Contract Data, after the Time for Completion of the Design-Build or any extension thereto granted under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*].
- 1.1.27 **"DAB"** means the person or three persons so named in the Contract, or other person(s) appointed under Sub-Clause 20.3 [*Appointment of the Dispute Adjudication Board*] or Sub-Clause 20.4 [*Failure to Agree Dispute Adjudication Board*], or Sub-Clause 20.10 [*Disputes Arising During the Operation Service Period*].
- 1.1.28 **"day"** means a calendar day.
- 1.1.29 **"Design-Build"** means all work to be performed by the Contractor under the Contract to design, build, test and complete the Works and obtain the Commissioning Certificate issued in accordance with Sub-Clause 9.12 [*Completion of Design-Build*].
- 1.1.30 **"Design-Build Period"** means the period from the Commencement Date to the date stated in the Commissioning Certificate.
- 1.1.31 **"Dispute"** means any situation where (a) one Party makes a claim against the other Party; (b) the other Party rejects the claim in whole or in part; and (c) the first Party does not acquiesce, provided however that a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.
- 1.1.32 **"Employer"** means the person named as Employer in the Contract Data and the legal successors in title to this person.
- 1.1.33 **"Employer's Equipment"** means the apparatus, machinery and vehicles (if any) made available by the Employer for the use of the Contractor in the execution of the Works and/or the Operation Service, as stated in the Employer's Requirements, but does not include Plant which has not been taken over by the Employer.
- 1.1.34 **"Employer's Personnel"** means the Employer's Representative, the assistants referred to in Sub-Clause 3.2 [*Delegation by the Employer's Representative*] and all other staff, labour and other employees of the Employer's Representative and of the Employer; and any other personnel notified to the Contractor, by the Employer or the Employer's Representative, as Employer's Personnel.
- 1.1.35 **"Employer's Representative"** means the person appointed by the Employer to act as Employer's Representative for the purposes of the

Contract and named as such in the Contract Data, or other person appointed from time to time by the Employer and notified as such to the Contractor under Sub-Clause 3.4 [*Replacement of the Employer's Representative*].

- 1.1.36 **"Employer's Requirements"** means the document entitled Employer's Requirements, as included in the Contract, and any additions and modifications made thereto in accordance with the Contract. Such document specifies the purpose, scope, and/or design and/or other technical criteria for the execution of the Works and provision of the Operation Service.
- 1.1.37 **"Exceptional Event"** means an event or circumstance which is (a) beyond a Party's control; (b) which the Party could not reasonably have provided against before entering into the Contract; (c) which having arisen, such Party could not reasonably have avoided or overcome; and (d) which is not substantially attributable to the other Party.
- 1.1.38 **"FIDIC"** means the Fédération Internationale des Ingénieurs-Conseils, the International Federation of Consulting Engineers.
- 1.1.39 **"Final Payment Certificate Design-Build"** means the payment certificate issued for the Design-Build under Sub-Clause 14.12 [*Issue of Final Payment Certificate Design-Build*].
- 1.1.40 **"Final Payment Certificate Operation Service"** means the payment certificate issued for the Operation Service under Sub-Clause 14.15 [*Issue of Final Payment Certificate Operation Service*].
- 1.1.41 **"Final Statement Design-Build"** means the Statement defined in Sub-Clause 14.11 [*Application for Final Payment Certificate Design-Build*].
- 1.1.42 **"Final Statement Operation Service"** means the Statement defined in Sub-Clause 14.13 [*Application for Final Payment Certificate Operation Service*].
- 1.1.43 **"Financial Memorandum"** means the document which details the Employer's financial arrangements and is attached to or forms part of the Employer's Requirements.
- 1.1.44 **"Foreign Currency"** means a currency in which part (or all) of the Contract Price is payable, but not the Local Currency.
- 1.1.45 **"Goods"** means Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.
- 1.1.46 **"Interim Payment Certificate"** means a payment certificate issued under Clause 14 [*Contract Price and Payment*], other than the Final Payment Certificates.
- 1.1.47 **"Laws"** means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority.
- 1.1.48 **"Letter of Acceptance"** means the letter of formal acceptance, signed by the Employer, of the Letter of Tender, including any annexed memoranda



comprising agreements between and signed by both Parties. If there is no such Letter of Acceptance, the expression "Letter of Acceptance" means the Contract Agreement and the date of issuing or receiving the Letter of Acceptance means the date of signing the Contract Agreement.

- 1.1.49 **"Letter of Tender"** means the document entitled Letter of Tender, which was completed by the Contractor and includes the signed offer to the Employer for the execution of the Works and provision of the Operation Service.
- 1.1.50 **"Local Currency"** means the currency of the Country.
- 1.1.51 **"Maintenance Retention Fund"** and **"Maintenance Retention Guarantee"** mean the fund and guarantee respectively provided for under Sub-Clause 14.19 [*Maintenance Retention Fund*].
- 1.1.52 **"Materials"** means things of all kinds (other than Plant) whether on the Site or otherwise allocated to the Contract and intended to form or forming part of the Works, including the supply-only Materials (if any) to be supplied by the Contractor under the Contract.
- 1.1.53 **"Notice"** means a written communication identified as a Notice and issued in accordance with the provisions of Sub-Clause 1.3 [*Notices and Other Communications*].
- 1.1.54 **"Operating Licence"** means the licence referred to in Sub-Clause 1.7 [*Operating Licence*] by which the Employer grants a royalty-free licence to the Contractor to operate and maintain the Works during the Operation Service.
- 1.1.55 **"Operation Management Requirements"** means the set of procedures and requirements, provided by the Employer, included in the Employer's Requirements for the proper implementation of the Operation Service.
- 1.1.56 **"Operation and Maintenance Plan"** means the plan for operating and maintaining the facility, submitted by the Contractor, and agreed and included in the Contract.
- 1.1.57 **"Operation Service"** means the operation and maintenance of the facility as set out in the Operation Management Requirements.
- 1.1.58 **"Operation Service Period"** means the period from the date stated in the Commissioning Certificate as provided for under Sub-Clause 10.2 [*Commencement of Operation Service*] to the date stated in the Contract Completion Certificate.
- 1.1.59 **"Party"** means the Employer or the Contractor, as the context requires.
- 1.1.60 **"Performance Security"** means the security under Sub-Clause 4.2 [*Performance Security*].
- 1.1.61 **"Permanent Works"** means the permanent works to be designed, executed and operated by the Contractor under the Contract.
- 1.1.62 **"Plant"** means the apparatus, machinery and vehicles intended to form or forming part of the Permanent Works.

- 1.1.63 **"Provisional Sum"** means a sum (if any) which is specified in the Contract by the Employer as a Provisional Sum, for the execution of any part of the Works or for the supply of Plant, Materials or services under Sub-Clause 13.5 [*Provisional Sums*].
- 1.1.64 **"Rates and Prices"** means the rates and prices inserted in the Schedules for the design, execution and completion of the Works and for the provision of the Operation Service as incorporated in the Contract.
- 1.1.65 **"Retention Money"** means the accumulated retention monies which the Employer retains under Sub-Clause 14.3 [*Application for Advance and Interim Payment Certificates*].
- 1.1.66 **"Retention Period"** means the period of 1 year after the date stated in the Commissioning Certificate for the completion of outstanding work.
- 1.1.67 **"Risk of Damage"** means a risk which results in physical loss or damage to the Works or other property belonging to either Party, other than a Commercial Risk.
- 1.1.68 **"Schedules"** means the document(s) entitled Schedules, completed by the Contractor and submitted with the Letter of Tender, as incorporated in the Contract. Such documents shall include the Asset Replacement Schedule, and may also include data, lists, Schedules of Payments and/or prices, and guarantees.
- 1.1.69 **"Schedule of Payments"** means those Schedules (if any) incorporated in the Contract showing the manner in which payments are to be made to the Contractor.
- 1.1.70 **"Section"** means a part of the Works specified in the Contract Data as a Section (if any).
- 1.1.71 **"Section Commissioning Certificate"** means a certificate issued by the Employer's Representative to the Contractor under Sub-Clause 11.7 [*Commissioning Certificate*].
- 1.1.72 **"Site"** means the places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, and where the Operation Service is to be provided, and any other places as may be specified in the Contract as forming part of the Site.
- 1.1.73 **"Statement"** means a financial Statement submitted by the Contractor as part of an application, under Clause 14 [*Contract Price and Payment*], for a payment certificate.
- 1.1.74 **"Subcontractor"** means any person named in the Contract as a subcontractor, or any person appointed as a subcontractor, for a part of the Works; and the legal successors in title to each of these persons.
- 1.1.75 **"Tender"** means the Letter of Tender and all other documents which the Contractor submitted with the Letter of Tender, as incorporated in the Contract.
- 1.1.76 **"Tests on Completion of Design-Build"** means the tests which are specified in the Contract or agreed by both Parties or instructed as a

Variation, and which are to be carried out under Clause 11 [*Testing*] before the Works or a Section (as the case may be) are deemed to be fit for purpose as defined in the Employer's Requirements.

- 1.1.77 **"Tests Prior to Contract Completion"** means the tests (if any) which are specified in the Contract and any other such tests as may be agreed by the Employer's Representative and the Contractor or instructed as a Variation and which are to be carried out under Clause 11 [*Testing*] before the expiry of the Contract Period.
- 1.1.78 **"Time for Completion of Design-Build"** means the time for completing the Design-Build or a Section thereof (as the case may be) under Sub-Clause 9.2 [*Time for Completion of Design-Build*], as stated in the Contract Data (with any extension under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]), calculated from the Commencement Date.
- 1.1.79 **"Temporary Works"** means all temporary works of every kind (other than Contractor's Equipment) required on Site for the execution, completion and operation of the Works.
- 1.1.80 **"Unforeseeable"** means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.
- 1.1.81 **"Variation"** means any change to the Employer's Requirements or the Works, which is instructed or approved as a Variation under Clause 13 [*Variations and Adjustments*].
- 1.1.82 **"Works"** means the Permanent Works and Temporary Works or either of them as appropriate and the facility to be operated by the Contractor during the Operation Service Period.
- 1.1.83 **"year"** means 365 days.

1.2

Interpretation

In the Contract, except where the context requires otherwise:

- (a) words indicating one gender include all genders;
- (b) words indicating the singular also include the plural and words indicating the plural also include the singular;
- (c) provisions including the word "agree", "agreed" or "agreement" require the agreement to be recorded in writing;
- (d) "written" or "in writing" means hand-written, type-written, printed or electronically made, and resulting in a permanent record;
- (e) "shall" means that the Party or person referred to has an obligation under the Contract to perform the duty referred to; and
- (f) "may" means that the Party or person referred to has the choice of whether to act or not in the matter referred to.

The marginal words and other headings shall not be taken into consideration in the interpretation of these Conditions.

1.3

Notices and Other Communications

Wherever these Conditions provide for the giving or issuing of a Notice or other communication including approvals, certificates, consents, determinations, instructions and requests, such Notice or communication shall be:

- (a) where it is a Notice, identified as a Notice and include reference to the Clause under which it is issued;
- (b) where it is another form of communication, identified as such, and include reference to the Clause under which it is issued where appropriate;
- (c) in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted by using any of the agreed systems of electronic transmission as stated in the Contract Data; and
- (d) delivered, sent or transmitted to the address for the recipient's communications as stated in the Contract Data. However:
 - (i) if the recipient gives Notice of another address, communications and Notices shall thereafter be delivered accordingly; and
 - (ii) if the recipient has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued.

Notices and other communications shall not be unreasonably withheld or delayed. When a certificate is issued to a Party, the certifier shall send a copy to the other Party. When a Notice is issued to a Party, by the other Party or the Employer's Representative, a copy shall be sent to the Employer's Representative or the other Party, as the case may be.

1.4

Law and Language

The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Contract Data.

If there are versions of any part of the Contract which are written in more than one language, the version which is in the ruling language stated in the Contract Data shall prevail.

The language for communications shall be that stated in the Contract Data. If no language is stated there, the language for communications shall be the ruling language of the Contract.

1.5

Priority of Documents

The documents forming the Contract are to be taken as mutually explanatory of one another. For the purposes of interpretation, the priority of the documents shall be in accordance with the following sequence:

- (a) the Contract Agreement (if any),
- (b) the Letter of Acceptance,
- (c) the Letter of Tender,
- (d) the Particular Conditions Part A – Contract Data,
- (e) the Particular Conditions Part B – Special Provisions,
- (f) these General Conditions,
- (g) the Employer's Requirements,
- (h) the Schedules, and
- (i) the Contractor's Proposal and any other documents forming part of the Contract.

If an ambiguity or discrepancy is found in the documents, the Employer's Representative shall issue any necessary clarification or instruction.

1.6

Contract Agreement

The Parties shall enter into a Contract Agreement within 28 days after the Contractor receives the Letter of Acceptance, unless they agree otherwise. The Contract Agreement shall be based upon the sample form included in the tender documents. The costs of stamp duties and similar charges (if any) imposed by law in connection

with entry into the Contract Agreement shall be borne by the Employer.

1.7

Operating Licence

Together with the Letter of Acceptance, the Employer shall issue to the Contractor the Operating Licence or equivalent legal authorisation to enable the Contractor to operate and maintain the Works during the Operation Service Period.

The Operating Licence shall automatically come into full force and effect upon the issue of the Commissioning Certificate upon completion of the Design-Build under Sub-Clause 9.12 [*Completion of Design-Build*] and shall remain in force until the issue of the Contract Completion Certificate under Sub-Clause 8.6 [*Contract Completion Certificate*].

The Operating Licence shall only extend to those parts of the Site which it is required to occupy for the purposes of carrying out the Works and Operation Service as set out in the Contract. The Operating Licence granted pursuant to this Sub-Clause shall not operate nor be deemed to operate as a tenement or a demise of the Site or any part thereof. The Contractor shall not have or be entitled to any estate right, title, or interest in the Site. The licence will immediately terminate upon the termination of this Contract for whatever reason.

1.8

Assignment

Neither Party shall assign the whole or any part of the Contract or any benefit or interest in or under the Contract. However, either Party:

- (a) may assign the whole or any part with the prior agreement of the other Party, at the sole discretion of such other Party; and
- (b) may, as security in favour of a bank or financial institution, assign its right to any monies due, or to become due, under the Contract.

1.9

Care and Supply of Documents

Each of the Contractor's Documents shall be in the custody and care of the Contractor, unless and until taken over by the Employer. Unless otherwise stated in the Contract, the Contractor shall supply to the Employer's Representative six copies of each of the Contractor's Documents.

The Contractor shall keep, on the Site, a copy of the Contract, publications named in the Employer's Requirements, the Contractor's Documents, and Variations and other communications given under the Contract. The Employer's Personnel shall have the right of access to all these documents at all reasonable times.

If a Party becomes aware of an error or defect of a technical nature in a document which was prepared for use in executing the Works, the Party shall promptly give Notice to the other Party of such error or defect.

1.10

Errors in the Employer's Requirements

Notwithstanding the Contractor's obligations to scrutinise the Employer's Requirements under Sub-Clause 5.1 [*General Design Obligations*], if the Contractor finds an error in the Employer's Requirements, he shall immediately give a written Notice to the Employer's Representative advising him of the nature and details of the error and requesting instruction regarding its rectification.

After receiving this Notice, the Employer's Representative shall, without prejudice to other rights and obligations of the Parties, promptly confirm to the Contractor:

- (a) whether or not there is an error in the Employer's Requirements as stated in the Contractor's Notice;

- (b) whether or not an experienced contractor should have discovered the error when scrutinising the Employer's Requirements under Sub-Clause 5.1 [*General Design Obligations*]; and
- (c) the measures which the Employer's Representative requires the Contractor to take to rectify the error.

If the Contractor suffers delay and/or incurs cost as a result of an error in the Employer's Requirements, and an experienced contractor exercising due care would not have discovered the error when scrutinising the Employer's Requirements under Sub-Clause 5.1 [*General Design Obligations*], the Contractor shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to:

- (i) an extension of time for any such delay, if completion is or will be delayed under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (ii) payment of any such Cost Plus Profit, which shall be included in the Contract Price.

1.11

Employer's Use of Contractor's Documents

As between the Parties, the Contractor shall retain the copyright and other intellectual property rights in the Contractor's Documents and other design documents made by (or on behalf of) the Contractor.

The Contractor shall be deemed (by signing the Contract) to give to the Employer a non-terminable transferable non-exclusive royalty-free licence to copy, use and communicate the Contractor's Documents, including making and using modifications of them. This licence shall:

- (a) apply throughout the actual or intended working life (whichever is longer) of the relevant part of the Works;
- (b) entitle any person in proper possession of the relevant part of the Works to copy, use and communicate the Contractor's Documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing and demolishing the Works;
- (c) in the case of Contractor's Documents which are in the form of computer programs and other software, permit their use on any computer on the Site and other places as envisaged by the Contract, including replacements of any computers supplied by the Contractor; and
- (d) enable the Employer to relet the Contract as provided for under Sub-Clause 15.2 [*Termination for Contractor's Default*].

The Contractor's Documents and other design documents made by (or on behalf of) the Contractor shall not, without the Contractor's consent, be used, copied or communicated to a third party by (or on behalf of) the Employer for purposes other than those permitted under this Sub-Clause.

1.12

Contractor's Use of Employer's Documents

As between the Parties, the Employer shall retain the copyright and other intellectual property rights in the Employer's Requirements and other documents made by (or on behalf of) the Employer. The Contractor may, at his cost, copy, use, and obtain communication of these documents for the purposes of the Contract. They shall not, without the Employer's consent, be copied, used, or communicated to a third party by the Contractor, except as necessary for the purposes of the Contract.

1.13

Confidential Details

The Contractor shall disclose all such confidential and other information as the Employer's Representative may reasonably require in order to verify the Contractor's compliance with the Contract.

The Contractor shall treat the details of the Contract as private and confidential, except to the extent necessary to carry out his obligations under the Contract. The Contractor shall not publish, permit to be published, or disclose any particulars of the Contract in any trade or technical paper or elsewhere without the previous consent in writing of the Employer. The said consent shall not be unreasonably withheld.

The Employer shall treat all information designated by the Contractor as confidential, as confidential, and shall not disclose it to third parties, except as maybe necessary when exercising his rights under Sub-Clause15.2 [*Termination for Contractor's Default*].

1.14

Compliance with Laws

The Contractor shall, in performing the Contract, comply with applicable Laws. Unless otherwise stated in the Employer's Requirements:

- (a) the Employer shall have obtained (or shall obtain) the planning, zoning, building permit, or similar permission for the Permanent Works and for the Operation Service, and any other permissions described in the Employer's Requirements as having been (or being) obtained by the Employer; and the Employer shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so;
- (b) the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all further permits, licences and approvals, as required by the Laws, in relation to the design, execution and completion of the Works and Operation Service and the remedying of any defects; and the Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so; and
- (c) the Contractor shall at all times and in all respects comply with, give all notices under, and pay all fees required by any licence obtained by the Employer in respect of the Site or the Works or Operation Service, whether relating to the Works or Operation Service on or off the Site.

1.15

Joint and Several Liability

If the Contractor constitutes (under applicable Laws) a joint venture, consortium or other unincorporated grouping of two or more persons:

- (a) these persons shall be deemed to be jointly and severally liable to the Employer for the performance of the Contract;
- (b) these persons shall notify the Employer of their leader who shall have authority to bind the Contractor and each of these persons; and
- (c) the Contractor shall not alter his composition or legal status without the prior consent of the Employer.

The Employer

2.1

Right of Access to the Site

The Employer shall give the Contractor right of access to, and possession of, all or part of the Site within the time (or times) stated in the Contract Data. The right and possession may not be exclusive to the Contractor. If, under the Contract, the Employer is required to give the Contractor possession of any foundation, structure, plant or means of access, the Employer shall do so in the time and manner stated in the Employer's Requirements. However, the Employer may withhold any such right or possession until the Performance Security has been received.

If no such time is stated in the Contract Data, the Employer shall give the Contractor right of access to, and possession of, the Site within such times as may be required

to enable the Contractor to proceed in accordance with the programme submitted under Sub-Clause 8.3 [*Programme*].

If the Contractor suffers delay and/or incurs cost as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give Notice to the Employer's Representative and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such Cost Plus Profit, which shall be included in the Contract Price.

After receiving this Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

However, if and to the extent that the Employer's failure was caused by any error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor's Documents, the Contractor shall not be entitled to such extension of time or cost.

2.2

Permits, Licences or Approvals

The Employer shall provide, at the request of the Contractor, such reasonable assistance as to allow the Contractor to obtain:

- (a) copies of the Laws of the Country which are relevant to the Contract but are not readily available; and
- (b) any permits, licences or approvals required by the Laws of the Country, including details of the information required to be submitted by the Contractor in order to obtain such permits, licences or approvals:
 - (i) which the Contractor is required to obtain under Sub-Clause 1.14 [*Compliance with Laws*];
 - (ii) for the delivery of Goods, including clearance through customs; and
 - (iii) for the export of Contractor's Equipment when it is removed from the Site.

2.3

Employer's Personnel

The Employer shall be responsible for ensuring that the Employer's Personnel and the Employer's other contractors on the Site:

- (a) co-operate with the Contractor's efforts under Sub-Clause 4.6 [*Co-operation*]; and
- (b) take actions similar to those which the Contractor is required to take under subparagraphs (a), (b) and (c) of Sub-Clause 4.8 [*Safety Procedures*] and under Sub-Clause 4.18 [*Protection of the Environment*].

2.4

Employer's Financial Arrangements

The Employer's arrangements for financing the design, execution and operation of the Works, including the provision of the Asset Replacement Fund, shall be detailed in the Financial Memorandum.

If the Employer intends to make any material changes to the financial arrangements or has to do so because of changes in his financial or economic situation, the Employer shall give Notice to the Contractor, with detailed particulars. Within 28 days after receiving any request of the Contractor the Employer shall give reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price.

3

The Employer's Representative

3.1

Employer's Representative's Duties and Authority

The Employer shall appoint the Employer's Representative prior to the signing of the Contract, who shall be suitably qualified and experienced and who shall carry out the duties assigned to him in the Contract. The Employer's Representative's staff shall include suitably qualified engineers and other professionals who are competent to carry out these duties.

The Employer's Representative shall have no authority to amend the Contract.

The Employer's Representative may exercise the authority attributable to the Employer's Representative as specified in or necessarily to be implied from the Contract.

The Employer undertakes not to impose further constraints on the Employer's Representative's authority, except as agreed with the Contractor.

However, whenever the Employer's Representative exercises a specified authority for which the Employer's approval is required, then (for the purposes of the Contract) the Employer shall be deemed to have given approval.

Except as otherwise stated in these Conditions:

- (a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Employer's Representative shall be deemed to act for the Employer;
- (b) the Employer's Representative has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract; and
- (c) any approval, check, certificate, consent, examination, inspection, instruction, Notice, proposal, request, test or similar act by the Employer's Representative (including absence of disapproval) shall not relieve the Contractor from any responsibility he has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances.

3.2

Delegation by the Employer's Representative

The Employer's Representative may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include independent inspectors (other than the Auditing Body) appointed to inspect and/or test items of Plant and/or Materials and/or workmanship or monitor the provision of the Operation Service. The assignment, delegation or revocation shall be in writing and shall not take effect until copies have been received by both Parties. However, unless otherwise agreed by both Parties, the Employer's Representative shall not delegate the authority to determine any matter in accordance with Sub-Clause 3.5 [*Determinations*].

Assistants shall be suitably qualified persons, who are competent to carry out these duties and exercise this authority, and who are fluent in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

Each assistant, to whom duties have been assigned or authority has been delegated, shall only be authorised to issue instructions to the Contractor to the extent defined by the delegation. Any approval, check, certificate, consent, examination, inspection, instruction, Notice, proposal, request, test or similar act by an assistant, in accordance with the delegation, shall have the same effect as though the act had been an act of the Employer's Representative. However:

- (a) any failure to disapprove any work, Plant, Materials or any part of the Operation Service shall not constitute approval, and shall therefore not prejudice the right of the Employer's Representative to reject the work, Plant, Materials or any part of the Operation Service; and
- (b) if the Contractor questions any determination or instruction of an assistant, the Contractor may refer the matter to the Employer's Representative, who shall promptly confirm, reverse or vary the determination or instruction.

3.3

Instructions of the Employer's Representative

The Employer's Representative may issue to the Contractor (at any time) instructions which may be necessary for the execution of the Works and the remedying of any defects, all in accordance with the Contract. The Contractor shall only take instructions from the Employer's Representative, or from an assistant to whom the appropriate authority has been delegated under this Clause. If an instruction constitutes a Variation, Clause 13 [*Variations and Adjustments*] shall apply.

The Contractor shall comply with the instructions given by the Employer's Representative or delegated assistant on any matter related to the Contract. These instructions shall be given in writing.

If the Contractor considers that any instruction of the Employer's Representative does not comply with applicable Laws or is technically impossible, he shall immediately notify the Employer's Representative in writing. The Employer's Representative shall then either confirm or amend such instruction.

3.4

Replacement of the Employer's Representative

If the Employer intends to replace the Employer's Representative, the Employer shall, not less than 42 days before the intended date of replacement, give Notice to the Contractor of the name, address and relevant experience of the intended replacement Employer's Representative.

The Employer shall not replace the Employer's Representative with a person against whom the Contractor raises reasonable objection by Notice to the Employer, with supporting particulars.

3.5

Determinations

Whenever these Conditions provide that the Employer's Representative shall proceed in accordance with this Sub-Clause to agree or determine any matter, the Employer's Representative shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Employer's Representative shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Employer's Representative shall give Notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [*Claims, Disputes and Arbitration*].

The Contractor

4.1

Contractor's General Obligations

The Contractor shall design, execute and complete the Works and provide the Operation Service in accordance with the Contract and shall remedy any defects in the Works. When completed, the Works shall be fit for the purposes for which the

Works are intended as defined in the Contract, and the Contractor shall be responsible for ensuring that the Works remain fit for such purposes during the Operation Service Period.

The Contractor shall provide the Plant and Contractor's Documents specified in the Contract, and all Contractor's Personnel, Goods, consumables and other things and services, whether of a temporary or permanent nature, required to meet the Contractor's obligations under the Contract.

The Works shall include any work which is necessary to satisfy the Employer's Requirements, Contractor's Proposal and Schedules, or is implied by the Contract, and all works which (although not mentioned in the Contract) are necessary for stability or for the completion, or safe and proper operation, of the Works.

The Contractor shall be responsible for the adequacy, stability and safety of all Site operations, of all methods of construction and of all the Works during both the Design-Build Period and the Operation Service Period.

The Contractor shall, whenever required by the Employer's Representative, submit details of the arrangements and methods which the Contractor proposes to adopt for the execution of the Works. No significant alteration to these arrangements and methods shall be made without this having previously been notified to the Employer's Representative.

The Contractor shall attend all meetings as reasonably required by the Employer or the Employer's Representative.

4.2

Performance Security

The Contractor shall obtain at his cost the Performance Security for proper performance of the Contract, in the amounts and currencies set out in the Contract Data. If no amount is stated in the Contract Data, this Sub-Clause shall not apply.

At the end of the Retention Period, the Contractor is entitled to a reduction of the amount of the Performance Security, as stated in the Contract Data.

The Contractor shall deliver the Performance Security to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Employer's Representative. The Performance Security shall be issued by an entity and from within a country (or other jurisdiction) approved by the Employer, and shall be based on the sample form included in the tender documents, or in another form approved by the Employer.

The Contractor shall ensure that the Performance Security is valid and enforceable until the issue of the Contract Completion Certificate. If the terms of the Performance Security specify its expiry date, and the Contractor has not become entitled to receive the Contract Completion Certificate by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the Performance Security until the Works and the Operation Service have been completed (or alternatively, until the Contractor has been entitled to receive the Contract Completion Certificate). Failure by the Contractor to maintain the validity of the Performance Security shall be grounds for termination in accordance with Sub-Clause 15.2 [*Termination for Contractor's Default*].

The Employer shall not make a claim under the Performance Security except for amounts to which the Employer is entitled under the Contract in the event of:

(a) failure by the Contractor to extend the validity of the Performance Security as described in the preceding paragraph, in which event the Employer may claim

- the full or, in case of an earlier reduction, the reduced amount of the Performance Security;
- (b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 3.5 [*Determinations*] or Clause 20 [*Claims, Disputes and Arbitration*], within 42 days after this agreement or determination;
 - (c) failure by the Contractor to remedy a default within 42 days after receiving the Employer's Notice requiring the default to be remedied; or
 - (d) circumstances which entitle the Employer to terminate under Sub-Clause 15.2 [*Termination for Contractor's Default*], irrespective of whether Notice of termination has been given.

The Employer shall indemnify and hold the Contractor harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from a claim under the Performance Security which the Employer was not entitled to make.

The Employer shall return the Performance Security to the Contractor within 21 days after receiving a copy of the Contract Completion Certificate.

4.3

Contractor's Representative

The Contractor shall appoint the Contractor's Representative and shall give him all authority necessary to act on the Contractor's behalf under the Contract.

Unless the Contractor's Representative is named in the Contract, the Contractor shall, prior to the Commencement Date, submit to the Employer's Representative for consent the name and particulars of the person the Contractor proposes to appoint as Contractor's Representative. If consent is withheld or subsequently revoked, or if the appointed person fails to act as Contractor's Representative, the Contractor shall similarly submit the name and particulars of another suitable person for such appointment.

The Contractor shall not, without the prior consent of the Employer's Representative, revoke the appointment of the Contractor's Representative or appoint a replacement.

The whole time of the Contractor's Representative shall be given to directing the Contractor's performance of the Contract. If the Contractor's Representative is to be temporarily absent from the Site during the execution of the Works or provision of the Operation Service, a suitable replacement person shall be appointed, subject to the Employer's Representative's prior consent, and the Employer's Representative shall be notified accordingly.

The Contractor's Representative shall, on behalf of the Contractor, receive instructions under Sub-Clause 3.3 [*Instructions of the Employer's Representative*].

The Contractor's Representative may delegate any powers, functions and authority to any competent person, and may at any time revoke the delegation. Any delegation or revocation shall not take effect until the Employer's Representative has received prior Notice signed by the Contractor's Representative, naming the person and specifying the powers, functions and authority being delegated or revoked.

The Contractor's Representative and all these persons shall be fluent in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

4.4

Subcontractors

The Contractor shall not subcontract the whole of the Works. Unless otherwise agreed, the Contractor shall not subcontract the provision of the Operation Service.

