

**AL MADINA AL ZARQA**  
**("THE BLUE CITY")**  
**PROJECT**  
**PHASE 1 CONDITIONS OF CONTRACT**

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1. **GENERAL PROVISIONS**

1.1 **Definitions**

In these Conditions of Contract ("**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.

"**Adjusted Fee**" means the percentage fee of 4 4%, applied to Cost and paid to the Contractor where specified in the Contract,.

"**Advance Payment Security**" means the bond (or a maximum of two such bonds, such bond or bonds or any of them referred to as and comprising the Advance Payment Security) referred to in Sub-Clause 14.2 [*Advance Payment*].

" Affiliate" means in respect of any Person , any other Person, which directly or indirectly Controls , is Controlled by, or is under common Control with such Person". Without predidice to the generality of the previous definition and for the avoidance of doubt the following entities are considered Affiliates of the Employer :

|  |
|--|
| Al Sawadi Investment &<br>Tourism Company LLC            |
| Blue City Company 1<br>S.A.O.C.                          |
| Blue City Company 2<br>S.A.O.C.                          |
| Blue City Company 4<br>S.A.O.C.                          |
| Blue City Phase One<br>Investment Company<br>Limited     |
| Blue City Future Phases<br>Investment Company<br>Limited |
| Blue City Share  |

|   |
|---|
| Investments Limited <sup>1</sup>            |
| Blue City Phase One<br>Land Company Limited |

"Control" means , as used with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting shares by contract or otherwise"

"Person " means any individual , corporation, joint stock company, limited liability company, partnership, joint venture, association, trust, incorporated organization, governmental authorities and/or legal entities, or any other entity

"ASIT" means Al Sawadi Investment and Tourism Company LLC.

"**Change of Law**" means any of the following events occurring or having occurred after Effective Date as a result of any action by a Government Authority (as the term is defined in the Development Agreement) affecting all or any part of the Project Area ((as the term is defined in the Development Agreement), the Project (as the term is defined in the Development Agreement), the Works , the Employer or any of its Affiliates, the Contractor or any of its Affiliates, the Contractor's agents, employees and Sub Contractors rights or obligations under the Contract : A) A change or repeal of any existing Law (i.e a law as applicable on Effective Date) B) the enactment of any new Law , C) a change in the interpretation of any Law or in the law, custom, or practice relating to the enforcement of any law D) the suspension, withdrawal or variation of a License (other than in accordance with the terms upon which it was originally granted or as a result of any unlawful act or omission of the Contractor or its agents employees and Sub Contractors which entitles such Government Authority to so suspend, withdraw or vary

**Comment [e1]:** AE: this definition is to be proposed by the Employer. In as far as the Contractor is concerned the concept of "fir for the purpose intended "which has specific legal meaning under English law is enough.

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1 Note – status of this entity to be determined by Maples & Calder.

the License under Law) and (E) any improper failure by a Government Authority to issue, extend or vary a License in accordance with the Law and the Development Agreement .

"**Commencement Date**" means the date notified under Sub-Clause 8.1 [*Commencement of Works*] in relation to each Section, and in relation to the Works the date so notified in respect of the first Section to be commenced, as further described in Schedule 5 Part 1 [Sectional Commencement Dates and Time for Completion].

"**Conditions Precedent**" means the conditions referred to in the definition of "Contract Effective Date" in these Conditions.

"**Construction Contract Direct Agreement**" means the funder's direct agreement referred to in Sub-Clause 2.4(c)(i) [*Employer's Financial Arrangements*].

"**Contract**" means the Contract Agreement, these Conditions, the Employer's Requirements, the Schedules, and the further documents (if any) which are listed in the Contract Agreement.

"**Contract Agreement**" means the contract agreement so entitled forming part of the Contract.

"**Contract Effective Date**" means the first date on which the following conditions have been fulfilled:

- (i) The Effective Date as defined in the Development Agreement has occurred;
- (ii) Financial Close has occurred;
- (iii) The Contractor has received a copy of the legal opinion or opinions issued to the Funders in respect of the validity and enforceability of the Development Agreement (or of such parts of such opinions which relate to that issue); and
- (iv) Delivery by the Contractor of duly executed originals of the Performance Security, Advance Payment Security, the Construction Contract Direct Agreement and any Subcontractor Collateral Agreement in respect of a Subcontractor or as described in Sub-Clause 4.4(c) [*Subcontractors*] who has been appointed as at the Contract Effective Date.

"**Contractor**" means AECO Development LLC and its legal successors in title permitted in accordance with Sub-clause 1.6 [*Novation and Assignment*].

"**Contractor's Documents**" means the calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature (if any) supplied by the Contractor under the Contract, as described in Sub-Clause 5.2 [*Contractor's Documents*].

"**Contractor's Equipment**" means all apparatus, machinery, vehicles, camp 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 Permanent Works.

"**Contractor's Personnel**" means the Contractor's Representative and all personnel whom the Contractor utilises on Site, who may include 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.

"**Contractor's Representative**" means the person named 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.

"**Contractor's Share**" bears the meaning set out in Schedule 3 [*Open Book Policy, Cost Management and Payment*].

"**Cost**" means those items reasonably incurred by the Contractor in connection with the Works and otherwise falling within the definition of Cost contained in Schedule 3 [*Open Book Policy, Cost Management and Payment*], excluding items defined in the said Schedule as comprising part of the Fee or Adjusted Fee.

"**Country**" means the Sultanate of Oman.

"**day**" means a calendar day and "**year**" means 365 days.

"**Defects Notification Period**" means in respect of each Section the period commencing on the date of completion appearing in the Taking-Over Certificate and expiring one year later, subject to any extension in accordance with Clause 11 [*Defects Liability*].

"**Design Development**" bears the meaning set out in Schedule 4 [*Design Development and Value Engineering*].

"**Design Development Period**" bears the meaning set out in Schedule 4 [*Design Development and Value Engineering*].

"**Development Agreement**" means the agreement dated 26<sup>th</sup> day of July 2005 between the Government of the Sultanate of Oman and Al Sawadi Investment & Tourism Company LLC as amended by an addendum agreement dated 23 April 2006, a copy of the current version of which (in effect as at the Contract Effective Date) is attached as Schedule 6 [*Employer's Agreements*] as supplemented, varied or replaced from time to time (subject always to Sub-Clause 1.14 [*Employer's Agreements*]).

"**Dispute**" means any claim, dispute or difference between the Parties, or any of them, arising out of or in relation to this Contract, or the breach, termination or invalidity thereof and includes any dispute as to any certificate, determination, instruction, opinion or valuation by the Engineer.

"**Employer**" means Blue City Company 1 S.A.O.C and the legal successors in title to this person permitted in accordance with Sub-Clause 1.6 [*Novation and Assignment*].

"**Employer's Agreements**" means the Development Agreement, the Funding Documents, the Works Agreement, the Escrow Agreement and all the agreements between or among the Employer and ASIT and its affiliates annexed as part of Schedule 6 [*Employer's Agreements*], all as supplemented, varied or replaced from time to time, subject always to Sub-Clause 1.14 [*Employer's Agreements*].

"**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, as stated in the Employer's Requirements; but does not include Plant which has not been taken over by the Employer.

"**Employer's Personnel**" means the Engineer, the assistants referred to in Sub-Clause 3.2 [*Delegation by the Engineer*] and all other staff, labour and other employees of the Engineer and of the Employer; and any other personnel notified to the Contractor by the Employer or the Engineer as Employer's Personnel.

"**Employer's Requirements**" means the documents entitled Employer's Requirements, as included in the Contract, and any additions and modifications to those documents made in accordance with the Contract, at the discretion of the Employer.

"**Employer's Share**" bears the meaning set out in Schedule 3 [*Open Book Policy, Cost Management and Payment*].

"**Engineer**" means Associated Consulting Engineers (ACE) International, or such other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 [*Replacement of the Engineer*].

"**Escrow Agreement**" means the escrow agreement between *inter alios* The Bank of New York, the Contractor and the Employer in or substantially in the form attached in Schedule 6 [*Employer's Agreements*].

"**Fee**" means the percentage fee of 14 % applied to Cost (save where the Adjusted Fee applies or where provided in paragraph 3.1.1.3(d) of Schedule 3 [*Open Book Policy, Cost Management and Payment*]) and payable by the Employer to the Contractor as set out in the Contract .

"**Final Payment Certificate**" means the payment certificate issued under Sub-Clause 14.13 [*Issue of Final Payment Certificate*].

"**Final Statement**" means the statement defined in Sub-Clause 14.11 [*Application for Final Payment Certificate*].

"**Financial Close**" bears the meaning set out in the Funding Documents, save that it shall be deemed to have occurred when all applicable requirements of the Funding Documents have been met, save only for the requirement of effectiveness of this Contract.

"**Force Majeure**" is defined in Clause 19 [*Force Majeure*].

"**Funders**" means the Employer's counterparts from time to time under the Funding Documents.

"**Funding Documents**" means the documents issued or entered into by the Employer or its Affiliates in connection with the external financing of the Works, copies of which (as existing at the Contract Effective Date) are attached as Schedule 6 [*Employer's Agreements*] all as supplemented, varied or replaced from time to time, subject always to Sub-Clause 1.14 [*Employer's Agreements*].

"**Goods**" means Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.

"**Government**" means the government of the Country.

"**Guarantors**" means the entity or entities that guarantee the Contractor's obligations pursuant to the terms of the Parent Company Guarantee.

"**Interim Milestone**" means .....

"**Interim Payment Certificate**" means a payment certificate issued under Clause 14 [*Payment*], other than the Final Payment Certificate.

"**Laws**" means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority in force from time to time and shall include without limitation any Law as defined in the Development Agreement.

"**LIBOR**" means the dollar rate quoted for 6 month London Interbank Offered Rates by the British Bankers' Association Interest Settlement Rate displayed on the appropriate page of the Telerate or if such page is replaced or service ceases to be available, such replacement page as agreed between the Parties.

**Comment [e2]:** AE: this item increases the exposure of the Contractor and should be dealt with caution. Subject to agreement on all other risk apportionment items the Contractor may accept the inclusion of such Milestones provided the Interim LDs will be recoverable in full in case the Contractor achieves any of the following Milestones and/or the Time of Completion for the particular Section.

**Comment [m3]:** To be defined.

"**Materials**" means things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under the Contract.

"**Parent Company Guarantee**" means the duly executed guarantee by Aktor Ate and Enka Insaat ve Sanayi A.S. provided by the Contractor as a condition of Financial Close.

"**Party**" means the Employer or the Contractor as the context requires.

"**Payment Certificate**" means a payment certificate issued under Clause 14 [*Payment*].

"**Performance Certificate**" means the certificate issued under Sub-Clause 11.9 [*Performance Certificate*].

"**Performance Security**" means the security under Sub-Clause 4.2 [*Performance Security*].

"**Permanent Works**" means the permanent works to be executed by the Contractor under the Contract executed as Phase 1 of the Project, as more particularly described in the Employer's Requirements.

"**Plant**" means the apparatus, machinery and vehicles intended to form or forming part of the Permanent Works.

"**Project**" bears the meaning set out in the Development Agreement.

"**Project Company Event of Default**" bears the meaning set out in the Development Agreement.

"**Proviso**" bears the meaning set out in Sub-Clause 13.5(b)(i).

"**Retention Money**" means the accumulated retention moneys which the Employer retains under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] and pays under Sub-Clause 14.9 [*Payment of Retention Money*].

"**Retention Security**" means the bond or any of the bonds referred to in Sub-Clause 14.9 [*Payment of Retention Money*].

"**Schedules**" means the document(s) entitled Schedules, as included in the Contract.

"**Section**" means a part of the Works specified in Schedules 2 [*Value of TCs and STCs*] and 5 [*Sectional Commencement Dates and Time for Completion*] and further described in the Employer's Requirements as a Section.

"**Sectional Target Cost**" or "**STC**" means initially the amounts indicated in Schedule 2 for the respective Sections, which are estimated total amounts that the Employer will pay to the

Contractor for Cost, Fee and Adjusted Fee for the performance of the Works of each Section. The Parties will exercise all reasonable efforts (inclusive of but not limited to value engineering as the term is defined in Schedule 3 and 4, modification to the specifications and/or to the ER and ERDDs etc) with a common intention to ensure that the performance of the Works for each Section will not cause the Employer to pay to the Contractor for Cost, Fee and Adjusted Fee an amount higher than the respective Sectional Target Cost. Sectional Target Costs may be adjusted from time to time as provided for in the Contract. For the avoidance of doubt it is hereby clarified that the Sectional Target Cost shall not operate so that the Employer is not obliged to pay the Contractor for Cost and Adjusted Fee in excess of the Sectional Target Cost but shall operate so that all payments made by the Employer for Cost in excess of the Sectional Target Cost, as such Sectional Target Cost may be adjusted from time to time in accordance with the Contract, will be made, not as Cost plus Fee, but as Cost plus Adjusted Fee.

"Site" means the places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site and shall include without limitation all parts of Phase 1 as defined in the Development Agreement delineated as part of the Site in the Employer's Requirements.

"Statement" means a statement submitted by the Contractor as part of an application, under Clause 14 [Payment], for a Payment Certificate.

"Subcontractor" means any person named in the Contract as a subcontractor, or any person appointed at any tier below the Contractor (including for the avoidance of doubt design and other subconsultants) as a subcontractor, for a part of the Works; and the legal successors in title to each of these persons.

"Taking - Over Certificate" means a certificate issued under Clause 10 [Employer's Taking Over].

"Target Cost" or "TC" is an amount of USD .....which is the estimated total amount that the Employer will pay to the Contractor for Cost, Fee and Adjusted Fee for the performance of the Works. The Parties will exercise all reasonable efforts (inclusive of but not limited to value engineering as the term is defined in Schedule 3 and 4, modification to the specifications and/or to the ER and ERDDs) with a common intention to ensure that the performance of the Works will not cause the Employer to pay to the Contractor for Cost, Fee and Adjusted Fee an amount higher than the Target Cost. Target Cost may be adjusted from time to time as provided for in the Contract. For the avoidance of doubt it is hereby clarified that the Target Cost shall not operate so that the Employer is not obliged to pay the Contractor for Cost and Adjusted Fee in excess of the above mentioned amount of the Target Cost but shall operate so that all payments made by the Employer for Cost in excess of the Target Cost, as such Target Cost may

**Comment [J4]:** Subject to a substantial reduction in Fee and Adjusted Fee

**Comment [e5]:** AE: the Contractor is considering decreasing the percentage of the Fee on the understanding that the risk of the Project in terms of finance and risks not within the reasonable control of the Contractor will be assumed effectively by the Employer. When the above will be properly reflected in the draft contract the Contractor will assess the situation and in doing so it will take into consideration the STC and TC mechanism agreed.

be adjusted from time to time in accordance with the Contract, will be made, not as Cost plus Fee, but as Cost plus Adjusted Fee.

**Comment [J6]:** See comment J8

"**Temporary Works**" means all temporary works of every kind (other than Contractor's Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects.

**Comment [e7]:** AE: the Contractor is considering decreasing the percentage of the Fee on the understanding that the risk of the Project in terms of finance and risks not within the reasonable control of the Contractor will be assumed effectively by the Employer. When the above will be properly reflected in the draft contract the Contractor will assess the situation and in doing so it will take into consideration the STC and TC mechanism agreed.

"**Tests after Completion**" means the tests (if any) which are specified in the Contract and which are carried out under Clause 12 [*Tests after Completion*] after the Works or a Section (as the case may be) are taken over by the Employer.

"**Tests on Completion**" means the tests which are specified in the Contract or agreed by both Parties or instructed as a Variation, and which are carried out under Clause 9 [*Tests on Completion*] before the Works or a Section (as the case may be) are taken over by the Employer.