The Contractor shall be responsible for the acts or defaults of any Subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor. Unless otherwise stated in the Particular Conditions:

- (a) the Contractor shall not be required to obtain consent to suppliers of Materials, or to a subcontract for which the Subcontractor is named in the Contract;
- (b) the prior consent of the Employer's Representative shall be obtained to other proposed Subcontractors; and
- (c) the Contractor shall give Notice to the Employer's Representative not less than 28 days' prior to the intended date of the commencement of each Subcontractor's work, and of the commencement of such work on the Site.

If any Subcontractor is entitled under any contract or agreement relating to the Works to relief from any risk on terms additional to or broader than those specified in the Contract, such additional or broader events or circumstances shall not excuse the Contractor's non-performance or entitle him to relief under the Contract.

4.5

Nominated Subcontractors

In this Sub-Clause, "nominated Subcontractor" means a Subcontractor named as such in the Employer's Requirements or whom the Employer's Representative, under Clause 13 [*Variations and Adjustments*], instructs the Contractor to employ as a Subcontractor. The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by Notice to the Employer's Representative as soon as practicable, with supporting particulars.

4.6

Co-operation

The Contractor shall, as specified in the Contract or as instructed by the Employer's Representative, allow appropriate opportunities for carrying out work to:

- (a) the Employer's Personnel;
- (b) any other contractors employed by the Employer; and
- (c) the personnel of any legally constituted public authorities;

who may be employed in the execution on or near the Site of any work not included in the Contract.

Any such instruction shall constitute a Variation if and to the extent that it causes the Contractor to incur Unforeseeable cost. Services for these personnel and other contractors may include the use of Contractor's Equipment, Temporary Works or access arrangements which are the responsibility of the Contractor.

The Contractor shall be responsible for his construction and operation activities on the Site, and shall co-ordinate his own activities with those of other contractors to the extent (if any) specified in the Employer's Requirements.

If, under the Contract, the Employer is required to give to the Contractor possession of any foundation, structure, plant or means of access in accordance with Contractor's Documents, the Contractor shall submit such documents to the Employer's Representative in the time and manner stated in the Employer's Requirements.

4.7

Setting Out

The Contractor shall set out the Works in relation to original points, lines and levels of reference specified in the Contract or notified by the Employer's Representative. The Contractor shall be responsible for the correct positioning of all parts of the Works,

and shall rectify any error in the positions, levels, dimensions or alignment of the Works.

The Employer shall be responsible for any errors in these specified or notified items of reference, but the Contractor shall use reasonable efforts to verify their accuracy before they are used.

If the Contractor suffers delay and/or incurs cost from executing work which was necessitated by an error in these items of reference, and an experienced contractor could not reasonably have discovered such error and avoided this delay and/or cost, the Contractor shall give Notice to the Employer's Representative and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such Cost Plus Profit, which shall be included in the Contract Price.

After receiving this Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) whether and (if so) to what extent the error could not reasonably have been discovered, and (ii) the matters described in sub-paragraphs (a) and (b) above related to this extent.

4.8

Safety Procedures

The Contractor shall:

- (a) comply with all applicable safety regulations;
- (b) take care for the safety of all persons entitled to be on the Site;
- (c) use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger to these persons;
- (d) provide fencing, lighting, guarding and watching of the Works until the issue of the Contract Completion Certificate; and
- (e) provide any Temporary Works (including roadways, footways, guards and fences) which may be necessary, because of the execution of the Works, for the use and protection of the public and of owners and occupiers of adjacent land.

4.9

Quality Assurance

The Contractor shall institute a quality assurance system to demonstrate compliance with the requirements of the Contract. The system shall be in accordance with the details stated in the Contract. The Employer's Representative shall be entitled to audit any aspect of the system.

Details of all procedures and compliance documents shall be submitted to the Employer's Representative for information before each design, execution and operation stage is commenced. When any document of a technical nature is issued to the Employer's Representative, evidence of the prior approval by the Contractor himself shall be apparent on the document itself.

Compliance with the quality assurance system shall not relieve the Contractor of any of his duties, obligations or responsibilities under the Contract.

4.10

Site Data

The Employer shall have made available to the Contractor for his information, prior to the Base Date, all relevant data in the Employer's possession on sub-surface, hydrological and climatic conditions at the Site, including environmental aspects. The

Employer shall similarly make available to the Contractor all such data which come into the Employer's possession after the Base Date. The Contractor shall be responsible for interpreting all such data.

To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works or the provision of the Operation Service. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, its surroundings, the above data and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including (without limitation):

- (a) the form and nature of the Site, including sub-surface conditions;
- (b) the hydrological and climatic conditions;
- (c) the extent and nature of the work and Goods necessary for the execution and completion of the Works and the remedying of any defects;
- (d) the Laws, procedures of regulatory and other authorities and labour practices of the Country; and
- (e) the Contractor's requirements for access, accommodation, facilities, personnel, power, transport, water and other services.

4.11

Sufficiency of the Accepted Contract Amount

The Contractor shall be deemed to:

- (a) have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount; and
- (b) have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters referred to in Sub-Clause 4.10 [*Site Data*], and any further data relevant to the Contractor's design.

The Accepted Contract Amount covers all the Contractor's obligations under the Contract (including those under Provisional Sums, if any) and all things necessary for the proper design, execution and completion of the Works, the remedying of any defects and the provision of the Operation Service.

4.12

Unforeseeable Physical Conditions

In this Sub-Clause, "physical conditions" means natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions.

If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give Notice to the Employer's Representative as soon as practicable.

This Notice shall describe the physical conditions, so that they can be inspected by the Employer's Representative, and shall set out the reasons why the Contractor considers them to be Unforeseeable. The Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions, and shall comply with any instructions which the Employer's Representative may give. If an instruction constitutes a Variation, Clause 13 [*Variations and Adjustments*] shall apply.

If and to the extent that the Contractor encounters physical conditions which are Unforeseeable, gives such a Notice, and suffers delay and/or incurs cost due to these

conditions, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such Cost, which shall be included in the Contract Price.

After receiving such Notice and inspecting and/or investigating these physical conditions, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) whether and (if so) to what extent these physical conditions were Unforeseeable, and (ii) the matters described in sub-paragraphs (a) and (b) above.

However, before additional Cost is finally agreed or determined under (ii), the Employer's Representative may also review whether other physical conditions in similar parts of the Works (if any) were more favourable than could reasonably have been foreseen when the Contractor submitted the Tender. If and to the extent that these more favourable conditions were encountered, the Employer's Representative may proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the reductions in Cost which were due to these conditions, which may be included (as deductions) in the Contract Price and payment certificates. However, the net effect of all adjustments under sub-paragraph (b) and all these reductions, for all the physical conditions encountered in similar parts of the Works, shall not result in a net reduction in the Contract Price.

The Employer's Representative may take account of any evidence of the physical conditions foreseen by the Contractor when submitting the Tender, which may be made available by the Contractor, but shall not be bound by any such evidence.

4.13

Rights of Way and Facilities

The Contractor shall bear all costs and charges for special and/or temporary rights-of-way which he may require, including those for access to the Site. The Contractor shall also obtain, at his risk and cost, any additional facilities outside the Site which he may require for the purposes of the Works.

4.14

Avoidance of Interference

The Contractor shall not interfere unnecessarily or improperly with:

- (a) the convenience of the public; or
- (b) the access to and use and occupation of all roads and footpaths, irrespective of whether they are public or in the possession of the Employer or of others.

The Contractor shall indemnify and hold the Employer harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from any such unnecessary or improper interference.

4.15

Access Route

The Contractor shall be deemed to have been satisfied as to the suitability and availability of access routes to the Site. The Contractor shall use reasonable efforts to prevent any road or bridge from being damaged by the Contractor's traffic or by the Contractor's Personnel. These efforts shall include the proper use of appropriate vehicles and routes.

Except as otherwise stated in these Conditions:

- (a) the Contractor shall (as between the Parties) be responsible for any

- (b) the Contractor shall provide all necessary signs or directions along access routes, and shall obtain any permission which may be required from the relevant authorities for his use of routes, signs and directions;
- (c) the Employer shall not be responsible for any claims which may arise from the use or otherwise of any access route;
- (d) the Employer does not guarantee the suitability or availability of particular access routes; and
- (e) Costs due to non-suitability or non-availability, for the use required by the Contractor, of access routes shall be borne by the Contractor.

4.16

Transport of Goods

Unless otherwise stated in the Particular Conditions:

- (a) the Contractor shall give Notice to the Employer's Representative not less than 21 days prior to the date on which any Plant or a major item of other Goods will be delivered to the Site; and
- (b) the Contractor shall be responsible for packing, loading, transporting, receiving, unloading, storing and protecting all Goods and other things required for the Works or provision of Operation Service; and
- (c) the Contractor shall indemnify and hold the Employer harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from the transport of Goods, and shall negotiate and pay all claims arising from their transport.

4.17

Contractor's Equipment

The Contractor shall be responsible for all Contractor's Equipment. When brought on to the Site, Contractor's Equipment shall be deemed to be exclusively intended for the execution of the Works and provision of the Operation Service. The Contractor shall not remove from the Site any major items of Contractor's Equipment without the consent of the Employer's Representative. However, consent shall not be required for vehicles transporting Goods or Contractor's Personnel off Site.

4.18

Protection of the Environment

The Contractor shall take all reasonable steps to protect the environment (both on and off the Site) and to limit damage and nuisance to people and property resulting from pollution, noise and other results of his operations.

The Contractor shall ensure that emissions, surface discharges and effluent from the Contractor's activities shall not exceed the values indicated in the Employer's Requirements, and shall not exceed the values prescribed by applicable Laws.

4.19

Electricity, Water and Gas

Except as stated below, the Contractor shall be responsible for the provision of all electricity, water and other services he may require.

The Contractor shall be entitled to use for the purposes of the Works and provision of the Operation Service such supplies of electricity, water, gas and other services as may be available on the Site and of which details are given in the Employer's Requirements.

In such a case the Contractor shall take over in his own name and shall be responsible for payment of the electricity, water, gas and other services to the utility provider. The Contractor will be allowed to take over the existing service entry and provision points and shall be responsible for taking and recording such information as is necessary for the utility providers to correctly charge the Contractor from the Commencement Date.

4.20

Employer's Equipment and Free-Issue Materials

The Employer shall make the Employer's Equipment (if any) available for the use of the Contractor in the execution of the Works in accordance with the details, arrangements and prices stated in the Employer's Requirements. Unless otherwise stated in the Employer's Requirements:

- (a) the Employer shall be responsible for the Employer's Equipment, except that
- (b) the Contractor shall be responsible for each item of Employer's Equipment whilst any of the Contractor's Personnel is operating it, driving it, directing it or in possession or control of it.

The appropriate quantities and the amounts due (at such stated prices) for the use of Employer's Equipment shall be agreed or determined by the Employer's Representative in accordance with Sub-Clause 20.2 [*Employer's Claims*] and Sub-Clause 3.5 [*Determinations*]. The Contractor shall pay these amounts to the Employer.

The Employer shall supply, free of charge, the "free-issue materials" (if any) in accordance with the details stated in the Employer's Requirements. The Employer shall, at his risk and cost, provide these materials at the time and place specified in the Contract. The Contractor shall then visually inspect them, and shall promptly give Notice to the Employer's Representative of any shortage, defect or default in these materials. Unless otherwise agreed by both Parties, the Employer shall immediately rectify the notified shortage, defect or default.

After this visual inspection, the free-issue materials shall come under the care, custody and control of the Contractor. The Contractor's obligations of inspection, care, custody and control shall not relieve the Employer of liability for any shortage, defect or default not apparent from a visual inspection.

4.21

Progress Reports

During the Design-Build Period, monthly progress reports, in a format agreed with the Employer's Representative shall be prepared by the Contractor and submitted to the Employer's Representative in one original and five copies, unless otherwise stated in the Employer's Requirements. The first report shall cover the period up to the end of the first calendar month following the Commencement Date. Reports shall be submitted monthly thereafter, each within 7 days after the last day of the period to which it relates.

Reporting on progress shall continue until the Contractor has received the Contract Completion Certificate. Details of the content of the progress reports for the Design-Build Period and the Operation Service Period shall be as specified in the Employer's Requirements.

Unless otherwise stated or agreed, each progress report shall include:

- (a) charts and detailed descriptions of progress, including each stage of design, Contractor's Documents, procurement, manufacture, delivery to Site, construction or replacement, erection, testing, commissioning, trial operation and provision of Operation Service;
- (b) photographs showing the status of manufacture or replacement and of progress on the Site;
- (c) for the manufacture or replacement of each main item of Plant and Materials, the name of the manufacturer, manufacture location, percentage progress, and the actual or expected dates of:
 - (i) commencement of manufacture,
 - (ii) Contractor's inspections,

- (iii) tests, and
 - (iv) shipment and arrival at the Site;
- (d) the details described in Sub-Clause 6.10 [*Records of Contractor's Personnel and Equipment*];
 - (e) copies of quality assurance documents, test results and certificates of Materials;
 - (f) list of Variations, Notices given under Sub-Clause 20.1 [*Contractor's Claims*] and Notices given under Sub-Clause 20.2 [*Employer's Claims*];
 - (g) safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations; and
 - (h) comparisons of actual and planned progress, with details of any events or circumstances which may jeopardise the completion in accordance with the Contract, and the measures being (or to be) adopted to overcome delays.

The particular reporting requirements during the Operation Service Period shall be as specified in the Employer's Requirements.

4.22

Security of the Site

The Contractor shall be responsible for the security of the Site. Unless otherwise stated in the Particular Conditions:

- (a) the Contractor shall be responsible for keeping unauthorised persons off the Site; and
- (b) authorised persons shall be limited to the Contractor's Personnel and the Employer's Personnel, and to any other personnel notified to the Contractor, by the Employer or the Employer's Representative, as authorised personnel of the Employer's other contractors on the Site.

4.23

Contractor's Operations on Site

The Contractor shall confine his operations to the Site, and to any additional areas which may be obtained by the Contractor and agreed by the Employer's Representative as working areas. The Contractor shall take all necessary precautions to keep Contractor's Equipment and Contractor's Personnel within the Site and these additional areas, and to keep them off adjacent land.

At all times the Contractor shall keep the Site free from all unnecessary obstruction, and shall store or dispose of any Contractor's Equipment or surplus materials. The Contractor shall promptly clear away and remove from the Site any surplus material, wreckage, rubbish and Temporary Works which are no longer required.

Upon the issue of a Commissioning Certificate, the Contractor shall clear away and remove, from that part of the Site and Works to which the Commissioning Certificate refers, all Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works. The Contractor shall leave that part of the Site and the Works in a clean and safe condition.

The Contract Completion Certificate shall not be issued until the Contractor has removed any remaining Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works from the Site which are not required. The Contractor shall leave the Site and the Works in a clean and safe condition.

4.24

Fossils

All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological or archaeological interest found on the Site shall be placed under the care and authority of the Employer. The Contractor shall take reasonable

precautions to prevent Contractor's Personnel or other persons from removing or damaging any of these findings.

The Contractor shall, upon discovery of any such finding, promptly give Notice to the Employer's Representative, who shall issue instructions for dealing with it. If the Contractor suffers delay and/or incurs cost from complying with the instructions, the Contractor shall give a further Notice to the Employer's Representative and shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such Cost, which shall be included in the Contract Price.

After receiving this further Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

4.25

Changes in the Contractor's Financial Situation

If the Contractor becomes aware of any change in the Contractor's financial situation which will or could adversely affect his ability to complete and fulfil all his obligations under the Contract, he shall immediately give Notice to the Employer with detailed particulars. Within 28 days of receiving such Notice, the Employer shall advise the Contractor of what action he intends to take and/or what action the Employer requires the Contractor to take.

In any event, the Contractor shall provide the Employer annually with his audited financial statements and reports.

5 Design

5.1 General Design Obligations

The Contractor shall carry out, and be responsible for, the design of the Works. Design shall be prepared by qualified designers who are engineers or other professionals who comply with the criteria (if any) stated in the Employer's Requirements. Unless otherwise stated in the Contract, the Contractor shall submit to the Employer's Representative for consent the name and particulars of each proposed designer and design Subcontractor.

The Contractor warrants that he, his designers and design Subcontractors have the experience and capability necessary for the design. The Contractor undertakes that the designers shall be available to attend discussions with the Employer's Representative at all reasonable times.

Upon receiving Notice under Sub-Clause 8.1 [*Commencement Date*], the Contractor shall scrutinise the Employer's Requirements (including design criteria and calculations, if any) and the items of reference mentioned in Sub-Clause 4.7 [*Setting Out*]. Within the period stated in the Contract Data, calculated from the Commencement Date, the Contractor shall give Notice to the Employer's Representative of any error, fault or other defect found in the Employer's Requirements or these items of reference.

After receiving this Notice, the Employer's Representative shall determine whether Clause 13 [*Variations and Adjustments*] shall be applied, and shall give Notice to the Contractor accordingly. If and to the extent that (taking account of cost and time) an

experienced contractor exercising due care would have discovered the error, fault or other defect when examining the Site and the Employer's Requirements before submitting the Tender, the Time for Completion shall not be extended and the Contract Price shall not be adjusted.

If the Contractor finds any error, fault or other defect in the Employer's Requirements after the period stated in the Contract Data, then Sub-Clause 1.10 [*Errors in the Employer's Requirements*] shall be applicable.

5.2

Contractor's Documents

The Contractor's Documents shall comprise the technical documents specified in the Employer's Requirements, documents required to satisfy all regulatory approvals, and the documents described in Sub-Clause 5.5 [*As-Built Documents*] and Sub-Clause 5.6 [*Operation and Maintenance Manuals*]. Unless otherwise stated in the Employer's Requirements, the Contractor's Documents shall be written in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

The Contractor shall prepare all Contractor's Documents, and shall also prepare any other documents necessary to instruct the Contractor's Personnel. The Employer's Personnel shall have the right to inspect the preparation of all these documents, wherever they are being prepared.

If the Employer's Requirements describe the Contractor's Documents which are to be submitted to the Employer's Representative for review leading to consent and/or for approval, they shall be submitted accordingly, together with a Notice as described below. The Employer's Representative gives his consent to a document when he is satisfied that the Contractor's Documents conform to the Employer's Requirements. In the following provisions of this Sub-Clause, (i) "review period" means the period required by the Employer's Representative for review leading to consent and (if so specified) for approval, and (ii) "Contractor's Documents" exclude any documents which are not specified as being required to be submitted for review leading to consent and/or for approval. The Contractor's Documents which require approval from the Employer's Representative shall be as listed in the Contract Data.

Unless otherwise stated in the Employer's Requirements or agreed with the Employer's Representative, each review period shall not exceed 21 days, calculated from the date on which the Employer's Representative receives a Contractor's Document and the Contractor's Notice. This Notice shall state that the Contractor's Document is considered ready for review leading to either approval (if so specified) or consent with regard to conformity with the Employer's Requirements, in accordance with this Sub-Clause and for use. The Notice shall also state that the Contractor's Document complies with the Contract, or the extent to which it does not comply.

The Employer's Representative may, within the review period, give Notice to the Contractor that a Contractor's Document fails (to the extent stated) to conform with the Contract. If a Contractor's Document so fails to conform, it shall be rectified, resubmitted and reviewed (and, if specified, approved) in accordance with this Sub-Clause, at the Contractor's cost. If such re-submission and review causes the Employer to incur additional costs, the Contractor shall, subject to Sub-Clause 20.2 [*Employer's Claims*], pay these costs to the Employer.

For each part of the Works, and except to the extent that the prior approval or consent of the Employer's Representative shall have been obtained:

- (a) in the case of a Contractor's Document which has (as specified) been submitted for the Employer's Representative's approval or consent:

- (i) the Employer's Representative shall give Notice to the Contractor that the Employer's Representative gives his consent that the Contractor's Document conforms with the Employer's Requirements or is approved, or that it does not (to the extent stated) comply with the Contract;
 - (ii) execution of such part of the Works shall not commence until the Employer's Representative has either approved or given his consent to the Contractor's Document; and
 - (iii) the Employer's Representative shall be deemed to have approved the Contractor's Documents or given his consent that the Contractor's Documents conform to the Employer's Requirements upon the expiry of the review periods for all the Contractor's Documents which are relevant to the design and execution of such part, unless the Employer's Representative has previously notified otherwise in accordance with sub-paragraph (i);
- (b) execution of such part of the Works shall not commence prior to the expiry of the review periods for all the Contractor's Documents which are relevant to its design and execution;
 - (c) execution of such part of the Works shall be in accordance with those Contractor's Documents for which the Employer's Representative has given his consent as to the conformity with the Employer's Requirements, (and, if specified, approved); and
 - (d) if the Contractor wishes to modify any design or document which has previously been submitted for review (and, if specified, approval), the Contractor shall immediately give Notice to the Employer's Representative, accompanied by a written explanation of the need for such modification. Thereafter, the Contractor shall submit revised documents to the Employer's Representative in accordance with the above procedure.

Any such consent and/or approval (where specified) (under this Sub-Clause or otherwise) shall not relieve the Contractor from any obligation or responsibility.

5.3

Contractor's Undertaking

If the Employer's Representative reasonably instructs that further Contractor's Documents are required, the Contractor shall prepare them promptly at his own cost. The Contractor undertakes that the design, the Contractor's Documents, the execution and the completed Works will be in accordance with:

- (a) the Laws of the Country; and
- (b) the documents forming the Contract, as altered or modified by Variations.

5.4

Technical Standards and Regulations

Unless otherwise stated, the design, the Contractor's Documents, the execution and the completed Works shall comply with the Country's technical standards, building, construction and environmental Laws, Laws applicable to the product being produced from the Works, and other standards specified in the Employer's Requirements, applicable to the Works, or defined by the applicable Laws.

All these Laws shall, in respect of the Works and each Section, be those prevailing when the Commissioning Certificate is issued in accordance with Sub-Clause 11.7 [*Commissioning Certificate*]. References in the Contract to published standards shall be understood to be references to the edition applicable on the Base Date, unless stated otherwise.

If changed or new applicable standards come into force in the Country after the Base Date, the Contractor shall give Notice to the Employer's Representative and (if appropriate) submit proposals for compliance. In the event that:

- (a) the Employer's Representative determines that compliance is required; and
- (b) the proposals for compliance constitute a variation,

then the Employer's Representative shall initiate a Variation in accordance with Clause 13 [*Variations and Adjustments*].

5.5

As-Built Documents

The Contractor shall prepare, and keep up-to-date, a complete set of "as-built" records of the execution of the Works, showing the exact as-built locations, sizes and details of the work as executed. These records shall be kept on the Site and shall be used exclusively for the purposes of this Sub-Clause. At least two copies shall be supplied to the Employer's Representative prior to the commencement of the Tests on Completion of Design-Build.

In addition, the Contractor shall supply to the Employer's Representative as-built drawings of the Works, showing all Works as executed, and submit them to the Employer's Representative for review under Sub-Clause 5.2 [*Contractor's Documents*]. The Contractor shall obtain the consent of the Employer's Representative as to their size, the referencing system, and other relevant details.

Prior to the issue of the Commissioning Certificate, the Contractor shall supply to the Employer's Representative the specified numbers and types of copies of the relevant as-built drawings, in accordance with the Employer's Requirements. The relevant work shall not be considered to be completed for the purposes of issuing the Commissioning Certificate under Sub-Clause 11.7 [*Commissioning Certificate*] until the Employer's Representative has received these documents.

5.6

Operation and Maintenance Manuals

Prior to the commencement of the Commissioning Period, the Contractor shall supply to the Employer's Representative two copies of all operation and maintenance manuals in sufficient detail for the Employer to operate, maintain, dismantle, reassemble, adjust and repair the Plant and the Works. The Contractor shall supply the balance of the required operation and maintenance manuals prior to the issue of the Commissioning Certificate. The Works or any Section shall not be considered to be completed for the purposes of issuing the Commissioning Certificate under Sub-Clause 11.7 [*Commissioning Certificate*] until the Employer's Representative has received these documents.

5.7

Design Error

If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Contractor's Documents, they and the Works shall be corrected at the Contractor's cost, notwithstanding any consent or approval under this Clause.

6

Staff and Labour

6.1

Engagement of Staff and Labour

Except as otherwise stated in the Employer's Requirements, the Contractor shall make arrangements for the engagement of all staff and labour, local or otherwise, and for their payment, housing, feeding and transport.

6.2

Rates of Wages and Conditions of Employment

The Contractor shall pay rates of wages and observe conditions of labour which are not lower than those established for the trade or industry where the work is carried out. If no established rates or conditions are applicable, the Contractor shall pay rates of wages and observe conditions which are not lower than the general level of wages and conditions

observed locally by employers whose trade or industry is similar to that of the Contractor.

6.3

Persons in the Service of Employer

The Contractor shall not recruit, or attempt to recruit, staff and labour from amongst the Employer's Personnel.

6.4

Labour Laws

The Contractor shall comply with all the relevant labour Laws applicable to the Contractor's Personnel, including Laws relating to their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights.

The Contractor shall require the Contractor's Personnel to obey all applicable Laws, including those concerning safety at work.

6.5

Working Hours

No work shall be carried out on the Site on locally recognised days of rest or outside the normal working hours stated in the Contract Data, unless:

- (a) otherwise stated in the Contract;
- (b) the Employer's Representative gives consent;
- (c) the work is unavoidable, or necessary for the protection of life or property or for the safety of the Works, in which case the Contractor shall immediately advise the Employer's Representative; or
- (d) required for the proper fulfilment of the requirements of the Operation Service Period.

6.6

Facilities for Staff and Labour

Except as otherwise stated in the Employer's Requirements, the Contractor shall provide and maintain all necessary accommodation and welfare facilities for the Contractor's Personnel. The Contractor shall also provide facilities for the Employer's Personnel as stated in the Employer's Requirements.

The Contractor shall not permit any of the Contractor's Personnel to maintain any temporary or permanent living quarters within the Site of the Works, save where the Employer has given the Contractor permission in writing.

6.7

Health and Safety

The Contractor shall at all times during the Contract Period take all reasonable precautions to maintain the health and safety of the Contractor's Personnel. In collaboration with local health authorities, the Contractor shall ensure that medical staff, first aid facilities, sick bay and ambulance service are available at all times at the Site and at any accommodation for Contractor's and Employer's Personnel, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics.

The Contractor shall appoint an accident prevention officer at the Site, responsible for maintaining safety and protection against accidents. This person shall be qualified for this responsibility, and shall have the authority to issue instructions and take protective measures to prevent accidents. Throughout the execution and operation of the Works, the Contractor shall provide whatever is required by this person to exercise this responsibility and authority.

The Contractor shall send details of any accident to the Employer's Representative as soon as practicable after its occurrence. The Contractor shall maintain records and make reports concerning health, safety and welfare of persons, and damage to property, as the Employer's Representative may reasonably require.

6.8
Contractor's
Superintendence

For the complete Contract Period, the Contractor shall provide all necessary superintendence to plan, arrange, direct, manage, inspect, test and monitor the design and execution of the Works and the provision of the Operation Service in accordance with his obligations under the Contract.

Superintendence shall be given by a sufficient number of persons having adequate knowledge of the language for communications (defined in Sub-Clause 1.4 [*Law and Language*]) and of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents), for the satisfactory and safe execution of the Works and the provision of the Operation Service.

6.9

Contractor's Personnel

The Contractor's Personnel shall be appropriately qualified, skilled and experienced in their respective trades or occupations. The Employer's Representative may require the Contractor to remove (or cause to be removed) any person employed on the Site or Works, including the Contractor's Representative if applicable, who:

- (a) persists in any misconduct or lack of care;
- (b) carries out duties incompetently or negligently;
- (c) fails to conform with any provisions of the Contract; or
- (d) persists in any conduct which is prejudicial to safety, health, or the protection of the environment.

If appropriate, the Contractor shall then appoint (or cause to be appointed) a suitable replacement person.

6.10

Records of Contractor's
Personnel and
Equipment

During the Design-Build Period, the Contractor shall submit, to the Employer's Representative, details showing the number of each class of Contractor's Personnel and of each type of Contractor's Equipment on the Site. Any changes to the Personnel or Equipment shall be notified at the end of each calendar month to the Employer's Representative.

During the Operation Service Period, any changes to the Personnel or Equipment shall be notified at the end of each calendar month to the Employer's Representative.

6.11

Disorderly Conduct

The Contractor shall at all times take all reasonable precautions to prevent any unlawful, riotous or disorderly conduct by or amongst the Contractor's Personnel, and to preserve peace and protection of persons and property on and near the Site.

Plant, Materials, and Workmanship

7.1

Manner of Execution

The Contractor shall carry out the manufacture and/or replacement and/or repair of Plant, the production and manufacture of Materials, and all other activities during the execution of the Works and provision of the Operation Service:

- (a) in accordance with the applicable Laws in the manner (if any) specified in the Contract;
- (b) in a proper workmanlike and careful manner, in accordance with recognised good practice; and
- (c) with properly equipped facilities and non-hazardous Materials, except as otherwise specified in the Contract.

7.2 Samples

The Contractor shall submit the following samples of Materials, and relevant information, to the Employer's Representative for review in accordance with the procedures for Contractor's Documents described in Sub-Clause 5.2 [*Contractor's Documents*]:

- (a) manufacturer's standard samples of Materials and samples specified in the Contract, all at the Contractor's cost; and
- (b) additional samples instructed by the Employer's Representative as a Variation.

Each sample shall be labelled as to origin and intended use in the Works.

7.3

Inspection

The Employer's Personnel and other persons authorised by the Employer shall at all reasonable times:

- (a) have full access to all parts of the Site and to all places from which natural Materials are being obtained;
- (b) during production, manufacture and construction (at the Site and elsewhere), operation and maintenance, be entitled to examine, inspect, measure and test the Materials and workmanship, and to check the progress of manufacture of Plant and production and manufacture of Materials; and
- (c) carry out other authorised duties and inspections.

The Contractor shall give the Employer's Personnel and other persons authorised by the Employer full opportunity to carry out these activities, including providing access, facilities, permissions and safety equipment. No such activity shall relieve the Contractor from any obligation or responsibility.

The Contractor shall give Notice to the Employer's Representative whenever any work is ready and before it is covered up, put out of sight, or packaged for storage or transport. The Employer's Representative shall then either carry out the examination, inspection, measurement or testing without unreasonable delay, or promptly give Notice to the Contractor that the Employer's Representative does not require to do so. If the Contractor fails to give the Notice, he shall, if and when required by the Employer's Representative, uncover the work and thereafter reinstate and make good, all at the Contractor's cost.

7.4

Testing

This Sub-Clause shall apply to all tests on Plant, Materials and workmanship specified in the Contract.

The Contractor shall provide all apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, labour, materials, and suitably qualified and experienced staff, as are necessary to carry out the specified tests efficiently. The Contractor shall agree, with the Employer's Representative, the time and place for the specified testing of any Plant, Materials and other parts of the Works.