"**Time for Completion**" means the time for completing each Section under Sub-Clause 8.2 [*Time for Completion*] as stated in Part 1 of Schedule 5 [*Sectional Commencement Dates and Time for Completion*], with any extension under Sub-Clause 8.4 [*Extension of Time for Completion*], calculated from the Commencement Date for the relevant Section.

"**Unforeseeable**" means not reasonably foreseeable by an experienced contractor by the Contract Effective Date.

"**Variation**" means (i) any change to the Employer's Requirements or the Works; or (ii) any change to the sequence, Commencement Date or Dates or Time or Times for Completion of any Section or Sections; or (iii) any other matter expressly so defined in Clause 13 [*Variations and Adjustments*], which is instructed, approved or determined as a variation under Clause 13 [*Variations and Adjustments*] (and as further defined in Sub-Clause 1.14 [*Employer's Agreements*], 5.2 [*Contractor's Documents*] and in Schedule 3 [*Open Book Policy, Cost Management and Payment*]).

"**Works**" mean all works to be carried out and any materials, equipment, services and all other works to be rendered by the Contractor in accordance with the Contract including the design.

"**Works Agreement**" means the works agreement in or substantially in the form attached in Schedule 6 [*Employer's Agreements*].

## 1.2 Interpretations

In the Contract, except where the content 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, and
- (d) "written" or "in writing" means hand-written, type-written, printed or electronically made, and resulting in a permanent record.

The headings shall not be taken into consideration in the interpretation of these Conditions.

### 1.3 **Communications**

Wherever these Conditions provide for the giving or issuing of approvals, certificates, consents, determinations, notices and requests, these communications shall be:

- (a) in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in Schedule 1 [*Contract Particulars*]; and
- (b) delivered, sent or transmitted to the address for the recipient's communications as stated in Schedule 1 [*Contract Particulars*]. However:

if the recipient gives notice of another address, communications shall thereafter be delivered accordingly; and

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.

Approvals, certificates, consents and determinations 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 Engineer, a copy shall be sent to the Engineer or the other Party, as the case may be.

### 1.4 **Law and Language**

The Contract shall be governed by English Law and the language of the Contract and all communications shall be English (save to the extent that any matter arising under the Contract - for example the meaning of a consent or Law - is available or applicable solely in another language).

### 1.5 **Priority of Documents**

The documents forming the Contract are to be taken as mutually explanatory of one another. For

the purposes of resolving discrepancies, the priority of the documents shall be in accordance with the following sequence:

- (a) the Contract Agreement,
- (b) these Conditions,
- (c) the Schedules,
- (d) the Employer's Requirements, and
- (e) any other documents forming part of the Contract.

If an ambiguity or discrepancy is found in the documents, the Engineer shall issue any necessary clarification or instruction. Such power of the Engineer shall be subject to, and incapable of derogating from, the priority described above.

#### **1.6 Novation and Assignment**

The Contractor shall not assign the whole or any part of the Contract or any benefit or interest in or under the Contract, save with the written consent of the Employer. The Employer will not unreasonably withhold consent where, in the reasonable opinion of the Employer, the proposed assignee is of a technical and financial standing at least equivalent to the parties comprising the Contractor as at the Contract Effective Date and either:

- (a) each Guarantor has confirmed that the Parent Company Guarantee continues in full force at effect notwithstanding such assignment or;
- (b) a replacement parent company guarantee is provided by an entity or entities whose technical and financial standing is at least equivalent to the parties comprising the Guarantors as at the Contract Effective Date,

provided always that the Employer shall be entitled in any event to withhold consent unless and until any required consent of the Funders has been obtained.

The Employer shall be at liberty to create, and shall give notification to the Contractor in respect of, any security, substitution, step-in or other right or interest in relation to the Contract as shall be required by the Funders in connection with the financing of the Project and to assign the Contract or any right or interest therein (or require the Contractor to accept a novation of all the Employer's past and future rights, obligations and liabilities in or under the Contract) to any Affiliate of the Employer or otherwise in accordance with the Construction Contract Direct Agreement. The Employer shall provide written particulars of all such arrangements to the Contractor.

### 1.7 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 Engineer 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.

### 1.8 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 parts 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 and to extend or adapt the same and to use the said documents and rights for the purpose of implementing further Phases (as defined in the Development Agreement) of the Project, and
- (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.

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.

#### 1.9 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.

#### 1.10 Confidential Details

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

#### 1.11 Compliance with Laws

The Contractor shall, in performing the Contract, comply with applicable Laws. Unless otherwise stated in these Conditions:

- (a) the Employer shall have obtained (or shall obtain) the planning and zoning or similar permission for the Permanent Works, and any other permissions described in Schedule 15 [*List of Permits and Approvals*] as having been (or being) obtained by the Employer. In respect of any delay or failure by the authorities to grant any such permission and provided such delay or failure by the authorities is not exclusively due to the Contractor's delayed or incomplete submission, the Contractor shall be entitled to an extension of time in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*] and to the payment of any resulting Cost plus Adjusted Fee and equivalent STC/TC increase. Delays which are the fault of the Employer (rather than of the authorities, or the Contractor) shall entitle the Contractor to an extension of time in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*] and payment of Cost plus Fee and STCs/TC adjustments; and
- (b) the Contractor shall at its own risk in respect to the STCs/TC and time extension obtain, maintain and comply with all permits and licenses and approvals described

in Schedule 15 [List of Permits and Approvals] as being obtained by the Contractor, subject to Sub-Clauses 2.2 [Permits, Licences or Approvals] and 19.1(g) [Definition of Force Majeure]. The Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so or to comply with any Laws.

**Comment [e8]:** AE: Contractor expects the Employer to assume this risk.

**Comment [J9]:** Needs to be revised to eliminate current ambiguity wrt Building Permits

#### 1.12 Joint and Several Liability

If the Contractor comprises 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 and for the discharge of all liabilities of the Contractor arising in connection with the Contract; and
- (b) the Contractor shall not alter its composition or legal status without the prior consent of the Employer.

#### 1.13 Contract Effective Date

Save for this Sub-Clause 1.13, which shall become binding on the Parties with effect from the signing of the Contract, the Contract shall become effective on the Contract Effective Date.

The Contractor shall provide reasonable assistance to the Employer in meeting the Conditions Precedent.

#### 1.14 Employer's Agreements

The Contractor acknowledges that it has received and is aware of the contents of the Employer's Agreements as of the Contract Effective Date, in the form annexed and initialled in Schedule 6 [Employer's Agreements].

The Contractor shall comply with the Employer's Agreements insofar as they relate to the design, construction or rectification of defects in the Works, and provide the Employer in good time with all and any documents, information or data which the Employer is required to produce pursuant to, or requires in connection with, the Employer's Agreements insofar as the same relate to the Works.

The Contractor shall not by its breach of the Contract cause the Employer to breach or otherwise incur any liability or suffer any loss or diminution of any rights, entitlement, relief or defence under any Employer's Agreement.

To the extent that any supplement, variation or replacement of any Employer's Agreement affects the Works, it shall (save as provided below) be treated as a Variation.

Provided that if any such supplement, variation or replacement consists of the deletion or amendment of the Proviso, such amendment having the effect provided in Sub-Clause 13.5(b)(i), no such Variation shall arise and the rights and obligations of the Parties shall be as set out in Sub- Clause 13.5.

## 2. THE EMPLOYER

### 2.1 Right of Access to the Site

The Employer and Contractor acknowledge that the Contractor has the right of access to and possession of, all parts of the Site at the present time and shall continue to do so for the duration of this Contract provided that such rights of access and possession shall be no greater than those allowed to the Employer pursuant to the Development Agreement and pursuant to the Law. The right and possession may not be exclusive to the Contractor. If, under the Contract, the Employer is required to give (to 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 Schedule 5 [*Sectional Commencement Dates and Time for Completion*], 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 and maintain any such right or possession within such time, the Contractor shall give notice to the Engineer 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 8.4 [Extension of Time for Completion], and
- (b) payment of Cost plus Fee and increase in the TC and applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer 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 and adjustment to TC/STCs, and any payment of Cost or Fee shall be limited as set out in paragraph 3.1.1.2(iii) of Schedule 3 [*Open Book Policy, Cost Management and Payment*].

## 2.2 Permits, Licences or Approvals

The Employer shall (where he is in a position to do so) provide assistance to the Contractor at the request of the Contractor:

- (a) by obtaining copies of the Laws of the Country which are relevant to the Contract but are not readily available, and
- (b) for the Contractor's applications for any permits, licenses or approvals (not already obtained by the Employer) required by the Laws of the Country:
  - (i) which the Contractor is required to obtain under Sub-Clause 1.11 [*Compliance with Laws*],
  - (ii) for the delivery of Goods, including clearance through customs,
  - (iii) for the export of Contractor's Equipment when it is removed from the Site, and
  - (iv) otherwise in connection with the performance of the Works, for example in connection with visas.

The Employer shall in particular exercise or cause ASIT to exercise any special rights or exemptions conferred upon him under the Development Agreement for the purpose of providing such assistance.

## 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 sub paragraphs (a), (b) and (c) of Sub-Clause 4.8 [*Safety Procedures*] and under Sub-Clause 4.18 [*Protection of the Environment*].

If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to comply with the above obligations, the Contractor shall give notice to the Engineer and 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 8.4 [*Extension of Time for Completion*], and
- (ii) payment of Cost plus Fee and increase in the TC and applicable STC or STCs in an amount equal to such payment.

#### 2.4 **Employer's Financial Arrangements**

(a) The Employer shall notify the Contractor upon any material change in or development relating to its financing arrangements. Upon the Contractor's written request, the Employer shall procure the delivery to the Contractor by the security trustee appointed in respect of the said financing of a written statement confirming whether or not a notice of acceleration in respect of the repayment of such bond proceeds is subsisting as at the date of issuance of such notice and whether or not (in the Security Trustee's opinion) the Employer is in a position to meet its payment obligations to the Contractor for a period of not less than three (3) months from the date of the Contractor's request. In case the Employer fails to provide the Contractor with the above mentioned statement of the security trustee and/or the statement of the security trustee does not clearly state that the Employer is able to meet its payment obligations towards the Contractor for the next three (3) months and/or such notice of acceleration is served on the Employer by any of the Funders at any time, the Contractor shall be entitled to suspend the Works immediately until such time as the Employer reasonably substantiates an ability to make the 3 month's further payments to the Contractor.. If the Contractor suffers delay and/or incurs Cost as a result of any such suspension of Works , the Contractor shall give notice to the Engineer and 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 8.4 [*Extension of Time for Completion*], and
- (ii) Payment of Cost plus Fee and increase in the TC and applicable STC or STCs in an amount equal to such payment.

~~(b)(c)~~ The Contractor shall provide to the Employer such information and assistance as the Employer shall reasonably require in the finalisation of its financing arrangements, in relation to the provision of information, facilitation of access to

and inspection of the Works by or on behalf of the Funders and generally in relation to compliance with other obligations under the Funding Documents.

~~(e)~~(d) The Contractor shall forthwith enter into:

- (i) A form of Construction Contract Direct Agreement in or substantially in the form annexed as Schedule 6 [*Employer's Agreements*], and
- (ii) An acknowledgement of the Employer's assignment by way of security of the Contract and Performance Security.

Where from time to time the Employer introduces any additional or replacement Funders the Contractor will enter into equivalent documents in substantially identical form to the above mentioned versions with or for the benefit of such Funders, subject to compliance by the Employer with Sub-Clause 2.4(e) below.

~~(d)~~(e) The Contractor will be made a third ranking beneficiary of the security trust and a party to the documentation for the purposes set out below. The Funders will have first ranking security over all items held as security. The mortgage banks who have provided finance for the purchasers of the residential units together with the purchasers of the residential units will have second ranking security. The Contractor's third ranking security right shall be granted for the sole purpose of securing any repayment to which the Contractor is entitled in relation to:

- (i) any proceeds of a call under the Performance Security which were received other than in respect of a breach by or insolvency event affecting the Contractor;
- (ii) any amounts unpaid and due as a result of termination of this Agreement arising from the default of the Employer; and
- (iii) any amounts finally determined to be due and payable by an arbitral tribunal overruling a determination made by the Engineer under this Agreement, but which are outstanding, to the Contractor.

~~(e)~~(f) Upon any refinancing of the Employer's external debt, the Employer shall procure that the Contractor continues to enjoy a security interest for the purpose and of no lesser ranking and effect as described in Sub-Clause 2.4(d) above.

## 2.5 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, and/or to any extension of the

Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [*Extension of Defects Notification Period*].

This amount may be included as a deduction from any Payment Certificate or (subject to Sub-Clause 14.16 [*Set-Off*]) payment. 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.

### **3. THE ENGINEER**

#### **3.1 Engineer's Duties and Authority**

The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract. The Engineer's staff shall include suitable qualified engineers and other professionals who are competent to carry out these duties.

The Engineer shall have no authority to amend the Contract and his authority shall be further limited as notified in writing by the Employer to the Contractor from time to time. Any authority removed from the Engineer shall be directly exercisable by the Employer's Personnel identified in such notice, or if none by any director (or equivalent) of the Employer. It is hereby clarified that the Employer cannot limit the authority of the Engineer in relation to Sub-Clause 3.5 [*Determination*]. The decision of the Employer to limit the Engineer's authority will not have retrospective effect, and will take effect as from receipt of the said notice by the Contractor.

The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in these Conditions.

Except as otherwise stated in these Conditions:

- (a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer;
- (b) the Engineer has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract; and
- (c) any approval, deemed approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Engineer (or by the Employer, any party to any Employer's Agreement or any party acting on their behalf) (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 Engineer

The Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include a resident engineer, and/or independent inspectors appointed to inspect and/or test items of Plant and/or Materials. 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 Engineer shall not delegate the authority to determine any matter in accordance with Sub-Clause 3.5 [*Determinations*].

Assistants shall be suitable 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 Engineer. However:

- (a) any failure to disapprove any work, Plant or Materials, approval or deemed approval shall not prejudice the right of the Engineer to reject the work, Plant or Materials;
- (b) if the Contractor questions any determination or instruction of an assistant, the Contractor may refer the matter to the Engineer, who shall promptly confirm, reverse or vary the determination or instruction.

### 3.3 Instructions of the Engineer

Subject to the limitations set out or referred to in Sub-Clause 3.1 above, the Engineer 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 Engineer, 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.

Subject to the limitations set out or referred to in Sub-Clause 3.1 above, the Contractor shall comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Contract. These instructions shall be given in writing.

### 3.4 Replacement of the Engineer

If the Employer intends to replace the Engineer, 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 Engineer. The Employer shall not replace the Engineer with a person against whom the Contractor raises reasonable objection by notice to the Employer, with supporting particulars.

### 3.5 Determinations

Whenever the Contract provides that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult, acting in a fair and impartial manner, with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. Where agreement has not been reached within 7 days of initial notice to the Engineer, agreement shall be deemed to be not achieved for the

purposes of this Sub-Clause 3.5 and the Parties shall use reasonable endeavours to procure and enable the Engineer to issue the determination required by this Sub-Clause 3.5 within a further 14 days.

The Employer shall procure the inclusion at all times in any terms of appointment of the Engineer of a provision obliging him to exercise his powers of consultation and determination fairly and impartially in accordance with this Sub-Clause 3.5, and the Employer shall not seek to impede or prevent such exercise by the Engineer.

The Engineer 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*].

#### 4. THE CONTRACTOR

##### 4.1 Contractor's General Obligations

The Contractor shall design, execute and complete the Works 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.

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 in and for this design, execution, completion and remedying of defects.

The Works shall include any work which is necessary to satisfy the requirements of the Development Agreement (insofar as applicable to the design, construction and rectification of defects in the Works), , the Employer's Requirements and Schedules.

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.

The Contractor shall, whenever required by the Engineer, 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 Engineer.

##### 4.2 Performance Security

The Contractor shall procure and maintain:

- (a) On .....an on demand bond (or a maximum number of two bonds) (such document or documents or any of them referred to as and comprising the Performance Security) in an amount in aggregate equal to 2% of the amount received from the Employer until .....plus an amount equal to 2% of the Cost Plus Fee that the Employer is forecasted to pay to the Contractor in accordance with the cash flow provided for in Schedule 16 hereof for the year 2010. On .....the Employer shall hand over to the Contractor the original of the bond issued by HYPO on ..... which is as of that date to be deemed null and void. On 15<sup>th</sup> December of each year starting from 15<sup>th</sup> December 2011 the Contractor will furnish to the Employer a replacement Performance Security, provided the

Employer will hand over to the Contractor the original of the previous Performance Security, in an amount in aggregate equal to 2% of the amounts received by the Employer until that date plus an amount equal to 2% of the Cost Plus Fee that the Employer is forecasted to pay to the Contractor in accordance with the cash flow provided for in Schedule 16 hereof for the particular year. All Performance Securities mentioned above will each be duly executed by an entity and from within a country approved by the Employer, each in the form annexed as Schedule 12 [*Performance Security*] or in another form approved by the Employer; and

- (b) on or before the Contract Effective Date, a Parent Company Guarantee in the form annexed as Schedule 9 [*Parent Company Guarantee*] duly executed by the parties there referred to.

The Contractor shall ensure that the Performance Security is valid and enforceable for the period specified below. If the terms of the Performance Security specify its expiry date, and the Contractor has not become entitled to the return of the Performance Security by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the Performance Security until it is entitled to the return of such Performance Security. Failing such extension by the date 7 days prior to such expiry date the Employer shall be entitled to make a claim under the Performance Security for the full value thereof.

The Employer shall give prior notice in writing to the Contractor of its intention to make a demand under the Performance Security, and shall not make a claim under such 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 amount of the Performance Security; or
- B) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Clause 20.3 hereof within 60 days from such agreement or arbitral award

The Employer shall return the Performance Security to the Contractor within 21 days after issuance of the Taking-Over Certificate for the last Section to be completed, save where unsatisfied claims are outstanding at that date in which case the Employer may retain the same for the sole purpose of pursuing such claims.

**Comment [m10]:** BCC1 will get back on this

**Comment [e11]:** AE: Agreement on the Contractor's proposal is beneficial for both Parties in terms of Cost and is one of the most significant elements which would allow the Contractor to reduce the amount of the Fee.

Within 28 days after the date of completion of each Section certified by the Engineer in his Taking-Over Certificate, the Bond Amount (as defined in the Performance Security) shall be reduced to the lesser of value A or value B as defined below:

$$\text{Value A} = \frac{X \times Y}{Z}$$

$$\text{Value B} = X - W$$

where:

X = the Bond Amount as at it will apply at the time the Taking Over Certificate for the particular Section will be issued Date plus an ;

Y = the aggregate value of the then current STCs in respect of all remaining incomplete Sections; and

Z = the then current TC

W = the aggregate value of all payments made as at that date under the Performance Security.

The Employer is obliged to notify immediately the issuer of the Performance Security in respect of the above reductions, stating in such notice value A or value B as the case may be.

#### 4.3 Contractor's Representative

The Contractor shall appoint the Contractor's Representative(s) and shall give him (them) 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 Engineer 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 Engineer, 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, a suitable replacement person shall be appointed, subject to the Engineer's prior consent, and the Engineer shall be notified accordingly.

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

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 Engineer 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.

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 these Conditions:

- (a) the Contractor shall obtain consent from the Engineer to all Subcontractors, including the suppliers of all Materials. Such consent or refusal thereof shall be provided by the Engineer within seven (7) days from the date that the relevant request by the Contractor is made. Failure from the part of the Engineer to respond by providing or refusing its consent within the above time limit will be considered as a deemed consent. In case the Engineer elects not to provide its consent, it should provide adequate substantiation of its rejection;
- (b) the Contractor shall give the Engineer not less than 28 days' notice of the intended date of the commencement of each Subcontractor's work, and of the commencement of such work on the Site;
- (c) having regard to the pricing basis of the Contract, the Employer and Contractor shall operate and comply with the further provisions relating to the planning, procurement, tendering, approval and cost substantiation of subcontracts set out in Schedule 3 [*Open Book Policy, Cost Management and Payment*].
- (d) the Contractor shall procure the inclusion in any subcontract whose scope includes the supply of Plant or Materials of provisions which:
  - (i) ensure that unencumbered title in the relevant Plant or Materials passes to the Contractor prior to the date on which the same is to become the

property of the Employer pursuant to Sub-Clause 7.7 [*Ownership of Plant and Materials*];

- (ii) waives any liens or other encumbrances (whether for non-payment or otherwise) to which the relevant Subcontractor would otherwise be entitled; and
- (iii) provide for a waiver in the terms of (ii) above and an indemnity from the Subcontractor in respect of the consequences of exercising any lien or encumbrance, in both cases in favour of and directly enforceable by the Employer.

#### 4.5 Nominated Subcontractors

In this Sub-Clause, "nominated Subcontractor" means a Subcontractor whom the Engineer, 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 Engineer as soon as practicable.

#### 4.6 Co-operation

The Contractor shall as instructed by the Engineer 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 Cost. Services for these personnel and other contractors may include the use of Contractor's Equipment (to the extent available), Temporary Works (to the extent available) or access arrangements which are the responsibility of the Contractor.

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 Engineer in the time and manner stated in the Employer's Requirements.

Within one (1) month after the Contract Effective Date the Parties shall, in good faith, use all reasonable endeavours to agree a shared access and interface protocol regulating arrangements for access to the Site by the Contractor's Personnel and the parties referred to in (a) to (c) above. The protocol shall be worded and operated to reflect that first priority must at all times be given to the Contractor's performance of the Works. The said protocol shall recognise the need to minimise or avoid interference with the performance of the Works.

#### 4.7 Setting Out

The Employer shall be liable for the accuracy of the boundaries and bench marks of the Site and of each Section set out in or provided in accordance with the Employer's Requirements.

The Contractor shall set out the Works within such boundaries and bench marks and by reference to locations of buildings and other structures either as required by the Contract or otherwise approved by the Engineer pursuant to Sub-Clause 5.2 [*Contractor's Documents*] or the Employer's Requirements and in all cases in accordance with all Laws, consents and approvals. The Contractor shall be responsible for the correct positioning of all parts of the Works (subject to Sub-Clause 5.9), and shall rectify any error in the positions, levels, dimensions or alignment of the Works.

The Employer shall be responsible for any errors in the above mentioned boundaries and bench marks of the Site or Sections.

If the Contractor suffers delay and/or incurs Cost from executing work which was necessitated by an error in the above mentioned boundaries or bench marks of the Site or Sections as indicated in the above paragraph, 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 Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of Cost plus Fee and an increase in the TC and applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the matters described in sub-paragraphs (a) and (b) above.

Where the Employer or Engineer subsequently requires any change in the location of any building or structure previously required or approved by either of them, such change shall be a Variation unless necessitated by:

- (i) any error of the Contractor; or
- (ii) any risk expressly assumed by the Contractor

#### 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, to the extent required by the Contract , fencing, lighting, guarding and watching of the Works until completion and taking over under Clause 10 [*Employer's Taking Over*], 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 Engineer shall be entitled to audit any aspect of the system.

Details of all procedures and compliance documents shall be submitted to the Engineer for information before each design and execution stage is commenced. When any document of a technical nature is issued to the Engineer, 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 (save to the extent set out in Sub-Clauses 4.7 [*Setting Out*] and 4.11 [*Physical Conditions*]) be responsible for the accuracy, sufficiency or completeness of data made available by or on behalf of the Employer at any time on subsurface, hydrological, environmental, dimensional, climatic, or other natural or man made conditions of any kind affecting the Site or the Works. If the Contractor suffers delay and/or incurs Cost from

executing work which was necessitated by an error in the above Site Data as indicated in the above paragraph 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 Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of Cost plus Fee and an increase in the TC and applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the matters described in sub-paragraphs (a) and (b) above.

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 Works. To the same extent the Contractor shall be deemed to have inspected and examined the Site , its surroundings , the above data furnished by the Employer and other available information and has allowed time and cost for the above in the TC . However in case the Contractor suffers delay and/or incurs Cost from executing work which was necessitated by an error in the above Site Data as indicated in the above paragraph, 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 Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of Cost plus Adjusted Fee and an increase in the TC and applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the matters described in sub-paragraphs (a) and (b) above.

#### 4.11 **Physical Conditions**

The Contractor shall be responsible for ascertaining and dealing with all natural and man made conditions (including pollutants, environmental conditions, fossils and other matters described in Clause 4.22 [*Fossils*] and obstructions and the conditions referred to in Clause 4.10 [*Site Data*]), save that in respect of any such conditions:

- (a) the Contractor's Cost plus Adjusted Fee will be paid for remediating such conditions;
- (b) the effect of such conditions will be mitigated by both Parties taking account (in accordance with Schedule 3 [*Open Book Policy, Cost Management and Payment*]) of updated site data to be obtained by the Contractor during Design Development, and by the allowance by the Employer of reasonable flexibility, including accelerating measures and as to the locations of building if conditions not reasonably foreseeable at the end of Design Development are encountered during construction;
- (c) the Contractor will be entitled to an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and
- (d) payment of Cost plus Adjusted Fee and an increase in the TC or any STC in an amount equal to such payment; and

The Employer shall, save as aforesaid, have no responsibility or liability to the Contractor under this Contract or otherwise in respect of any such matters.

#### 4.12 **Rights of Way and Facilities**

The Contractor shall pay (subject to reimbursement as Cost plus Fee and increase in TC or STC) 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 any additional facilities outside the Site which he may require for the purposes of the Works.

#### 4.13 **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.

#### 4.14 **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 maintenance which may be required for his use of access routes;
- (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 reimbursed as Costs plus Fee .

#### 4.15 **Transport of Goods**

Unless otherwise stated in these Conditions:

- (a) the Contractor shall give the Engineer not less than 21 days' notice of the date on which any Plant or a major item of other Goods will be delivered to the Site;
- (b) the Contractor shall be responsible for packing, loading, transporting, receiving, unloading, storing and protecting all Goods and other things required for the Works; 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.

#### **4.16 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. Save in cases of suspension of Works and/or termination of the Contract the Contractor shall not remove from the Site any major items of Contractor's Equipment without the consent of the Engineer. However, consent shall not be required for vehicles transporting Goods or Contractor's Personnel off Site.

On the date of expiry of the Defects Notification Period of the last Section or in the opinion of the Contractor any of the Contractor's Equipment has been completely depreciated or rendered useless, the Contractor shall attempt to sell each item in the open market. If no sale is achieved within 90 days after advertising the sale, then ownership in this item of Contractor's Equipment shall pass to the Employer against nominal consideration which will not exceed the non depreciated value of the particular equipment. In such a case the Employer, within 10 working days from receipt of the relevant invitation by the Contractor may request the Contractor to arrange to scrap the said item of equipment. All and any revenue received by the Contractor in excess of the non depreciated value of the equipment for such sale or scrap shall be passed to the Employer by a corresponding reduction of the TC/STC to the absolute exclusion of cash payment.

#### **4.17 Protection of the Environment**

The Contractor shall observe and comply absolutely with the requirements of the Law and the Development Agreement relating to protection of the environment and avoidance of nuisance and damage. Subject to such compliance the Contractor shall otherwise 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.

#### **4.18 Progress Reports**

Unless otherwise stated in these Conditions, monthly progress reports shall be prepared by the Contractor and submitted to the Engineer in six copies (with one copy to the Funders' technical adviser). 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 shall continue until the Contractor has completed all work which is known to be outstanding at the completion date stated in the Taking-Over Certificate for the last Section to be completed.

Each report shall include:

- (a) charts and detailed descriptions of progress, including each stage of design, Contractor's Documents, procurement, manufacture, delivery to Site, construction, erection, testing, commissioning and trial operation;
- (b) photographs showing the status of manufacture and of progress on the Site;
- (c) for the manufacture 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 2.5 [*Employer's Claims*] and notices given under Sub-Clause 20.1 [*Contractor'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 Contractor shall provide such further reports and information in relation to the Works as may be required by the Funding Documents.

#### 4.19 **Security of the Site**

Unless otherwise stated in these 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 Engineer, as authorised personnel of the Employer's other contractors on the Site.

#### 4.20 **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 Engineer 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.

During the execution of the Works, 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 clear away and remove from the Site any wreckage, rubbish and Temporary Works which are no longer required.

Upon the issue of a Taking-Over Certificate, the Contractor shall clear away and remove, from the Section or part of the Site and Works to which the Taking-Over 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. However, the Contractor may retain on Site, during the Defects Notification Period, such Goods as are required for the Contractor to fulfil obligations under the Contract.

#### 4.21 **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 comply with the Law in relation to any such discovery. In relation to Fossils Sub-Clause 4.11 [*Physical Conditions*] applies.

### 5. **DESIGN**

#### 5.1 **General Design Obligations**

The Contractor shall carry out, and in consultation with the Employer 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 Engineer for consent the name and particulars of each proposed designer and design Subcontractor.

The Contractor warrants that he, his designers and design Subcontractors have and will at all times have the experience and capability necessary for the design of the Works. The Contractor undertakes that the designers shall be available to attend discussions with the Engineer at all reasonable times, until the expiry date of the relevant Defects Notification Period.

Save to the extent provided in Sub-Clause 4.7 [*Setting Out*], and subject to the final paragraph of Sub-Clause 5.2 below, the Contractor shall remain liable for all errors, faults and defects in the Employer's Requirements. In case the Contractor suffers delay or incurs Cost from executing work which was necessitated by an error or, fault or defect in the Employer's Requirements the Contractor shall give notice to the Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) Payment of Cost plus Fee/ Fee and an increase in the TC and applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the matters described in sub-paragraphs (a) and (b) above.

## 5.2 Contractor's Documents

The Contractor's Documents shall comprise the technical documents specified in the Employer's Requirements, Schedules 3 [*Open Book Policy, Cost Management and Payment*] and 4 [*Design Development and Value Engineering*], documents required to satisfy all regulatory approvals, and the documents described in Sub-Clause 5.6 [*As-Built Documents*] and Sub-Clause 5.7 [*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*]. Contractor's Documents shall be copied to the Funders' technical adviser at the same time as any delivery to the Engineer or the Employer.

The Contractor shall prepare all Contractors' 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 Contract describes the Contractor's Documents which are to be submitted to the Engineer for review and/or for approval, they shall be submitted accordingly, together with a notice as described below. In the following provisions of this Sub-Clause, (i) "review period" means the period required by the Engineer for review 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 and/or for approval.

Unless otherwise stated in the Employer's Requirements, each review period shall not exceed 21 days, calculated from the date on which the Engineer receives a Contractor's Document and the Contractor's notice. This notice shall state that the Contractor's Document is considered ready, both for review (and approval, if so specified) 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 Engineer may, within the review period, give notice to the Contractor that a Contractor's Document fails (to the extent stated) to comply with the Contract. If a Contractor's Document so fails to comply, it shall be rectified, resubmitted and reviewed (and, if specified, approved) in accordance with this Sub-Clause.

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

- (a) in the case of a Contractor's Document which has (as specified) been submitted for the Engineer's approval:
  - (i) the Engineer shall give notice to the Contractor that the Contractor's Document is approved, with or without comments, or that it fails (to the extent stated) to comply with the Contract;
  - (ii) execution of such part of the Works shall not commence until the Engineer has approved the Contractor's Document; and
  - (iii) the Engineer shall be deemed to have approved the Contractor's Document 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 Engineer has previously notified otherwise in accordance with subparagraph (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 these reviewed (and, if specified, approved) Contractor's Documents; 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 Engineer. Thereafter, the Contractor shall submit revised documents to the Engineer in accordance with the above procedure.