The Employer's Representative may, under Clause 13 [*Variations and Adjustments*], vary the location or details of specified tests, or instruct the Contractor to carry out additional tests. If these varied or additional tests show that the tested Plant, Materials or workmanship is not in accordance with the Contract, the cost of carrying out this Variation shall be borne by the Contractor, notwithstanding other provisions of the Contract.

The Employer's Representative shall give Notice to the Contractor not less than 24 hours prior to the tests, of the Employer's Representative's intention to attend the

tests. If the Employer's Representative does not attend at the time and place agreed, the Contractor may proceed with the tests, unless otherwise instructed by the Employer's Representative, and the tests shall then be deemed to have been made in the Employer's Representative's presence.

If the Contractor suffers delay in carrying out the tests and/or incurs cost from complying with these instructions or as a result of a delay for which the Employer is responsible, the Contractor shall give Notice to the Employer's Representative and shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such Cost Plus Profit, which shall be included in the Contract Price.

After receiving this Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

The Contractor shall promptly forward to the Employer's Representative duly certified reports of the tests. When the specified tests have been passed, the Employer's Representative shall endorse the Contractor's test certificate, or issue a certificate to him, to that effect. If the Employer's Representative has not attended the tests, he shall be deemed to have accepted the readings as accurate.

7.5

Rejection

If, as a result of an examination, inspection, measurement or testing, any Plant, Materials, or workmanship is found to be defective or otherwise not in accordance with the Contract, the Employer's Representative may reject the Plant, Materials, design or workmanship by giving Notice to the Contractor, with reasons. The Contractor shall then promptly make good the defect at the Contractor's cost and ensure that the rejected item complies with the Contract.

If the Employer's Representative requires this Plant, Materials, or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If the rejection and retesting cause the Employer to incur additional costs, the Contractor shall, subject to Sub-Clause 20.2 [*Employer's Claims*], pay these costs to the Employer.

7.6

Remedial Work

At any time during the Contract Period, notwithstanding any previous test or certification, the Employer's Representative may instruct the Contractor to:

- (a) repair, remove from the Site and replace, any Plant or Materials which is not in accordance with the Contract;
- (b) remove and re-execute any other work which is not in accordance with the Contract; and
- (c) execute any work which is urgently required for the safety of the Works or the provision of the Operation Service, whether because of an accident, unforeseeable event or otherwise.

The Contractor shall comply with the instruction within a reasonable time, which shall be the time (if any) specified in the instruction, or immediately if urgency is specified under sub-paragraph (c).

Except to the extent that the Contractor may be entitled to payment for the work required under sub-paragraph (c), the Contractor shall bear the cost of such remedial work.

If the Contractor fails to comply with the instruction, the Employer shall be entitled to

employ and pay other persons to carry out the work. Except to the extent that the Contractor would have been entitled to payment for the work, the Contractor shall, subject to Sub-Clause 20.2 [*Employer's Claims*], pay to the Employer all costs arising from this failure.

7.7

Ownership of Plant and Materials

Each item of Plant and Materials shall, to the extent consistent with the Laws of the Country, become the property of the Employer at whichever is the earlier of the following times, free from liens and other encumbrances:

- (a) when it is delivered to the Site;
- (b) when the Contractor is paid the value of the Plant and Materials under Sub-Clause 9.9 [*Payment for Plant and Materials in Event of Suspension*]; and
- (c) when the Contractor is paid the value of the Plant and Materials under Sub-Clause 14.6 [*Payment for Plant and Materials intended for the Works*].

7.8

Royalties

Unless otherwise stated in the Employer's Requirements, the Contractor shall pay all royalties, rents and other payments for:

- (a) natural Materials obtained from outside the Site; and
- (b) the disposal of material from demolitions and excavations and of other surplus material (whether natural or man-made), except to the extent that disposal areas within the Site are specified in the Contract.

8 Commencement Date, Completion and Programme

8.1

Commencement Date

The Employer's Representative shall give Notice stating the Commencement Date to the Contractor not less than 14 days prior to the Commencement Date. Unless otherwise stated in the Particular Conditions, the Commencement Date shall be within 42 days after the Contractor receives the Letter of Acceptance.

8.2

Time for Completion

The Contractor shall complete the whole of the Design-Build and each Section (if any), in accordance with Sub-Clause 9.2 [*Time for Completion of Design-Build*], or as extended under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*], and shall provide the Operation Service for the period stated in the Contract Data.

8.3

Programme

The Contractor shall submit a detailed time programme to the Employer's Representative within 28 days after receiving the Notice under Sub-Clause 8.1 [*Commencement Date*]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations. Each programme shall include:

- (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design, Contractor's Documents, procurement, manufacture, inspection, delivery to Site, construction, erection, testing, commissioning and trial operation;
- (b) the period of Operation Service;
- (c) the periods for reviews under Sub-Clause 5.2 [*Contractor's Documents*] and for any other submissions, including the supply of samples in accordance with Sub-Clause 7.2 [*Samples*], approvals and consents specified in the Employer's Requirements;

- (d) the sequence and timing of inspections and tests specified in the Contract, and
- (e) a supporting report which includes:
 - (i) a general description of the methods which the Contractor intends to adopt for both the Design-Build and the Operation Service;
 - (ii) details showing the Contractor's reasonable estimate of the number of each class of Contractor's Personnel and of each type of Contractor's Equipment, required on the Site for each major stage; and
 - (iii) the Contractor's proposed manning schedule for the Operation Service.

Unless the Employer's Representative, within 21 days after receiving a programme, gives Notice to the Contractor stating the extent to which it does not comply with the Contract, the Contractor shall proceed in accordance with the programme, subject to his other obligations under the Contract. The Employer's Personnel shall be entitled to rely upon the programme when planning their activities.

If, at any time, the Employer's Representative gives Notice to the Contractor that a programme fails (to the extent stated) to comply with the Contract or to be consistent with actual progress and the Contractor's stated intentions, the Contractor shall submit, within 14 days, a revised programme to the Employer's Representative in accordance with this Sub-Clause.

8.4

Advance Warning

Each Party shall endeavour to advise the other Party in advance of any known or probable future events or circumstances which may adversely affect the work, increase the Contract Price or delay the execution of the Works or the Operation Service. The Employer's Representative may require the Contractor to submit an estimate of the anticipated effect of the future events or circumstances, and/or a proposal under Sub-Clause 13.3 [*Variation Procedure*].

8.5

Delay Damages

If the Contractor fails to complete the Design-Build in accordance with the requirements of Sub-Clause 9.2 [*Time for Completion of Design-Build*], he shall pay delay damages as detailed in Sub-Clause 9.6 [*Delay Damages relating to Design-Build*].

If the Contractor fails or is unable to provide the Operation Service for the complete period specified in the Contract, or parts of the Operation Service, and such failure is:

- (a) due to a cause for which the Contractor is responsible; and
- (b) results in the Employer losing revenue or income which the Employer would normally have expected to receive during the Operation Service Period; or
- (c) results in the Employer suffering any other loss which he would not have suffered but for such failure,

then the Contractor shall pay to the Employer compensation in accordance with Sub-Clause 10.6 [*Delays and Interruptions during the Operation Service*].

8.6

Contract Completion Certificate

Performance of the Contractor's obligations in respect of the Contract shall not be considered to have been completed until the Contract Completion Certificate has been signed by the Employer's Representative and issued to the Contractor, stating the date on which the Contractor completed his obligations in respect of both the Design-Build and the Operation Service (Contract Completion Date).

The Employer's Representative shall, subject to Sub-Clause 11.8 [*Joint Inspection Prior to Contract Completion*], Sub-Clause 10.8 [*Completion of Operation Service*]

and Sub-Clause 4.23 [*Contractor's Operations on Site*], issue the Contract Completion Certificate to the Contractor, with a copy to the Employer, within 21 days after the last day of the Contract Period. No extension of the Operation Service Period shall be allowed except by written agreement between the Parties.

Only the Contract Completion Certificate shall be deemed to constitute the Employer's acceptance of the Contractor's completion of his obligations under the Contract. Following the issue of the Contract Completion Certificate the Employer shall be fully responsible for the care, safety, operation, servicing and maintenance of the Works.

8.7

Handback Requirements The Contractor shall ensure that the Works comply with the handback requirements specified in the Employer's Requirements prior to the issue of the Contract Completion Certificate.

8.8

Unfulfilled Obligations After the Contract Completion Certificate has been issued, each Party shall remain liable for the fulfilment of any obligation under the Contract which remains unperformed at that time. For the purposes of determining the nature and extent of unperformed obligations, the Contract shall be deemed to remain in force.

9 Design-Build

9.1

Commencement of Design-Build The Contractor shall commence the design and execution of the Works within 28 days of the Commencement Date, and shall then proceed with the Design-Build with due expedition and without delay.

9.2

Time for Completion of Design-Build The Contractor shall complete the whole of the Design-Build of the Works, and each Section (if any), within the Time for Completion of Design-Build of the Works or Section (as the case may be) as set out in the Contract Data, including:

- (a) passing the Tests on Completion under Sub-Clause 11.1 [*Testing of the Works*];
- (b) completing all work which is stated in the Contract as being required under Sub-Clause 11.5 [*Completion of the Works and Sections*]; and
- (c) preparation and delivery to the Employer's Representative of Contractor's Documents required under Sub-Clause 5.2 [*Contractor's Documents*].

9.3

Extension of Time for Completion of Design-Build The Contractor shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to an extension of the Time for Completion of Design-Build if and to the extent that completion for the purposes of Sub-Clause 11.5 [*Completion of the Works and Sections*] is or will be delayed by any of the following causes:

- (a) a Variation (unless an adjustment to the Time for Completion of Design-Build has been agreed under Sub-Clause 13.3 [*Variation Procedure*]);
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions;
- (c) exceptionally adverse climatic conditions;
- (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions; or
- (e) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.

If the Contractor considers himself to be entitled to an extension of the Time for Completion of Design-Build, the Contractor shall give Notice to the Employer's Representative in accordance with Sub-Clause 20.1 [*Contractor's Claims*]. When determining each extension of time, the Employer's Representative shall review previous determinations and may increase, but shall not decrease, the total extension of time.

If a Dispute regarding an extension of time has been referred to the DAB, the Contractor shall be immediately entitled to any extension of the Time for Completion of Design-Build which is decided by the DAB under Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*].

9.4

Delays Caused by Authorities

If the following conditions apply during the Design-Build Period, namely:

- (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public and/or local authorities in the Country;
- (b) these authorities delay or disrupt the Contractor's work; and
- (c) the delay or disruption was Unforeseeable,

then this delay or disruption will be considered as a cause of delay under subparagraph (b) of Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*].

9.5

Rate of Progress

If, in the opinion of the Employer's Representative, at any time during the Design-Build Period:

- (a) actual progress is too slow to complete within the Time for Completion of Design-Build; and/or
- (b) progress has fallen (or will fall) behind the current programme under Sub-Clause 8.3 [*Programme*],

other than as a result of a cause listed in Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*], then the Employer's Representative may instruct the Contractor to submit, under Sub-Clause 8.3 [*Programme*], a revised programme and supporting report describing the revised methods which the Contractor proposes to adopt in order to expedite progress and complete within the Time for Completion of Design-Build.

Unless the Employer's Representative notifies otherwise, the Contractor shall adopt these revised methods, which may require increases in the working hours and/or in the numbers of Contractor's Personnel and/or Goods, at the risk and cost of the Contractor. If these revised methods cause the Employer to incur additional costs, the Contractor shall, subject to Sub-Clause 20.2 [*Employer's Claims*], pay these costs to the Employer, in addition to delay damages (if any) under Sub-Clause 9.6 [*Delay Damages relating to Design-Build*] below.

9.6

Delay Damages relating to Design-Build

If the Contractor fails to comply with Sub-Clause 9.2 [*Time for Completion of Design-Build*], the Contractor shall, subject to Sub-Clause 20.2 [*Employer's Claims*], pay delay damages to the Employer for this default. These delay damages shall be the amount stated in the Contract Data, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Commissioning Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Contract Data.

These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Clause 15 [*Termination by Employer*] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Design-Build and the Operation Service, or from any other duties, obligations or responsibilities which he may have under the Contract.

9.7

Suspension of Work

The Employer's Representative may at any time instruct the Contractor to suspend progress of part or all of the Works. During such suspension, the Contractor shall protect, store, secure and maintain such part or the Works against any deterioration, loss or damage.

The Employer's Representative shall also notify the cause for the suspension. If and to the extent that the cause is the responsibility of the Contractor, the following Sub-Clauses 9.8, 9.9 and 9.10 shall not apply.

9.8

Consequences of Suspension

If, during the Design-Build Period, the Contractor suffers delay and/or incurs cost from complying with the Employer's Representative's instructions under Sub-Clause 9.7 [*Suspension of Work*] and/or from resuming the work, the Contractor shall give Notice to the Employer's Representative and shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such Cost, which shall be included in the Contract Price.

After receiving this Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

The Contractor shall not be entitled to an extension of time for, or to payment of the Cost incurred in, making good the consequences of the Contractor's faulty design, workmanship or materials, or of the Contractor's failure to protect, store or secure in accordance with Sub-Clause 9.7 [*Suspension of Work*].

9.9

Payment for Plant and Materials in Event of Suspension

The Contractor shall be entitled to payment of the value (as at the date of suspension) of Plant and/or Materials which have not been delivered to Site, if:

- (a) the work on Plant or delivery of Plant and/or Materials has been suspended for more than 28 days; and
- (b) the Contractor has marked the Plant and/or Materials as the Employer's property in accordance with the Employer's Representative's instructions.

Payment for Plant and/or Materials made pursuant to this Sub-Clause shall, if requested by the Employer's Representative, be subject to the production of satisfactory evidence by the Contractor that the said Plant and/or Materials are fully owned by the Contractor and are not subject to any retention of title by the supplier.

9.10

Prolonged Suspension

If the suspension under Sub-Clause 9.7 [*Suspension of Work*] has continued for more than 84 days, the Contractor may request the Employer's Representative's permission to proceed. If the Employer's Representative does not give permission within 28 days after being requested to do so, the Contractor may, by giving Notice to the Employer's Representative, treat the suspension as an omission under Clause

13 [*Variations and Adjustments*] of the affected part of the Works. If the suspension affects the whole of the Works, the Contractor may give Notice of termination under Sub-Clause 16.2 [*Termination by Contractor*].

9.11

Resumption of Work

After the permission or instruction to proceed is given, the Contractor and the Employer's Representative shall jointly examine the Works and the Plant and Materials affected by the suspension. The Contractor shall make good any deterioration or defect in or loss of the Works or Plant or Materials, which has occurred during the suspension. The Employer's Representative shall make a written record of all making good required to be carried out by the Contractor.

9.12

Completion of Design-Build

The Design-Build shall not be considered as complete until all of the following are achieved:

- (a) the Works have been fully designed and executed in accordance with the Employer's Requirements and other relevant provisions of the Contract;
- (b) the Works have passed the Tests on Completion of Design-Build in accordance with Sub-Clause 11.1 [*Testing of the Works*];
- (c) Contractor's Documents in accordance with Sub-Clause 5.5 [*As-Built Documents*] and Sub-Clause 5.6 [*Operation and Maintenance Manuals*] have been supplied and approved by the Employer's Representative; and
- (d) the Commissioning Certificate required under Sub-Clause 11.7 [*Commissioning Certificate*] has been issued stating the date upon which the Design-Build has been completed and the Operation Service shall commence.

9.13

Failure to Complete

Should the Contractor fail to complete the Design-Build prior to the Cut-Off Date, the Employer may, at his sole option, either:

- (a) permit the Contractor to continue the Design-Build for a further named period, with an absolute right to re-apply this Sub-Clause in the event that the Contractor fails to complete the Design-Build within the extended period; or
- (b) terminate the Contract in accordance with Sub-Clause 15.2 [*Termination for Contractor's Default*] and, if he so chooses, complete the work and subsequently execute the Operation Service himself or by engaging others.

In either case, the Employer will be entitled to recover from the Contractor any direct loss incurred, including any loss resulting from the delayed operation of the Works, subject to the limitations contained in Sub-Clause 9.6 [*Delay Damages Relating to Design-Build*] and Sub-Clause 17.8 [*Limitation of Liability*].

10 Operation Service

10.1

General Requirements

The Contractor shall comply with the Operation Management Requirements as provided for in the Contract and any revisions thereof which are agreed during the Contract Period.

The Contractor shall follow the requirements of the Operation and Maintenance Plan and the operation and maintenance manuals. No significant alteration to such arrangements and methods shall be made without the prior approval of the Employer's Representative.

During the Operation Service, the Contractor shall be responsible for ensuring that the Works remain fit for the purposes for which they are intended.

The operators and maintenance personnel for the Works, including Plant operators, shall have the appropriate experience and qualifications to perform the Operation Service. The names, with details of their qualifications and experience, of all operation and maintenance personnel shall be submitted to the Employer for approval, and no such personnel shall be engaged prior to receiving such approval.

10.2

Commencement of Operation Service

Unless otherwise stated in the Employer's Requirements, the commencement of the Operation Service shall be from the date stated in the Commissioning Certificate issued under Sub-Clause 11.7 [*Commissioning Certificate*].

The Operation Service shall not commence until the Design-Build of the Works or any Sections has been completed in accordance with Sub-Clause 9.12 [*Completion of Design-Build*].

Should the Commissioning Certificate, or any Notice attached or pertaining thereto, contain requirements or restrictions over and above those in the Contract, the Contractor shall comply with such requirements and/or restrictions, and, to the extent that the Contractor suffers additional Cost as a result, and subject to the provisions of Sub-Clause 20.1 [*Contractor's Claims*], he shall be reimbursed by the Employer unless such requirements or restrictions were as a result of a fault or failure of the Contractor.

The Contractor shall thereafter provide the Operation Service in compliance with the Operation Management Requirements and in accordance with Sub-Clause 5.5 [*As-Built Documents*] and Sub-Clause 5.6 [*Operation and Maintenance Manuals*].

If the Contractor wishes to modify a document which has previously been submitted and approved, the Contractor shall immediately notify the Employer's Representative, and shall subsequently submit revised document(s) to the Employer's Representative for review accompanied by a written explanation of the need for such modification.

The Contractor shall not implement any proposed modification in accordance with subparagraph (d) of Sub-Clause 5.2 [*Contractor's Documents*] until such modification has been reviewed by the Employer's Representative, and consent to proceed has been given in writing. However, any such approval or consent, or any review (under this Sub-Clause or otherwise), shall not relieve the Contractor from any obligation or responsibility.

10.3

Independent Compliance Audit

At least 182 days prior to the commencement of the Operation Service, the Employer and the Contractor shall jointly appoint the Auditing Body to carry out an independent and impartial audit during the Operation Service. The terms of appointment of the Auditing Body shall be included in the Employer's Requirements, and the purpose will be to audit and monitor the performance of both the Employer and the Contractor during the Operation Service in compliance with the Operation Management Requirements. If the Parties cannot agree on the appointment of the Auditing Body, the matter shall be referred to the DAB by the Parties. The DAB shall make the appointment and notify the Parties accordingly.

The Auditing Body shall commence its duties on the same date as the Operation Service commences.

Payment of the Auditing Body shall be made from the Provisional Sum included in the Contract for that purpose.

Both Parties shall cooperate with the Auditing Body and give due regard to the matters raised in each report issued by the Auditing Body.

10.4

Delivery of Raw Materials The Employer shall be responsible for the free issue and supply and delivery to the Site (or other designated place) of the raw materials, fuels, consumables and other such items specified in the Employer's Requirements. The Employer shall be responsible that all such items are fit for purpose and comply with the requirements of the Contract in respect of quality, purpose and function.

In the event that any such item or product is not delivered in accordance with the agreed delivery programme or deviates from the specified quality, and such delay or deviation causes the Contractor to suffer additional cost, the Contractor shall be entitled to give due notice to the Employer of the nature of the costs which he has incurred and, subject to Sub-Clause 20.1 [*Contractor's Claims*], be entitled to recover his Cost Plus Profit.

The provisions of this Sub-Clause shall not apply in cases where delays are due to:

- (a) breakdown, maintenance, repair, replacement or other operational failure under the responsibility of the Contractor;
- (b) health, safety and environmental risks carried by the Contractor; or
- (c) any act or omission of the Contractor under the Contract.

10.5

Training

The Contractor shall carry out the training of Employer's Personnel in the operation and maintenance of the Works to the extent specified in the Employer's Requirements.

The programme and scheduling of the training shall be agreed with the Employer, and the Contractor shall provide experienced training staff, and all training materials as stated in the Employer's Requirements. The Employer shall be responsible for providing the training facilities and nominating and selecting suitable personnel for training.

10.6

Delays and Interruptions during the Operation Service

Delays and interruptions during the Operation Service shall be agreed and determined as follows:

- (a) Delays or Interruptions caused by the Contractor

If there are any delays or interruptions during the Operation Service which are caused by the Contractor or by a cause for which the Contractor is responsible, the Contractor shall compensate the Employer for any losses including loss of revenue, loss of profit and overhead losses. The amount of compensation due shall be agreed or determined according to Sub-Clause 3.5 [*Determinations*], and the Employer shall be entitled to recover the amount due by making a corresponding deduction from the next payment due to the Contractor. However, the total amount of compensation payable by the Contractor to the Employer shall not exceed the amount stated in the Contract Data. There will be no extension of the period of the Operation Service as a result of any such delay or interruption.

- (b) Delays or Interruptions caused by the Employer

If there are any delays or interruptions during the Operation Service which are

caused by the Employer or by a cause for which the Employer is responsible, the Employer shall compensate the Contractor for any cost and losses including loss of revenue and loss of profit. The amount of compensation due shall be agreed or determined according to Sub-Clause 3.5 [*Determinations*], and the Employer shall pay the amount due by making a corresponding adjustment to the next payment due to the Contractor. In any event other than in the case of election by the Employer to terminate for his convenience pursuant to Sub-Clause 15.5 [*Termination for Employer's Convenience*], the total amount of compensation payable by the Employer to the Contractor shall not exceed the amount stated in the Contract Data. There will be no extension of the period of the Operation Service as a result of any such delay or interruption.

(c) Suspension by the Employer

The Employer's Representative may at any time during the Operation Service instruct the Contractor to suspend progress of the Operation Service. During such suspension, the Contractor shall protect, store, secure and maintain the Plant against any deterioration, loss or damage.

If the need to suspend the Operation Service by the Employer is due to any failure of the Contractor or circumstances for which the Contractor is responsible under the Contract, the provisions of paragraph (a) of this Sub-Clause shall apply.

If the need to suspend the Operation Service is a result neither of any failure by the Contractor nor of circumstances for which the Contractor is responsible under the Contract, the provisions of paragraph (b) of this Sub-Clause shall apply.

If a suspension, which is due neither to any failure by the Contractor nor to circumstances for which the Contractor is responsible under the Contract, has continued for more than 84 days, the Contractor may request the Employer's Representative's permission to proceed. If the Employer's Representative does not give permission within 28 days after being requested to do so, the Contractor may give Notice of termination under Sub-Clause 16.2 [*Termination by Contractor*].

After the permission or instruction to proceed is given, the Contractor and the Employer's Representative shall jointly examine the Works. The Contractor shall make good any deterioration or defect in the Plant and the Employer's Representative shall make a written record of all making good required to be carried out by the Contractor. If the suspension is due neither to any failure by the Contractor nor to circumstances for which the Contractor is responsible under the Contract, the Contractor shall be entitled to be paid the Cost Plus Profit of making good the Works prior to re-commencing the Operation Service.

10.7

**Failure to Reach
Production Outputs**

In the event that the Contractor fails to achieve the production outputs required under the Contract, the Parties shall jointly establish the cause of such failure.

(a) If the cause of the failure lies with the Employer or any of his servants or agents, then, after consultation with the Contractor, the Employer shall give written instruction to the Contractor of the measures which the Employer requires the Contractor to take.

If the Contractor suffers any additional cost as a result of the failure or the measures instructed by the Employer, the Employer, subject to Sub-Clause 3.5 [*Determinations*] and Sub-Clause 20.1 [*Contractor's Claims*], shall pay the Contractor his Cost Plus Profit.

- (b) If the cause of the failure lies with the Contractor then, after due consultation with the Employer, the Contractor shall take all steps necessary to restore the output to the levels required under the Contract.

If the Employer suffers any loss as a result of the failure or the measures taken by the Contractor, the Contractor, subject to Sub-Clause 3.5 [*Determinations*], shall pay the Employer the performance damages specified in the Contract Data.

Unless otherwise stated in the Contract Data, if the failure continues for a period of more than 84 days and the Contractor is unable to achieve the required production output, the Employer may either:

- (i) continue with the Operation Service at a reduced level of compensation determined in accordance with Sub-Clause 3.5 [*Determinations*]; or,
- (ii) if the production outputs fail to reach the minimum values required in the Contract Data, give Notice to the Contractor not less than 56 days prior to terminating the Contract, in accordance with Sub-Clause 15.2 [*Termination for Contractor's Default*]. In such an event, the Employer shall be free to continue the Operation Service himself or by others.

10.8

Completion of Operation Service

Unless the Parties have mutually agreed to prolong the Operation Service, the obligation of the Contractor to operate and maintain the Plant under the Operation Service shall cease at the end of the period stated in the Contract as the Operation Service Period.

Notwithstanding the foregoing, other services to be performed by the Contractor must be completed before the Contractor will be entitled to receive the Contract Completion Certificate in accordance with Sub-Clause 8.6 [*Contract Completion Certificate*].

Pre-conditions which must be fulfilled by the Contractor before the Contract Completion Certificate will be issued are:

- (a) Inspection in accordance with Sub-Clause 11.8 [*Joint Inspection Prior to Contract Completion*];
- (b) Testing in accordance with Sub-Clause 11.9 [*Procedure for Tests Prior to Contract Completion*];
- (c) Updating Operation and Maintenance manuals providing performance records and data in accordance with Sub-Clause 5.6 [*Operation and Maintenance Manuals*]; and
- (d) Remedying defects found during inspection in accordance with Sub-Clause 11.8 [*Joint Inspection Prior to Contract Completion*].

10.9

Ownership of Output and Revenue

During the Operation Service, any production output and revenue shall be the exclusive property of the Employer.

Testing

11.1

Testing of the Works

The Contractor shall carry out the Tests on Completion of Design-Build in accordance with this Clause and Sub-Clause 7.4 [Testing], after providing the documents in accordance with Sub-Clause 5.5 [As-Built Documents] and Sub-Clause 5.6 [Operation and Maintenance Manuals].

The Contractor shall give Notice to the Employer's Representative not less than 21 days prior to the date after which the Contractor will be ready to carry out each of the Tests on Completion of Design-Build. Unless otherwise agreed, Tests on Completion of Design-Build shall be carried out within 14 days after this date, on such day or days as the Employer's Representative shall instruct.

Unless otherwise stated in the Particular Conditions, the Tests on Completion of Design-Build shall be carried out in the following sequence and are further detailed in the Employer's Requirements:

- (a) pre-commissioning tests, which shall include the appropriate inspections and ("dry" or "cold") functional tests to demonstrate that each item of Plant can safely undertake the next stage; (b);
- (b) commissioning tests, which shall include the specified operational tests to demonstrate that the Works or Section can be operated safely and as specified, under all available operating conditions; and
- (c) trial operation, which shall demonstrate that the Works or Section perform reliably and in accordance with the Contract.

The Employer shall be the sole beneficiary of any revenue or benefit resulting from the Tests on Completion of Design-Build.

During trial operation, when the Works are operating under stable conditions, the Contractor shall give Notice to the Employer's Representative that the Works are ready for any other Tests on Completion of Design-Build, including performance tests to demonstrate whether the Works conform with criteria specified in the Employer's Requirements and with the Schedule of Guarantees.

Trial operation shall not constitute a commencement of the Operation Service under Sub-Clause 10.2 [Commencement of Operation Service].

In considering the results of the Tests on Completion of Design-Build, the Employer's Representative shall make allowances for the effect of any use of the Works by the Employer on the performance or other characteristics of the Works. As soon as the Works, or a Section, have passed each of the Tests on Completion of Design-Build described in sub-paragraph (a), (b) or (c) above, the Contractor shall submit a report certified by the Contractor of the results of these Tests to the Employer's Representative.

11.2

Delayed Tests on Completion of Design-Build

If the Tests on Completion of Design-Build are being unduly delayed by the Employer, Sub-Clause 7.4 [Testing] (fifth paragraph) shall be applicable.

If the Tests on Completion of Design-Build are being unduly delayed by the Contractor, the Employer's Representative may by Notice require the Contractor to carry out such Tests within 21 days after receiving the Notice. The Contractor shall carry out such Tests on the day or days within that period as the Contractor may fix and of which he

shall give Notice to the Employer's Representative.

If the Contractor fails to carry out the Tests on Completion of Design-Build within the period of 21 days, the Employer's Personnel may proceed with the Tests at the risk and cost of the Contractor. The Tests on Completion shall then be deemed to have been carried out in the presence of the Contractor and the results of the Tests shall be accepted as accurate.

11.3

Retesting of the Works

If the Works, or a Section, fail to pass the Tests on Completion of Design-Build, Sub-Clause 7.5 [*Rejection*] shall apply, and the Employer's Representative or the Contractor may require the failed Tests, and Tests on Completion of Design-Build on any related work, to be repeated under the same terms and conditions.

11.4

Failure to Pass Tests on Completion of Design-Build

If the Works, or a Section, fail to pass the Tests on Completion of Design-Build repeated under Sub-Clause 11.3 [*Retesting of the Works*] the Employer's Representative shall be entitled to:

- (a) order further repetition of Tests on Completion of Design-Build under Sub-Clause 11.3 [*Retesting of the Works*]; or
- (b) issue a Notice under Sub-Clause 15.1 [*Notice to Correct*].

11.5

Completion of the Works and Sections

Except as stated in Sub-Clause 11.11 [*Failure to Pass Tests Prior to Contract Completion*], the Works shall be deemed by the Employer to be completed when:

- (a) the Works have been completed in accordance with the Contract, including the matters described in Sub-Clause 9.2 [*Time for Completion of Design-Build*] and Sub-Clause 5.6 [*Operation and Maintenance Manuals*] and except as allowed in sub-paragraph (i) below; and
- (b) a Commissioning Certificate has been issued, or is deemed to have been issued, in accordance with this Sub-Clause.

The Contractor may apply by Notice to the Employer's Representative for a Commissioning Certificate not earlier than 14 days before the Works will, in the Contractor's opinion, be complete and ready for commencement of the Operation Service Period. If the Works are divided into Sections, the Contractor may similarly apply for a Commissioning Certificate for each Section.