If the Engineer instructs that further Contractor's Documents are required, the Contractor shall prepare them promptly.

Any such approval or consent, or any review (under this Sub-Clause or otherwise), shall not relieve the Contractor from any obligation or responsibility.

No consent, condition of approval or other change in the design or Works effected by the Contractor at the request or direction of the Employer or Engineer (including pursuant to ERDD as defined in Schedule 4 [*Design Development and Value Engineering*]) pursuant to this Clause or otherwise shall constitute a Variation or otherwise entitle the Contractor to any time extension, payment of Cost or other sums, any Fee, TC or STC adjustment or other relief unless it has been agreed by the Employer or determined by dispute resolution to constitute a Variation, and then only to the extent that the Contractor has notified the Employer in writing that he considers the relevant work to comprise a variation prior to carrying out the same. Any such agreement or dispute resolution tribunal shall be required to take into consideration the TC nature of this Contract and the fact that both parties entered into it recognising the need for significant design development and value engineering processes by both Parties after the date of execution. Without limitation, the Parties agree that neither:

- (i) conformity with a requirement as to scope or quality referred to or reasonably to be inferred from the Contract (including the Employer's Requirements);
- (ii) an outcome within a range of alternatives or parameters expressly contemplated in the Employer's Requirements; nor
- (iii) a degree of design development reasonably within the contemplation of a contractor skilled and experienced in contracts of this kind

will constitute a Variation.

However, the Parties agree that a Variation will arise where either:

- (aa) the Employer changes the scope or quality requirements referred to in or reasonably to be inferred from the Contract (including any range of alternatives or parameters in the Employer's Requirements); or
- (bb) the Contractor proposes as its Detailed Design a solution which is compliant in all respects with the above mentioned requirements but the Employer requires the implementation of an alternative solution; or
- (cc) the Employer varies interrelated works in another Phase of the Development in a manner which would have constituted a Variation if an equivalent change had been implemented in relation to the Works and the Contractor is obliged in consequence to vary the Works in order to comply with its undertaking pursuant to Sub-Clause 5.3; or
- (dd) the Cost plus Fee for the performance of Works related to Water Reticulation Works, District Cooling System, Electrical Reticulation Works, temporary access road (from Golf Resort Hotel to Contractor's camp roundabout), Gas Distribution Network (if any), ICT System (Draka System) and Beach Beautification (as described in the Employer's Requirements) exceeds the amounts referred to in Schedule 2 and/or the total amount of .....USD.

### 5.3 Contractor's Undertaking

The Contractor undertakes that the design, the Contractor's Documents, the execution and the completed Works will be in accordance with (and fit for the purposes disclosed by or reasonably ascertainable from):

- (a) the Laws in the Country,
- (b) the documents forming the Contract, as altered or modified by Variations,

### 5.4 Technical Standards and Regulations

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 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 Works or Section are taken over by the Employer under Clause 10 [*Employer's Taking Over*]. References in the Contract to published standards shall be understood to be references to the edition applicable on the Contract Effective Date, unless stated otherwise.

If changed or new applicable standards come into force in the Country after the Contract Effective Date, the Contractor shall give notice to the Engineer and (if appropriate) submit proposals for compliance. In the event that:

- (a) the Engineer determines that compliance is required, and
- (b) the proposals for compliance constitute a variation,

then the Engineer shall initiate a Variation in accordance with Clause 13 [*Variations and Adjustments*] provided that:

- (i) in the case of changes in the standards which are mandatory under the Laws of the Country, the Contractor shall be entitled to an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and payment of Cost, plus Adjusted Fee and an equivalent adjustment to the TC and any STC
- (ii) where such changes in standards are not mandatory and the Engineer requires compliance with the same in writing, such compliance shall be a Variation. If the Contractor elects to comply with the same without such an instruction, it shall do so as its own risk as to Cost and time.

#### **5.5 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. If the Contract specifies training which is to be carried out before taking-over, the Works shall not be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [*Taking Over of the Works and Sections*] until this training has been completed.

#### **5.6 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. Two copies shall be supplied to the Engineer prior to the commencement of the Tests on Completion.

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

Prior to the issue of any Taking-Over Certificate, the Contractor shall supply to the Engineer the specified numbers and types of copies of the relevant as-built drawings, in accordance with the Employer's Requirements. The Works shall not be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [*Taking Over of the Works and Sections*] until the Engineer has received these documents.

#### **5.7 Operation and Maintenance Manuals**

Prior to commencement of the Tests on Completion, the Contractor shall supply to the Engineer provisional operation and maintenance manuals in sufficient detail for the Employer to operate, maintain, dismantle, reassemble, adjust and repair the Plant.

The Works shall not be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [*Taking Over of the Works and Sections*] until the Engineer has received final operation and maintenance manuals in such detail, and any other manuals specified in the Employer's Requirements for these purposes.

#### **5.8 Design Error**

If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Contractor's Documents, save to the extent provided in Sub-Clause 4.7 [*Setting Out*], they and the Works shall be corrected with no adjustments the TC and any STC in relation to the Cost plus Fee to be paid for such corrective works, notwithstanding any consent or approval under this Clause.

#### **5.9 The Kwahr**

Other than by Variations instructed pursuant to Clause 13 the Employer will not require by the terms of any ERDD or other instruction the location of any permanent structure, golf course, landscaping or open parking on the seaward side of the actual high tide line in the locality of the Kwahr if and to the extent that the Employer's Requirements as at the Effective Date show such items as located to the landward side of the high tide line.

### **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 Labour**

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 his employees to obey all applicable Laws, including those concerning safety at work.

The Contractor shall in particular comply, and ensure that his Subcontractors comply, with the Omanisation and training requirements of clause 14 of the Development Agreement insofar as they apply to the performance of the Works.

## **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 Employer's Requirements, unless:

- (a) otherwise stated in the Contract,
- (b) the Engineer gives consent, or
- (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 Engineer.

## **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 adjacent to the Site 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 structures forming part of the Permanent Works.

#### **6.7 Health and Safety**

The Contractor shall at all times 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 of the Works, the Contractor shall provide whatever is required by this person to exercise this responsibility and authority.

The Contractor shall send, to the Engineer, details of any accident 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 Engineer may reasonably require.

#### **6.8 Contractor's Superintendence**

Throughout the design and execution of the Works, and as long thereafter as is necessary to fulfil the Contractor's obligations, the Contractor shall provide all necessary superintendence to plan, arrange, direct, manage, inspect and test the work.

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.

#### **6.9 Contractor's Personnel**

The Contractor's Personnel shall be appropriately qualified, skilled and experienced in their respective trades or occupations. The Engineer 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**

The Contractor shall submit, to the Engineer, details showing the number of each class of Contractor's Personnel and of each type of Contractor's Equipment on the Site. Details shall be submitted each calendar month, in a form approved by the Engineer, until the Contractor has completed all work which is known to be outstanding at the completion date stated in the Taking-Over Certificate for the Works.

#### **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.

### **7. PLANT, MATERIALS AND WORKMANSHIP**

#### **7.1 Manner of Execution**

The Contractor shall carry out or procure the manufacture of Plant, the production and manufacture of Materials, and all other execution of the Works:

- (a) to the standards 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 Engineer 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 Engineer as a Variation.

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

### 7.3 **Inspection**

The Employer's Personnel 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, and
- (b) during production, manufacture and construction (at the Site and elsewhere), 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.

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

The Contractor shall give notice to the Engineer whenever any work is ready and before it is covered up, put out of sight, or packaged for storage or transport. The Engineer shall then either carry out the examination, inspection, measurement or testing without unreasonable delay, or promptly (and in any event within 2 days) give notice to the Contractor that the Engineer does not require to do so. If the Contractor fails to give the notice, he shall, if and when required by the Engineer, 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 specified in the Contract, other than the Tests after Completion (if any).

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 subject always

to the deferral of the test indicated in section 12 of part 1.5 and part 1.7.6 of the Employer's Requirements dealing with the testing of waste water treatment works. The Contractor shall agree, with the Engineer, the time and the place for the specified testing of any Plant, Materials and other parts of the Works.

The Engineer 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 Engineer shall give the Contractor not less than 24 hours' notice of the Engineer's intention to attend the tests. If the Engineer does not attend at the time and place agreed, the Contractor may proceed with the tests, unless otherwise instructed by the Engineer, and the tests shall then be deemed to have been made in the Engineer's presence.

If the Contractor suffers delay 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 Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of Cost plus Fee and an increase in the TC and applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

The Contractor shall promptly forward to the Engineer duly certified reports of the tests. When the specified tests have been passed, the Engineer shall endorse the Contractor's test certificate, or issue a certificate to him, to that effect. If the Engineer 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, design or workmanship is found to be defective or otherwise not in accordance with the Contract, the Engineer 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 and ensure that the rejected item complies with the Contract.

If the Engineer requires this Plant, Materials, design 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 2.5 [*Employer's Claims*] pay these costs to the Employer.

### 7.6 Remedial Work

Notwithstanding any previous test or certification, the Engineer may instruct the Contractor to:

- (a) 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, 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 subparagraph (c).

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 2.5 [*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 entitled to payment of the value of the Plant and Materials under Sub-Clause 8.10 [*Payment for Plant and Materials in Event of Suspension*] or at such other date prior to delivery stipulated elsewhere in the Contract.

#### 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, DELAYS AND SUSPENSION

#### 8.1 Commencement of Works

The Engineer shall give the Contractor not less than 7 days' notice of each Commencement Date. The first Commencement Date shall be 60 days after the Contract Effective Date.

The Contractor shall commence the design and execution of the Works as soon as is reasonably practicable after the Commencement Date, and shall then proceed with the Works with due expedition and without delay.

#### 8.2 Time for Completion

The Contractor shall complete the whole of the Works, and each Section, within the Time for Completion for the Works or Section provided for in Part 1 of Schedule 5 [*Sectional Commencement Dates and Time for Completion*], including:

- (a) achieving the passing of the Tests on Completion, and
- (b) completing all work which is in the Contract as being required for the Works or Section to be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [*Taking Over of the Works and Sections*].

#### 8.3 Programme

The Contractor shall submit a Level 3 time programme which will include Interim Milestones for the applicable Section to the Engineer for approval not less than 4 weeks prior to the commencement of the construction works within such Section as shown in Schedule 5 part 2 and Level 3 time programme revisions which shall only require approval of the Engineer in

cases where revisions provide for amendment of the Times for Completion for Sections and/or the Interim Milestones provided in Schedule 5 Part 1. The Contractor shall also submit an updated sectional and overall programme, whenever the previous version is inconsistent with actual progress or with the Contractor's obligations which will for the avoidance of doubt not require the Engineer's approval. 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 periods for reviews under Sub-Clause 5.2 [*Contractor's Documents*] and for any other submissions, approvals and consents specified in the Employer's Requirements,
- (c) the sequence and timing of inspections and tests specified in the Contract, and
- (d) a supporting report which includes:
  - (i) a general description of the methods which the Contractor intends to adopt, and of the major stages, in the execution of the Works, and
  - (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.

The Employer's Personnel shall be entitled to rely upon the programme (as revised from time to time in accordance with both Sub-Clause 8.3 and Sub-Clause 8.4 hereof) when planning their activities.

The Contractor shall promptly give notice to the Engineer of specific probable future events or circumstances which may adversely affect the Works, increase the TC or any STC or delay the execution of the Works. The Engineer may require the Contractor to submit an estimate of the anticipated effect of the future event or circumstances, and/or a proposal under Sub-Clause 13.3 [*Variation Procedure*].

If, at any time, the Engineer 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 a revised programme to the Engineer in accordance with this Sub-Clause.

**Comment [m12]:** Interim Milestones will carry interim LDs which will be recoverable by the Contractor in case it achieves any subsequent milestone or the Time for Completion of the Section.

**Comment [J13]:** We cannot be forced to rely on Contractor's programmes that we have not agreed to

**Comment [e14]:** This is not acceptable by the Contractor and is not negotiable especially in view of the existence of Interim Milestones. In case the Employer insists on it the Contractor will not be able to accept the Interim Milestones concept.

#### 8.4 Extension of Time for Completion

The Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [*Taking Over 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 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, or
- (c) 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 or to the Authorities, or
- (d) Any delaying event which is not due to the Contractor being in breach of any of its obligations under the Contract or is not within the Contractor's reasonable control.

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [*Contractor's Claims*]. When determining each extension of time under Sub-Clause 20.1, the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time. In case as a result of the extension of time the Contractor incurs additional Cost then the Contractor shall be entitled to payment of such additional Cost plus Fee or Adjusted Fee as the case may be and the TC and any STC will be adjusted in an amount equal to such additional Cost and Fee or Adjusted Fee.

The Parties may from time to time discuss and in their absolute discretion agree mutually acceptable arrangements whereby in return for agreed compensation the Contractor waives an entitlement to such an extension of time or agrees to reduce any Time for Completion.

#### 8.5 Rate of Progress

If, at any time:

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

other than as a result of a cause listed in Sub-Clause 8.4 [*Extension of Time for Completion*], then the Engineer 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.

Unless the Engineer 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 2.5 [*Employer's Claims*] pay these costs to the Employer, in addition to delay damages (if any) under Sub-Clause 8.7 [*Delay Damages*] below.

#### **8.6 Delay Damages**

If the Contractor fails to comply with Sub-Clause 8.2 [*Time for Completion*] as adjusted from time to time in accordance with Sub-Clause 8.4, the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay or allow delay damages to the Employer for this default. These delay damages shall be the sum stated in respect of each Section in Schedule 7 [*Liquidated Damages*] adjusted if applicable in accordance with Sub-Clause 10.2 [*Taking Over of Parts of the Works*], which shall be paid for every day or part thereof which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages stated in respect of each Section in Schedule 7 [*Liquidated Damages*].

These delay damages shall be the only damages due from the Contractor for such default, other than as provided in Sub-Clause 8.6 above or in the event of termination under Sub-Clause 15.2 [*Termination by Employer*] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract.

#### **8.7 Suspension of Works**

The Engineer 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 and secure such part of the Works against any deterioration, loss or damage.

The Engineer shall also notify the cause for the suspension. If and to the extent that the cause is notified and is the responsibility of the Contractor, the following Sub-Clauses 8.8, 8.9 and 8.10 shall not apply.

#### 8.8 Consequences of Suspension

If the Contractor suffers delay and/or incurs Cost from complying with the Engineer's instructions under Sub-Clause 8.7 [*Suspension of Works*] and/or from resuming the work, the Contractor shall give notice to the Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of any such Cost, which shall be included in the Costs plus Fee and entitle the Contractor to an increase in the TC and applicable STC or STCs in the amount of such Costs and Fee .

After receiving this notice, the Engineer 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 any increase in the TC and any STC or STCs in consequence of 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 8.7 [*Suspension of Works*].

#### 8.9 Payment for Plant and Materials in Event of Suspension

The Contractor shall be entitled to payment of the Cost plus Fee (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 Engineer's instructions.

#### 8.10 **Prolonged Suspension**

If the suspension under Sub-Clause 8.7 [*Suspension of Works*] has continued in aggregate for more than 180 days, the Contractor may request the Engineer's permission to proceed. If the Engineer does not give permission within 28 days after being requested to do so, the Contractor may, by giving notice to the Engineer, 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*].

#### 8.11 **Resumption of Works**

After the permission or instruction to proceed is given, the Contractor and the Engineer 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 Contractor shall be entitled to the Cost plus Fee of doing so and the TC and applicable STC shall be increased by the amount of such payment, save where the final paragraph of Sub-Clause 8.8 [*Consequences of Suspension*] above applies,.

### 9. **TESTS ON COMPLETION**

#### 9.1 **Contractor's Obligations**

The Contractor shall carry out the Tests on Completion in accordance with this Clause and Sub-Clause 7.4 [*Testing*], after providing the documents in accordance with Sub-Clause 5.6 [*As-Built Documents*] and Sub-Clause 5.7 [*Operation and Maintenance Manuals*] subject always to the deferral of the test indicated in section 12 of part 1.5 and part 1.7.6 of the Employer's Requirements dealing with the testing of waste water treatment works and provided that references elsewhere in this Clause to Tests on Completion shall be read subject to the said section and parts of the Employer's Requirements.

The Contractor shall give to the Engineer not less than 21 days' notice of the date after which the Contractor will be ready to carry out each of the Tests on Completion. Unless otherwise agreed, Tests on Completion shall be carried out within 14 days after this date, on such day or days as the Engineer shall instruct.

In considering the results of the Tests on Completion, the Engineer 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, the Contractor shall submit a certified report of the results of these Tests to the Engineer.

## 9.2 Delayed Tests

If the Tests on Completion are being unduly delayed by the Employer, Sub-Clause 7.4 [*Testing*] (fifth paragraph) and/or Sub-Clause 10.3 [*Interference with Tests on Completion*] shall be applicable.

If the Tests are being unduly delayed by the Contractor, the Engineer may by notice require the Contractor to carry out the Tests within 21 days after receiving the notice. The Contractor shall carry out the Tests on such day or days within that period as the Contractor may fix and of which he shall give notice to the Engineer.

If the Contractor fails to carry out the Tests on Completion 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.

## 9.3 Retesting

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

## 9.4 Failure to Pass Tests on Completion

If the Works, or a Section, fail to pass the Tests on Completion repeated under Sub-Clause 9.3 above, the Engineer shall be entitled to :

- (a) order further repetition of Tests on Completion under Sub-Clause 9.3 above;
- (b) if the failure deprives the Employer of substantially the whole benefit of the Works or Section, reject the Works or Section (as the case may be); or
- (c) issue a Taking-Over Certificate, if the Employer so requests.

In the event of sub-paragraph (b), the Contractor shall then proceed in accordance with all other obligations under the Contract, . Unless the relevant reduction for this failure is stated (or its method of calculation is defined) in the Contract, the Employer may require the reduction to be (i) agreed by both Parties (in full satisfaction of this failure only) and paid before this Taking-Over Certificate is issued, or (ii) determined and paid under Sub-Clause 2.5 [*Employer's Claims*] and Sub-Clause 3.5 [*Determinations*].

In the event of sub-paragraph (c), the Contractor may within 14 days after issuance of the relevant Taking-Over Certificate undertake (by notice in writing to the Employer) to rectify the

cause of the failure. Upon receipt of such undertaking the said cause shall be deemed to be a defect to which Sub-Clause 11.2 (a) to (d) applies. In the absence of such notice the Employer shall have (in lieu of any remedy under Clause 11) the likely remedy as in the case of Sub-Clause 9.4 (b) as set out above.

## 10. EMPLOYER'S TAKING OVER

### 10.1 Taking Over of the Works and Sections

Except as stated in Sub-Clause 9.4 [*Failure to Pass Tests on Completion*], the Works shall be taken over by the Employer when (i) the Works have been completed in accordance with the Contract, including the matters described in Sub-Clause 8.2 [*Time for Completion*] and except as allowed in sub-paragraph (a) below, and (ii) a Taking-Over Certificate for the Works has been issued, or is deemed to have been issued in accordance with this Sub-Clause.

The Contractor may apply by notice to the Engineer for a Taking-Over Certificate not earlier than 14 days before the Works will, in the Contractor's opinion, be complete and ready for taking over. If the Works are divided into Sections, the Contractor may similarly apply for a Taking-Over Certificate for each Section.

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

- (a) issue the Taking-Over 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 (either until or whilst this work is completed and these defects are remedied); or
- (b) reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work before issuing a further notice under this Sub-Clause.

If the Engineer fails either to issue the Taking-Over Certificate or to 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 Taking-Over Certificate shall be deemed to have been issued on the last day of that period.

The Section entitled "Section 12, Infrastructure" shall be certified as complete progressively in accordance with the procedure set out in those parts of the Employer's Requirements entitled "Section Descriptions". For the purposes of that procedure, infrastructure shall be deemed to include the relevant part of Section 11 (Common Area Landscaping).

In the event that upon completion of all other Sections (or, where applicable, Sub-Sections), any of the requirements for completion set out in Sub-Clause 10.1(a) above remain unfulfilled in relation to Section 12, the Engineer shall issue a Taking-Over Certificate for the whole Section when such requirements have been fulfilled. Otherwise Section 12 shall be deemed to have been taken over as at the date of completion of all other Sections (or, where applicable, Sub-Sections).

#### 10.2 Taking Over of Parts of the Works

The Engineer may, at the sole discretion of the Employer, issue a Taking-Over Certificate for any part of a Section or a sub-section. In respect of those parts of Sections identified as Sub-Sections in Part 1 of Schedule 5 [*Sectional Commencement Dates and Time for Completion*] and described in the Employer's Requirements, the Employer shall be obliged to procure the issuance of such a certificate if and as soon as the same have been completed in accordance with Sub-Clause 10.1 above. The reduction in delay damages to be allowed in consequence of such completion, as referred to in the final paragraph of this Sub-Clause, shall be as set out in Schedule 7 [*Liquidated Damages*].

The Employer shall not use any part of the Works (other than as a temporary measure which is either specified in the Contract or agreed by both Parties) unless and until the Engineer has issued a Taking-Over Certificate for this part. However, if the Employer does use any part of the Works before the Taking-Over Certificate is issued:

- (a) the part which is used shall be deemed to have been taken over as from the date on which it is used,
- (b) the Contractor shall cease to be liable for the care of such part as from this date, when responsibility shall pass to the Employer, and
- (c) if requested by the Contractor, the Engineer shall issue a Taking-Over Certificate for this part,

Provided that use on the part of the Employer shall not arise, and the entitlements of the Contractor set out below shall not apply:

- (i) unless forthwith upon commencement of any such use by the Employer, the Contractor serves notice in writing on the Employer of its intention to rely on this Clause 10.2; and
- (ii) until 24 hours after receipt of such notice to the extent that the Employer is continuing such use.

After the Engineer has issued a Taking-Over Certificate for a part of the Works, the Contractor shall be given the earliest opportunity to take such steps as may be necessary to carry out any outstanding Tests on Completion. The Contractor shall carry out these Tests on Completion as soon as practicable before the expiry date of the relevant Defects Notification Period.

If the Contractor incurs Cost as a result of the Employer taking over and/or using a part of the Works, other than such use as is specified in the Contract or agreed by the Contractor, the Contractor shall (i) give notice to the Engineer and (ii) be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to payment of any such Cost plus the Fee and increase in the TC and the applicable STC or STCs in an amount equal to such Costs and Fee. After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the above adjustment.

If a Taking-Over Certificate has been issued for part of a Section, the delay damages thereafter for completion of the remainder of the Section shall be reduced. For any period of delay after the date stated in this Taking-Over Certificate, the proportional reduction in these delay damages shall (subject to the first paragraph of this Sub-Clause) 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 Engineer 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 8.6 [*Delay Damages*], and shall not affect the maximum amount of these damages.

### 10.3 **Interference with Tests on Completion**

If the Contractor is prevented, for more than 14 days, from carrying out the Tests on Completion by a cause for which the Employer is responsible, the Employer shall be deemed

to have taken over the Works or Section (as the case may be) on the date when the Tests on Completion would otherwise have been completed.

The Engineer shall then issue a Taking-Over Certificate accordingly, and the Contractor shall carry out the Tests on Completion as soon as practicable, before the expiry date of the Defects Notification Period. The Engineer shall require the Tests on Completion to be carried out by giving 14 days' notice and in accordance with the relevant provisions of the Contract.

If the Contractor suffers delay and/or incurs Cost as a result of this delay in carrying out the Tests on Completion, the Contractor shall give notice to the Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of any such Cost plus the Fee and increase in the TC and the applicable STC or STCs in an amount equal to such Costs and Fee.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

#### 10.4 Surfaces Requiring Reinstatement

Except as otherwise stated in a Taking-Over Certificate, a certificate for a Section or part of the Works shall not be deemed to certify completion of any ground or other surfaces requiring reinstatement.

### 11. DEFECTS LIABILITY

#### 11.1 Completion of Outstanding Work and Remedying Defects

In order that the Works and Contractor's Documents, and each Section, shall be in the condition required by the Contract (fair wear and tear excepted) by the expiry date of the relevant Defects Notification Period or as soon as practicable thereafter, the Contractor shall:

- (a) complete any work which is outstanding on the date stated in a Taking-Over Certificate, within such reasonable time as is instructed by the Engineer, and
- (b) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period for the Works or Section (as the case may be).

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

#### 11.2 Cost of Remedying Defects

All work referred to in sub-paragraph (b) of Sub-Clause 11.1 [*Completion of Outstanding Work and Remedying Defects*] shall be executed by the Contractor, with no amendment to the TC paid by the Employer. Cost plus Adjusted Fee shall be payable for such remedial work, subject to the limitation that such payment will not exceed in aggregate the unutilised balance of any Retention Money or equivalent bond held by the Employer if and to the extent that the work is attributable to:

- (a) the design of the Works, (subject to Sub-Clause 4.7 [*Setting Out*]),

- (b) Plant, Materials or workmanship not being in accordance with the Contract,
- (c) improper operation or maintenance which was attributable to matters for which the Contractor is responsible (under Sub-Clauses 5.5 [*Training*] to 5.7 [*Operation and Maintenance Manuals*] or otherwise), or
- (d) failure by the Contractor to comply with any other obligation.

If and to the extent that such work is attributable to any other cause, the Contractor shall be notified promptly by (or on behalf of) the Employer and Sub-Clause 13.3 [*Variation Procedure*] shall apply.

Such other causes shall include, without limitation:

- (i) routine maintenance of the Works (save to the extent increased by any of the causes listed in (a) to (d) above); and
- (ii) defects or damage caused by the use of the Works for purposes or in conditions other than those contemplated by the Contract.

The Contractor shall not be obliged to remedy defects or damage arising from causes other than those listed in (a) to (d) above after completion of the last Section to be completed.

### 11.3 Extension of Defects Notification Period

The Employer shall be entitled subject to Sub-Clause 2.5 [*Employer's Claims*] to an extension of the Defects Notification Period for the Works or a Section if and to the extent that the Works, Section or a major item of Plant (as the case may be, and after taking over) cannot be used for the purposes for which they are intended by reason of a defect or damage. However, a Defects Notification Period shall not be extended by more than two years.

If delivery and/or erection of Plant and/or Materials was suspended under Sub-Clause 8.8 [*Suspension of Works*] or Sub-Clause 16.1 [*Contractor's Entitlement to Suspend Works*], the Contractor's obligations under this Clause shall not apply to any defects or damage occurring more than two years after the Defects Notification Period for the Plant and/or Materials would otherwise have expired.

Where any work is executed to which Sub-Clauses 11.1(a) or 11.2(a) to (c) above apply, the Defects Notification Period in respect of such work only shall expire one year after the completion of such work, subject to an overall limit of three years following completion of the relevant Sections.

### 11.4 Failure to Remedy Defects

If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, 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 this notified date, the Employer may (at his option):

- (a) carry out the work himself or by others, in a reasonable manner and (subject to the proviso below) at the Contractor's cost, but the Contractor shall have no responsibility for this work; and the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay to the Employer (subject to the proviso below) the costs reasonably incurred by the Employer in remedying the defect or damage (provided that where the cause of any defect or damage is other than as referred to in Sub-Clause 11.2 (a) to (d) above, the amount recoverable from the Contractor shall be the excess, if any, of the costs so incurred by the Employer over the amount which would have been payable to the Contractor for carrying out the relevant work pursuant to Sub-Clause 11.2 above); or
- (b) in the case only of items falling within Sub-Clauses 11.2 (a) to (d) above, require the Engineer to agree or determine a reasonable reduction in the TC and the applicable STC or STCs.

#### 11.5 **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.

#### 11.6 **Further Tests**

If the work of remedying of any defect or damage may affect the performance of the Works, the Engineer may require the repetition of any of the tests described in the Contract, including Tests on Completion and/or Tests after Completion (if any). 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 11.2 above, for the cost of the remedial work.

#### 11.7 **Right of Access**

Until the Performance Certificate has been issued, the Contractor shall have the right of access to all parts of the Works and to records of the operation and performance of the Works, except as may be inconsistent with the Employer's reasonable security restrictions.

**11.8 Contractor to Search**

The Contractor shall, if required by the Engineer, search for the cause of any defect, under the direction of the Engineer. Unless the defect is to be remedied at the cost of the Contractor under Sub-Clause 11.2 above, the Cost of the search plus Fee shall be determined by the Engineer in accordance with Sub-Clause 3.5 [*Determinations*] shall be payable to the Contractor and an increase in the TC and any applicable STC in the like amount shall be made .

**11.9 Performance Certificate**

Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed his obligations under the Contract.

The Engineer shall issue the Performance Certificate within 28 days after the latest of the expiry dates of the Defects Notification Periods, or as soon thereafter as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects. A copy of the Performance Certificate shall be issued to the Employer.

**11.10 Unfulfilled Obligations**

After the Performance Certificate has been issued, each Party shall remain liable for the fulfilment of any obligation 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 and the Contract shall remain in force until fulfilment of those obligations and/or satisfaction of any liabilities arising under the Contract.

In particular, the Contractor shall remain liable to compensate the Employer in respect of any defects in respective Sections of the Works for a period expiring 3years after the issue of the Taking-Over Certificate for the applicable Section to the extent that such defects arise in consequence of any breach of the Contract by the Contractor.

**Comment [m15]:** To be revisited

**Comment [e16]:** AE: Agreement on the Contractor's proposal is beneficial for both Parties in terms of Cost and is one of the elements which would allow the Contractor to reduce the amount of the Fee.

### 11.11 Clearance of Site

Within 28 days of the expiry of the Defects Notification Period for each Section, the Contractor shall remove any remaining Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works from the relevant part of the Site.

If all these items have not been removed within the said 28 days, the Employer may sell or otherwise dispose of any remaining items. The Employer shall be entitled to be paid the costs incurred in connection with, or attributable to, such sale or disposal and restoring the Site.

Any balance of the moneys from the sale shall be paid to the Contractor. If these moneys are less than the Employer's costs, the Contractor shall pay the outstanding balance to the Employer.

## 12. TESTS AFTER COMPLETION

### 12.1 Procedure for Tests after Completion

If Tests after Completion are specified in the Employer's Requirements, this Clause shall apply. The Employer shall:

- (a) provide all electricity, equipment, fuel, instruments, labour, materials, and suitably qualified and experienced staff, as are necessary to carry out the Tests after Completion efficiently, and
- (b) carry out the Tests after Completion in accordance with the manuals supplied by the Contractor under Sub-Clause 5.7 [*Operation and Maintenance Manuals*] and such guidance as the Contractor may be required to give during the course of these Tests; and in the presence of such Contractor's Personnel as either Party may reasonable request.

The Tests after Completion shall be carried out as soon as is reasonably practicable after the Works or Section have been taken over by the Employer. The Employer shall give to the Contractor 21 days' notice of the date after which the Tests after Completion will be carried out. Unless otherwise agreed, these Tests shall be carried out within 14 days after this date, on the day or days determined by the Employer.

If the Contractor does not attend at the time and place agreed, the Employer may proceed with the Tests after Completion, which shall be deemed to have been made in the Contractor's presence, and the Contractor shall accept the readings as accurate.

The results of the Tests after Completion shall be compiled and evaluated by both Parties. Appropriate account shall be taken of the effect of the Employer's prior use of the Works.