The Employer's Representative shall, within 28 days after receiving the Contractor's application:

- (i) issue the Commissioning Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract, except for any minor outstanding work and defects which will not substantially affect the use of the Works or Section for their intended purpose (listing such outstanding work and defects which are to be remedied); or
- (ii) reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Commissioning Certificate to be issued.

The Contractor shall then complete the work referred to in sub-paragraph (ii) above before issuing a further Notice under this Sub-Clause.

If the Employer's Representative either fails to issue the Commissioning Certificate or

reject the Contractor's application within the period of 28 days, and if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Commissioning Certificate shall be deemed to have been issued on the last day of that period.

11.6

Commissioning of Parts of the Works

The Employer's Representative may, at the request of the Contractor, issue a Section Commissioning Certificate for any part of the Permanent Works.

If a Section Commissioning Certificate has been issued for a part of the Works, the delay damages thereafter for completion of the remainder of the Works shall be reduced. Similarly, the delay damages for the remainder of the Section (if any) in which this part is included shall also be reduced. For any period of delay after the date stated in this Section Commissioning Certificate, the proportional reduction in these delay damages shall be calculated as the proportion which the value of the part so certified bears to the value of the Works or Section (as the case may be) as a whole. The Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these proportions. The provisions of this paragraph shall only apply to the daily rate of delay damages under Sub-Clause 9.6 [*Delay Damages relating to Design-Build*], and shall not affect the maximum amount of these damages (if any).

11.7

Commissioning Certificate

Performance of the Contractor's Design-Build obligations, including care of the Works, shall not be considered to have been completed until the Commissioning Certificate has been signed by the Employer's Representative and delivered to the Contractor, stating the date on which the Contractor, in the opinion of the Employer's Representative, completed all such obligations in accordance with the Contract (subject to the outstanding works and defects listed in accordance with Sub-Clause 11.5 [*Completion of the Works and Sections*]).

The Employer's Representative shall issue the Commissioning Certificate to the Contractor within 28 days after the application by the Contractor for the Commissioning Certificate subject to the provisions of Sub-Clause 11.5 [*Completion of the Works and Sections*].

Only the Commissioning Certificate shall be deemed to constitute acceptance of the Works.

11.8

Joint Inspection Prior to Contract Completion

Not less than two years prior to the expiry date of the Operation Service Period, the Employer's Representative and the Contractor shall carry out a joint inspection of the Works and, within 28 days of the completion of the joint inspection, the Contractor shall submit a report on the condition of the Works identifying maintenance works (excluding routine maintenance works and the correction of defects), replacements and other works required to be carried out to satisfy the requirements of the Operation and Maintenance Plan after the Contract Completion Date.

The Contractor shall submit a programme for carrying out such works over the remainder of the Operation Service Period.

Following receipt of the Contractor's report, the Employer's Representative may, throughout the remainder of the Operation Service Period, instruct the Contractor to carry out all or part of the works identified in the Contractor's report. The quoted sums from the Asset Replacement Fund will be added to the monthly payments upon replacement of items of Plant in accordance with the Schedule of

replacement prepared at Tender stage and the provisions of Sub-Clause 14.18 [*Asset Replacement Fund*]. Other works shall be carried out at the Contractor's cost.

Upon satisfactory completion of the items identified in this Sub-Clause the Employer shall instruct the Contractor to commence the Tests Prior to Contract Completion in accordance with Sub-Clause 11.9 [*Procedure for Tests Prior to Contract Completion*].

11.9

Procedure for Tests Prior to Contract Completion

The Tests Prior to Contract Completion ("Tests") are to be carried out by the Contractor who shall provide all necessary labour, materials, electricity, fuel and water, other than items identified as being the responsibility of the Employer under Sub-Clause 10.4 [*Delivery of Raw Materials*], and undertake any required remedial works as may be required. The Tests are to be carried out in accordance with the Employer's Requirements.

The Tests shall be carried out towards the end of the Operation Service Period. The Employer shall give Notice to the Contractor not less than 21 days prior to the date after which the Tests shall be carried out. Unless otherwise agreed, such Tests shall be commenced within 14 days after this date, on the day or days determined by the Employer's Representative.

The results of the Tests shall be compiled and evaluated by the Employer's Representative and the Contractor. The Contractor shall make the results of any tests, inspections or monitoring available to the Employer's Representative within 7 days of their receipt. Any effect on the results of the Tests which can reasonably be shown to be due to prior use of the Works by the Contractor during the Operation Service Period shall be taken into account in assessing such results.

As soon as the Contractor has completed the Tests, the Contractor shall notify the Employer's Representative that the Works are complete and ready for final inspection. Upon the Employer's Representative being satisfied that the Contractor has satisfied the requirements of the Tests regarding such final inspection, the Employer's Representative shall notify the Employer and the Contractor prior to the issue of the Contract Completion Certificate.

11.10

Delayed Tests Prior to Contract Completion

If the Employer incurs cost as a result of any unreasonable delay by the Contractor in carrying out the Tests Prior to Contract Completion ("Tests"), the Employer shall be entitled, subject to Sub-Clause 20.2 [*Employer's Claims*], to payment of any such cost which shall be recoverable from the Contractor by the Employer, and may be deducted by the Employer from any monies due, or to become due, to the Contractor.

If the Contractor fails to commence the Tests on the day or days determined under Sub-Clause 11.9 [*Procedure for Tests Prior to Contract Completion*], the Employer's Representative shall give Notice to the Contractor that unless the Tests are commenced within 14 days of this Notice the Employer's Representative may order that the Tests be undertaken by others on behalf of the Employer. In such event, the Contractor shall be bound by the results of such Tests as being accurate and the Employer shall be entitled to deduct the costs associated with the undertaking of the Tests by others from any monies due, or to become due, to the Contractor.

If, for reasons not attributable to the Contractor, the Tests Prior to Contract Completion of the Works, or any Section, cannot be completed during the Contract

Period (or any other period agreed upon by both Parties), then the Works or Section shall be deemed to have passed the Tests.

11.11

Failure to Pass Tests Prior to Contract Completion

If the Works or a Section thereof, fails to pass the Tests Prior to Contract Completion ("Tests") under Sub-Clause 11.9 [*Procedure for Tests Prior to Contract Completion*], the Employer's Representative shall be entitled to:

- (a) order further repetition of Tests under Sub-Clause 11.12 [*Retesting Prior to Contract Completion*];
- (b) reject the Works or a Section thereof (as the case may be), in which event the Employer shall have the same remedies against the Contractor as provided under Clause 15 [*Termination by Employer*]; or
- (c) issue a Contract Completion Certificate, if the Employer so requires. The Contract Price shall then be reduced by such an amount as may be agreed by the Employer and the Contractor (in full satisfaction of such failure only),

and the Contractor shall then proceed in accordance with his other obligations under the Contract.

In the event of (c) above, if the Works, or a Section, fail to pass any of the Tests and the Contractor proposes to make adjustments or modifications to the Works or such Section, the Contractor may be instructed by (or on behalf of) the Employer that right of access to the Works or Section cannot be given until a time that is convenient to the Employer. The Contractor shall then remain liable to carry out the adjustments or modifications and to satisfy this Test, within a reasonable period of receiving Notice by (or on behalf of) the Employer of the time that is convenient to the Employer. However, if the Contractor does not receive this Notice during the relevant Contract Period, the Contractor shall be relieved of this obligation and the Works or Section (as the case may be) shall be deemed to have passed the Tests.

If the Contractor incurs additional cost as a result of any unreasonable delay by the Employer in permitting access to the Works or Plant by the Contractor after issue of the Contract Completion Certificate, either to investigate the causes of a failure to pass any of the Tests or to carry out any adjustments or modifications, the Contractor shall be paid the additional Cost Plus Profit, as determined or agreed in accordance with Sub-Clause 3.5 [*Determinations*], caused by such a delay.

11.12

Retesting Prior to Contract Completion

If the Works, or a Section, fail to pass the Tests Prior to Contract Completion:

- (a) sub-paragraph (b) of Sub-Clause 12.1 [*Completion of Outstanding Work and Remedying Defects*] shall apply; and
- (b) the Employer may require the failed Tests, and the Tests Prior to Contract Completion on any related work, to be repeated under the same terms and conditions.

If such failure and retesting results from a default of the Contractor and causes the Employer to incur additional costs, such costs shall be recoverable from the Contractor by the Employer, subject to Sub-Clause 20.2 [*Employer's Claims*], and may be deducted by the Employer from any monies due, or to become due, to the Contractor.

The Employer's Representative may carry out such additional tests, inspections and monitoring as he deems necessary. The costs of such tests, except where such tests are carried out for the purpose of remedying any damage, defect or failure to meet standards that are the responsibility of the Contractor under the Contract, shall be borne by the Employer.

12

Defects

12.1

Completion of Outstanding Work and Remedying Defects

The requirements regarding the completion of outstanding work and the remedying of defects are as follows:

- (a) Design-Build Period: In order that the Works and Contractor's Documents, and each Section, shall be in the condition required by the Contract, the Contractor shall:
 - (i) complete any work which is outstanding on the date stated in the Commissioning Certificate as soon as practicable after such date, and not later than one year after such date; and
 - (ii) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer.

Final payment for the Design-Build Period, in accordance with Clause 14 [*Contract Price and Payment*], will not be certified until the above requirements have, in the opinion of the Employer's Representative, been met.

If a defect appears or damage occurs, the Contractor shall be notified accordingly, by (or on behalf of) the Employer.

- (b) Operation Service Period: The Contractor shall be responsible for repairing and making good any damage or defect occurring during the Operation Service Period, whether such defect or damage is notified by the Employer or his Representative, or observed by the Contractor himself.

The Contract Completion Certificate issued under Sub-Clause 8.6 [*Contract Completion Certificate*] will not be issued until all defects and damage and all outstanding work, including all such items identified during the joint inspection made in accordance with Sub-Clause 11.8 [*Joint Inspection Prior to Contract Completion*], have been completed.

12.2

Cost of Remedying Defects

All work required to repair defects or damage shall be executed at the risk and cost of the Contractor, except:

- (a) where it is attributable to any act by the Employer or the Employer's Personnel or agents; or
- (b) where it is as a result of an event that is covered under Clause 18 [*Exceptional Risks*].

Where the Contractor is required to remedy a defect or damage to the Works under sub-paragraphs (a) or (b) of this Sub-Clause, the Contractor shall notify the Employer's Representative and shall be entitled to a Variation under Clause 13 [*Variations and Adjustments*].

12.3

Failure to Remedy Defects

If the Contractor fails to remedy any defect or damage arising during either the Design-Build Period or the Operation Service Period within a reasonable time, a date may be fixed by (or on behalf of) the Employer's Representative, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable Notice of this date.

If the Contractor fails to remedy the defect or damage by such date and the necessity for such work is due to the Contractor subject to Sub-Clause 12.2 [*Cost of Remedying Defects*], the Employer may (at his sole discretion):

- (a) require the Employer's Representative to determine and certify a reasonable reduction in the Contract Price or the Rates and Prices submitted for the Operation Service Period in accordance with Sub-Clause 3.5 [*Determinations*]; or
- (b) if the defect or damage is such that the Contractor has been unable to commission the Works or continue providing the Operation Service and the Employer has been deprived of substantially the whole of the benefit of the Works or parts of the Works, the Employer shall be entitled to terminate the Contract in respect of such parts of the Works as cannot be put to the intended use in accordance with the provisions of Clause 15 [*Termination by Employer*].

In the event of (b) above occurring, the Employer shall, notwithstanding the provisions of Sub-Clause 15.4 [*Payment after Termination for Contractor's Default*]:

- (i) during the Design-Build Period, be entitled to recover from the Contractor all sums paid for such parts of the Works plus financing costs together with the cost of dismantling the same, clearing the Site and returning Plant and Materials to the Contractor; or, if the Employer chooses to complete the Works himself or by engaging others, the Employer shall be entitled to recover the extra costs, if any, of completing the Works after allowing for any sum due to the Contractor under Sub-Clause 15.3 [*Valuation at Date of Termination for Contractor's Default*]. If there are no such extra costs, the Employer shall pay any balance to the Contractor; and
- (ii) during the Operation Service Period, not be liable to make any further payments to the Contractor until the costs of operation and maintenance, completion and remedying of any defects and all other costs incurred and to be incurred by the Employer have been established.

12.4

Further Tests

If the work of remedying any defect or damage may affect the performance of the Works, the Employer's Representative may require the repetition of any of the tests described in the Contract. The requirement shall be made by Notice within 28 days after the defect or damage is remedied.

These tests shall be carried out in accordance with the terms applicable to the previous tests, except that they shall be carried out at the risk and cost of the Party liable, under Sub-Clause 12.2 [*Cost of Remedying Defects*], for the cost of the remedial work.

12.5

Removal of Defective Work

If the defect or damage cannot be remedied expeditiously on the Site and the Employer gives consent, the Contractor may remove from the Site for the purposes of repair such items of Plant as are defective or damaged. This consent may require the Contractor to increase the amount of the Performance Security by the full replacement cost of these items, or to provide other appropriate security.

12.6

Contractor to Search

The Contractor shall, if required by the Employer's Representative, search for the cause of any defect, under the direction of the Employer's Representative. Unless the defect is to be remedied at the cost of the Contractor under Sub-Clause 12.2 [*Cost of Remedying Defects*], the Cost Plus Profit of the search shall be agreed or determined by the Employer's Representative in accordance with Sub-Clause 3.5 [*Determinations*] and shall be included in the Contract Price.

13

Variations and Adjustments

13.1

Right to Vary

Variations may be initiated by the Employer's Representative at any time prior to issuing the Commissioning Certificate, either by an instruction to the Contractor by the Employer's Representative or by a request for the Contractor to submit a proposal. A Variation shall not comprise the omission of any work which is to be carried out by others.

The Contractor shall execute and be bound by each Variation; unless the Contractor promptly gives Notice to the Employer's Representative stating (with supporting particulars) that (i) the Contractor cannot readily obtain the Goods required for the Variation, (ii) it will reduce the safety or suitability of the Works for the purposes for which they were intended under the Contract; (iii) it will have an adverse impact on the achievement of the Schedule of guarantees; or (iv) it will have an adverse effect on the provision of the Operation Service under the Contract. Upon receiving this Notice, the Employer's Representative shall cancel, confirm or vary the instruction and the Contractor shall execute and be bound by it.

If the Employer or the Employer's Representative wishes to instruct a Variation during the Operation Service Period, he shall give the Contractor written details of his requirements. The Contractor shall then proceed in accordance with Sub-Clause 13.3 [Variation Procedure] sub-paragraphs (a), (b) and (c). However, the Contractor shall not be obliged to proceed with the Variation until the matters covered in Sub-Clause 13.3 [Variation Procedure] sub-paragraphs (a), (b) and (c) have been agreed between the Employer and the Contractor.

13.2

Value Engineering

The Contractor may, at any time, submit to the Employer's Representative a written proposal, which (in the Contractor's opinion) will, if adopted:

- (a) accelerate completion of the Works;
- (b) reduce the cost to the Employer of executing, maintaining or operating the Works;
- (c) improve the efficiency or value to the Employer of the completed Works;
- (d) improve the efficiency of the Operation Service being provided; or
- (e) otherwise be of benefit to the Employer.

The proposal shall be prepared at the cost of the Contractor and shall include the items listed in Sub-Clause 13.3 [Variation Procedure].

13.3

Variation Procedure

If the Employer's Representative requests a proposal, prior to instructing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why he cannot comply (if this is the case) or by submitting:

- (a) a description of the proposed design and/or work to be performed and a programme for its execution;
- (b) the Contractor's proposal for any necessary modifications to the programme according to Sub-Clause 8.3 [Programme] and to the Time for Completion; and
- (c) the Contractor's proposal for adjustment to the Contract Price.

The Employer's Representative shall, as soon as practicable after receiving such proposal (under Sub-Clause 13.2 [Value Engineering] or otherwise), respond with

approval, disapproval or comments. The Contractor shall not delay any work whilst awaiting a response.

Each instruction to execute a Variation, with any requirements for the recording of costs, shall be issued by the Employer's Representative to the Contractor, who shall acknowledge receipt.

Upon instructing or approving a Variation, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine adjustments to the Contract Price and the Schedule of Payments. These adjustments, except adjustments made under Sub-Clause 13.6 [*Adjustments for Changes in Legislation*] and Sub-Clause 13.7 [*Adjustments for Changes in Technology*], shall include reasonable profit, and shall take account of the Contractor's submissions under Sub-Clause 13.2 [*Value Engineering*] if applicable.

13.4

Payment in Applicable Currencies

If the Contract provides for payment of the Contract Price in more than one currency, then whenever an adjustment is agreed, approved or determined as stated above, the amount payable in each of the applicable currencies shall be specified. For this purpose, reference shall be made to the actual or expected currency proportions of the cost of the varied work, and to the proportions of various currencies specified for payment of the Contract Price.

13.5

Provisional Sums

Each Provisional Sum shall only be used, in whole or in part, in accordance with the Employer's Representative's instructions, and the Contract Price shall be adjusted accordingly. The total sum paid to the Contractor shall include only such amounts, for the work, supplies or services to which the Provisional Sum relates, as the Employer's Representative shall have instructed. For each Provisional Sum, the Employer's Representative may instruct:

- (a) work to be executed (including Plant, Materials or services to be supplied) by the Contractor and valued under Sub-Clause 13.3 [*Variation Procedure*]; and/or
- (b) Plant, Materials or services to be purchased by the Contractor, for which there shall be included in the Contract Price:
 - (i) the actual amounts paid (or due to be paid) by the Contractor; and
 - (ii) a sum for overhead charges and profit, calculated as a percentage of these actual amounts by applying the relevant percentage rate (if any) stated in the appropriate Schedule. If there is no such rate, the percentage rate stated in the Contract Data shall be applied.

The Contractor shall, when required by the Employer's Representative, produce quotations, invoices, vouchers and accounts or receipts in substantiation.

13.6

Adjustments for Changes in Legislation

Adjustments to the execution of the Works or provision of the Operation Service necessitated by a change in Law shall be dealt with as a Variation and as provided for under Clause 13 [*Variations and Adjustments*]. Either Party may, by written Notice to the other, require that adjustments shall be made to the provision of the Contract as are necessary to enable the Contractor to comply with changes in Law.

The Contract Price and programme for design, execution and operation of the Works shall be adjusted to take account of any increase or decrease in cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the

repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws or changes to technical standards and regulations in accordance with Sub-Clause 5.4 [*Technical Standards and Regulations*], made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.

If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional cost as a result of these changes in the Laws or in such interpretations, made after the Base Date, the Contractor shall give Notice to the Employer's Representative providing evidence supporting any adjustment, an indication of the nature of change in cost and how the Contractor proposes to implement the necessary change.

The Contractor shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such additional Cost, which shall be included in the Contract Price.

After receiving this Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

13.7

Adjustments for Changes in Technology

The Contract Price and programme for design, execution and operation of the Works shall be adjusted to take into account any increase or decrease in cost resulting from any changes in technology, new materials or products which the Contractor is obliged to adopt, either:

- (a) where a proposal from the Contractor under Sub-Clause 13.2 [*Value Engineering*] is accepted by the Employer's Representative;
- (b) where the Employer's Representative instructs the Contractor to use new technology or new materials or products; or
- (c) there is a statutory requirement for the Contractor to use new technology or new materials or products.

In any such case, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (i) an extension of time for any such delay, if the events delay the completion of the Design-Build; and
- (ii) any additional Cost, subject to an adjustment for any operational or other savings which the Contractor may make as a result of the introduction of such new technology, materials or products.

After receiving a Notice of claim, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters. Where appropriate, the Employer's Representative shall issue a Variation to the Contractor with details of the required changes.

13.8

Adjustments for Changes in Costs

The Contract Price and the Rates and Prices shall be adjusted in accordance with the Schedules of cost indexation as contained in the Schedule of Payments. If there are no such Schedules of cost indexation included in the Contract, this Sub-Clause shall not apply.

14

Contract Price and Payment

14.1

The Contract Price

The Contract Price shall be the amount or amounts submitted by the Contractor for the Design-Build and the Operation Service including the Asset Replacement Fund, priced at the Base Date, and due to be paid to the Contractor in accordance with the Contract together with any adjustments as provided for under Clause 13 [*Variations and Adjustments*] or arising as a result of claims under Clause 20 [*Claims, Disputes and Arbitration*].

The Contractor shall pay all taxes, duties and fees required to be paid by him under the Contract and the Contract Price shall not be adjusted for changes in any of these costs, except as provided for in Sub-Clause 13.6 [*Adjustments for Changes in Legislation*] and to the extent allowed for under Clause 20 [*Claims, Disputes and Arbitration*].

14.2

Advance Payment

The Employer shall make an advance payment, as an interest-free loan for mobilisation and design, when the Contractor submits a guarantee in accordance with this Sub-Clause that shall be based on the sample form included in the tender documents or in another form acceptable to the Employer. The amount of the advance payment and the applicable currencies shall be as stated in the Contract Data.

Unless and until the Employer receives this guarantee, or if no advance payment is stated in the Contract Data, this Sub-Clause shall not apply.

The Employer's Representative shall issue an Interim Payment Certificate for the advance payment under Sub-Clause 14.7 [*Issue of Advance and Interim Payment Certificates*] after receiving an application under Sub-Clause 14.3 [*Application for Advance and Interim Payment Certificates*] and after the Employer receives (i) the Performance Security in accordance with Sub-Clause 4.2 [*Performance Security*] and (ii) a guarantee in amounts and currencies equal to the advance payment. This guarantee shall be issued by an entity and from within a country (or other jurisdiction) approved by the Employer, and shall be based on the sample form included in the tender documents or in another form approved by the Employer.

The Contractor shall ensure that the guarantee is valid and enforceable until the advance payment has been repaid, but its amount may be progressively reduced by the amount repaid by the Contractor as indicated in the Interim Payment Certificates. If the terms of the guarantee specify its expiry date, and the advance payment has not been repaid by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the guarantee until the advance payment has been repaid.

The advance payment shall be repaid through percentage deductions in Interim Payment Certificates. Unless other percentages are stated in the Contract Data:

- (a) deductions shall commence in the Interim Payment Certificate in which the total of all certified interim payments (excluding the advance payment and deductions and repayments of retention) exceeds ten percent (10%) of the Accepted Contract Amount for the Design-Build less Provisional Sums; and
- (b) deductions shall be made at the amortisation rate of one-quarter (25%) of the amount of each Interim Payment Certificate (excluding the advance payment and deductions and repayments of retention) issued during the Design-Build Period.

If the advance payment has not been repaid prior to the issue of the Commissioning Certificate or prior to termination under Clause 15 [*Termination by Employer*], Clause

16 [*Suspension and Termination by Contractor*] or Clause 18 [*Exceptional Risks*] (as the case may be), the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Employer.

14.3

Application for Advance and Interim Payment Certificates

When submitting the advance payment guarantee required under Sub-Clause 14.2 [*Advance Payment*], the Contractor shall include his application for the advance payment.

The Contractor shall thereafter submit a Statement in one original and five copies to the Employer's Representative after the end of each month (unless otherwise stated in the Contract), in a form approved by the Employer's Representative, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents.

The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable:

- (a) the estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including Variations but excluding items described in sub-paragraphs (b) to (j) below);
- (b) any amounts to be added and deducted for changes in legislation, changes in cost and changes in technology, in accordance with Sub-Clause 13.6 [*Adjustments for Changes in Legislation*], Sub-Clause 13.7 [*Adjustments for Changes in Technology*] and Sub-Clause 13.8 [*Adjustments for Changes in Cost*];
- (c) any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Contract Data to the total of the above amounts, until the amount so retained by the Employer's Representative reaches the limit of Retention Money (if any) stated in the Contract Data;
- (d) any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [*Advance Payment*];
- (e) any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.6 [*Payment for Plant and Materials intended for the Works*];
- (f) any amounts due for Plant, Materials or services purchased by the Contractor under Sub-Clause 13.5 [*Provisional Sums*];
- (g) amounts due for the Operation Service;
- (h) amounts due from the Asset Replacement Fund;
- (i) adjustments due for the Maintenance Retention Fund;
- (j) any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [*Claims, Disputes and Arbitration*]; and
- (k) the deduction of amounts certified in all previous Interim Payment Certificates.

14.4

Schedule of Payments

If the Contract includes a Schedule of Payments for the Design-Build Period and/or the Operation Service Period specifying the instalments in which the Contract Price and/or the Rates and Prices will be paid, then, unless otherwise stated in this Schedule:

- (a) the instalments quoted in the Schedule of Payments shall be the estimated values for the purposes of Sub-Clause 14.3 [*Application for Advance and Interim Payment Certificates*];
- (b) Sub-Clause 14.6 [*Payment for Plant and Materials intended for the Works*] shall not apply; and

- (c) if these instalments are not defined by reference to the actual progress achieved in executing the Works, and if actual progress is found to differ from that on which the Schedule of Payments was based, then the Employer's Representative may proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine revised instalments which shall take account of the extent to which progress differs from that on which the instalments were previously based.

If the Contract does not include a Schedule of Payments for the Design-Build Period and/or the Operation Service Period, the Contractor shall submit non-binding estimates of the payments which he expects to become due during each quarterly period. The first estimate shall be submitted within 42 days after the Commencement Date. Revised estimates shall be submitted at quarterly intervals until the Contract Completion Certificate has been issued.

14.5

Asset Replacement Schedule

Payments from the Asset Replacement Fund shall be made in accordance with the provisions of Sub-Clause 14.18 [*Asset Replacement Fund*].

On no account will payments be made for assets replaced which are not identified in the Asset Replacement Schedule unless they have been instructed as a Variation under Clause 13 [*Variations and Adjustments*].

If Assets are replaced in advance of the date given in the Asset Replacement Schedule, payment will not be released until the date stated in the Schedule has been reached.

If Assets are not replaced on or before the scheduled date, payment will not be released until such replacements have been effected.

Any monies remaining in the Asset Replacement Fund at the time of issue of the Contract Completion Certificate will be disbursed between the Parties as described in Sub-Clause 14.18 [*Asset Replacement Fund*].

14.6

Payment for Plant and Materials intended for the Works

If this Sub-Clause applies, Interim Payment Certificates shall include, under sub-paragraph (e) of Sub-Clause 14.3 [*Application for Advance and Interim Payment Certificates*], (i) an amount for Plant and Materials which have been sent to the Site for incorporation in the Permanent Works, and (ii) a reduction when the contract value of such Plant and Materials is included as part of the Permanent Works under sub-paragraph (a) of Sub-Clause 14.3.

If the lists referred to in sub-paragraphs (b)(i) or (c)(i) below are not included in the Contract Data, this Sub-Clause shall not apply.

The Employer's Representative shall determine and certify each addition if the following conditions are satisfied:

- (a) the Contractor has:
- (i) kept satisfactory records (including the orders, receipts, costs and use of Plant and Materials) which are available for inspection; and
 - (ii) submitted a statement of the cost of acquiring and delivering the Plant and Materials to the Site, supported by satisfactory evidence; and either:
- (b) the relevant Plant and Materials:

- (i) are those listed in the Contract Data for payment when shipped;
 - (ii) have been shipped to the Country, en route to the Site, in accordance with the Contract; and
 - (iii) are described in a clean shipped bill of lading or other evidence of shipment, which has been submitted to the Employer's Representative together with evidence of payment of freight and insurance, any other documents reasonably required, and a bank guarantee in a form and issued by an entity approved by the Employer in amounts and currencies equal to the amount due under this Sub-Clause. This guarantee may be in a similar form to the form referred to in Sub-Clause 14.2 [*Advance Payment*] and shall be valid until the Plant and Materials are properly stored on Site and protected against loss, damage or deterioration; or
- (c) the relevant Plant and Materials:
- (i) are those listed in the Contract Data for payment when delivered to the Site; and
 - (ii) have been delivered to and are properly stored on the Site, are protected against loss, damage or deterioration, and appear to be in accordance with the Contract.

The additional amount to be certified shall be the equivalent of eighty percent (80%) of the Employer's Representative determination of the cost of the Plant and Materials (including delivery to Site), taking account of the documents mentioned in this Sub-Clause and of the contract value of the Plant and Materials.

The currencies for this additional amount shall be the same as those in which payment will become due when the contract value is included under sub-paragraph (a) of Sub-Clause 14.3 [*Application for Advance and Interim Payment Certificates*]. At that time, the Interim Payment Certificate shall include the applicable reduction which shall be equivalent to, and in the same currencies and proportions as, this additional amount for the relevant Plant and Materials.

14.7

Issue of Advance and Interim Payment Certificates

No amount will be certified or paid until the Employer has received and approved the Performance Security provided for in Sub-Clause 4.2 [*Performance Security*]. Upon receipt of the Contractor's application for the advance payment, the Employer's Representative shall, within 14 days of receiving the application, issue to the Employer an Interim Payment Certificate in respect of such payment, with a copy to the Contractor. Thereafter, in respect of interim payment applications the Employer's Representative shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Employer's Representative fairly determines to be due, with supporting particulars, and shall include any amounts due to or from the Contractor in accordance with a decision by the DAB made under Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*].

However, prior to issuing the Commissioning Certificate, the Employer's Representative shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Contract Data. In this event, the Employer's Representative shall give Notice to the Contractor accordingly.

An Interim Payment Certificate shall not be withheld for any other reason, although:

- (a) if any thing supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or
- (b) if the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Employer's Representative, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Employer's Representative may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. An Interim Payment Certificate shall not be deemed to indicate the Employer's Representative's acceptance, approval, consent or satisfaction of the Works.

14.8

Payment

The Employer shall pay to the Contractor:

- (a) the advance payment within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [Performance Security] and Sub-Clause 14.2 [Advance Payment] and the Payment Certificate for the advance payment issued in accordance with Sub-Clause 14.7 [Issue of Advance and Interim Payment Certificates];
- (b) the amount certified in each Interim Payment Certificate within 56 days after the Employer's Representative receives the corresponding Statement and supporting documents, including any amounts due in accordance with a decision by the DAB which have been included in the Interim Payment Certificate; and
- (c) the amounts certified in the Final Payment Certificate Design-Build and the Final Payment Certificate Operation Service within 56 days after the Employer receives each such Final Payment Certificate, including any amounts due in accordance with a decision by the DAB which have been included in the Final Payment Certificate.

Payment of the amount due in each currency shall be made into the bank account, nominated by the Contractor, in the payment country (for this currency) specified in the Contract.

14.9

Delayed Payment

If the Contractor does not receive payment in accordance with Sub-Clause 14.8 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.8 [Payment], irrespective (in the case of its sub-paragraph (b)) of the date on which any Interim Payment Certificate is issued.