#### 12.2 **Delayed Tests**

If the Contractor incurs Cost as a result of any unreasonable delay by the Employer to the Tests after Completion, the Contractor shall:

- (a) give notice to the Engineer; and
- (b) be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to the Costs and payment of the Fee thereon only.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the above entitlements.

If, for reasons not attributable to the Contractor, a Test after Completion on the Works or any Section cannot be completed during the Defects Notification Period (or any other period agreed upon by both Parties), then the Works or Section shall be deemed to have passed this Test after Completion.

#### 12.3 **Retesting**

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

- (a) sub-paragraph (b) of Sub-Clause 11.1 [*Completion of Outstanding Work and Remedying Defects*] shall apply, and
- (b) either Party may then require the failed Tests, and the Tests after Completion on any related work, to be repeated under the same terms and condition.

If and to the extent that this failure and retesting are attributable to any of the matters listed in sub-paragraphs (a) to (d) of Sub-Clause 11.2 [*Cost of Remedying Defects*] and cause the Employer to incur additional costs, the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay these costs to the Employer.

#### 12.4 **Failure to Pass Tests after Completion**

If the following conditions apply, namely:

- (a) the Works, or a Section, fail to pass any or all of the Tests after Completion,
- (b) the relevant sum payable as non-performance damages for this failure is stated (or its method of calculation is defined) in the Contract, and

- (c) the Contractor pays this relevant sum to the Employer during the Defects Notification Period

then the Works or Section shall be deemed to have passed these Tests after Completion.

If the Works, or a Section, fail to pass a Test after Completion 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 Defects Notification 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 this Test after Completion.

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, either to investigate the causes of a failure to pass a Test after Completion or to carry out any adjustments or modifications, the Contractor shall (i) give notice to the Engineer and (ii) be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to payment of any Cost plus Fee and an increase in the TC and any applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the above entitlements.

### 13. VARIATIONS AND ADJUSTMENTS

#### 13.1 Right to Vary

Variations may be initiated by the Engineer (subject to Sub-Clause 3.1 [*Engineer's Duties and Authority*]) at any time prior to issuing the Taking-Over Certificate for the Works or each Section or sub-section, either by an instruction or by a request for the Contractor to submit a proposal. The term Variation shall also include any matter which by an express term of the Contract is deemed or required to be treated and/or valued as a Variation. Variation shall not comprise the omission of any work which is to be carried out by others unless the Employer transfers ownership of a distinct part of the Works or a Section to a third party which is not an Affiliate of the Employer and provided that the value of such negative Variations does not exceed an amount equal to 25% of the TC.

The Contractor shall execute and be bound by each Variation, provided that the Employer shall have delivered to the Contractor a copy of a notice from the Employer to the security trustee containing brief particulars of the proposed variation, as well as a copy of the security trustee's

response to such notice (if any). The requirement for delivery of such copy notice shall not arise:

- (a) unless the aggregate effect of the relevant proposed Variation in combination with all other Variations so far instructed would be to increase the TC by more than US\$1,000,000; or
- (b) where the value of the proposed Variation is less than the unutilised portion of the Employer's Share as defined in paragraph 3.5.4.2 of Schedule 3 [*Open Book Policy, Cost Management and Payment*].

### 13.2 Value Engineering

The Contractor may, at any time, submit to the Engineer a written proposal which (in the Contractor's opinion) will, if adopted, (i) accelerate completion and/or (ii) reduce the cost to the Employer of executing, maintaining or operating the Works and/or (iii) improve the efficiency or value to the Employer of the completed Works and/ or (iv) otherwise be of benefit to the Employer.

The proposal shall include the items listed in Sub-Clause 13.3 below.

Where at its discretion the Employer accepts such a proposal, there shall be no reduction in the TC or STC even if the amount of Cost plus Fee payable in consequence of such proposal is reduced.

### 13.3 Variation Procedure

If the Engineer 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 TC or applicable STC or STCs .

The Engineer shall, as soon as practicable after receiving such proposal (under Sub-Clause 13.2 above 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 shall be issued by the Engineer to the Contractor, who shall acknowledge receipt and comply with each instruction regardless of the Contractor agreeing with the value of such Variation made by the Engineer.

Upon instructing or approving a Variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine Costs plus Fee, the adjustment to the TC and any STC and payment. Any adjustments shall take account of the Contractor's submissions under Sub-Clause 13.2 above if applicable. In case the aggregate result of all Variations issued by the Engineer under this clause, is a reduction in the TC exceeding 25% of the previously applicable TC, the Employer shall be obliged to pay to the Contractor an amount equal to 30% of the excess over the above percentage of 25%.

#### 13.4 Payment in Applicable Currencies

There will be no adjustment to the Target TC in respect of changes in any currency exchange rate or rates.

#### 13.5 Adjustments for Changes in Legislation

**13.5(a)** The TC and STCs shall be adjusted to take account of any increase or decrease in Cost and/or Fee resulting from a Change of Law event made after the Contract Effective 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 Change of Law events, changes in the Laws of the Country or in such interpretations, made after the Contract Effective Date, the Contractor shall give notice to the Engineer and 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 8.4 [*Extension of Time for Completion*], and
- (ii) payment of any Cost plus Fee and an increase in the TC and any applicable STC or STCs in an amount equal to such payment.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

#### 13.6 Adjustment for Changes in Cost

There shall be no adjustment to the TC or any STC in consequence purely of any rises or falls in the cost of any labour, Goods or other inputs to the Works. However the Contractor shall be

entitled to payment of Cost plus Fee in relation to any Cost incurred as a result of change in the cost of any labour, Goods or other inputs to the Works.

**14. PAYMENT**

**14.1 The TC**

Unless otherwise stated in these Conditions:

- (a) The TC is initially an amount of USD .....which is an estimated total amount that the Employer will pay to the Contractor for Cost, Fee and Adjusted Fee for the performance of the Works. The TC is not necessarily the maximum amount that the Employer will pay to the Contractor for the performance of the Works and does not represent a limitation of the Employer’s obligation to pay to the Contractor Cost plus Fee and Adjusted Fee as the case may be in accordance with the Contract for all Cost reasonably and properly incurred by the Contractor in relation or in connection with the performance of the Works. The Parties will exercise all reasonable efforts (inclusive of but not limited to value engineering as the term is defined in Schedule 3 and 4, modification to the specifications and/or to the ER and ERDDs etc) with a common intention to ensure that the performance of the Works will not cause the Employer to pay to the Contractor for Cost, Fee and Adjusted Fee an amount higher than the TC. The TC shall be adjusted from time to time as provided for in the Contract. For the avoidance of doubt it is hereby clarified that the TC does not operate so that the Employer is not obliged to pay the Contractor for Cost plus Fee and Adjusted Fee in excess of the above mentioned amount of the TC but all payments made by the Employer in excess of the TC will be made for Cost plus Adjusted Fee and not Cost plus Fee.
- (b) the Contractor shall pay and ensure that its Subcontractors pay all taxes, duties, statutory fees, levies or similar impositions in the Country or elsewhere payable in respect of the Contract or the Works or the activities of the Contractor and Subcontractors in connection with the Works. There shall be no payment by the Employer of any Cost incurred or Fee thereon in respect of such items (whether in respect of changes in amount or interpretation or changes in relevant Laws imposing additional liabilities) save withholding tax imposed on any payment made by the Contractor from within the Country and duty on imports into the Country which shall be reimbursed as Costs plus Adjusted Fee and an increase in the TC and any applicable STC or STCs, provided that no Costs or Adjusted Fee shall be paid to the extent that the Contractor has failed to exercise all reasonable endeavours to avail itself of any exemption or other tax mitigation lawfully available to the Contractor; and

- (c) any quantities of units of Plant or Materials which may be set out in any Schedule are not to be taken as the actual and correct quantities of the Works which the Contractor is required to execute within the , and

(subject to the final paragraph of Sub-Clause 5.2 [*Contractor's Document*]) no variance between such quantities and actual quantities shall entitle the Contractor to any adjustment of the TC or any STC or any extension of time or be deemed to be a Variation. For the avoidance of doubt references to "quantities" in this Sub-Clause excludes numbers of whole buildings or structures indicated in the Employer's Requirements, to which Sub-Clause 5.2 [*Contractor's Documents*] shall apply.

#### 14.2 Advance Payment

The Employer shall make an advance payment to the Contractor, as an advance payment deemed to be received in respect of Costs and the Fee and accruing towards the TC in the proportions described in Schedule 1 [*Contract Particulars*], at the same time as the Advance Payment Security is delivered to the Employer. The total advance payment will be X% of the TC

The Employer shall pay the advance payment to the Contractor on or within 7 days after the Contract Effective Date on condition that the Employer, on or before the date of such payment, receives (i) the Performance Security in accordance with Sub-Clause 4.2 [*Performance Security*] and (ii) an Advance Payment Security in amounts and currencies equal to the advance payment. This Advance Payment Security shall be issued by an entity and from within a country (or other jurisdiction) approved by the Employer, and shall be in the form annexed to these Conditions or in another form approved by the Employer.

The Contractor shall ensure that the Advance Payment Security is valid and enforceable until 7 days after the date of Taking-Over Certificate of the last Section to be completed, or shall be extended if expressed to expire prior to such date. If such extension has not been effected by 7 days prior to the expiry date, the Employer may call the entire outstanding amount of the Advance Payment Security.

The advance payment shall be repaid through percentage deductions from the gross value of Payment Certificates, as follows:

- (a) deductions shall commence in the first Payment Certificate following payment to the Contractor of the advance payment; and

- (b) deductions shall be made at the amortisation rate of X% of the amount of each Payment Certificate (excluding the advance payment and repayments of retention) until such time as the advance payment has been repaid. The Employer is obliged to notify immediately the issuers of the Advance Payment Security in respect of the above reduction.

If the advance payment has not been repaid prior to the issue of the Taking-Over Certificate for the last Section to be completed or prior to termination under Clause 15 [*Termination by Employer*], (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 Interim Payment Certificates

The Contractor shall submit a Statement in six copies to the Engineer after the end of each month, in a form approved by the Engineer, showing in detail the amounts to which Contractor considers himself to be entitled, together with supporting documents which shall include the relevant report on progress in accordance with Sub-Clause 4.19 [*Progress Reports*].

The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Costs and Fee or Adjusted Fee are payable, in the sequence listed:

- (a) the Costs and amount of any Fee or Adjusted Fee thereon eligible for payment in accordance with Schedule 3 [*Open Book Policy, Cost Management and Payment*], 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 (e) below);
- (b) any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.5 [*Adjustments for Changes in Legislation*];
- (c) an amount to be deducted for retention at the rate of 2% of the total of the above amounts (disregarding any deduction in respect of the advance payment and provided that no such deduction shall be made from the advance payment or the Payment Certificate for such payment) until, in respect of each Section, the amount so retained reaches 2% of either the aggregate amount of Cost plus Fee and Adjusted Fee paid for all Works performed up to completion for the Section or the applicable STC whichever is the lesser;

**Comment [m17]:** To be revisited once the range of Advance Payment amount is known.

**Comment [J18]:** The amount of retention should be 5% but capped to a max that covers the value of retention to the final 4 or 5 sections of work

- (d) 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
- (e) the deduction of amounts certified in all previous Payment Certificates.

If subsequent to the payment by the Employer of Cost plus Fee for any items of the Works, any third party asserts or establishes any claim to title over, or any lien or other encumbrance in respect of, such items the Employer shall be entitled, on giving notice, to withhold from any other payment an amount equal to such previous payment until the Contractor either discharges the relevant claim, lien or encumbrance or secures the same by way of an on demand bond in the like amount. The Contractor shall procure waivers of such liens and encumbrances in its subcontracts.

#### 14.4 **Schedule of Payments**

If the Contract includes a Schedule of Payments specifying the instalments in which any Costs and/or the Fee or Adjusted Fee will be paid, then, unless otherwise stated in this Schedule:

- (a) the instalments quoted in the Schedule of Payments shall be the estimated contract values for the purposes of sub-paragraph (a) of Sub-Clause 14.3 above;
- (b) Sub-Clause 14.5 below 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 be less than that on which the Schedule of Payments was based, then the Engineer 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 is less than that on which the instalments were previously based (provided that this Sub-Clause (c) shall not apply to Contractor's Design Costs (as defined in Schedule 3 [*Open Policy, Cost Management and Payment*], to which paragraph 3.6.3.2 of Schedule 3 [*Open Book Policy, Cost Management and Payment*] shall apply).

If the Contract does not include a Schedule of Payments, 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 Taking-Over Certificate has been issued for the Works.

#### 14.5 **Plant and Material intended for the Works**

Interim Payment Certificates of the Works or any Section thereof shall include, under subparagraph (a) of Sub-Clause 14.3 above an amount of Cost plus Fee for Plant and Materials which have been sent to the Site for incorporation in the Permanent Works, as further provided below and in Schedule 3 [*Open Book Policy, Cost Management and Payment*].

The Engineer 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 Employer's Requirements or otherwise agreed 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 Engineer together with evidence of payment of freight and insurance, any other documents reasonably required;

or

- (c) the relevant Plant and Materials 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 amount to be certified in respect of items described in (b) above shall be the equivalent of 80% of the Engineer's determination of the amount of Cost and Fee thereon on such amount properly attributable to the Plant and Materials, with the remaining 20% of Cost and Fee thereon paid, upon delivery to Site (subject always to Schedule 3 [*Open Book Policy, Cost Management and Payment*]).

#### 14.6 Issue of Interim Payment Certificates

No amount will be certified or paid until the Employer has received and approved the Performance Security. Thereafter, the Engineer shall, within 10 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

**Comment [m19]:** To be revisited once the range of Advance Payment amount is known.

An Interim Payment Certificate shall not be withheld for any reason, save that:

- (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 Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction.

#### 14.7 Payment

The Employer shall (subject to paragraph 3.6.2 of Schedule 3 [*Open Book Policy, Cost Management and Payment*]) pay to the Contractor:

- (a) the Advance Payment on or within 7 (seven) days from Contract Effective Date;
- (b) the amount certified in each Interim Payment Certificate within 30 days after the Engineer receives the Statement and supporting documents; and
- (c) the amount certified in the Final Payment Certificate within 28 days after the Employer receives this Payment Certificate.

**Comment [AE20]:** Again, one MUST provide against the fact that the Advance Payment has been significantly reduced. The Contractor's cash flow must be protected in the most efficient way possible. The proposal may result in a significant Cost of the Contractor having to obtain external finance to counter balance the negative effects of the retention. These days cost of money is exorbitant.

Payment of the amount due shall be made into the bank account nominated by the Contractor which may be within or outside Oman.

**Comment [m21]:** To be revisited once the range of Advance Payment amount is known.

#### 14.8 Delayed Payment

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 above, 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 14.7 above, irrespective (in the case of its sub-paragraph (b)) of the date on which any Interim Payment Certificate is issued.

Unless otherwise stated in these Conditions, these financing charges shall be calculated at the annual rate of two per cent above LIBOR.

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

In relation to such financing charges the Contractor shall give notice to the Engineer and shall be entitled to payment of such charges and an increase in the like amount to the TC and any applicable STC.

#### 14.9 **Payment of Retention Money**

When the Taking-Over Certificate has been issued for each Section, and the Works for each Section have passed all specified tests (including the Tests after Completion, if any), the first half of the Retention Money applicable to such Section (1% - less in each case any unsatisfied claims to which the Employer is entitled) shall be certified by the Engineer for payment to the Contractor.

Promptly after the latest of the expiry dates of the Defects Notification Periods, the outstanding balance of the Retention Money (1% - less in each case any unsatisfied claims to which the Employer is entitled) shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate was issued for a Section, the relevant percentage of the second half of the Retention Money (1% - less in each case any unsatisfied claims to which the Employer is entitled) shall be certified and paid promptly after the expiry date of the Defects Notification Period for the Section.