Unless otherwise stated in the Contract Data, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency (or currencies if more than one) of payment, and shall be paid in such currencies.

The Contractor shall be entitled to this payment without formal Notice or certification, and without prejudice to any other right or remedy.

14.10

Payment of Retention Money

When the Commissioning Certificate has been issued, the first half of the Retention Money shall be certified by the Employer's Representative for payment to the Contractor. If a Section Commissioning Certificate is issued for a Section, the relevant percentage of the first half of the Retention Money shall be certified and paid to the

Contractor. Such amount shall be included for payment in the next Interim Payment Certificate following the issue of the Commissioning Certificate.

The Contractor shall be entitled to include the second half of the Retention Money in the Final Statement Design-Build.

14.11

Application for Final Payment Certificate Design-Build

Within 28 days after the end of the Retention Period, the Contractor shall submit to the Employer's Representative one original and five copies of the Final Statement Design-Build with supporting documents showing:

- (a) the value of all work done in respect of the Design-Build; and
- (b) any further sums which the Contractor considers to be due to him under the Contract in respect of the Design-Build.

Together with the Final Statement Design-Build, the Contractor shall submit a written undertaking that the Statement is in full and final settlement of all matters under or in connection with the Contract relating to the Design-Build.

If the Employer's Representative disagrees with or cannot verify any part of the Final Statement Design-Build, the Employer's Representative and the Contractor shall attempt to agree such matters, and the Contractor shall re-submit his Final Statement based on the agreement with the Employer's Representative. The Employer's Representative shall then issue a Final Payment Certificate Design-Build under Sub-Clause 14.12 [*Issue of Final Payment Certificate Design-Build*] for the agreed amount. If the Parties cannot agree on such matters, or if the Contractor has failed to submit his application for payment within the said 28 days, the Employer's Representative shall issue an Interim Payment Certificate under Sub-Clause 14.7 [*Issue of Advance and Interim Payment Certificates*] for the amount which he considers to be due to the Contractor. If the Contractor is dissatisfied with the amount certified, he may refer the matter to the DAB for a decision in accordance with Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*].

14.12

Issue of Final Payment Certificate Design-Build

Within 28 days of receiving the Final Statement Design-Build, or the resubmitted Final Statement (as the case may be), and the written undertaking from the Contractor in accordance with Sub-Clause 14.11 [*Application for Final Payment Certificate Design-Build*], the Employer's Representative shall issue to the Employer, with a copy to the Contractor, the Final Payment Certificate Design-Build stating:

- (a) the amount which is finally due for the Design-Build; and
- (b) after giving credit to the Employer for all amounts previously paid by the Employer and all sums to which the Employer is entitled in respect of the Design-Build, the balance (if any) due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be.

Upon receipt of the Final Payment Certificate Design-Build, the Employer shall pay the Contractor the amount, if any, due in accordance with the provisions of Sub-Clause 14.8 [*Payment*].

14.13

Application for Final Payment Certificate Operation Service

Within 56 days after receiving the Contract Completion Certificate, the Contractor shall submit to the Employer's Representative one original and five copies of the Final Statement Operation Service with supporting documents showing:

- (a) the value of all work done in respect of the Operation Service including authorised expenditure from the Asset Replacement Fund; and

- (b) any further sums which the Contractor considers to be due to him under the Contract including any unused monies from the Maintenance Retention Fund.

Together with the Final Statement Operation Service, the Contractor shall submit a written discharge according to the requirements of Sub-Clause 14.14 [Discharge].

14.14

Discharge

When submitting the Final Statement Operation Service, the Contractor shall submit a written discharge which confirms that the total of the Final Statement Operation Service, together with the Final Statement Design-Build submitted according to Sub-Clause 14.11 [Application for Final Payment Certificate Design-Build] represents full and final settlement of all monies due to the Contractor under or in connection with the Contract. This discharge may state that it becomes effective only after payment due under the Final Payment Certificate Operation Service has been made and the Performance Security referred to in Sub-Clause 4.2 [Performance Security] has been returned to the Contractor.

14.15

Issue of Final Payment Certificate Operation Service

Within 28 days of receiving the Final Statement Operation Service and the written discharge from the Contractor in accordance with Sub-Clause 14.13 [Application for Final Payment Certificate Operation Service] and Sub-Clause 14.14 [Discharge] respectively, the Employer's Representative shall issue to the Employer, with a copy to the Contractor, the Final Payment Certificate Operation Service stating:

- (a) the amount which is finally due for the Operation Service; and
- (b) the amount which is finally due for the Contract; and
- (c) after giving credit to the Employer for all amounts previously paid by the Employer and all sums to which the Employer is entitled in respect of the Contract, the balance (if any) due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be.

If the Employer's Representative disagrees with or cannot verify any part of the Final Statement Operation Service, the Employer's Representative and the Contractor shall attempt to agree such matters, and the Employer's Representative shall issue a Final Payment Certificate Operation Service for the agreed amount. If the Parties cannot agree on such matters, the Employer's Representative shall issue a Final Payment Certificate Operation Service for the amount which he considers to be due to the Contractor. If the Contractor is dissatisfied with the amount certified, he may refer the matter to the DAB for a decision in accordance with Clause 20.6 [Obtaining Dispute Adjudication Board's Decision].

Upon receipt of the Final Payment Certificate Operation Service, the Employer shall pay the Contractor in accordance with the provisions of Sub-Clause 14.8 [Payment].

14.16

Cessation of Employer's Liability

The Employer shall not be liable to the Contractor for any matter or thing under or in connection with the Contract or execution of the Works, except to the extent that the Contractor shall have included an amount expressly for it in the Final Statement Design-Build or the Final Statement Operation Service.

However, this Sub-Clause shall not limit the Employer's liability under his indemnification obligations, or the Employer's liability in any case of fraud, deliberate default or reckless misconduct by the Employer.

Furthermore, if the Contractor has not submitted any matter to the Dispute Adjudication Board under Sub-Clause 20.6 [Obtaining Dispute Arbitration Board's Decision] within 56 days of receiving notification from the Employer's Representative

of the amounts included for payment in either the Final Certificate Design-Build or the Final Certificate Operation Service, then he will be deemed to have accepted the amounts so certified, and the Employer shall be deemed to have no further liability to the Contractor, subject only to that payment due under the Final Payment Certificate Operation Service has been made and that the Performance Security referred to in Sub-Clause 4.2 [*Performance Security*] has been returned to the Contractor.

14.17

Currencies of Payment

The Contract Price shall be paid in the currency or currencies named in the Contract Data. Unless otherwise stated in the Particular Conditions, if more than one currency is so named, payments shall be made as follows:

- (a) if the Accepted Contract Amount was expressed in Local Currency only:
 - (i) the proportions or amounts of the Local and Foreign Currencies, and the fixed rates of exchange to be used for calculating the payments, shall be as stated in the Contract Data, except as otherwise agreed by both Parties;
 - (ii) payments and deductions under Sub-Clause 13.5 [*Provisional Sums*] and Sub-Clause 13.6 [*Adjustments for Changes in Legislation*] shall be made in the applicable currencies and proportions; and
 - (iii) other payments and deductions under sub-paragraphs (a) to (d) of Sub-Clause 14.3 [*Application for Advance and Interim Payment Certificates*] shall be made in the currencies and proportions specified in sub-paragraph (a)(i) above;
- (b) payment of the damages specified in the Contract Data shall be made in the currencies and proportions specified in the Contract Data;
- (c) other payments to the Employer by the Contractor shall be made in the currency in which the sum was expended by the Employer, or in such currency as may be agreed by both Parties;
- (d) if any amount payable by the Contractor to the Employer in a particular currency exceeds the sum payable by the Employer to the Contractor in that currency, the Employer may recover the balance of this amount from the sums otherwise payable to the Contractor in other currencies; and
- (e) if no rates of exchange are stated in the Contract Data, they shall be those prevailing on the Base Date and determined by the central bank of the Country.

14.18

Asset Replacement Fund

The Asset Replacement Fund is to provide the necessary funding for the replacement of items of Plant identified in the Asset Replacement Schedule as required for the continued efficient operation of the Works for the duration of the Operation Service Period.

In each application for an Interim Payment Certificate during the Operation Service Period made in accordance with Sub-Clause 14.3 [*Application for Advance and Interim Payment Certificates*], the Contractor shall be entitled to include any monies from the Asset Replacement Fund which, according to the Asset Replacement Schedule, have become due following the replacement of the scheduled items by the Contractor. Under no circumstances will the amount payable from the Asset Replacement Fund be increased from the amount due according to the Asset Replacement Schedule, irrespective of the value or amount of replacements which have been made. For any items which have not been replaced by the date or other operational milestone identified in the Asset Replacement Schedule, payment will not be released until such replacement has been effected.

In the event that there is money remaining in the Asset Replacement Fund upon completion of the Contract due to planned replacements, which by mutual agreement

of the Parties, are not required or used, such amount shall be shared equally between the Parties, and the Contractor shall be entitled to include his share of such amount in his Application for Final Payment Certificate Operation Service made in accordance with Sub-Clause 14.13 [*Application for Final Payment Certificate Operation Service*].

The Asset Replacement Fund shall not cover the cost of:

- (a) routine maintenance items associated with the correction of defects;
- (b) replacement of Plant and Material which have a life expectancy of less than five years;
- (c) providing spares between scheduled dates for major plant replacement; or
- (d) the replacement of Plant and Materials which are not identified in the Asset Replacement Schedule.

The cost of meeting the requirements of sub-paragraphs (a) to (d) above shall be borne by the Contractor and be deemed to be included in the Contract Price.

The Contractor shall give Notice to the Employer's Representative at least 28 days prior to his intention to replace any item of Plant identified in the Asset Replacement Schedule.

The Employer shall authorise release of funds from the Asset Replacement Fund in accordance with the amounts certified by the Employer's Representative in each applicable Interim Payment Certificate. Funds will only be disbursed from the Asset Replacement Fund to the values and in accordance with the time scales for replacement identified in the Asset Replacement Schedule.

Where items of Plant require replacement at times earlier than the scheduled replacement times given in the Asset Replacement Schedule, the appropriate funds shall not be released until the scheduled replacement date has been reached.

If the Contract Price is subject to adjustments for changes in cost according to Sub-Clause 13.8 [*Adjustments for Changes in Cost*], the amounts due from the Asset Replacement Fund shall be adjusted on the same basis as other costs.

In the event of a termination of the Contract under Clause 15 [*Termination by Employer*], or Clause 16 [*Suspension and Termination by Contractor*], any amount remaining in the Asset Replacement Fund, including any accrued interest, shall be deemed to be to the account of the Employer and shall not be disbursed to the Contractor.

14.19

Maintenance Retention Fund

During the Operation Service Period, a Maintenance Retention Fund shall be created by deducting five percent (5%) from the value of each interim payment, determined by the Employer's Representative in accordance with Sub-Clause 14.7 [*Issue of Advance and Interim Payment Certificates*], due to the Contractor, commencing with the first payment following the issue of the Commissioning Certificate, and continuing until the last Interim Payment Certificate is issued or until the amount in the Maintenance Retention Fund has reached the value (if any) stated in the Contract Data, whichever is the earlier. If the Contractor so chooses, the Maintenance Retention Fund may be replaced by a Maintenance Retention Guarantee in a form and with an entity approved by the Employer. However, the value of the Guarantee shall not exceed the maximum amount of the Maintenance Retention Fund stated in the Contract Data. The Contractor shall ensure that the Maintenance Retention Guarantee remains valid and in force until the issue of the Contract Completion Certificate.

If the maintenance required under the Contract has not been carried out, the Employer may, after giving due Notice to the Contractor, carry out such maintenance

himself and apply any amounts standing to the credit of the Maintenance Retention Fund in so doing. Where such amounts are insufficient to cover the Employer's whole costs of carrying out the maintenance, the unrecovered costs shall be set off against any payment due to the Contractor under the Contract, or to the extent that no such payment is due, shall become a debt due by the Contractor to the Employer.

Following the issue of the Contract Completion Certificate under Sub-Clause 8.6 [*Contract Completion Certificate*], all funds remaining in the Maintenance Retention Fund shall be included in the Final Payment Certificate Operation Service and paid to the Contractor with the final payment.

15 Termination by Employer

15.1

Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Employer's Representative shall by Notice require the Contractor to make good the failure and to remedy it within the time specified in the said Notice.

15.2

Termination for Contractor's Default

The Employer shall be entitled to terminate the Contract if the Contractor:

- (a) fails to comply with Sub-Clause 4.2 [*Performance Security*] or with a Notice under Sub-Clause 15.1 [*Notice to Correct*],
- (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,
- (c) without reasonable excuse fails:
 - (i) to proceed with the Works in accordance with Sub-Clause 9.1 [*Commencement of Design-Build*] or Sub-Clause 10.2 [*Commencement of Operation Service*]; or
 - (ii) to comply with a Notice issued under Sub-Clause 7.5 [*Rejection*] or Sub-Clause 7.6 [*Remedial Work*], within 28 days after receiving it;
- (d) subcontracts the whole of the Works or assigns the Contract without the required agreement or subcontracts the Operation Service or any parts of the Works in breach of Sub-Clause 4.4 [*Subcontractors*];
- (e) either gives Notice to the Employer under Sub-Clause 4.25 [*Changes in the Contractor's Financial Situation*] from which the Employer reasonably concludes that the Contractor will be unable to complete or fulfil his obligations under the Contract or, if the Contractor fails to give such a Notice, but the Employer in any event reasonably concludes that the Contractor will be unable to complete or fulfil his obligations under the Contract due to the Contractor's financial situation;
- (f) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events;
- (g) gives or offers to give (directly or indirectly, either before or during the currency of the Contract) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:
 - (i) for doing or forbearing to do any action in relation to the Contract; or
 - (ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract;

or if any of the Contractor's Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (g). However, lawful inducements and rewards to Contractor's Personnel shall not give a right to termination;

- (h) fails to complete the Design-Build by the Cut-Off Date stated in the Contract Data or, if no such date is given, then a period of 182 days after the Time for Completion of Design-Build.

In any of these events or circumstances, the Employer may, not less than 14 days after giving Notice to the Contractor, terminate the Contract and expel the Contractor from the Site unless the Contractor cures the event or circumstance within the said 14 days. However, in the case of sub-paragraph (f) or (g), the Employer may by Notice terminate the Contract immediately.

The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Employer's Representative. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the Notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.

The Employer shall then give Notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

15.3

Valuation at Date of Termination for Contractor's Default

As soon as practicable after a Notice of termination under Sub-Clause 15.2 [*Termination for Contractor's Default*] has taken effect, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.

15.4

Payment after Termination for Contractor's Default

After a Notice of termination under Sub-Clause 15.2 [*Termination for Contractor's Default*] has taken effect, the Employer may:

- (a) proceed in accordance with Sub-Clause 20.2 [*Employer's Claims*];
- (b) withhold further payments to the Contractor until the costs of design, execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established; and/or
- (c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [*Valuation at Date of Termination for*

Contractor's Default]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

15.5

Termination for Employer's Convenience

If at any time the Employer elects to terminate the Contract for reasons other than those specified in Sub-Clause 15.2 [*Termination for Contractor's Default*], and subject to the applicable Law of the Contract, he shall notify the Contractor in writing, with a copy to the Employer's Representative. Such termination shall be deemed to be termination for the convenience of the Employer.

Upon issuing a Notice to terminate under this Sub-Clause, the Employer shall immediately make arrangements to return the Performance Security to the Contractor, and the termination shall take effect 28 days after the date the Contractor receives the Notice, or 28 days after he receives the Performance Security, whichever is the later. Upon issuing the Notice, the Employer shall immediately cease to have any right of use of any of the Contractor's Documents, and shall forthwith return all and any such Contractor's Documents to the Contractor.

The Employer shall not terminate the Contract under this Sub-Clause in order to execute or operate the Works (or any part thereof) himself, or arrange for the Works (or any part thereof) to be executed by another contractor.

15.6

Valuation at Date of Termination for Employer's Convenience

As soon as practicable after a Notice of termination under Sub-Clause 15.5 [*Termination for Employer's Convenience*] has taken effect, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.

15.7

Payment after Termination for Employer's Convenience

After termination for the Employer's convenience under Sub-Clause 15.5 [*Termination for Employer's Convenience*], the Contractor shall proceed in accordance with Sub-Clause 16.3 [*Cessation of Work and Removal of Contractor's Equipment*] and shall be paid in accordance with Sub-Clause 16.4 [*Payment on Termination*].

16 Suspension and Termination by Contractor

16.1

Contractor's Entitlement to Suspend Work

If the Employer's Representative fails to certify in accordance with Sub-Clause 14.7 [*Issue of Advance and Interim Payment Certificates*], or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.8 [*Payment*], the Contractor may, not less than 21 days after giving Notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Interim Payment Certificate, reasonable evidence or payment, as the case may be and as described in the Notice.

The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.9 [*Delayed Payment*] and to termination under Sub-Clause 16.2 [*Termination by Contractor*].

If the Contractor subsequently receives such Interim Payment Certificate, evidence or payment (as described in the relevant Sub-Clause and in the above Notice) before giving a Notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

If the Contractor suffers delay and/or incurs cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give Notice to the Employer's Representative and shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of any such Cost Plus Profit, which shall be included in the Contract Price.

After receiving this Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

16.2

Termination by Contractor

The Contractor shall be entitled to terminate the Contract if:

- (a) the Contractor does not receive the reasonable evidence within 42 days after giving Notice under Sub-Clause 16.1 [*Contractor's Entitlement to Suspend Work*] in respect of a failure to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*];
- (b) the Employer's Representative fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate;
- (c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.8 [*Payment*] within which payment is to be made (except for deductions in accordance with Sub-Clause 20.2 [*Employer's Claims*]);
- (d) the Employer substantially fails to perform his obligations under the Contract,
- (e) the Employer fails to comply with Sub-Clause 1.6 [*Contract Agreement*] or Sub-Clause 1.8 [*Assignment*];
- (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 9.10 [*Prolonged Suspension*]; or
- (g) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, the Contractor may, not less than 14 days after giving Notice to the Employer, terminate the Contract unless the Employer cures the event or circumstance within the said 14 days. However, in the case of subparagraph (f) or (g), the Contractor may by Notice terminate the Contract immediately.

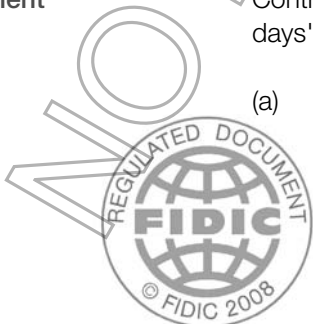
The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise.

16.3

Cessation of Work and Removal of Contractor's Equipment

After a Notice of termination under Sub-Clause 16.2 [*Termination by Contractor*] or Sub-Clause 18.5 [*Optional Termination, Payment and Release*] has taken effect, the Contractor shall, unless the Employer cured the event or circumstance within the 14-days' Notice period, promptly:

- (a) cease all further work, except for such work as may have been instructed by the Employer's Representative for the protection of life or property or for the safety of the Works or protection of the environment. For all such instructed work, the Contractor shall be entitled to be paid Cost Plus Profit and shall be relieved of further liabilities under Sub-Clauses 4.8 [*Safety Procedures*] and 4.18 [*Protection of the Environment*];



- (b) hand over to the Employer the Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment; and
- (c) remove all other Goods from the Site, except as necessary for safety, and leave the Site.

16.4

Payment on Termination

After a Notice of termination under Sub-Clause 16.2 [*Termination by Contractor*] has taken effect, the Employer shall promptly:

- (a) return the Performance Security to the Contractor;
- (b) pay the Contractor in accordance with Sub-Clause 18.6 [*Optional Termination, Payment and Release*]; and
- (c) pay to the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of this termination.

17 Risk Allocation

17.1

The Employer's Risks during the Design-Build Period

Subject to the provisions of Sub-Clause 17.8 [*Limitation of Liability*], the risks allocated to the Employer and for which the Employer is liable during the Design-Build Period are divided into:

- (a) The Employer's Commercial Risks, which are:
 - (i) the financial loss, delay or damage allocated to the Employer under the Contract or for which the Employer is liable by law, unless otherwise modified under the Contract;
 - (ii) the right of the Employer to construct the Works or any part thereof on, over, under, in or through the Site;
 - (iii) the use or occupation of the Site by the Works or any part thereof, or for the purpose of design, construction or completion of the Works other than the abusive or wrongful use by the Contractor; and
 - (iv) the use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract;

and

- (b) The Employer's Risks of Damage, which are:
 - (i) damage due to any interference, whether temporary or permanent, with any right of way, light, air, water or other easement (other than that resulting from the Contractor's method of construction) which is the unavoidable result of the construction of the Works in accordance with the Contract;
 - (ii) fault, error, defect or omission in any element of the design of the Works by the Employer or which may be contained in the Employer's Requirements, other than design carried out by the Contractor pursuant to his obligations under the Contract;
 - (iii) any operation of the forces of nature (other than those allocated to the Contractor in the Contract Data) against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions; and
 - (iv) The Exceptional Risks under Clause 18 [*Exceptional Risks*].



17.2
The Contractor's Risks during the Design-Build Period

Subject to the provisions of Sub-Clause 17.8 [*Limitation of Liability*], the risks allocated to the Contractor and for which the Contractor is liable during the Design-Build Period are all the risks other than those listed under Sub-Clause 17.1 [*The Employer's Risks during the Design-Build Period*], including the care of both the Works and the Goods.

17.3

The Employer's Risks during the Operation Service Period

Subject to the provisions of Sub-Clause 17.8 [*Limitation of Liability*], the risks allocated to the Employer and for which the Employer is liable during the Operation Service Period are divided into:

- (a) The Employer's Commercial Risks, which are:
 - (i) the financial loss, delay or damage allocated to the Employer under the Contract or for which the Employer is liable by law, unless otherwise modified under the Contract;
 - (ii) the use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract; and
 - (iii) the use or occupation of the Site by the Works or any part thereof, or for the purpose of operating and maintaining the Permanent Works;
- and
- (b) The Employer's Risks of Damage, which are:
 - (i) damage due to any interference, whether temporary or permanent, with any right of way, light, air, water or other easement (other than that resulting from the Contractor's methods of operation and maintenance) which is the unavoidable result of operating and maintaining the Permanent Works in accordance with the Contract;
 - (ii) fault, error, defect or omission in any element of the design of the Works by the Employer or which may be contained in the Employer's Requirements, other than design carried out by the Contractor pursuant to his obligations under the Contract;
 - (iii) any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions; and
 - (iv) The Exceptional Risks under Clause 18 [*Exceptional Risks*].

17.4

The Contractor's Risks during the Operation Service Period

Subject to the provisions of Sub-Clause 17.8 [*Limitation of Liability*], the risks allocated to the Contractor and for which the Contractor is liable during the Operation Service Period are:

- (a) all risks resulting or arising from the design (excluding any design allocated to the Employer under Sub-Clauses 17.1(b)(ii) and 17.3(b)(ii)) or construction of the Works, or the Materials used therein, notwithstanding any testing carried out by or approved or witnessed by the Employer or the Employer's Representative during the Design-Build Period; and
- (b) all risks resulting or arising from the operation and maintenance of the Permanent Works and the care of the Works excluding the Employer's Risks listed under Sub-Clause 17.3 [*The Employer's Risks during the Operation Service Period*].

17.5

Responsibility for Care of the Works

Unless the Contract is terminated in accordance with these Conditions, the Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Commissioning Certificate for the whole of the Works is issued pursuant to Sub-Clause 11.7 [*Commissioning Certificate*]. If the Contract is

terminated in accordance with these Conditions, the Contractor shall cease to be responsible for the care of the Works from the date of expiry of the Notice of termination.

The Contractor shall also be responsible for the care of the Permanent Works during the Operation Service Period in accordance with the requirements of the Operating Licence pursuant to Sub-Clause 1.7 [*Operating Licence*].

The Contractor shall also be responsible for the care of any part of the Permanent Works for which a Section Commissioning Certificate has been issued.

The Contractor shall also take full responsibility for any outstanding work which he shall have undertaken to complete during the Operation Service Period until all such outstanding work is completed.

17.6

Consequences of the Employer's Risks of Damage

Subject to the provisions of Sub-Clause 18.4 [*Consequences of an Exceptional Event*], if any of the risks allocated as an Employer's Risk under Sub-Clause 17.1 [*The Employer's Risks during the Design-Build Period*] and 17.3 [*The Employer's Risks during the Operation Service Period*] occurs and results in damage to the Works or other property or Goods or Contractor's Documents, the Contractor shall promptly give Notice to the Employer's Representative, and shall thereafter rectify such loss and/or damage to the extent required by instruction of the Employer's Representative. Such instruction shall be deemed a Variation.

In the event of the allocation of the risk not being governed by any other term of the Contract, and such risk occurs during the Design-Build Period and the Contractor is delayed and/or incurs cost from rectifying this damage, the Contractor shall give a further Notice to the Employer's Representative and shall be entitled to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) payment of Cost-Plus Profit, which shall be included in the Contract Price.

If the event occurs during the Operation Service Period, sub-paragraph (b) of this Sub-Clause shall apply, but sub-paragraph (a) of this Sub-Clause shall not apply.

The Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to determine the amounts due.

17.7

Consequences of the Contractor's Risks resulting in Damage

If any of the risks allocated as a Contractor's risk under Sub-Clause 17.2 [*The Contractor's Risks during the Design-Build Period*] and 17.4 [*The Contractor's Risks during the Operation Service Period*] occurs and results in damage to the Works or other property or Goods, the Contractor shall promptly give Notice to the Employer's Representative, and shall thereafter rectify such damage to the extent required by the Employer's Representative. All such work of replacement, repair or rectification shall be carried out by the Contractor at his own cost.

17.8

Limitation of Liability

Neither Party shall be liable to the other Party for any loss of use of any Works, loss of profit, loss of contract or for any other indirect loss or damage which may be suffered by the other Party in connection with the Contract, other than under Sub-Clause 10.6 [*Delays and Interruptions during the Operation Service*], Sub-Clause 16.4 [*Payment on Termination*], Sub-Clause 17.9 [*Indemnities by the Contractor*], Sub-Clause 17.10 [*Indemnities by the Employer*] and Sub-Clause 17.12 [*Risk of Infringement of Intellectual and Industrial Property Rights*].

The total liability of the Contractor to the Employer, under or in connection with the Contract, shall not exceed the sum stated in the Contract Data or (if a sum is not so stated) the Accepted Contract Amount.

This Sub-Clause shall not limit any liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.

17.9

Indemnities by the Contractor

The Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

- (a) bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the Contractor's design, execution, completion or operation and maintenance of the Works, unless attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents; and
- (b) damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss;
 - (i) arises out of or in the course of or by reason of the Contractor's design, execution and completion or operation and maintenance of the Works, or
 - (ii) is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.

The Contractor shall also indemnify the Employer against all errors in the Contractor's design of the Works and other professional services which result in the Works not being fit for purpose or result in any loss and/or damage for the Employer.

17.10

Indemnities by the Employer

The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

- (a) bodily injury, sickness, disease or death, or loss of or damage to any property other than the Works, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents; and
- (b) the Employer's Risks as set out in Sub-Clauses 17.1 [*The Employer's Risks during the Design-Build Period*] and 17.3 [*The Employer's Risks during the Operation Service Period*].

17.11

Shared Indemnities

The Contractor's liability to indemnify the Employer, as aforesaid, shall be reduced proportionately to the extent that the Employer's Risks may have contributed to the said damage, loss or injury. Similarly, the Employer's liability to indemnify the Contractor, as aforesaid, shall be reduced proportionately to the extent that the Contractor's risks may have contributed to the said damage, loss or injury.

17.12

Risk of Infringement of Intellectual and Industrial Property Rights

In this Sub-Clause, "infringement" means an infringement (or alleged infringement) of any patent, registered design, copyright, trademark, trade name, trade secret or other intellectual or industrial property right relating to the Works; and "claim" means a claim (or proceedings pursuing a claim) alleging an infringement.

Whenever a Party does not give Notice to the other Party of any claim within 28 days of receiving the claim, the first Party shall be deemed to have waived any right to indemnity under this Sub-Clause.

The Employer shall indemnify and hold the Contractor harmless against and from any claim alleging an infringement which is or was:

- (a) an unavoidable result of the Contractor's compliance with the Employer's Requirements; or
- (b) a result of any Works being used by the Employer:
 - (i) for a purpose other than that indicated by, or reasonably to be inferred from, the Contract; or
 - (ii) in conjunction with any thing not supplied by the Contractor, unless such use was disclosed to the Contractor prior to the Base Date or is stated in the Contract.

The Contractor shall indemnify and hold the Employer harmless against and from any other claim which arises out of or in relation to (i) the Contractor's design, manufacture, construction or execution of the Works, (ii) the use of Contractor's Equipment, or (iii) the proper use of the Works.

If a Party is entitled to be indemnified under this Sub-Clause, the indemnifying Party may (at its cost) conduct negotiations for the settlement of the claim, and any litigation or arbitration which may arise from it. The other Party shall, at the request and cost of the indemnifying Party, assist in contesting the claim. This other Party (and its Personnel) shall not make any admission which might be prejudicial to the indemnifying Party, unless the indemnifying Party failed to take over the conduct of any negotiations, litigation or arbitration upon being requested to do so by the other Party.

18 Exceptional Risks

18.1

Exceptional Risks

An exceptional risk is a risk arising from an Exceptional Event which includes, but is not limited to:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country;
- (c) riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (d) strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (e) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; and
- (f) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity which are Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.

18.2
Notice of an
Exceptional Event

If a Party is or will be prevented from performing any of its obligations under the Contract due to an Exceptional Event, then it shall give Notice to the other Party of such event or circumstance and shall specify the obligations, the performance of which is or will be prevented. The Notice shall be given within 14 days after the Party became aware, or should have become aware, of the event or circumstance constituting an Exceptional Event.

The Party shall, having given Notice, be excused performance of such obligations for so long as such Exceptional Event prevents it from performing them.

Notwithstanding any other provision of this Clause, the obligations of either Party to make payments to the other Party under the Contract shall not be excused by an Exceptional Event.

18.3

Duty to Minimise Delay

Each Party shall at all times use all reasonable endeavors to minimise any delay in the performance of the Contract as a result of an Exceptional Event.

A Party shall give Notice to the other Party when it ceases to be affected by an Exceptional Event.

18.4

Consequences of an
Exceptional Event

If the Contractor is prevented from performing any of his obligations under the Contract due to an Exceptional Event of which Notice has been given under Sub-Clause 18.2 [*Notice of an Exceptional Event*] and suffers delay and/or incurs cost by reason of such Exceptional Event, the Contractor shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*], to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 9.3 [*Extension of Time for Completion of Design-Build*]; and
- (b) if the event or circumstance is of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 [*Exceptional Risks*] and, in the case of sub-paragraphs (b) to (e), occurs in the Country, payment of any such Cost.

If the Exceptional Event occurs during the Operation Service Period, sub-paragraph (a) of this Sub-Clause 18.4 will not apply.

After receiving this Notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

18.5

Optional Termination,
Payment and Release

If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of an Exceptional Event of which Notice has been given under Sub-Clause 18.2 [*Notice of an Exceptional Event*], or for multiple periods which total more than 140 days due to the same notified Exceptional Event, then either Party may give to the other Party a Notice of termination of the Contract. In this event, the termination shall take effect 7 days after the Notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [*Cessation of Work and Removal of Contractor's Equipment*].

Upon such termination, the Employer's Representative shall determine the value of the work done and issue a payment certificate which shall include:

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;
- (b) the Cost of Plant and Materials ordered for the Works which have been

delivered to the Contractor, or of which the Contractor is liable to accept delivery. This Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;

- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and
- (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

18.6

Release from Performance under the Law

Notwithstanding any other provision of this Clause, if any event arises outside the control of the Parties (including, but not limited to, an Exceptional Event) which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon Notice by either Party to the other Party of such event:

- (a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract; and
- (b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 18.5 [*Optional Termination, Payment and Release*] if the Contract had been terminated under that Sub-Clause.

19 Insurance

19.1

General Requirements

Without limiting his or the Employer's obligations or responsibilities under the Contract, the Contractor shall effect and maintain all insurances for which he is responsible with insurers and in terms, both of which shall be subject to approval by the Employer, such approval shall not be unreasonably withheld or delayed.

The insurances required to be provided herein are the minimum required by the Employer, and the Contractor may, at his own cost, add such other insurances that he may deem prudent.

Whenever required by the Employer, the Contractor shall produce the insurance policies which he is required to effect under the Contract. As each premium is paid, the Contractor shall send a copy of each receipt of payment to the Employer.

If the Contractor fails to effect and keep in force any of the insurances required under Sub-Clause 19.2 [*Insurances to be provided by the Contractor during the Design-Build Period*], or fails to provide the policies or receipts as aforementioned, then, and in any such case, the Employer may effect and keep in force such insurances and pay any premium as may be necessary and recover the same from the Contractor from time to time by deducting the amount(s) so paid from any monies due to the Contractor or otherwise recover the same as a debt from the Contractor.

If either the Contractor or the Employer fails to comply with the conditions attaching to the insurances effected pursuant to the Contract, the Party so failing to comply as aforesaid shall indemnify the other Party against all losses and claims arising from such failure.

The Contractor shall also be responsible for the following:

- (a) notifying the insurers of any changes in the nature, extent or programme for the execution of the Works;
- (b) notifying the insurers of any changes in the nature, extent or programme for the provision of the Operation Service; and
- (c) the adequacy and validity of the insurances in accordance with the Contract at all times during the performance of the Contract.

The permitted deductible limits allowed in any policy shall not exceed the amounts stated in the Contract Data.

Where there is a shared liability the loss shall be borne by each Party in proportion to its liability under Clause 17 [*Risk Allocation*] or Clause 18 [*Exceptional Risks*], provided the non-recovery from insurers has not been caused by a breach of this Clause by the Contractor. In the event that non-recovery from insurers has been caused by such a breach of Contract by the Contractor, the Contractor shall bear the loss suffered.

19.2

Insurances to be provided by the Contractor during the Design-Build Period

The Contractor shall provide the following insurances during the Design-Build Period:

- (a) The Works

The Contractor shall insure and keep insured in the joint names of the Contractor and the Employer from the Commencement Date until the date of issue of the Commissioning Certificate:

- (i) the Works, together with Materials and Plant for incorporation therein, for their full replacement value with deductible limits not exceeding those stated in the Contract Data. The insurance cover shall extend to include loss and damage of any part of the Works as a consequence of failure of elements defectively designed or constructed with defective material or workmanship; and
- (ii) an additional sum of fifteen percent (15%) of such replacement value (or such sum as may be specified in the Contract Data) to cover any additional costs incidental to the rectification of loss or damage, including professional fees and the cost of demolition and removal of debris.

The insurance cover shall cover the Employer and the Contractor against all loss or damage from whatever cause arising until the Commissioning Certificate is issued. Thereafter, the insurance shall continue until the date of issue of the Final Payment Certificate Design Build in respect of any incomplete work for loss or damage arising from any cause occurring prior to the date of the Commissioning Certificate, and for any loss or damage occasioned by the Contractor in the course of any operation carried out by him for the purpose of complying with his obligations under Clause 12 [*Defects*].

The insurance cover provided by the Contractor for the Works may exclude any of the following:

- (1) the cost of making good any part of the Works which is defective (including defective material and workmanship) or otherwise does not comply with the Contract, provided that it does not exclude the cost of

- making good any loss or damage to any other part of the Works attributable to such defect or non-compliance.
- (2) indirect or consequential loss or damage including any reductions in the Contract Price for delay.
 - (3) wear and tear, shortages and pilferages.
 - (4) the Employer's Risks set out in Sub-Clause 17.1 [*Employer's Risks during the Design-Build Period*] unless otherwise stated in the Contract Data regarding the risks in sub-paragraph (b)(iii) thereof.
 - (5) the Exceptional Risks set out in Sub-Clause 18.1 [*Exceptional Risks*] unless, otherwise stated in the Contract Data regarding the risks in sub-paragraph (f) thereof.

(b) Contractor's Equipment

The Contractor shall insure in the joint names of the Employer and the Contractor the Contractor's Equipment and other things brought onto Site by the Contractor to the extent specified in the Contract Data.

(c) Liability for breach of professional duty

The Contractor shall insure the legal liability of the Contractor arising out of the negligent fault, defect, error or omission of the Contractor or any person for whom the Contractor is responsible in the carrying out their professional duties in an amount not less than that stated in the Contract Data.

Such insurance shall contain an extension indemnifying the Contractor for his liability arising out of negligent fault, defect, error or omission in the carrying out his professional duties which result in the Works not being fit for the purpose specified in the Contract and resulting in any loss and/or damage to the Employer.

The Contractor shall maintain this insurance for the period specified in the Contract Data.

(d) Injury to persons and damage to property

The Contractor shall insure, in the joint names of the Contractor and the Employer, against liabilities for death or injury to any person, or loss of or damage to any property (other than the Works) arising out of the performance of the Contract and occurring before the issue of the Final Payment Certificate Design-Build, other than loss or damage caused by any event covered under Sub-Clause 17.1 [*Employer's Risks during the Design-Build Period*] or Sub-Clause 18.1 [*Exceptional Risks*].

The insurance policy shall include a cross liability clause such that the insurance shall apply to the Contractor and the Employer as separate insureds.

Such insurance shall be effected before the Contractor begins any work on the Site and shall remain in force until the issue of the Final Payment Certificate Design-Build and shall be for not less than the amount specified in the Contract Data.

(e) Injury to employees

The Contractor shall effect and maintain insurance against liability for claims, damages, losses and expenses (including legal fees and expenses) arising from injury, sickness, disease or death of any person employed by the Contractor or any other of the Contractor's Personnel.



The Employer and the Employer's Representative shall also be indemnified under the policy of insurance, except that this insurance may exclude losses and claims to the extent that they arise from any act or neglect of the Employer or of the Employer's Personnel.

The insurance shall be maintained in full force and effect during the whole time that the Contractor's Personnel are assisting in the execution of the Works. For any person employed by a Subcontractor, the insurance may be effected by the Subcontractor, but the Contractor shall be responsible for the Subcontractor's compliance with this Sub-Clause.

- (f) Other insurances required by Law and by local practice

Other insurances required by Law and by local practice (if any) shall be detailed in the Contract Data and the Contractor shall provide such other insurances in compliance with the details given, at his own cost.

19.3

Insurances to be provided by the Contractor during the Operation Service Period

The Contractor shall provide the following insurances during the Operation Service Period:

- (a) Fire extended cover for the Works

The Contractor shall provide, in the joint names of the Employer and the Contractor, fire extended cover insurance for the Works as specified in the Contract Data for the Operation Service Period. Notwithstanding any other provision in the Contract, the Operation Service shall not commence until the fire extended cover insurance is effected and the terms and details have been approved by the Employer.

The terms of the policy shall be submitted to the Employer for his approval no later than 28 days before the date upon which the Commissioning Certificate is due to be issued, and shall come into force on the date stated in the Commissioning Certificate.

- (b) Injury to any person and damage to property

The Contractor shall ensure that an insurance as required under Sub-Clause 19.2 (d) [*Injury to persons and damage to property*] be effected prior to the issue of the Commissioning Certificate and maintained until the issue of the Contract Completion Certificate. Such insurance shall be for an amount and in terms as specified in the Contract Data.

- (c) Injury to employees

The Contractor shall ensure that an insurance as required under Sub-Clause 19.2(e) [*Injury to employees*] be effected prior to the issue of the Commissioning Certificate and maintained until the issue of the Contract Completion Certificate, or the last of his or any of his Subcontractors' employees have left the Site, whichever is the later.

- (d) Other insurances required by Law and by local practice

Other insurances required by Law and by local practice (if any) shall be detailed in the Contract Data and the Contractor shall provide such insurances in compliance with the details given, at his own cost.



- (e) Other optional operational insurances

Other optional insurances required (if any) shall be detailed in the Contract Data and the Contractor shall provide such other insurances in compliance with the details given, at his own cost.

20 Claims, Disputes and Arbitration

20.1

Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion of Design-Build and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, he must comply with the following procedures:

- (a) Notices

The Contractor shall give Notice to the Employer's Representative, describing the event or circumstance giving rise to the claim as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance. The Notice shall state that it is given under this Sub-Clause.

If the Contractor fails to give Notice of a claim within such period of 28 days, the Time for Completion of Design-Build shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers that, in all the circumstances, it is fair and reasonable that the late submission be accepted, the DAB shall have the authority to overrule the relevant 28-day limit and, if it so decides, it shall advise the Parties accordingly.

If the Contractor has submitted his Notice of claim within the 28-day limit or the DAB has ruled that the late Notice was acceptable, then the Contractor shall proceed in accordance with the provisions of this Sub-Clause.

- (b) Contemporary records

Following the giving of Notice, the Contractor shall keep such contemporary records as may be necessary to substantiate any claim. Contemporary records shall be kept on Site unless agreed otherwise with the Employer's Representative. Without admitting the Employer's liability, the Employer's Representative may, after receiving any Notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep additional contemporary records. The Contractor shall permit the Employer's Representative to inspect all these records, and shall (if instructed) submit copies to the Employer's Representative.

- (c) Details and particulars

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be allowed by the DAB under paragraph (a) above, or proposed by the Contractor and approved by the Employer's Representative, the

Contractor shall send to the Employer's Representative a fully detailed claim which includes full supporting particulars of the contractual or other basis of the claim and of the extension of time and/or additional payment claimed. The Contractor shall also provide the Employer's Representative with any additional particulars which the Employer's Representative may reasonably require.

If the Contractor fails to provide the contractual or other basis of the claim within the said 42 days or other time allowed or approved, the Notice given under paragraph (a) above shall be deemed to have lapsed and shall no longer be considered as a valid Notice. If the Contractor considers there are circumstances which justify a late submission, he may submit the details to the DAB for a ruling. If the DAB considers that, in all the circumstances, it is fair and reasonable that the late submission be accepted, the DAB shall have the authority to overrule the given 42-day limit and, if it so decides, it shall advise the Parties accordingly.

If the event or circumstance giving rise to the claim has a continuing effect:

- (i) the fully detailed claim shall be considered as interim;
- (ii) the Contractor shall send further interim claims at 28-day intervals, giving the accumulated delay and/or amount claimed, and such additional particulars as the Employer's Representative may reasonably require; and
- (iii) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Employer's Representative.

(d) Employer's Representative's response

Within 42 days after receiving a fully detailed claim or any further particulars requested by the Employer's Representative, or within such other period as may be agreed by the Employer's Representative and the Contractor, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion of Design-Build (before or after its expiry) in accordance with Sub-Clause 9.3 [*Extension of Time for Completion for Design-Build*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract with detailed comments. He may also request any necessary additional particulars, but shall nevertheless give his response on the contractual or other aspects of the claim within the 42 days after receiving the fully detailed claim from the Contractor.

If the Employer's Representative does not respond in accordance with the foregoing procedures and timetable, either Party may consider that the claim has been rejected by the Employer's Representative, and either Party may refer the matter to the DAB in accordance with Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*].

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

If either Party is dissatisfied with the determination of the Employer's Representative, either Party may, within 28 days after receiving the determination, issue to the Employer's Representative and the other Party, a



Notice of dissatisfaction, and thereafter proceed in accordance with Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*]. If no Notice of dissatisfaction is issued by either Party within the said 28 days, the determination of the Engineer's Representative shall be deemed to have been accepted by both Parties.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the paragraph (a) of this Sub-Clause.

20.2

Employer's Claims

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, the Employer or the Employer's Representative shall give Notice and particulars to the Contractor.

The Notice shall be given as soon as practicable after the Employer becomes aware, or should have become aware, of the event or circumstances giving rise to the claim.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount to which the Employer considers himself to be entitled in connection with the Contract. The Employer's Representative shall then proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the amount (if any) which the Employer is entitled to be paid by the Contractor.

If either Party is dissatisfied with the determination of the Employer's Representative, either Party may, within 28 days after receiving the determination, issue to the Employer's Representative and the other Party, a Notice of dissatisfaction, and thereafter proceed in accordance with Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*]. If no Notice of dissatisfaction is issued by either Party within the said 28 days, the determination of the Engineer's Representative shall be deemed to have been accepted by both Parties.

The amount determined by the DAB may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.

20.3

Appointment of the Dispute Adjudication Board

Disputes arising during the Design-Build Period shall be adjudicated by a DAB in accordance with Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*]. The Parties shall jointly appoint a DAB by the date stated in the Contract Data.

The DAB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, subject to their being able and willing to accept appointment to the DAB.

The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement in these General Conditions, with such amendments as are agreed between them.

The terms of the remuneration of either the sole member or each of the three members shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. The replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause. However the appointment of any member may only be terminated by mutual agreement of both Parties, and not by the Employer or the Contractor acting alone.

Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire upon the issue of the Commissioning Certificate under Sub-Clause 9.12 [*Completion of Design-Build*] or 28 days after the DAB has given its decision to a Dispute under Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*], whichever is the later.

20.4

Failure to Agree Dispute Adjudication Board

If any of the following conditions apply, namely:

- (a) the Parties fail to agree upon the appointment of the sole member of the DAB by the date stated in the first paragraph of Sub-Clause 20.3 [*Appointment of the Dispute Adjudication Board*];
- (b) either Party fails to nominate a member (for approval by the other Party), or fails to approve a member nominated by the other Party, of a DAB of three persons by such date;
- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.5

Avoidance of Disputes

If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties must be present at such discussions. The Parties are not bound to act upon any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute resolution process and decision by any views given during the informal assistance process, whether provided orally or in writing.

If a Dispute of any kind whatsoever arises between the Parties, whether or not any informal discussions have been held under this Sub-Clause, either Party may refer the Dispute in writing to the DAB according to the provisions of Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision].

20.6

Obtaining Dispute Adjudication Board's Decision

If a Dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works during the Design-Build Period, including any Dispute as to any certificate, determination, instruction, opinion or valuation of the Employer's Representative, either Party may, within 28 days of issuing a Notice of dissatisfaction under Sub-Clause 20.1(d) [Contractor's Claims] or Sub-Clause 20.2 [Employer's Claims], refer the Dispute in writing to the DAB for its decision, with copies to the other Party and the Employer's Representative. Such reference shall state that it is given under this Sub-Clause. The other Party shall then have 21 days to send a response to the DAB with copies to the referring Party and the Employer's Representative. If the dissatisfied Party has not formally referred the matter to the DAB within the said 28-day period, the Notice of dissatisfaction shall be deemed to have lapsed and no longer be considered to be valid.

For a DAB of three persons, the DAB shall be deemed to have received such submissions on the date when they are received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all information, access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such Dispute. The DAB shall not act as arbitrator(s).

Within 84 days after receiving the other Party's response or, if no such response is received, within 105 days after receiving the reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision in writing to both Parties and the Employer's Representative, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties and the Employer's Representative, who shall promptly comply with it notwithstanding that a Party gives a Notice of dissatisfaction with such decision as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give Notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period prescribed in this Sub-Clause, then either Party may, within 28 days after this period has expired, give Notice to the other Party of its dissatisfaction. In either case, the dissatisfied Party shall send a copy of the Notice to the chairman of the DAB.

In either event, this Notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in Dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.9 [Failure to Comply with Dispute Adjudication Board's Decision], neither Party shall be entitled to commence arbitration of a Dispute unless a Notice of dissatisfaction with respect to that Dispute has been given in accordance with this Sub-Clause.

If the decision of the DAB requires a payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment.

If the DAB has given its decision as to a matter in Dispute to both Parties, and no Notice of dissatisfaction has been given by either Party within 28 days after it received

the DAB's decision, then the decision shall become final and binding upon both Parties.

20.7

Amicable Settlement

Where Notice of dissatisfaction has been given under Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*], both Parties shall attempt to settle the Dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the twenty-eighth day after the day on which Notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

20.8

Arbitration

Unless settled amicably, and subject to Sub-Clause 20.9 [*Failure to Comply with Dispute Adjudication Board's Decision*], any Dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the Dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce;
- (b) the Dispute shall be settled by three arbitrators appointed in accordance with these Rules; and
- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*] unless otherwise stated in the Contract Data.

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Employer's Representative, and any decision of the DAB, relevant to the Dispute. Nothing shall disqualify the Employer's Representative from being called as a witness and giving evidence before the arbitrator(s) on any matter whatsoever relevant to the Dispute.

Neither Party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its Notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.

Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties, the Employer's Representative and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

20.9

Failure to Comply with Dispute Adjudication Board's Decision

In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.8 [*Arbitration*] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.7 [*Amicable Settlement*] shall not apply to this reference.

20.10

Disputes Arising during the Operation Service Period

Disputes arising during the Operation Service Period which cannot be resolved between the Parties shall be settled by a one-person DAB ("Operation Service DAB"). Such person shall be jointly agreed and appointed by the Parties at the time of issue of the Commissioning Certificate.

If the Parties cannot agree on the person who shall be the Operation Service DAB, then the person shall be appointed according to the provisions of Sub-Clause 20.4 [*Failure to Agree Dispute Adjudication Board*].

Such person shall be appointed for a term of five years. At the end of each five-year period, a new Operation Service DAB shall be agreed and appointed. If both Parties and the previously appointed person agree, the same Operation Service DAB may be re-appointed for a second (or third or fourth, as the case may be) five-year term.

The agreement between the Parties and the Operation Service DAB shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in these General Conditions, with such amendments as are agreed between them.

The terms of remuneration of the Operation Service DAB shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

The procedure for obtaining a decision from the Operation Service DAB shall be in accordance with the provisions of Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*], and the DAB shall give its decision no later than 84 days after receiving the other Party's response or, if no such response is received, within 105 days after receiving the reference and the supporting documentation from the Party referring the Dispute..

The appointment of the Operation Service DAB shall expire five years after the date of its appointment unless such appointment is extended for a further five years as aforementioned.

If either Party is dissatisfied with the decision of the Operation Service DAB, the provisions of Sub-Clauses 20.6 [*Obtaining Dispute Adjudication Board's Decision*], 20.7 [*Amicable Settlement*], 20.8 [*Arbitration*] and 20.9 [*Failure to Comply with Dispute Adjudication Board's Decision*] shall apply.

20.11

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If a Dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.7 [*Amicable Settlement*], or Sub-Clause 20.10 [*Disputes Arising during the Operation Service Period*], as the case may be, shall not apply; and
 - (b) the Dispute may be referred directly to arbitration under Sub-Clause 20.8 [*Arbitration*].
-



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GENERAL CONDITIONS OF DISPUTE ADJUDICATION AGREEMENT

for the Dispute Adjudication Board and the Operation Service Dispute Adjudication Board

1

Definitions

Each "Dispute Adjudication Agreement" is a tripartite agreement by and between:

- (a) the "Employer";
- (b) the "Contractor"; and
- (c) the "Member" who is defined in the Dispute Adjudication Agreement as being:
 - (i) the sole adjudicator or sole Member of the DAB ("Dispute Adjudication Board") or the Operation Service DAB (as appropriate), and where this is the case, all references to the "Other Members" hereinafter do not apply; or
 - (ii) one of the three persons who are jointly called the DAB and, where this is the case, the other two persons are called the "Other Members".

The Employer and the Contractor have entered (or intend to enter) into a contract, which is called the "Contract" and is defined in the Dispute Adjudication Agreement. In the Dispute Adjudication Agreement, words and expressions which are not otherwise defined shall have the meanings assigned to them in the Contract.

2

General Provisions

Unless otherwise stated in the Dispute Adjudication Agreement, the Agreement shall take effect on the latest of the following dates:

- (a) the Commencement Date defined in the Contract;
- (b) when the Employer, the Contractor and the Member have each signed the Dispute Adjudication Agreement; or
- (c) when the Employer, the Contractor and each of the Other Members (if any) have respectively each signed a dispute adjudication agreement.

This employment of the Member is a personal appointment. At any time, the Member may give not less than 70-days' Notice of resignation to the Employer and to the Contractor, and the Dispute Adjudication Agreement shall terminate upon the expiry of this period.

The language to be used in all communications, reports, decisions and during all meetings and hearings relating to the business of either the DAB or the Operation Service DAB shall be the language for communications stated in the Contract Data.

3

Warranties

The Member warrants and agrees that he/she is and shall be impartial and independent of the Employer, the Contractor and the Employer's Representative. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is:

- (a) experienced in the work which the Contractor is to carry out under the Contract;
- (b) experienced in the interpretation of contract documentation; and
- (c) fluent in the language for communications which is stated in the Contract Data.

If there is a challenge of a DAB Member by either Party or, in the case of a three-person DAB, jointly by the other Members, for lack of independence, notwithstanding any disclosure made or not made by that Member under Clause 4 [*General Obligations of the Member*] of these General Conditions of Dispute Adjudication Agreement, the challenging Party or Members (as the case may be) may refer the alleged lack of independence to the appointing entity named in the Contract Data under Sub-Clause 20.4 [*Failure to Agree Dispute Adjudication Board*] of the General Conditions of Contract. If the appointing entity considers it to be prudent or necessary, it may refer the matter to an independent professional person or body (such as the International Chamber of Commerce) to review and assess the challenge. If such person or body is of the opinion that the Member in question is no longer independent as required by the terms of the Dispute Adjudication Agreement, the Member shall be removed from the DAB and the appointing entity shall, without delay, appoint a new Member. Any costs or fees due to the independent person or body shall be shared equally between the Parties.

4

General Obligations of the Member

The Member shall:

- (a) have no interest, financial or otherwise, in the Employer, the Contractor or Employer's Representative, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Employer, the Contractor or the Employer's Representative, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;
- (c) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Employer's Representative, and any previous involvement in the overall project of which the Contract forms part;
- (d) not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer, the Contractor or the Employer's Representative, except as may be agreed in writing by the Employer, the Contractor and the Other Members (if any);
- (e) comply with the annexed "Procedural Rules for Dispute Adjudication Board Members" ("Rules") and with Sub-Clause 20.5 [*Avoidance of Disputes*] of the General Conditions of Contract;
- (f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the Rules;
- (g) not, while a Member, enter into discussions or make any agreement with the Employer, the Contractor or the Employer's Representative regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication Agreement;
- (h) ensure his/her availability for all Site visits and hearings as are necessary;
- (i) become conversant with the Contract and with the progress of the Works (and

- of any other parts of the project of which the Contract forms part) by studying all documents received which shall be maintained in a current working file;
- (j) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any); and
 - (k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any).

5

General Obligations of the Employer and the Contractor

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DAB's activities under the Contract and the Dispute Adjudication Agreement, or when both Parties jointly agree to refer a matter to the DAB in accordance with Sub-Clause 20.5 [*Avoidance of Disputes*] of the General Conditions of Contract. The Employer and the Contractor shall be responsible for compliance with this provision by the Employer's Personnel and the Contractor's Personnel respectively.

The Employer and the Contractor undertake to each other and to the Member that the Member shall not, except as otherwise agreed in writing by the Employer, the Contractor, the Member and the Other Members (if any):

- (a) be appointed as an arbitrator in any arbitration under the Contract;
- (b) be called as a witness to give evidence concerning any Dispute before arbitrator(s) appointed for any arbitration under the Contract; or
- (c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

The Employer and the Contractor hereby jointly and severally indemnify and hold the Member harmless against and from claims from which he/she is relieved from liability under the preceding paragraph.

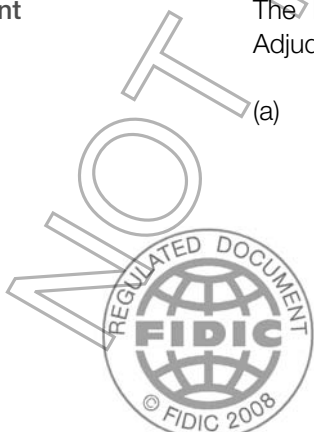
Whenever the Employer or the Contractor refers a Dispute to the DAB or the Operation Service DAB under Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*] or Sub-Clause 20.10 [*Disputes Arising during the Operation Service Period*] of the General Conditions of Contract, which will require the Member to make a Site visit and attend a hearing, the referring Party shall provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the Member. No account shall be taken of any other payments due or paid to the Member.

6

Payment

The Member shall be paid as follows, in the currency named in the Dispute Adjudication Agreement:

- (a) a retainer fee per calendar month, which shall be considered as payment in full for:
 - (i) being available on 28-days' notice for all Site visits and hearings;
 - (ii) becoming and remaining conversant with all project developments and maintaining relevant files, files in accordance with sub-paragraph (i) of Clause 4 hereof [*General Obligations of the Member*];
 - (iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his/her duties; and



- (iv) all services performed hereunder except those referred to in subparagraphs (b) and (c) of this Clause.

During the periods when each Operation Service DAB is acting, the retainer fee shall be paid monthly until the end of the month in which the appointment expires or is otherwise terminated, or the Member resigns.

- (b) a daily fee which shall be considered as payment in full for:
 - (i) each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and the Site, or another location of a meeting with the Other Members (if any);
 - (ii) each working day on Site visits, hearings or preparing decisions; and
 - (iii) each day spent reading submissions in preparation for a hearing.
- (c) all reasonable expenses including necessary travel expenses (air fare in less than first class, hotel and subsistence and other direct travel expenses, including visa charges) incurred in connection with the Member's duties, as well as the cost of telephone calls, courier charges, faxes and telexes: a receipt shall be required for each item in excess of five percent (5%) of the daily fee referred to in subparagraph (b) of this Clause.
- (d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The retainer and daily fees shall be as specified in the Dispute Adjudication Agreement. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months, and shall thereafter be adjusted by agreement between the Employer, the Contractor and the Member, at each anniversary of the date on which the Dispute Adjudication Agreement became effective.

If the parties fail to agree on the retainer fee or the daily fee, the appointing entity or official named in the Contract Data shall determine the amount of the fees to be used.

The Member shall submit invoices for payment of the monthly retainer and air fares quarterly in advance. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a Site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

The Contractor shall pay each of the Member's invoices in full within 56 days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Adjudication Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the function of the DAB, and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Sub-Clause 14.9 [Delayed Payment] of the General Conditions of Contract.

If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without

Notice) until the payment is received, and/or (ii) resign his/her appointment by giving Notice under Clause 7 hereof.

7

Default and Termination

At any time: (i) the Employer and the Contractor may jointly terminate the Dispute Adjudication Agreement by giving 42-days' Notice to the Member; or (ii) the Member may resign as provided for in Clause 2 hereof.

If the Member fails to comply with the Dispute Adjudication Agreement, the Employer and the Contractor may, without prejudice to their other rights, terminate the Agreement by Notice to the Member. The Notice shall take effect when received by the Member.

If the Employer or the Contractor fails to comply with the Dispute Adjudication Agreement, the Member may, without prejudice to his/her other rights, terminate the Agreement by Notice to the Employer and the Contractor. The Notice shall take effect when received by them both.

Any such Notice, resignation and termination shall be final and binding on the Employer, the Contractor and the Member. However, a Notice by the Employer or the Contractor, but not by both, shall be of no effect.

If the Member fails to comply with any of his/her obligations under Clause 4 (a) to (d) above, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to the Employer's and the Contractor's other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DAB or the Operation Service DAB which are rendered void or ineffective by the said failure to comply.

If the Member fails to comply with any of his obligations under Clause 4 (e) to (k) above, he shall not be entitled to any fees or expenses hereunder from the date and to the extent of the non-compliance and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses already received by the Member, for proceedings or decisions (if any) of the DAB or the Operation Service DAB which are rendered void or ineffective by the said failure to comply.

8

Disputes

Any Dispute or claim arising out of or in connection with this Dispute Adjudication Agreement, or the breach, termination or invalidity thereof, shall be finally settled by institutional arbitration. If no other arbitration institute is agreed, the arbitration shall be conducted under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with these Rules of Arbitration.



PROCEDURAL RULES FOR DISPUTE ADJUDICATION BOARD MEMBERS

- 1 Unless otherwise agreed by the Employer and the Contractor, the DAB shall visit the Site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor. Unless otherwise agreed by the Employer, the Contractor and the DAB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.
- 2 The timing of and agenda for each Site visit shall be as agreed jointly by the DAB, the Employer and the Contractor, or in the absence of agreement, shall be decided by the DAB. The purpose of Site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and, as far as reasonable, to endeavour to prevent potential problems or claims from becoming Disputes.
- 3 Site visits shall be attended by the Employer, the Contractor and the Employer's Representative and shall be co-ordinated by the Employer in co-operation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services. At the conclusion of each Site visit and before leaving the Site, the DAB shall prepare a report on its activities during the visit and shall send copies to the Employer and the Contractor.
- 4 The Employer and the Contractor shall furnish to the DAB one copy of all documents which the DAB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DAB and the Employer or the Contractor shall be copied to the other Party. If the DAB comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.
- 5 If any Dispute is referred to the DAB in accordance with Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*] or Sub-Clause 20.10 [*Disputes Arising during the Operation Service Period*] of the General Conditions of Contract, the DAB shall proceed in accordance with the said Sub-Clauses 20.6 and 20.10, and these Rules, or as otherwise agreed by the Employer and the Contractor in writing. Subject to the time allowed to give Notice of a decision and other relevant factors, the DAB shall:
 - (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case; and
 - (b) adopt procedures suitable to the Dispute, avoiding unnecessary delay or expense.
- 6 The DAB may conduct a hearing on the Dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.