However, if any work remains to be executed under Clause 11 [*Defects Liability*] or Clause 12 [*Tests after Completion*], the Engineer shall be entitled to withhold certification of the estimated cost of this work until it has been executed.

The Contractor may, in lieu of allowing the remaining balance of Retention Money in respect of that Section to be retained until expiry of the applicable Defects Notification Period, elect

to deliver to the Employer on or before the issue of the relevant Taking-Over Certificate a duly executed Retention Security in the form annexed as Schedule 10 [*Retention Security*] issued by a first class bank and from within a country approved by the Employer. Upon delivery of such security, the said remaining balance shall be certified and paid to the Contractor.

**Comment [J22]:** See comment above re retention

DITO

**Comment [m23]:** To be revisited once the range of Advance Payment amount is known.

#### 14.10 Statement at Completion

Within 84 days after receiving the Taking-Over Certificate for each Section, the Contractor shall submit to the Engineer six copies of a Statement at completion with supporting documents, in accordance with Sub-Clause 14.3 [*Application for Interim Payment Certificates*], showing:

- (a) the amount of all Costs and of the Fee or Adjusted Fee eligible for payment in accordance with the Contract up to the date stated in the Taking-Over Certificate for the Section,
- (b) the amount of the STC of that Section, (showing Costs and the Fee and Adjusted Fee separately),
- (c) the amount of the Contractor's Share (as and when applicable in respect of the Works); and
- (d) an estimate of any other amounts which the Contractor considers will become due to him under the Contract in respect of such Section. Estimated amounts shall be shown separately in this Statement at completion.

The Engineer shall then certify in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*].

#### 14.11 Application for Final Payment Certificate

Within 56 days after the expiry of the Defects Notification Period for each Section, the Contractor shall submit, to the Engineer, six copies of a draft final statement for such Section with supporting documents showing in detail in a form approved by the Engineer:

- (a) the amount of all Costs and of the Fee or Adjusted Fee for such Section eligible for payment in accordance with the Contract,
- (b) the amount of the STC for that Section (showing Costs and the Fee and Adjusted Fee separately)

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement for each Section as agreed. This agreed statement is referred to in these Conditions as a "**Final Statement**".

However if, following discussions between the Engineer and the Contractor and any changes to the draft final statement which are agreed, it becomes evident that a Dispute exists, the Engineer

shall deliver to the Employer (with a copy to the Contractor) an Interim Payment Certificate for the agreed parts of the draft final statement. Thereafter, if the Dispute is finally resolved under Sub-Clause 20.2 [*Senior Representative Negotiations*], the Contractor shall then prepare and submit to the Employer (with a copy to the Engineer) a Final Statement.

#### 14.12 **Discharge**

When submitting a Final Statement, the Contractor shall submit a written discharge which confirms that the total of that Final Statement represents full and final settlement of all moneys due to the Contractor under or in connection with the applicable Section. This discharge may state that it becomes effective when the Contractor has received the relevant reduction in the value of the Performance Security and the out-standing balance of this total in which event the discharge will be effective on such date.

#### 14.13 **Issue of Final Payment Certificate**

Within 28 days after receiving the Final Statement and written discharge in accordance with Sub-Clauses 14.11 and 14.12 above, the Engineer shall issue, to the Employer, the Final Payment Certificate which shall state in respect of the relevant Section:

- (a) the amount which is finally due, and
- (b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled, 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 Contractor has not applied for a Final Payment Certificate in accordance with Sub-Clauses 14.11 [*Application for Final Payment Certificate*] and 14.12 above, the Engineer shall request the Contractor to do so. If the Contractor fails to submit an application within a period of 28 days, the Engineer shall issue the Final Payment Certificate for such amount as he fairly determines to be due.

#### 14.14 **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:

- (a) in a Final Statement and also

- (b) (except for matters or things arising after the issue of the Taking-Over Certificate for the Works) in a Statement at completion described in Sub-Clause 14.10 [*Statement at Completion*].

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.

#### 14.15 Currencies of Payment

The TC and all STCs shall be denominated in, and all payments of Cost, the Fee and Adjusted Fee shall be made in, United States dollars (US\$). Provisions for converting Costs originally incurred in other currencies, for the application of the Fee or Adjusted Fee thereto appears in Schedule 3 [*Open Book Policy, Cost Management and Payment*]. The Employer however will pay to the Contractor any Cost plus Adjusted Fee related to the conversion to USD of Cost originally incurred in currencies other than USD.

#### 14.16 Set-Off

Subject to serving prior written notice on the Contractor specifying the amount and brief particulars of the grounds relied upon the Employer shall be entitled to set-off against any sum otherwise payable to the Contractor the amount of any sum for which the Contractor is liable to the Employer:

- (a) in the case of delay damages payable pursuant to Sub-Clause 8.7 [*Delay Damages*], without the need for any prior reference to the Engineer pursuant to Clause 2.5 [*Employer's Claims*]; and
- (b) in the case of any other sum, subject to having first obtained a determination pursuant to Clause 2.5 [*Employer's Claims*] that the relevant sum is payable.

### 15. TERMINATION BY EMPLOYER

#### 15.1 Notice to Correct

If the Contractor is in breach of any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time, provided that:

- (a) where the breach by the Contractor causes a Project Company Event of Default for which the Development Agreement provides a cure period, the said reasonable time shall be no longer than the time permitted by the Development Agreement to

cure the said Project Company Event of Default and shall expire if at any time the Contractor ceases to take all possible steps to cure such default; and

- (b) where the breach by the Contractor is likely to cause such a Project Company Event of Default, the said reasonable period shall expire at the earliest of:
  - (i) the avoidance of the default by the Contractor;
  - (ii) the cessation by the Contractor of the taking of all possible steps to avoid the said default;
  - (iii) any date at which the default has not been avoided and the Employer believes, acting reasonably, that either the Employer or a replacement contractor will be able to avert the default and that the Contractor will not;
  - (iv) the expiry of the relevant cure period (if any) under the Development Agreement, as set out in (a) above; or
  - (v) termination of the Development Agreement on the basis of the Contractor's default.

#### 15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract if the Contractor (or in the case of subparagraph (e) below its guarantors or the providers of the Performance Security and references to the Contractor or guarantor include any or all of any such entities comprising such parties who are bound jointly or severally):

- (a) fails to comply with Sub-Clause 4.2 [*Performance Security*] or with a notice under Sub-Clause 15.1 above,
- (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 Clause 8 [*Commencement, Delays and Suspension*], 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,

- (e) 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, or
- (f) gives or offers to give (directly or indirectly) 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 (f). However, lawful inducements and rewards shall not entitle termination.

In any of these events or circumstances, the Employer may, upon giving 30 days' notice (or notice of such shorter period as may be applicable pursuant to Sub-Clause 15.1 [*Notice to Correct*] above in the case of breaches by the Contractor causing actual or anticipated Project Company Events of Default) to the Contractor, terminate the Contract and expel the Contractor from the Site unless the relevant breach has been cured prior to expiry of the said period. However, in the case of sub-paragraph (e), or where any period specified in Sub-Clause 15.1 above in respect of breaches by the Contractor causing actual or anticipated Project Company Events of Default has expired without the default being cured or avoided, or where the said events are not subject to a cure period, 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 Engineer. 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 and the Contractor shall execute such further documents and take such further steps as may be required to secure such rights for the Employer.

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

As soon as practicable after a notice of termination under Sub-Clause 15.2 above has taken effect, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the value of Works, Goods and Contractor's Documents, and any other sums which would, but for Clause 15.4 below be due to the Contractor for work executed in accordance with the Contract.

### 15.4 Payment after Termination

After a notice of termination under Sub-Clause 15.2 above has taken effect, the Employer may:

- (a) proceed in accordance with Sub-Clause 2.5 [*Employer's Claims*],
- (b) withhold further payments to the Contractor until the costs, losses, damages and liabilities 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) when the Works have been completed and the total costs, losses, damages and liability suffered by the Employer determined or agreed, the Engineer shall carry out a reconciliation of the provisional assessment referred to below and a balancing payment shall be made by the Contractor to the Employer (where the excess referred to below has increased) or by the Employer to the Contractor (where the said excess has diminished or the total sums incurred by the Employer are less than the amount referred to in Sub-Clause 15.3 [*Valuation at Date of Termination*]).

The costs, losses, damages and liabilities referred to above and in Sub-Clause 15.5 below shall, for the avoidance of doubt, but subject to the cap referred to in the final paragraph of Sub-Clause 17.6 [*Limitation of Liability*], include the items referred to in the first paragraph of Sub-Clause 17.6 [*Limitation of Liability*].

Within 28 days after the said notice has taken effect the Engineer shall make a provisional assessment of all costs, losses, damages and liabilities which have been or will be incurred by the Employer in consequence of the Contractor's default and termination and the excess, if any, of such assessment over the amount ascertained in accordance with Sub-Clause 15.3 above shall be a debt immediately due from the Contractor to the Employer.

#### 15.5 Employer's Alternative Remedy on Termination

In lieu of completing the Works as contemplated by Clause 15.4 above the Employer may elect in whole or in part not to complete the Works, in which case the Contractor shall be liable for the costs, losses and liabilities suffered by the Employer as set out in Sub-Clause 15.4 above subject to Sub-Clause 17.6 [*Limitation of Liability*].

#### 15.6 Employer's Entitlement to Termination

The Employer shall be entitled to terminate the Contract, at any time after (but not prior to) the expiry of 1 year after the Contract Effective Date, for the Employer's convenience, by giving notice of such termination to the Contractor.

The termination shall take effect 28 days after the later of the date on which the Contractor receives this notice or the Employer returns the Performance Security, Advance Payment Security and any Retention Monies or bonds in lieu of such monies.

After this termination, 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 19.6 [*Optional Termination, Payment and Release*]. The Contractor shall also be paid an amount equal to 4% of the Cost (excluding Fee) of the Works already executed and (where following such termination the Employer awards the whole or part of the remaining Works to another party or performs it itself), 10% of the estimated Cost (excluding Fee) of such awarded or performed Works.

### 16. SUSPENSION AND TERMINATION BY CONTRACTOR

#### 16.1 Contractor's Entitlement to Suspend Works

If the Engineer fails to comply with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*], and the Employer fails in consequence to make a payment to which the Contractor is entitled within 30 days of an application made in accordance with Sub-Clause 14.3 [*Application for Interim Payment Certificates*] in respect of such payment, the Contractor may, after giving not less than 7 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the payment.

**Comment [AE24]:** The Contractor is willing to reinstate 56 days on condition that the Advance Payment amount will be the amount provided for in the current contract i.e. 130 M USD.

**Comment [m25]:** To be revisited once the range of Advance Payment amount is known.

**Comment [m26]:** To be revisited once the range of Advance Payment amount is known.

The Contractor's action shall not prejudice his entitlements to financing charges under Sub-Clause 14.8 [*Delayed Payment*] and to termination under Sub-Clause 16.2 [*Termination by Contractor*].

If the Contractor subsequently receives such 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 Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of Cost plus Fee (plus interest as provided in Sub-Clause 14.8 [*Delayed Payment*]) and an increase in the like amount to the TC and any applicable STC.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

## 16.2 Termination by Contractor

The Contractor shall subject to and on the conditions set out in the Construction Contract Direct Agreement be entitled to terminate the Contract if:

- (a) the Employer fails to make a payment to which the Contractor is entitled within 30 days of an application made in accordance with Sub-Clause 14.3 [*Application for Interim Payment Certificates*] in respect of such payment,
- (b) the Employer substantially fails to perform his obligations under the Contract,
- (c) the Employer fails to comply with Sub-Clause 1.6 [*Novation and Assignment*],
- (d) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [*Prolonged Suspension*], or
- (e) the Employer (or, subject as set out below, any Affiliate of the Employer to which the Development Agreement rights or any part thereof are assigned) 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

**Comment [AE27]:** The Contractor is willing to reinstate 56 days on condition that the Advance Payment amount will be the amount provided for in the current contract i.e. 130 M USD.

**Comment [m28]:** To be revisited once the range of Advance Payment amount is known.

acts or events In any of these events or circumstances, the Contractor may, upon giving 30 days' notice (or in the case of sub-paragraph (a), 7 days) to the Employer, terminate the Contract unless the default is wholly remedied prior to the end of such period. However, in the case of subparagraph (e), the Contractor may (again subject to and on the conditions set out in the Construction Contract Direct Agreement and unless the Employer has in the meantime remedied the default) 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 15.6 [*Employer's Entitlement to Termination*], Sub-Clause 16.2 [*Termination by Contractor*] or Sub-Clause 19.6 [*Optional Termination, Payment and Release*] has taken effect, the Contractor shall promptly:

- (a) cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works,
- (b) hand over 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 as well as the Advance Payment Security and the Retention Security (if any) and Retention Money subject to deductions (if any) which the Employer is entitled to make,
- (b) pay the Contractor in accordance with Sub-Clause 19.6 [*Optional Termination, Payment and Release*], and
- (c) pay to the Contractor the amount of 10% of the projected Costs of the non executed parts of the Works as well as other loss or damage sustained by the Contractor as a result of this termination.

## 17. RISK AND RESPONSIBILITY

### 17.1 Indemnities

The Contractor shall indemnify and hold harmless the Employer or its Affiliates, 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 design, execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful default 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 (including completed, but excluding uncompleted, Sections of Works), to the extent that such damage or loss:
  - (i) arises out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, and
  - (ii) is not attributable to any negligence, wilful default or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents.
- (c) any reasonably mitigated loss, damage, cost or liability suffered or incurred by the Employer or its Affiliates in relation to the Development Agreement to the extent caused by any breach of this Contract on the part of the Contractor, its Subcontractors and their respective agents.

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 bodily injury, sickness, disease or death, which is attributable to any negligence, wilful default or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents.

Notwithstanding the indemnities set out above, each party shall in any event bear, undertakes not to make any claim against the other party, and shall indemnify that other party in respect of any claim arising from:

- (a) the death of or injury to any employee of the party first referred to above, including in the case of the Employer and Contractor, the Employer's Personnel

and the Contractor's Personnel respectively, or any employee of such personnel;  
and

- (b) loss of or damage to the property of the party first referred to above (or of the personnel respectively referred to in (a) above) excluding in the case of the Employer any completed or uncompleted Section of the Works.

#### 17.2 Contractor's Care of the Works

The Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued (or is deemed to be issued under Sub-Clause 10.1 [*Taking Over of the Works and Sections*]) for the Works, when responsibility for the care of the Works shall pass to the Employer. If a Taking-Over Certificate is issued (or is so deemed to be issued) for any Section or part of the Works, responsibility for the care of the Section or part shall then pass to the Employer.

After responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed. The Contractor shall bear a like responsibility for any work of defect correction carried out under Clause 11 [*Defects Liability*].

If any loss or damage happens to the Works, Goods or Contractor's Documents during the period when the Contractor is responsible for their care, from any cause not listed in Sub-Clause 17.3 [*Employer's Risks*], the Contractor shall, subject to Clause 19 [*Force Majeure*] and Sub-Clause 18.2.1A [*Funder's Interest*], rectify the loss or damage at the Contractor's risk and cost, so that the Works, Goods and Contractor's Documents conform with the Contract.

The Contractor shall be liable for any loss or damage caused by any actions performed by the Contractor after a Taking-Over Certificate has been issued. The Contractor shall also be liable for any loss or damage which occurs after a Taking-Over Certificate has been issued and which arose from a previous event for which the Contractor was liable.

#### 17.3 Employer's Risks

The risks referred to in Sub-Clause 17.4 below are:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- (b) rebellion, act of terrorism, revolution, insurrection, military or usurped power, or civil war, in each case 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) 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,
- (e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds, and
- (f) use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract.

#### 17.4 Consequences of Employer's Risks

If and to the extent that any of the risks listed in Sub-Clause 17.3 above results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Engineer, shall promptly take reasonable measures to protect the Works and minimise such loss or damage and the effects thereof and shall rectify this loss or damage to the extent such rectification required by the Engineer.