- 7 If, within 14 days after giving its decision, the members of the DAB find and agree that such decision contained errors of fact or principle, the Chairman of the DAB (or the sole Member if applicable) shall advise the Employer and the Contractor of the error and issue an addendum to its decision in writing to both Parties.
- 8 If, within 14 days of receiving a decision from the DAB, either Party believes that such decision contains an ambiguity, that Party may seek clarification from the DAB in writing with a copy of such request to the other Party. Within 14 days of receiving such a request, the DAB shall respond with a copy to the other Party, and if the DAB is of the opinion that the decision did contain an error or ambiguity, it may correct its decision by issuing an addendum to its original decision.
- 9 Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Employer's Representative, and to proceed in the absence of any party who the DAB is satisfied received Notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.
- 10 The Employer and the Contractor empower the DAB, among other things, to:
- (a) establish the procedure to be applied in deciding a Dispute;
 - (b) decide upon the DAB's own jurisdiction, and as to the scope of any Dispute referred to it;
 - (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules;
 - (d) take the initiative in ascertaining the facts and matters required for a decision,
 - (e) make use of its own specialist knowledge, if any;
 - (f) decide upon the payment of financing charges in accordance with the Contract;
 - (g) decide upon any provisional relief such as interim or conservatory measures; and
 - (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Employer's Representative, relevant to the Dispute.
- 11 The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DAB shall make and give its decision in accordance with Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*] of the General Conditions of Contract, or as otherwise agreed by the Employer and the Contractor in writing.
- 12 If the DAB comprises three persons:
- (a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;
 - (b) it shall endeavour to reach a unanimous decision: if this proves impossible the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
 - (c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless:
 - (i) either the Employer or the Contractor does not agree that they do so; or
 - (ii) the absent Member is the chairman and he/she instructs the other Members not to make a decision.



INTRODUCTION

GENERAL CONDITIONS

FIDIC® Conditions of Contract for **DESIGN, BUILD AND OPERATE PROJECTS**

PARTICULAR CONDITIONS

SAMPLE FORMS

Particular Conditions

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FEDERATION INTERNATIONALE DES INGENIEURS-CONSEILS
INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS
INTERNATIONALE VEREINIGUNG BERATENDER INGENIEURE
FEDERACION INTERNACIONAL DE INGENIEROS CONSULTORES



Particular Conditions

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Introduction
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Notes on the Preparation of Special Provisions

Preamble

It is recommended that the following statement is included in the Tender Documents:

The Conditions of Contract comprise the "General Conditions", which form part of the "Conditions of Contract for Design, Build and Operate Projects First Edition 2008" published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC), "Particular Conditions Part A – Contract Data" and (where applicable) "Particular Conditions Part B – Special Provisions", which include amendments and additions to such General Conditions.



Particular Conditions Part A – Contract Data

INTRODUCTION

The following Sub-Clauses in the General Conditions make direct reference to the Contract Data and require that specific information is provided.

The document assumes that all information in the Contract Data will be provided by the Employer and included in the tender documents. If the Employer requires tenderers to provide any of the information required in the Contract Data, this must be clearly stated in the tender documents.

The Conditions of Contract comprise, as a minimum, the General Conditions and the Particular Conditions Part A – Contract Data, and failure by the Employer to provide the information and details required in the Contract Data will mean that either the Contract Documents are incomplete with vital information missing, or that the fall-back provisions to be found in some of the Sub-Clauses in the General Conditions will automatically take effect.



CONTRACT DATA

Sub-Clause	Data to be given	Data
1.1.24	Where the Contract allows for Cost Plus Profit, percentage profit to be added to the Cost:	_____ %
1.1.26	Cut-Off Date (number of days after the Time for Completion of Design-Build):	_____ days
1.1.32	Employer's name and address	_____ _____ _____
1.1.35	Employer's Representative's name and address:	_____ _____ _____
1.1.70	Parts of the Works that shall be designated a Section for the purposes of the Contract:	_____ _____ _____ _____
1.1.78	Time for Completion of Design-Build:	_____ days
1.3	Agreed methods of electronic transmission: ..	_____ _____ _____
1.3	Address of Employer for communications:	_____ _____ _____
1.3	Address of Employer's Representative for communications:	_____ _____ _____
1.3	Address of Contractor for communications: ...	_____ _____ _____
1.4	Contract shall be governed by the law of:	_____
1.4	Ruling language:	_____
1.4	Language for communications:	_____
2.1	After receiving the Letter of Acceptance, the Contractor shall be given right of access to all or part of the Site within:	_____ days
4.2	Performance Security (as percentages of the Accepted Contract Amount in Currencies):	



Percent %
 Currency
 Percent %
 Currency

4.2 Reduction in Performance Security at the end of the Retention Period: %

5.1 Period for notification of errors, faults and other defects is: days

5.2 Contractor's Documents requiring approval: ...

6.5 Normal working hours on the Site:

8.2 Period of the Operation Service: years

9.2 Time for Completion of Design-Build: days

9.2 Time for Completion of each Section:
 Section
 Time for Completion days
 Section
 Time for Completion days

9.6 Delay damages (percent of final Contract Price per day of delay): %

9.6 Maximum amount of delay damages (percent of final Contract Price): %

10.6a Maximum compensation payable by Contractor:

10.6b Maximum compensation payable by Employer:

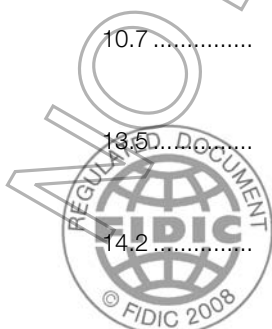
10.7 Performance damages:
 Failure
 Damages
 Failure
 Damages

10.7 Rights of Employer if failure continues for more than 84 days:

10.7 Minimum production outputs required (give details):

13.5 Percentage rate to be applied to Provisional Sums: %

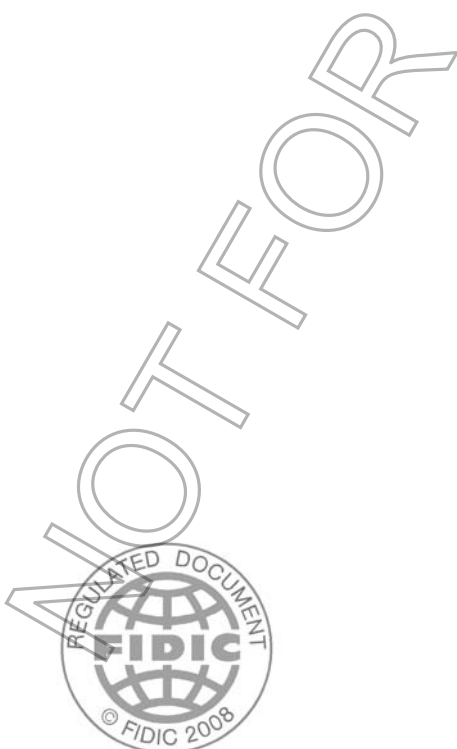
14.2 Amount of Advance Payment (percent of Accepted Contract Amount): %



14.2	Currencies of payment if different to the currencies quoted in the Contract.....	_____
14.2	Percentage deductions for the repayment of the Advance Payment:	_____ %
14.3	Percentage of Retention:	_____ %
14.3	Limit of Retention Money:	_____ %
14.6(b)(i)	Plant and Materials for payment when shipped:	_____
14.6(c)(i)	Plant and Materials for payment when delivered to the Site:	_____
14.7(b)	Minimum Amount of Interim Payment Certificate:	_____
14.9	Financing charges for delayed payment (percent points above discount rate):	_____ %
14.17	Currencies for payment of Contract Price:	_____
14.17	Proportions of Local and Foreign Currencies are:	
	Local	_____
	Foreign	_____
14.17	Rate of Exchange	_____
14.17	Payment of damages shall be:	
	Currency	_____
	Proportion	_____
	Currency	_____
	Proportion	_____
14.19	Amount of Maintenance Retention Fund:	_____
17.1	Operation of forces of nature allocated to the Contractor:	_____
17.8	Total liability of the Contractor shall not exceed:	_____
19.2(a)(i)	Permitted deductible limits:	_____ %
19.2(a)(ii)	Additional sum to be insured:	_____
19.2(a)4	Additional sum to be insured:	_____
19.2(a)5	Employer's Risks to be insured if different to Sub-Clause 17.1:	_____
19.2(b)	Exceptional Risks to be insured if different to Sub-Clause 18.1:	_____



- 19.2(c)..... Insurance of Contractor's Equipment (amount required):
- 19.2(c)..... Amount of professional liability insurance required:
- 19.2(d) Period for which professional liability insurance required:
- 19.2(f)..... Amount of insurance required for injury to persons and damage to property:
- 19.3(a)..... Other insurances required from the Contractor (give details):
- 19.3(d) Amount of fire extended cover insurance required:
- 19.3(e)..... Other insurances required by law from the Contractor (give details):
- 20.3 Other optional insurances required from the Contractor (give details):
- 20.3 Date for appointment of DAB:
- 20.4 The DAB shall comprise:members
- 20.8 Appointing entity (official) for DAB members, if not agreed, shall be the President of FIDIC or a person appointed by him.
- Language of arbitration:



Particular Conditions Part B – Special Provisions

INTRODUCTION

The terms of the Conditions of Contract for Design, Build and Operate (DBO) Projects have been prepared by the Fédération Internationale des Ingénieurs-Conseils (FIDIC) and are recommended where one entity takes total responsibility for an engineering project which incorporates the design, manufacture, delivery and installation of a facility, and the long-term operation and maintenance of that facility on behalf of the Employer. The DBO form is most suitable where tenders are invited on an international basis. Modifications to the Conditions of Contract may be required in some legal jurisdictions, particularly if they are to be used on domestic contracts.

One of the main objectives of the DBO contract format is to ensure the full commitment of the Contractor not only to design and build the facility, but also to operate the facility under licence from the Employer, for a period of 20 years, before returning the facility to the Employer for his continued operation. With the various skills and expertise required to cover all aspects of a DBO project, it is expected that the Contractor will be a consortium of several contractors covering all the required disciplines, and it is important that the joint and several liability provisions to be found in General Conditions are properly reflected in any new provisions prepared under Particular Conditions Part B – Special Provisions.

Before incorporating any new or changed clauses, the wording must be carefully checked to ensure that it is wholly suitable for the particular circumstances and that it does not unintentionally alter the meaning or operation of other clauses in the Contract, and does not inadvertently change the obligations assigned to the Parties or the balance of risks shared between them. Furthermore, it is important that new clauses do not create any ambiguity or misunderstanding in the rest of the document.

There are a number of Sub-Clauses in the General Conditions which require data to be provided by the Employer and inserted in the Particular Conditions Part A – Contract Data. However, there are no Sub-Clauses in the General Conditions which require data or information to be included in the Particular Conditions Part B – Special Provisions. Any provisions found in the tender documents and/or Contract Documents under Particular Conditions Part B – Special Provisions indicate that the General Conditions have been amended or supplemented.

Note that the provisions of the Particular Conditions Part B – Special Provisions will always overrule and supersede the equivalent provisions in the General Conditions of Contract, and it is important that the changes are easily identifiable by using the same clause numbers and titles as appear in the General Conditions. Furthermore, it is necessary to add a statement in the tender document and Contract Document that:

"The provisions to be found in the Particular Conditions Part B – Special Provisions take precedence over the equivalent provisions found under the same Sub-Clause number(s) in the General Conditions, and the provisions of the Particular Conditions Part A – Contract Data take preference over the Particular Conditions Part B – Special Provisions."

Users of the DBO form of contract who wish to amend and use the document for a 'brown field'

scenario for the operation and refurbishment of an existing facility, or where an operation period significantly different to the 20-year period assumed in this document, are referred to the forthcoming *FIDIC DBO Contract Guide* (planned for publication by FIDIC at a later date), for guidance and assistance in identifying those clauses and procedures which may need amending.

NOTES ON THE PREPARATION OF TENDER DOCUMENTS

When preparing the tender documents and planning the tendering process, Employers are recommended to read the publication *FIDIC Procurement Procedures* which gives invaluable help and advice on the contents of the tender documents, and the procedures for receiving and evaluating tenders.

The tender documents should be prepared by suitably qualified engineers who are familiar with the technical aspects of the required works and the particular requirements and contractual provisions of a DBO project. Furthermore, a review by suitably qualified lawyers may be advisable.

The tender documents issued to tenderers should normally include the following:

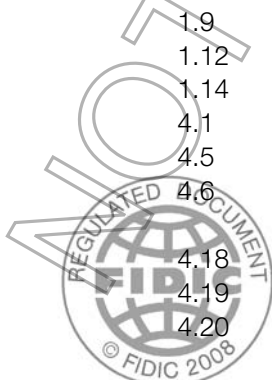
- Letter of invitation to tender
- Instructions to Tenderers
- Tender form and required appendices
- Employer's Requirements
- Conditions of Contract: General and Particular
- General information and data
- Technical information and data
- Schedules and drawings from Employer
- Details of schedules and drawings and other information required from tenderers
- Required forms of agreement, licence, securities and guarantees.

The publication *FIDIC Procurement Procedures* referred to above provides useful guidance as to the content and format of each of the above sections.

In particular, the Employer's Requirements should specify the particular requirements for the completed Works, including functional and operational requirements, quality and scope. If the Contractor is required to supply certain items, such as consumables or spare parts, etc., these should be listed in a Schedule. Drafters of the Employer's Requirements must remember that if any matters are not referred to or covered, the Contractor may well be relieved of any responsibility in respect of such matters.

The following Sub-Clauses make specific reference to matters which may be included in the Employer's Requirements. However, it may also be necessary under other Sub-Clauses for the Employer to give specific information in the Employer's Requirements:

- | | |
|------|------------------------------------------------------------------|
| 1.9 | Publications to be kept on Site |
| 1.12 | Intellectual property rights retained by Employer |
| 1.14 | Permissions being obtained by the Employer |
| 4.1 | Intended purposes for which the Works are required |
| 4.5 | Details of required nominated Subcontractors |
| 4.6 | Other contractors (and others) on the Site |
| 4.18 | Documents required by Employer |
| 4.19 | Environmental constraints |
| 4.20 | Electricity, water, gas and other services available on the Site |
| | Employer's Equipment and free-issue material |



5.1	Criteria for design personnel
5.2	Contractor's Documents required, and whether for approval Period for review
5.4	Technical standards and building regulations
5.5	As-built drawings and other records of the Works
6.1	Engagement of Staff
6.6	Facilities for Personnel
7.8	Payment of Royalties
10.5	Training required
11.1	Testing criteria.

Many Sub-Clauses in the General Conditions make reference to data being contained in the Particular Conditions Part A – Contract Data. This is data which must be provided in the tender documents, and these Conditions of Contract assume that all such Contract Data will be provided by the Employer. If the Employer requires tenderers to provide any of the information required in the Contract Data, the tender documents must make this quite clear.

If the Employer requires tenderers to provide additional data or information, a convenient way of doing this is to provide a suitably worded questionnaire with the tender documents.

If selected tenderers are required to carry out any preliminary design or study prior to deciding on the award, Employers should also consider remunerating the tenderers involved for such work.

It is important for the Parties to understand which of the documents included in the tender dossier, and which of the documents submitted by tenderers, will form a part of the Contract to be awarded by the Employer. For example, the Instructions to Tenders are not, by definition, a part of the Contract. They are simply instructions and information on the preparation and submission of the tender, and they should not contain anything of a binding or contractual nature.

Finally, when planning the overall programme, Employers must remember to allow a realistic time for tenderers to prepare and submit a responsive tender. Too short a time, and experienced contractors will not be prepared to tender, and too long a time will not be required and will be wasted.

Employers should also allow a realistic time for the review and evaluation of tenders and the award of the Contract to the successful tenderer. This will be the minimum time which tenderers should be asked to hold their tenders valid and open to acceptance.

NOTES ON THE PREPARATION OF SPECIAL PROVISIONS

The following references and examples show some of the Sub-Clauses in the General Conditions which may need amending to suit the needs of the project or the requirements of the Employer. The selected Sub-Clauses and the example wording are included as examples only. They also include, as an aide-memoire, references to other documents such as the Employer's Requirements and Contract Data, where particular issues may need to be addressed.

The selected Sub-Clauses do not necessarily require changing and the example wording may not suit the particular needs of the project or the Employer. It is the responsibility of the drafter of the Special Provisions to ensure that the selection of the Clauses and the choice of wording is appropriate to fulfill the new requirements. Furthermore, there may be other Sub-Clauses, not mentioned below, which need to be amended. Great care must be taken when amending the wording of Sub-Clauses from the General Conditions, or adding new provisions, to ensure that the balance of obligations and rights of the Parties is not unintentionally compromised.

Clause 1

General Provisions

Sub-Clause 1.1

Definitions

It is not recommended that any changes are made to the Definitions. This could have serious consequences on the interpretation of the document.

There are limited circumstances where some definitions may not be appropriate and may need changing or developing. For example, if the Site extends over two countries, the following changes could be considered.

EXAMPLE

1.1.25

"Country" means either xxxxx or yyyy depending on the location to which the reference will apply.

EXAMPLE

1.1.50

"Local Currency" means the currency of (name of country) or (name of country).

If it is necessary to introduce new terminology into the text of the Special Provisions, this should be carefully and properly defined, commencing with Sub-Clause 1.1.84, for example:

EXAMPLE

1.1.84

"Safety Regulations" means the Employer's safety regulations existing on the Site which the Contractor is required to follow.

Sub-Clause 1.5

Priority of Documents

An order of precedence is usually necessary, in case a conflict is subsequently found among the contract documents. If no order of precedence is to be prescribed, this Sub-Clause may be varied:

EXAMPLE

Delete Sub-Clause 1.5 and substitute:

The documents forming the Contract are to be taken as mutually explanatory of one another. If an ambiguity or discrepancy is found, the priority shall be such as may be accorded by the governing law. The Employer's Representative has authority to issue any instruction which he considers necessary to resolve an ambiguity or discrepancy.

Sub-Clause 1.6

Contract Agreement

Entry into a formal Contract Agreement may be mandatory under the applicable law. In such a case, the words "unless they agree otherwise" should be deleted from the text.

Sub-Clause 1.7

Operating Licence

If the required authorization is not in the form of an Operating Licence, or the terms according to the applicable law differ to the details given in the General Conditions, it may be necessary to provide more specific details regarding the form and nature of the authorization which the Employer will provide.

Sub-Clause 1.11 Employer's Use of Contractor's Documents

Additional provisions may be required, if all rights to particular items of computer software (for example) are to be assigned to the Employer. The provisions should take account of the applicable laws.

Sub-Clause 1.15 Joint and Several Liability

For a major contract, detailed requirements for the joint venture may need to be specified. These requirements, which tenderers will need to know when preparing their tenders, should be included in the Instructions to Tenderers. The Employer will wish the leader of the joint venture to be appointed at an early stage, providing a single point of contact thereafter, and will not wish to be involved in a dispute between the members of a joint venture. The Employer should scrutinise the joint venture agreement carefully, and it may have to be approved by the project's financing institutions.

Clause 2 The Employer

Sub-Clause 2.1 Right of Access to the Site

If right of access and possession of the Site cannot be granted in the normal way, details should be given in the Employer's Requirements.

Sub-Clause 2.3 Employer's Personnel

The provisions concerning cooperation between contractors should be reflected in the Employer's contracts with any other contractors on the Site.

Clause 3 The Employer's Representative

Sub-Clause 3.1 Employer's Representative's Duties and Authority

Any requirements for Employer's approval should be set out in these Special Conditions:

EXAMPLE

The Employer's Representative shall obtain the specific approval of the Employer before taking action under the following Sub-Clauses of these Conditions:

- (a) Sub-Clause _____ *
- (b) Sub-Clause _____ *

* [Insert number and describe specific procedure, where appropriate]

If the obligation to obtain the approval of the Employer only applies beyond certain limits, financial or otherwise, the example wording should be varied accordingly.

This requirement should not be applied to Sub-Clause 3.5 [Determinations], where the Employer's Representative is required to act fairly.

Schedule of Meetings

It can be useful to give information in the Employer's Requirements of the planned schedule

of meetings such as Management Meetings, Site Meetings, Technical Meetings, Progress Meetings, etc.

Clause 4

The Contractor

Sub-Clause 4.1

Contractor's General Obligations

The Employer's Requirements must contain a clear and specific purpose for which the facility will be used when complete, in order that the Contractor can comply with his obligation to provide Works which are 'fit for purpose'.

Sub-Clause 4.2

Performance Security

The acceptable form(s) of Performance Security should be included in the tender documents. Example forms are included in the section "Sample Forms" of this document. They incorporate two sets of Uniform Rules published by the International Chamber of Commerce (the "ICC", which is based at 38 Cours Albert 1^{er}, 75008 Paris, France), which also publishes guides to these Uniform Rules. These example forms and the wording of the Sub-Clause may have to be amended to comply with applicable law.

EXAMPLE

At the end of the second paragraph of Sub-Clause 4.2, insert:

If the Performance Security is in the form of a bank guarantee, it shall be issued either (a) by a bank located in the Country, or (b) directly by a foreign bank acceptable to the Employer. If the Performance Security is not in the form of a bank guarantee, it shall be furnished by a financial entity registered, or licensed to do business, in the Country.

The tender documents should make it quite clear how the reduction in the amount of the Performance Security at the end of the Design-Build Period will be managed.

If separate, or staged, Performance Securities are required during the Operation Service Period, and this Sub-Clause will need amending to reflect the appropriate requirements.

Sub-Clause 4.12

Unforeseeable Physical Conditions

In the case of major sub-surface works, the allocation of the risk of sub-surface conditions is an aspect which should be considered when tender documents are being prepared.

If this risk is to be shared between the Parties, the Sub-Clause may be amended:

EXAMPLE

Delete sub-paragraph (b) of Sub-Clause 4.12 and substitute:

(b) payment for any such Cost, _____ percent (_____ %) of which shall be included in the Contract Price (the balance _____ percent (_____ %) of the Cost shall be borne by the Contractor).

Sub-Clause 4.16

Transport of Goods

In some cases, the Contractor may be required to get permission prior to delivery. In such cases the following wording could be added:

EXAMPLE

Insert at the end of Sub-Clause 4.16:

The Contractor shall obtain permission in writing from the Employer's Representative prior to delivering any item of Goods to the Site. No Goods shall be delivered without this permission, which shall not relieve the Contractor from any obligation.

Clause 5

Design

Sub-Clause 5.1

General Design Obligations

If the Employer's Requirements include an outline design, tenderers should be advised of the extent to which the Employer's outline design is a suggestion or a requirement, and which parts, if any, are immutable.

Sub-Clause 5.2

Contractor's Documents

The Employer's Requirements should specify the extent to which Contractor's Documents are required, which of them are required for approval (not just review), and the submission procedures.

If different "review periods" are considered necessary, taking account of the time required to review the different types of drawing, and/or of the possibility of substantial submissions at particular stages of the design-build process, details should be given in these Particular Conditions.

Clause 6

Staff and Labour

Sub-Clause 6.6

Facilities for Staff and Labour

If the Employer plans to make office accommodation available for the Contractor, for example, during the Operation Service Period, details should be given in the Employer's Requirements.

See also Clause 17 [*Risk Allocation*] for suggested provisions regarding care of such facilities.

Sub-Clause 6.8

Contractor's Superintendence

If the ruling language is not the same as the language for day-to-day communications (under Sub-Clause 1.4 [*Law and Language*]), or if for any other reason it is necessary to stipulate that the Contractor's superintending staff shall be fluent in a particular language, the following sentence may be added.

EXAMPLE

Insert at the end of Sub-Clause 6.8:

A reasonable proportion of the Contractor's superintending staff shall have a working knowledge of

[*Insert name of language*],

or the Contractor shall have a sufficient number of competent interpreters available on Site during working hours.



Clause 7

Plant, Materials and Workmanship

Additional Sub-Clause

If the Contract is being financed by an institution whose rules or policies require a restriction on the use of its funds, a further sub-clause may be added:

EXAMPLE SUB-CLAUSE

All Goods shall have their origin in eligible source countries as defined in

[Insert name of published guidelines for procurement].

Goods shall be transported by carriers from these eligible source countries, unless exempted by the Employer in writing on the basis of potential excessive costs or delays. Surety, insurance and banking services shall be provided by insurers and bankers from the eligible source countries.

Clause 8

Commencement, Delays and Suspension

Sub-Clause 8.2

Time for Completion

If the Works are to be commissioned in stages, these stages should be defined as Sections, in the Contract Data.

Sub-Clause 8.5

Delay Damages

Under many legal systems (notably in common law jurisdictions), the amount of these pre-defined damages must represent a reasonable pre-estimate of the Employer's probable loss in the event of delay. If the Accepted Contract Amount is to be quoted as the sum of figures in more than one currency, it may be preferable to define these damages (per day) as the percentage reduction which would be applied to each of these figures.

If the Accepted Contract Amount is expressed in the Local Currency, the damages per day may either be defined as a percentage or be defined as a figure in Local Currency: see Sub-Clause 14.17(b).

Clause 10

Operation Service

Sub-Clause 10.2

Commencement of Operation Service

If there are known reasons why the Operation Service Period cannot commence upon the issue of the Commissioning Certificate, the first paragraph may be deleted and replaced by the following:

EXAMPLE

Notwithstanding the issue of the Commissioning Certificate, the Operation Service shall not commence until the Contractor receives a written instruction to commence from the Employer's Representative. Such instruction shall be issued within 28 days of the date of issue of the Commissioning Certificate.



Clause 11

Testing

Sub-Clause 11.4

Failure to Pass Tests on Completion of Design-Build

If the failure is such that the facility can still be operated and used, the Employer may choose to accept the failure and impose non-performance damages. These damages can be tabulated against the required performance criteria in the Contract Data, and a subparagraph (c) could be added to Sub-Clause 11.4 [*Failure to Pass Tests on Completion of Design-Build*] as follows:

EXAMPLE

(c) issue the Commissioning Certificate to the Contractor subject to the payment of the non-performance damages specified in the Contract Data.

Clause 13

Variations and Adjustments

Sub-Clause 13.5

Provisional Sums

Provisional Sums may be required for parts of the Works which are not required to be priced at the risk of the Contractor. For example, a Provisional Sum may be necessary to cover goods which the Employer wants to select, or to deal with a major uncertainty regarding sub-surface conditions. It is essential to define the scope of each Provisional Sum (possibly in a Schedule prepared by the Employer), since the defined scope will then be excluded from the other elements of the Accepted Contract Amount.

Clause 14

Contract Price and Payment

The provisions of Clause 14 [*Contract Price and Payment*] should be carefully studied to see that they are acceptable to both the Employer and any financing institution he may be using to fund the project. In particular, the Employer's procedures and timing for making payments should be checked to see that they comply within the wording in Clause 14. If they do not, the wording in Clause 14 may need to be changed. For example, if the times for payment given in Sub-Clause 14.8 [*Payment*] cannot be met, it is necessary to change the times given.

If expatriate staff are exempted from paying local income tax, a suitable sub-clause will need adding. However, advice should be sought from a qualified tax expert before drafting any such sub-clause.

Additional Sub-Clause

EXAMPLE SUB-CLAUSE

Expatriate (foreign) personnel shall not be liable for income tax levied in the Country on earnings paid in any foreign currency, or for income tax levied on subsistence, rentals and similar services directly furnished by the Contractor to Contractor's Personnel, or for allowances in lieu. If any Contractor's Personnel have part of their earnings paid in the Country in a foreign currency, they may export (after the conclusion of their term of service on the Works) any balance remaining of their earnings paid in foreign currencies.

The Employer shall seek exemption for the purposes of this Sub-Clause. If it is not granted, the relevant taxes paid shall be reimbursed by the Employer.



Clause 15

Termination by Employer

Sub-Clause 15.2

Termination by Employer

Before inviting tenders, the Employer should verify that the wording of this Sub-Clause, and each anticipated ground for termination, is consistent with the law governing the Contract.

Clause 16

Suspension and Termination by Contractor

Sub-Clause 16.2

Termination by Contractor

Before inviting tenders, the Employer should verify that the wording of this Sub-Clause is consistent with the law governing the Contract. The Contractor should verify that each anticipated ground for termination is consistent with such law.

Clause 17

Risk Allocation

Additional Sub-Clause Use of Employer's Accommodation/Facilities

If the Contractor is to occupy the Employer's facilities and/or accommodation during the Operation Service Period or any other period during the Contract, it may be necessary to add an additional sub-clause to cover his responsibilities for care.

EXAMPLE SUB-CLAUSE

The Contractor shall take full care of the items listed below from the date of use or occupation by the Contractor until the date on which such use or occupation is re-vested in the Employer.

[List of items and details]

If any loss or damage happens to any of the above items whilst the Contractor is responsible for their care, arising from any cause other than a cause for which the Employer is responsible or liable, the Contractor shall, at his own cost, rectify such loss or damage to the condition prior to such loss or damage occurring.

Clause 19

Insurance

If the Employer wishes to change the insurance provisions – for example by providing some of the insurance cover himself – it will be necessary to review and revise some of the provisions in Clause 19 *[Insurance]*. If this is the case, it is strongly recommended that a professional with extensive experience in construction insurance and liability should prepare the revised sub-clauses. If the insurance provisions are changed without due care and attention, there is a risk that the Employer will find himself carrying liabilities for which he is neither prepared nor covered.

Clause 20

Claims, Disputes and Arbitration

Sub-Clause 20.3

Appointment of the Dispute Adjudication Board

The adjudication procedure depends for its success on, amongst other things, the Parties' confidence in the agreed individual(s) who will serve on the DAB. Therefore, it is essential that

candidates for this position are not imposed by either Party on the other Party. Furthermore, if the individual is selected under Sub-Clause 20.4 [*Failure to Agree Dispute Adjudication Board*], the selection should be made by a wholly impartial entity with an understanding of the nature and purpose of a DAB. FIDIC is prepared to perform this role, and maintains a list of approved and experienced adjudicators.

Sub-Clause 20.3 [*Appointment of the Dispute Adjudication Board*] provides for two alternative arrangements for the Dispute Adjudication Board.

- (a) one person, who acts as the sole member of the DAB, having entered into a tripartite agreement with both Parties; or
- (b) a DAB of three persons, each of whom has entered into a tripartite agreement with both Parties.

A recommended form of this tripartite agreement is shown at the end of this document (in the section "Sample Forms"). This agreement incorporates (by reference) the General Conditions of Dispute Adjudication Agreement, which are included in this document (in the section "General Conditions"). They are also incorporated by reference in Sub-Clause 20.3 [*Appointment of the Dispute Adjudication Board*] of the General Conditions.

Before the Contract is entered into, consideration should be given as to whether a one-person or three-person DAB is preferable for a particular project, taking account of its size, duration and the fields of expertise which will be involved.

Sub-Clause 20.4 Failure to Agree Dispute Adjudication Board

It is essential that any entity or official named in the Contract as the 'appointing entity' is suitably qualified and willing to act in that capacity, and accepts to do so prior to naming them in the Contract. Examples of suitable persons able to fill this role include the President of FIDIC and the International Chamber of Commerce.

Sub-Clause 20.8 Arbitration

The Contract should include provisions for the resolution by international arbitration of any Disputes which are not resolved amicably. In international engineering contracts, international commercial arbitration has numerous advantages over litigation in national courts, and may be more acceptable to the Parties.

Careful consideration should be given to ensuring that the international arbitration rules chosen are compatible with the provisions of Clause 20 [*Claims, Disputes and Arbitration*] and with the other elements to be set out in the Contract Data. The Rules of Arbitration of the International Chamber of Commerce (the "ICC", which is based at 38 Cours Albert 1er, 75008 Paris, France) are frequently included in international contracts.

It is important that the Parties agree upon the number of arbitrators and the language of arbitration. If these are not stipulated by the Parties in the Contract, the International Court of Arbitration of the ICC will decide on these issues.

If the UNCITRAL (or other non-ICC) arbitration rules are preferred, it may be necessary to designate, in the Contract Data, an institution to appoint the arbitrators or to administer the arbitration, unless the institution is named (and its role is specified) in the arbitration rules.

For major projects tendered internationally, it is desirable that the place of arbitration be situated in a country other than that of the Employer or the Contractor. This country should

have a modern and liberal arbitration law and should have ratified a bilateral or multilateral convention (such as the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*), or both, that would facilitate the enforcement of an arbitral award in the states of the Parties.

It may be considered desirable in some cases for other parties to be joined into any arbitration between the Parties, thereby creating a multi-party arbitration. While this may be feasible, multi-party arbitration clauses require skilful drafting, and usually need to be prepared on a case-by-case basis by a suitably qualified lawyer.

Sub-Clause 20.10 Disputes Arising during the Operation Service Period

As an alternative to the five-year appointment envisaged in Sub-Clause 20.10 [*Disputes Arising during the Operation Service Period*], the Operation Service DAB could be appointed on an ad-hoc basis, if and when any Dispute arises during this period. In such a case, the DAB would be appointed when a Dispute arises, and would cease its appointment on the issue of its decision in respect of such Dispute. Should a new Dispute arise, a new ad-hoc DAB would be appointed.

The wording of Sub-Clause 20.10 to reflect this could be along the following lines:

EXAMPLE

Disputes arising during the Operation Service Period which cannot be resolved between the Parties shall be settled by a one person ad-hoc DAB ("Operation Service DAB"). Such person shall be jointly agreed and appointed by the Parties by the date 28 days after one Party has given Notice to the other Party of its intention to refer a Dispute to a DAB in accordance with Sub-Clause 20.10 [*Disputes Arising during the Operation Service Period*].

If the Parties cannot agree on the person who shall be the Operation Service DAB, then the person shall be appointed according to the provisions of Sub-Clause 20.4 [*Failure to Agree Dispute Adjudication Board*].

The agreement between the Parties and the Operation Service DAB shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the General Conditions of Contract, with such amendments as are agreed between them.

The terms of remuneration of the Operation Service DAB shall be mutually agreed upon by the Parties when agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.

The procedure for obtaining a decision from the Operation Service DAB shall be in accordance with the provisions of Sub-Clause 20.6 [*Obtaining Dispute Adjudication Board's Decision*], and the DAB shall give its decision no later than 84 days after receiving the response or, if no response is submitted, 105 days after receiving the reference and the supporting documentation from the Parties.

The appointment of the Operation Service DAB shall expire 28 days after it has given its decision in writing to both Parties.



If either Party is dissatisfied with the decision of the Operation Service DAB, the provisions of Sub-Clauses 20.6 [*Obtaining Dispute Adjudication Board's Decision*], 20.7 [*Amicable Settlement*], 20.8 [*Arbitration*] and 20.9 [*Failure to Comply with Dispute Adjudication Board's Decision*] shall apply.



INTRODUCTION

GENERAL CONDITIONS

FIDIC® Conditions of Contract for **DESIGN, BUILD AND OPERATE PROJECTS**

PARTICULAR CONDITIONS

SAMPLE FORMS

Sample Forms

First Edition 2008
ISBN 978-2-88432-052-8

FEDERATION INTERNATIONALE DES INGENIEURS-CONSEILS
INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS
INTERNATIONALE VEREINIGUNG BERATENDER INGENIEURE
FEDERACION INTERNACIONAL DE INGENIEROS CONSULTORES



Sample Forms

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Parent Company Guarantee
Performance Security - Demand Guarantee
Performance Security - Surety Bond
Advance Payment Guarantee
Maintenance Retention Guarantee

Introduction

The following Sample Forms are the forms referred to in the Contract documents and show formats which are acceptable under most jurisdictions.

The proposed forms should be included in the tender documents so that tenderers know what is required from them.

The sample forms of security (other than the form of Parent Company Guarantee) incorporate Uniform Rules published by the International Chamber of Commerce (the ICC, which is based at 38 Cours Albert 1er, 75008 Paris, France).

The attached sample forms of Security are prepared to cover the Design-Build Period. The provisions of Sub-Clause 4.2 [*Performance Security*] require a performance security to cover the full Contract Period. However it is recognized that this requirement may vary considerably from project to project and from Employer to Employer.

- Some Employers may not require a Performance Security during the Operation Service Period.
- Some Employers may require an on-going Security with a reduced value.
- Some Employers may require a new Security for the full Operation Service Period.
- Some Employers may require a short term renewable Security to cover the Operation Service Period.

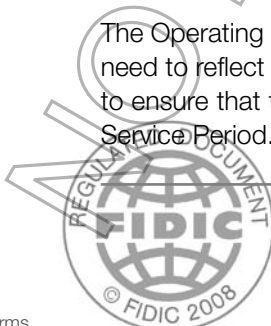
There are many options and alternatives.

For this reason, the sample forms included in this section only cover the Design-Build Period, and it is up to the drafter of the tender and contract documents to prepare appropriate provisions to suit the needs of the Employer and, where required, the financial institution which is funding the project. It is essential when preparing extended securities to obtain professional help to ensure that the proposed form is secure and binding on the parties, and it is recommended that all securities and guarantees shall incorporate, and be subject to the applicable Uniform Rules published by the International Chamber of Commerce.

When using or amending any of these sample forms, care must be taken to ensure that the format and wording of the forms to be incorporated into the Contract are not only appropriate, but also comply with the applicable laws.

It is recommended that professional and legal advice should be taken before incorporating or amending any of the sample forms provided.

The Operating Licence is in the form of a short aide memoire since the Licence Agreement itself will need to reflect not only the particular requirements of the Employer, but also the legal requirements to ensure that the Contractor has the continuing right of lawful entry and use during the Operation Service Period.



Sample Forms of Tender and Agreement

LETTER OF TENDER

Name of Contract: _____

Contract No.: _____

To: _____

We have examined the Conditions of Contract, Employer's Requirements, Schedules, Contract Data, and the attached Appendices and Addenda Nos _____ for the above-named Contract. We have understood and checked these documents and have ascertained that they contain no errors or other defects except as identified in our Tender. We accordingly offer to design, execute and complete the Works and remedy any defects therein so that they are fit for the purposes defined in the Contract, and to operate and maintain the facility under licence from the Employer for the period and in conformity with the terms and conditions contained in the Contract for the lump sum amount of: _____

(currency and amount in figures)

(currency and amount in words)

or such other amount as may be determined in accordance with the Contract.

This amount is made up of the following components:

For the Design-Build of the Works, the amount of: _____
(currency and amount in figures)

(currency and amount in words)

For the Operation Service, the amount of: _____
(currency and amount in figures)

(currency and amount in words)

For the Asset Replacement Fund, the amount of: _____
(currency and amount in figures)

(currency and amount in words)

We agree to abide by this Tender until _____ (date) and it shall remain binding upon us and may be accepted at any time before that date.

If this offer is accepted, we will provide the required Performance Security, and commence and complete the Works, and provide the Operation Service, in accordance with the above-named documents and the agreed programme.

We further undertake, together with the Employer, to jointly appoint the DAB and the Auditing Body in accordance with the requirements of the Contract.

Unless and until a formal Contract Agreement is prepared and executed, this Letter of Tender, together with your written acceptance thereof, shall constitute a binding Contract between us.

We understand that you are not bound to accept the lowest or any tender you may receive.

Signed by: _____
(signature)

in the capacity of: _____

duly authorised to sign tenders for and on behalf of: _____

Address: _____

Date: _____



LETTER OF ACCEPTANCE

Name of Contract: _____

Contract Number: _____

To: _____

Date: _____

Your Reference: _____

Our Reference: _____

We thank you for your Tender dated _____ for the design, execution and completion of the Works comprising the above-named Contract and remedying of defects therein so that they are fit for the purposes defined in the Contract, and for the operation and maintenance thereof under licence for the period of _____ years, all in conformity with the terms and conditions contained in the Contract as amended by the attached Memorandum, signed by you and ourselves.

We have pleasure in accepting your Tender (as corrected/adjusted in accordance with the Memorandum) for the Accepted Contract Amount of:

_____ (currency and amount in figures)

_____ (currency and amount in words)

This amount is made up of the following components:

For the Design-Build of the Works, the amount of: _____ (currency and amount in figures)

_____ (currency and amount in words)

For the Operation Service, the amount of: _____ (currency and amount in figures)

_____ (currency and amount in words)

For the Asset Replacement Fund, the amount of: _____ (currency and amount in figures)

_____ (currency and amount in words)

In consideration of you properly and truly performing the Contract, we agree to pay you the Accepted Contract Amount or such other sums to which you may become entitled under the terms of the Contract, at such times and as prescribed by the Contract.

We acknowledge that this Letter of Acceptance creates a binding Contract between us, and we undertake to fulfil all our obligations and duties in accordance with the terms of this Contract.

Signed by: _____ (signature)

For and behalf of: _____

Date: _____



CONTRACT AGREEMENT

This Agreement made the _____ day of _____, 20_____,
between _____ (name of Employer)
of _____ (address of Employer)
(herein called "the Employer"), of the one part,

and _____ (name of Contractor)
of _____ (address of Contractor)
(herein called "the Contractor"), of the other part:

Whereas the Employer desires that the Works known as _____ (name of Contract)
should be designed, executed and operated by the Contractor and has accepted a Tender from
the Contractor for the design, execution, completion and operation and maintenance of these
Works, and the remedying of any defects therein,

The Employer and the Contractor agree as follows:

1. In this Agreement, the words and expressions shall have the same meanings as are
respectively assigned to them in the Conditions of Contract hereinafter referred to.
2. The following documents shall be deemed to form and be read and construed as a part of
this Agreement:
 - (a) The Letter of Acceptance dated _____
 - (b) The Letter of Tender dated _____
 - (c) The Addenda Nos. _____
 - (d) The Conditions of Contract _____
 - (e) The Employer's Requirements _____
 - (f) The completed Schedules _____
 - (g) The Operating Licence, and _____
 - (h) The Contractor's Proposal _____
3. In consideration of the payments to be made by the Employer to the Contractor as hereinafter
mentioned, the Contractor hereby covenants with the Employer to design, execute, complete,
operate and maintain the Works and remedy any defects therein in conformity with the
provisions of the Contract and the Operating Licence granted by the Employer.
4. The Employer hereby covenants to pay the Contractor, in consideration of the design,
execution, completion, operation and maintenance of the Works and the remedying of
defects therein, the Contract Price at the times and in the manner prescribed by the
Contract, and to grant the Contractor a royalty-free licence to enable him to operate and
maintain the Works during the Operation Service Period.

In witness whereof the Parties hereto have caused this Agreement to be executed on the day and
year first above written.

Signed by: _____
(signature)

for and on behalf of the Employer in the presence of

Witness: _____
(signature)

Name: _____

Address: _____

Date: _____

Signed by: _____
(signature)

for and on behalf of the Contractor in the presence of

Witness: _____
(signature)

Name: _____

Address: _____

Date: _____

AGREEMENT FOR DISPUTE ADJUDICATION BOARD MEMBERS

[All italicised text and any enclosing square brackets is for use in preparing the form and should be deleted from the final product.]

Name of Contract: _____

This Agreement made the _____ day of _____, 20____, between

Name and address of Employer: _____

Name and address of Contractor: _____

Name and address of DAB Member: _____

Whereas the Employer and the Contractor have entered into a Contract and desire jointly to appoint the above-named Member to act on the DAB as [delete where not applicable] sole adjudicator/one of three adjudicators/chairman of the DAB,

And whereas the Member accepts the appointment.

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the "General Conditions of Dispute Adjudication Agreement" which are appended hereto, and the following provisions. In these provisions, which include amendments and additions to the "General Conditions of Dispute Adjudication Agreement", words and expressions shall have the same meanings as are assigned to them in the "General Conditions of Dispute Adjudication Agreement".
2. [Details of any amendments or additions or deletions from the "General Conditions of Dispute Adjudication Agreement" should be given here or in an attachment hereto.]
3. In accordance with Clause 6 of the "General Conditions of Dispute Adjudication Agreement", the Member shall be paid as follows: A retainer fee of _____ per calendar month, and
A daily fee of _____ per day spent on Site visits, hearings, and other time in connection with submissions to the DAB made in accordance with the provisions of the Contract between the Employer and the Contractor.
4. In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 6 of the "General Conditions of Dispute Adjudication Agreement", the Member undertakes to act as the DAB Member in the capacity above-mentioned in accordance with the terms of this Dispute Adjudication Agreement.
5. The Employer and the Contractor jointly and severally undertake to pay the Member in consideration for his acting as the DAB Member as aforementioned in accordance with this Dispute Adjudication Agreement.
6. This Dispute Adjudication Agreement shall be governed by the law of: _____

Signed by: _____
(signature)

for and on behalf of the Employer
in the presence of

Witness: _____
(signature)

Name: _____
Address: _____
Date: _____

Signed by: _____
(signature)

for and on behalf of the Contractor
in the presence of

Witness: _____
(signature)

Name: _____
Address: _____
Date: _____

Signed by: _____
(signature)

The Member in the presence of

Witness: _____
(signature)

Name: _____
Address: _____
Date: _____

AGREEMENT FOR OPERATION SERVICE DISPUTE ADJUDICATION BOARD

[All italicised text and any enclosing square brackets is for use in preparing the form and should be deleted from the final product.]

Name of Contract: _____

This Agreement made the _____ day of _____, 20____, between

Name and address of Employer: _____

Name and address of Contractor: _____

Name and address of DAB Member: _____

Whereas the Employer and the Contractor have entered into a Contract and desire jointly to appoint the above-named Member to act as the sole adjudicator on the Operation Service DAB for a period of five (5) years from the date of this Agreement,

And whereas the Member accepts the appointment.

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the "General Conditions of Dispute Adjudication Agreement" which are appended hereto, and the following provisions. In these provisions, which include amendments and additions to the "General Conditions of Dispute Adjudication Agreement", words and expressions shall have the same meanings as are assigned to them in the "General Conditions of Dispute Adjudication Agreement".
2. *[Details of any amendments or additions or deletions from the "General Conditions of Dispute Adjudication Agreement" should be given here or in an attachment hereto.]*
3. In accordance with Clause 6 of the "General Conditions of Dispute Adjudication Agreement", the Member shall be paid as follows: A retainer fee of _____ per calendar month, and
A daily fee of _____ per day spent on Site visits, hearings, and other time in connection with submissions to the DAB made in accordance with the provisions of the Contract between the Employer and the Contractor.
4. In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 6 of the "General Conditions of Dispute Adjudication Agreement", the Member undertakes to act as the DAB Member in the capacity above-mentioned in accordance with the terms of this Dispute Adjudication Agreement.
5. The Employer and the Contractor jointly and severally undertake to pay the Member in consideration for his acting as the DAB Member as aforementioned in accordance with this Dispute Adjudication Agreement.
6. This Dispute Adjudication Agreement shall be governed by the law of: _____

Signed by: _____
(signature)

for and on behalf of the Employer
in the presence of:

Witness: _____
(signature)

Name: _____

Address: _____

Date: _____

Signed by: _____
(signature)

for and on behalf of the Contractor
in the presence of:

Witness: _____
(signature)

Name: _____

Address: _____

Date: _____

Signed by: _____
(signature)

For and behalf of the Member in
the presence of:

Witness: _____
(signature)

Name: _____

Address: _____

Date: _____

OPERATING LICENCE

Aide Memoire

The Operating Licence is a document which is issued by the Employer to the Contractor at the time of issuing the Letter of Acceptance in accordance with Sub-Clause 1.7 [*Operating Licence*] of the Conditions of Contract, although it will not come into effect until the issue of the Commissioning Certificate.

The purpose of the Operating Licence is to give the Contractor unhindered legal access to the Works and the facility, and the legal right to operate the facility during the Operation Service Period in compliance with his obligations under his Contract with the Employer.

The terms of the licence must ensure that it is royalty-free and is issued without cost to the Contractor. It will automatically come into full force and effect upon the issue of the Commissioning Certificate, and it shall remain in full force and effect until the issue of the Contract Completion Certificate.

The proposed format and wording of the licence should be included in the tender documents so that tenderers know how it will function during the Operation Service Period.

The nature and format of the Operating Licence must clearly define the requirements of the Employer and must be a legally secure commitment from the Employer to allow the Contractor unhindered access to the facility for the duration of the Operation Service Period. Whatever the name or status of the document which the Employer provides for this purpose, all references in the Contract to Operating Licence shall be deemed to refer to that document.



Sample Forms of Security and Guarantee

TENDER SECURITY

Name of Contract/Contract No.: _____

Name and address of Beneficiary "the Employer": _____

We have been informed that: _____

(name of Tenderer)

(hereinafter called the "Principal") is submitting an offer for the above-named Contract in response to your invitation, and the conditions of your invitation require that his offer is supported by a tender security.

At the request of the Principal, we: _____

(name of bank)

hereby irrevocably undertake to pay you, the Beneficiary/Employer, any sum or sums not exceeding in total the amount of _____ (in words: _____) upon receipt by us of your demand in writing and your written statement (in the demand) stating that:

- (a) the Principal has, without your agreement, withdrawn his offer after the latest time specified for its submission and before the expiry of its period of validity, or
- (b) the Principal has refused to accept the correction of errors in his offer in accordance with the conditions of your invitation, or
- (c) you awarded the Contract to the Principal and he has failed to comply with Sub-Clause 1.6 [Contract Agreement] of the Conditions of Contract, or
- (d) you awarded the Contract to the Principal and he has failed to comply with Sub-Clause 4.2 [Performance Security] of the Conditions of Contract.

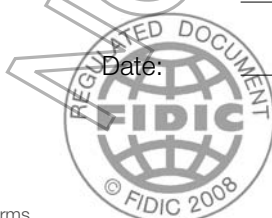
Any demand for payment must contain your signature(s) which must be authenticated by your bankers or by a notary public. The authenticated demand and statement must be received by us at this office on or before _____ (the date 35 days after the expiry of the validity of the Letter of Tender) _____, when this guarantee shall expire and shall be returned to us.

This guarantee is subject to the Uniform Rules for Demand Guarantees, published as number 458 by the International Chamber of Commerce, except as stated above.

Signed by: _____ Signed by: _____
(signature) (signature)

(name) (name)

Date: _____



PARENT COMPANY GUARANTEE

Name of Contract/Contract No.: _____

Name and address of Employer: _____
_____ (together with successors and assigns).

We have been informed that _____
_____ (name of Contractor)

(hereinafter called the "Contractor") is submitting an offer for such Contract in response to your invitation, and that the conditions of your invitation require his offer to be supported by a parent company guarantee.

In consideration of you, the Employer, awarding the Contract to the Contractor, we _____
_____ (name of parent company)

irrevocably and unconditionally guarantee to you, as a primary obligation, the due performance of all the Contractor's obligations and liabilities under the Contract, including the Contractor's compliance with all its terms and conditions according to their true intent and meaning.

If the Contractor fails to so perform his obligations and liabilities and comply with the Contract, we will indemnify the Employer against and from all damages, losses and expenses (including legal fees and expenses) which arise from any such failure for which the Contractor is liable to the Employer under the Contract.

This guarantee shall come into full force and effect when the Contract comes into full force and effect. If the Contract does not come into full force and effect within a year of the date of this guarantee, or if you demonstrate that you do not intend to enter into the Contract with the Contractor, this guarantee shall be void and ineffective. This guarantee shall continue in full force and effect until all the Contractor's obligations and liabilities under the Contract have been discharged, when this guarantee shall expire and shall be returned to us, and our liability hereunder shall be discharged absolutely.

This guarantee shall apply and be supplemental to the Contract as amended or varied by the Employer and the Contractor from time to time. We hereby authorise them to agree any such amendment or variation, the due performance of which and compliance with which by the Contractor are likewise guaranteed hereunder. Our obligations and liabilities under this guarantee shall not be discharged by any allowance of time or other indulgence whatsoever by the Employer to the Contractor, or by any variation or suspension of the works to be executed under the Contract, or by any amendments to the Contract or to the constitution of the Contractor or the Employer, or by any other matters, whether with or without our knowledge or consent.

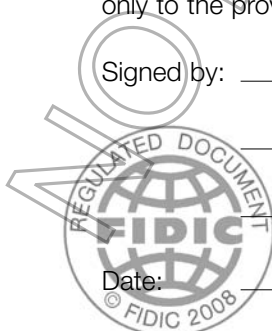
This guarantee shall be governed by the law of the same country (or other jurisdiction) as that which governs the Contract and any dispute under this guarantee shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with such Rules. We confirm that the benefit of this guarantee may be assigned subject only to the provisions for assignment of the Contract.

Signed by: _____ Signed by: _____
_____ (signature) _____ (signature)

_____ (name) _____ (name)

_____ (position in parent company) _____ (position in parent company)

Date: _____



PERFORMANCE SECURITY – DEMAND GUARANTEE

NOTE: This form is suitable during the Design-Build Period. If a security is required during the Operation Service Period (either in the form envisaged in the Contract, or in another form), this must be carefully prepared with professional and legal help.

Name of Contract/Contract No.: _____

Name and address of Beneficiary ("the Employer"): _____

We have been informed that: _____

(name of Contractor)

(hereinafter called the "Principal") is your contractor for the above-named Contract which requires him to obtain a performance security.

At the request of the Principal, we: _____

(name of bank)

undertake to pay you, the Beneficiary/Employer, any sum or sums not exceeding in total the amount of _____ (amount in words: _____) (the "guaranteed amount") upon receipt by us of your demand in writing with your written statement stating:

- (a) that the Principal is in breach of his obligations under the Contract, and
- (b) the respect in which the Principal is in breach.

Any demand for payment must contain your signature(s) which must be authenticated by your bankers or by a notary public. The authenticated demand and statement must be received by us at this office on or before _____ (the date 70 days after the expected date issue of the Commissioning Certificate) (the "expiry date"), when this guarantee shall expire and shall be returned to us.

We have been informed that the Beneficiary may require the Principal to extend this guarantee if the Commissioning Certificate has not been issued 28 days prior to such expiry date and we hereby undertake to extend this guarantee until the date 70 days after the actual date of issue of the Commissioning Certificate upon receipt of your written statement advising us of the actual date of issue, and that the late issue was for reasons attributable to the Principal. In such a case, the expiry date shall be adjusted accordingly.

This guarantee shall be governed by the laws of _____, and shall be subject to the Uniform Rules for Demand Guarantees, published as number 458 by the International Chamber of Commerce, except as stated above.

Signed by: _____
(signature)

Signed by: _____
(signature)

(name)

(name)

Date: _____



PERFORMANCE SECURITY – SURETY BOND

NOTE: This form is suitable during the Design-Build Period. If a security is required during the Operation Service Period (either in the form envisaged in the Contract, or in another form), this must be carefully prepared with professional and legal help.

Name of Contract/Contract No.: _____

Name and address of Beneficiary ("the Employer"): _____

We have been informed that: _____

(name of Contractor)

(hereinafter called the "Principal") is your contractor for the above-named Contract which requires him to obtain a performance security.

By this Bond, _____,

(name and address of Contractor)

who is the Contractor under the above named Contract, as Principal and

(name and address of Guarantor)

as Guarantor, are irrevocably held and firmly bound to the Beneficiary in the total amount of _____ (amount in words: _____) (the "Bond Amount")

for the due performance of all the Principal's obligations and liabilities under the above named Contract.

The Bond shall become effective on the Commencement Date defined in the Contract.

Upon default by the Principal to perform any contractual obligation, or upon the occurrence of any of the events and circumstances listed in Sub-Clause 15.2 of the Conditions of Contract, the Guarantor shall satisfy and discharge the damages sustained by the Beneficiary due to such default, event or circumstance. However, the total liability of the Guarantor shall not exceed the Bond Amount.

The obligations and liabilities of the Guarantor shall not be discharged by any allowance of time or other indulgence whatsoever by the Beneficiary to the Principal, or by any variation or suspension of the Works to be executed under the Contract, or by any amendments to the Contract or to the constitution of the Principal or the Beneficiary, or by any other matters, whether with or without the knowledge or consent of the Guarantor.

Any claim under this Bond must be received by the Guarantor on or before _____ (the date six months after the expected date of issue of the Commissioning Certificate), (the "expiry date"), when this Bond shall expire and be returned to the Guarantor.

The benefits of this Bond may be assigned, subject to the provisions for assignment of the Contract, and subject to receipt by the Guarantor of evidence of full compliance with such provisions.

This Bond shall be governed by the laws of _____ being the same country (or other jurisdiction) as that which governs the Contract. The Bond incorporates and shall be subject to the Uniform Rules for Contract Bonds, published as number 524 by the International Chamber of Commerce, and words used in this Bond shall bear the meanings set out in such Rules.

Whereas this Bond has been issued by the Principal and the Guarantor on this _____ day of _____, 20 ____.

Signatures for and on behalf of the Principal:

(signature)

(name)

(signature)

(name)

Signatures for and on behalf of the Guarantor:

(signature)

(name)

(signature)

(name)



ADVANCE PAYMENT GUARANTEE

Name of Contract/Contract No.: _____

Name and address of Beneficiary ("the Employer"): _____

We have been informed that: _____
(name of Contractor)

(hereinafter called the "Principal") is your contractor for the above-named Contract and wishes to receive an advance payment, for which the Contract requires him to obtain a guarantee.

At the request of the Principal, we: _____
(name of bank)

hereby irrevocably undertake to pay you, the Beneficiary/Employer, any sum or sums not exceeding in total the amount of _____ (amount in words: _____) (the "guaranteed amount") upon receipt by us of your demand in writing with your written statement stating:

- (a) that the Principal has failed to repay the advance payment in accordance with the Conditions of Contract, and
- (b) the amount which the Principal has failed to repay.

This guarantee shall become effective upon receipt of the advance payment, or, where applicable, the first installment thereof, by the Principal. Such guaranteed amount shall be reduced by the amounts of the advance payment repaid to you from time to time as evidenced by the Interim Payment Certificates issued under Sub-Clause 14.7 of the Conditions of Contract. Following receipt by us from the Principal of each Interim Payment Certificate, we shall promptly notify you of the revised guaranteed amount.

Any demand for payment must contain your signature(s) which must be authenticated by your bankers or by a notary public. The authenticated demand and statement must be received by us at this office on or before _____ (the date 70 days after the expected date of completion of the Design-Build) (the "expiry date"), when this guarantee shall expire and be returned to us.

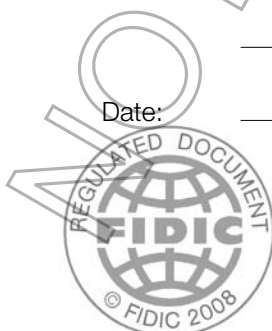
If the advance payment has not been fully repaid 28 days prior to the expiry date, we undertake, upon receipt of your written demand and statement that the advance payment has not been repaid, to pay you the guaranteed amount within 28 days of your demand.

This guarantee shall be governed by the laws of _____, and shall be subject to the Uniform Rules for Demand Guarantees, published as number 458 by the International Chamber of Commerce, except as stated above.

Signed by: _____ Signed by: _____
(signature) (signature)

(name) (name)

Date: _____



MAINTENANCE RETENTION GUARANTEE

Name of Contract and/or Contract No.: _____

Name and address of Beneficiary ("the Employer"): _____

We have been informed that: _____
(name of Contractor)

(hereinafter called the "Principal") is your contractor for the above-named Contract and wishes to receive early payment of, for which the Contract requires him to obtain a guarantee.

At the request of the Principal, we: _____
(name of bank)

hereby irrevocably undertake to pay you, the Beneficiary/Employer, any sum or sums not exceeding in total the amount of _____ (amount in words: _____) (the "guaranteed amount") upon receipt by us of your demand in writing with your written statement stating:

- (a) that the Principal has failed to carry out his obligation(s) to rectify certain defect(s) for which he is responsible under the Contract, and
- (b) the nature of such defects.

This guarantee shall become effective upon receipt of the advance payment, or, where applicable, the first installment thereof, by the Principal. Such guaranteed amount shall be reduced by the amounts of the advance payment repaid to you from time to time as evidenced by the Interim Payment Certificates issued under Sub-Clause 14.7 of the Conditions of Contract. Following receipt by us from the Principal of each Interim Payment Certificate, we shall promptly notify you of the revised guaranteed amount.

Any demand for payment must contain your signature(s) which must be authenticated by your bankers or by a notary public. The authenticated demand and statement must be received by us at this office on or before _____ (the date 70 days after the expected date of completion of the Design-Build) (the "expiry date"), when this guarantee shall expire and be returned to us.

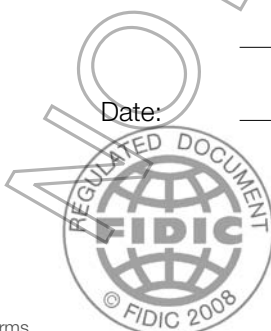
If the advance payment has not been fully repaid 28 days prior to the expiry date, we undertake, upon receipt of your written demand and statement that the advance payment has not been repaid, to pay you the guaranteed amount within 28 days of your demand.

This guarantee shall be governed by the laws of _____ and shall be subject to the Uniform Rules for Demand Guarantees, published as number 458 by the International Chamber of Commerce, except as stated above.

Signed by: _____ Signed by: _____
(signature) (signature)

(name) (name)

Date: _____





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