If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Engineer 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 8.4 [*Extension of Time for Completion*], and
- (b) payment of any such Cost, plus Adjusted Fee and an increase in the like amount shall be made in the TC or any applicable STC.

Comment [e29]: ok

After receiving this further notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

#### 17.5 Intellectual and Industrial Property Rights

In this Sub-Clause, "infringement" means an infringement (or alleged infringement) of any patent, registered design, copyright, trade mark, 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 where the Contractor has, prior to receipt of such claim, alerted the Employer in writing to the risk of such infringement and the Employer has failed to instruct a Variation avoiding the continuation of such infringement, 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, orin conjunction with any thing not supplied by the Contractor, unless such use was disclosed to the Contractor prior to the Contract Effective 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 costs) 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 such other Party.

#### **17.6 Limitation of Liability**

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract, cost of capital, loss of anticipated profit or revenue, loss of goodwill, loss of or cost of obtaining finance, sums due in connection with the Funding Documents or other pure economic loss which may be suffered by the other Party in connection with the Contract, other than:

- (a) to the extent included within any delay damages payable by the Contractor pursuant to Sub-Clause 8.7 [*Delay Damages*],

- (b) to the extent included in sums payable under Clauses 11.4(b) [*Failure to Remedy Defects*], 14.8 [*Delayed Payment*], 15 [*Termination by Employer*] (subject to the limit set out in the final paragraph below) or 16.4 [*Payment on Termination*],
- (c) to the extent included in fines or penalties payable under Clauses 1.11 [*Compliance with Law*] and/or 4.18 [*Protection of the Environment*] and sums payable in respect of third party claims under Sub-Clauses 17.1 [*Indemnities*] and/or 17.5 [*Intellectual and Industrial Property Rights*] (to the extent in the case of each such indemnity that the relevant third party has a direct claim in law against the Contractor),
- (d) to the extent included in Cost, the Fee or Adjusted Fee otherwise payable, and
- (e) to the extent included in sums payable as insurance recoveries which the Employer is obliged to pay to the Contractor or an indemnity claim pursuant to the third paragraph of Sub-Clause 18.1 [*General Requirements for Insurances*].

The total cumulative liability of the Contractor under or in connection with the Contract shall not exceed 20% of the TC save that this limit shall not apply to or be depleted by claims made by the Employer in respect of:

- (i) the matters referred to in sub-paragraph (c) above (other than Sub-Clause 17.1(c) [*Indemnities*]),
- (ii) liabilities in respect of which the Contractor is insured pursuant to the policies referred to in Clause 18 [*Insurance*], or
- (iii) wilful misconduct, meaning an intentional act or omission of a manifest duty that is undertaken by the Contractor with the realisation, intent or reckless disregard that injury or loss could arise from such conduct.

In respect of the liabilities of the Contractor for economic loss pursuant to Sub-Clause 15.4 [*Payment after Termination*], the liability of the Contractor to the Employer shall be further limited to the unutilised amount of the aggregate value of all sectional caps on delay damages.

## 18. INSURANCE

### 18.1 General Requirements for Insurances

In this Clause, "insuring Party" means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in this Sub-Clause. The Employer is the insuring Party in respect of the insurances described in Schedule 8 Part 1 [*Insurance*]; the Contractor is the insuring Party in respect of the insurances described in Schedule 8 Part 2

[*Insurance*].

Wherever the Contractor is the insuring Party, each insurance shall be effected as primary with insurers and in terms approved by the Employer as set out in Schedule 8 Part 2 [*Insurance*]. The respective insurances shall be effected on the terms set out in Schedule 8 [*Insurance*].

Both Parties shall observe the terms and conditions of, and ensure that they do not by their acts or omissions vitiate, the insurances procured pursuant to this Clause, and each Party shall indemnify the other to the extent of any loss or liability of that other Party which would have been insured but for any such vitiating act or omission by the first named Party.

If a policy is required to indemnify more than one insured, the cover shall apply separately to each insured as though a separate policy had been issued for each of the joint insured. If a policy indemnifies additional joint insured in addition to the insured specified in this Clause, (i) the Contractor shall act under the policy on behalf of Subcontractors and Contractor's Personnel and the Employer shall act on behalf of Employer's Personnel, (ii) additional joint insured shall not be entitled to receive payments directly from the insurer or to have any other direct dealings with the insurer, and (iii) the insuring Party shall require all additional joint insured to comply with the conditions stipulated in the policy.

The relevant insuring Party shall, within 14 days from the first Commencement Date, submit to the other Party:

- (a) evidence that the insurances described in this Clause have been effected, and
- (b) copies of the policies for the insurances described in Sub-Clause 18.2.1 [*Insurance for Works and Marine Open Cover*], Sub-Clause 18.2.2 [*Insurance against Injury to Persons and Damage to Property (TPL)*] and Sub-Clause 18.3 [*Insurance for Contractor's Equipment and Camps*].

When each premium is paid, the insuring Party shall submit evidence of payment to the other Party. Whenever evidence or policies are submitted, the insuring Party shall also give notice to the Engineer.

Each Party shall comply with the conditions stipulated in each of the insurance policies. The insuring Party shall keep the insurers informed of any relevant changes to the execution of the Works and ensure that insurance is maintained in accordance with this Clause.

Neither Party shall make any material alteration to the terms of any insurance without the prior approval of the other Party. If an insurer makes (or attempts to make) any alteration, the Party first notified by the insurer shall promptly give notice to the other Party.

If the insuring Party fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this Sub-Clause, the other Party may (at its option and without prejudice to any other right or remedy) effect insurance for the relevant coverage and pay the premiums due. The insuring Party shall pay the amount of these premiums to the other Party and the TC shall be adjusted accordingly.

Nothing in this Clause limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall, subject to Sub-Clause 18.5 below, be borne by the Contractor and/or the Employer in accordance with these obligations, liabilities or responsibilities. However, if the insuring Party fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the Contract, and the other Party neither approves the omission nor effects insurance for the coverage relevant to this default, any moneys which should have been recoverable under this insurance shall be paid by the insuring Party.

Payments by one Party to the other Party shall be subject to Sub-Clause 2.5 [*Employer's Claims*] or Sub-Clause 20.1 [*Contractor's Claims*], as applicable.

All insurances required to be maintained pursuant to this Clause shall provide for waivers of subrogation in favour of the insured parties and any person, company or corporation whose interests are covered by the insurances as stipulated in Schedule 8 [*Insurance*].

The Employer or the Funders shall be the loss payees in respect of claims under the insurances described in Sub-Clause 18.2 below, subject to Sub-Clause 18.2.1A. The Employer shall, subject to Sub-Clause 18.2.1A below, also submit and co-ordinate claims under the said insurances. The Contractor shall promptly provide all necessary information and co-operation in relation to such claims and shall be entitled to copies of all claim documents and to participate in all negotiations relating to such claims.

## **18.2 Insurance for Works, TPL and Marine Open Cover**

### **18.2.1 Insurance for Works and Marine Open Cover**

The Employer shall insure the Works, Plant and Materials and shall arrange Marine Open Cover insurance on the terms set out in Schedule 8 Part 1 [*Insurance*]. This insurance shall be effective from the date by which the evidence is to be submitted under sub-paragraph (a) of Sub-Clause 18.1 above.

Unless otherwise stated in these Conditions or Schedule 8 [*Insurances*], insurances under this Sub-Clause shall be composite policies naming as insured, inter alia, the Parties and subject to the loss payee provisions elsewhere in this Clause.

**18.2.1A Funder's Interest**

The Contractor shall be the loss payee for all proceeds of insurances less than or equal to US\$5,000,000 which are paid in respect of loss or damage to the Works and in respect of loss or damage insured under the Marine Open Cover insurance which the Contractor is liable to reinstate. The Contractor shall be entitled to handle claims settlement in respect of any claims for amounts lower than such amount, but shall keep the Employer fully informed and shall not waive, vitiate or prejudice the Employer's rights in respect of related delay in start up insurance, any such vitiation, waiver or prejudice being subject to the indemnity referred to in Sub-Clause 18.1 above.

The Funders or the Employer shall be named as joint insured parties and loss payees in respect of all proceeds of insurance in excess of US\$5,000,000, in relation to loss of or damage to the Works, and in respect of loss or damage insured under the Marine Open Cover insurance. The right of the Contractor to receive any proceeds of insurance in respect of such loss of or damage to the Works in excess of such amount shall be subject to the loss payee and security rights and interests of the Funders as set out in the Funding Documents, unless and until a notification as described below has been served. In the case of any claim for loss of or damage as aforesaid in excess of US\$5,000,000, the Contractor shall not be obliged to commence rectification pursuant to Clause 17.2 [*Contractor's Care of the Works*] or (to the extent that repair of the relevant defect or damage is insured under the above mentioned insurance) Clause 11 [*Defects Liability*] until receipt of a notification from the Funders that the proceeds of the insurance claim will be released to the Contractor, and that such loss payee rights are waived in respect of the relevant claim. If the Contractor suffers delay and/or incurs Cost as result of any delay in receipt of such notification, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to an extension of time for any such delay if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*] Provided that such notification may be served prior to receipt, and without stipulating the amount of any insurance proceeds.

**18.2.2 Insurance against Injury to Persons and Damage to Property (TPL)**

The Employer shall insure on the terms set out in Schedule 8 [*Insurance*] against each Party's liability for any loss, damage, death or bodily injury which may occur to any physical property (except things insured under Sub-Clause 18.2.1 [*Insurance for Works*])

and Marine Open Cover]) or to any person (except persons insured under Sub-Clause 18.4 [*Insurance for Contractor's Personnel*]), which may arise out of the Contractor's performance of the Contract.

This insurance shall be for a limit per occurrence of not less than the amount stated in Schedule 8 [*Insurance*], with no limit on the number of occurrences.

Unless otherwise stated in these Conditions, the insurances specified in this Sub-Clause:

shall be effected and maintained by the Employer as insuring Party on the terms set out in Schedule 8 [*Insurance*],

shall be a composite policy for the benefit of the Parties,

shall be extended to cover liability for all loss and damage to the Employer's property (except things insured under Sub-Clause 18.2.1 [*Insurance for Works and Marine Open Cover*]) arising out of the Contractor's performance of the Contract.

#### 18.3 **Insurance for Contractor's Equipment and Camps**

The Contractor shall insure in accordance with Schedule 8 Part 2 [*Insurance*] the Contractor's Equipment and Camps for not less than the full replacement value, including delivery to Site. For each item of Contractor's Equipment and Camps the insurance shall be effective while it is being transported to the site and until it is no longer required as Contractor's Equipment and Camps.

#### 18.4 **Insurance for Contractor's Personnel**

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 insurance shall be maintained in full force and effect during the whole time that these personnel are assisting in the execution of the Works. For a Subcontractor's employees, the insurance may be effected by the Subcontractor, but the Contractor shall be responsible for compliance with this Clause.

## 18.5 Insured Costs

In respect of:

- (a) any loss or damage to the Works (including where insured under the Marine Open Cover Insurance) or other items which the Contractor is liable to rectify pursuant to Sub-Clause 17.2 [*Contractor's Care of the Works*];
- (b) any third party liability of the Contractor for which the Employer is not liable to indemnify the Contractor pursuant to Sub-Clause 17.1 [*Indemnities*]; and
- (c) any other cost incurred by the Contractor in respect of which insurance has been effected pursuant to this Clause 18,

the Contractor's sole sources of compensation shall be as follows:

- (i) payment of the proceeds of insurance paid or payable pursuant to the insurance effected pursuant to this Clause 18; and/or
- (ii) payment of sums payable by the Employer pursuant to the indemnity referred to in the third paragraph of Sub-Clause 18.1 above; and/or
- (iii) where the insured loss or damage referred to in (a) above arises in consequence of any breach of Contract or neglect or default of the Employer or Employer's Personnel, the Employer shall pay to the Contractor a sum of Costs plus Fee equal in aggregate to the whole of the applicable deductible as set out in Schedule 8 [*Insurance*] and the relevant STC and TC shall be increased by the like amount; and/or
- (iv) where the insured loss or damage referred to in (a) above arises from causes other than those referred to in (iii) above, the Employer shall pay to the Contractor a sum of Costs plus Fee equal in aggregate to the difference between the amount set out in Annex A of Schedule 8 [*Insurance*] in respect of the relevant deductible and the deductible set out in Schedule 8, subject to paragraphs 3.1.1.2 (ii) and 3.6.2 of Schedule 3 [*Open Book Policy, Cost Management and Payment*], provided that there shall be no increase in any STC or the TC in respect of any such insured loss or damage or payment by the Employer.

The Contractor shall otherwise bear at its own cost any deductibles or excesses and (subject to Sub-Clause 17.3 [*Employer's Risks*]) the risk of any exclusions from, limits on or vitiation of (save where vitiated by the Employer) the applicable insurance cover.

The receipt by the Contractor of proceeds of insurance shall not be treated as Cost for the purpose of accruals towards any STC or the TC.

## 19. FORCE MAJEURE

### 19.1 Definition of Force Majeure

"**Force Majeure**" means an exceptional event or circumstances which is beyond the control of the relevant Party resulting in or causing the failure by the Party to perform any of its obligations under this Contract (whether in whole or in part), which event, circumstance or failure or effects thereof could not, in the case of the Contractor, have been provided against, avoided, prevented or overcome by the exercise by it of its obligations under the Contract **including** without limitation:

Comment [e30]: OK

- (a) nuclear explosion, radioactive, biological or chemical contamination, ionising radiation, or the identification of such contamination or radiation (save where attributable to the Contractor's use of materials giving rise to the same);
- (b) strikes, working to rule, go slows or lockouts (but not including any strikes, working to rule, go slows or lockouts involving the employees of the Government or any Government Authority or any of their agents or contractors, or which are confined to the Contractor or any Subcontractor;
- (c) any catastrophic effect of the natural elements, including, earthquake, sandstorm, tsunami or tornado;
- (d) explosion (save where attributable to the Contractor's use of materials giving risk to the same);
- (e) epidemic or plague;
- (f) pressure waves caused by aircraft or other material devices travelling at sonic or supersonic speeds; and
- (g) acts or omissions by the Government or Government Authorities (as defined in the Development Agreement) which reflect significant changes of policy other than those resulting from any breach of the Contract by the Contractor.

Provided that to the extent that a risk has been expressly assumed by the Contractor pursuant to a term of this Contract and/or is referred to in Sub-Clauses (i) to (iv) below, the same shall not constitute Force Majeure:

- (i) conditions as referred to in Clause 4.11 [*Physical Conditions*];

- (ii) adverse climatic conditions other than those expressly referred to in (c) above;  
and
- (iv) shortages of personnel or Goods.

#### 19.2 Notice of Force Majeure

If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure 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 relevant event or circumstance constituting Force Majeure.

The Party shall (subject to the proviso in Clause 19.1 above), having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.

Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.

#### 19.3 Duty to Minimise Delay

Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure.

A Party shall give notice to the other Party when it ceases to be affected by the Force Majeure.

#### 19.4 Consequences of Force Majeure

If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 above, and suffers delay and/or incurs Cost by reason of such Force Majeure, 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 8.4 [*Extension of Time for Completion*]; and
- (b) the Cost plus Adjusted Fee of any protection of Works affected by Force Majeure or rectification or recommencement of Works lost or damaged by Force Majeure (such Cost of rectification or recommencement to include demobilisation and remobilisation costs) to the extent in each case that:
  - (i) the Employer instructs in writing such protection or rectification or recommencement; and

Comment [e31]: OK

Comment [e32]: OK

- (ii) the relevant event of Force Majeure was not covered by the insurances effected pursuant to Clause 18 [*Insurance*]; and
- (c) any Cost (plus **Adjusted Fee**) which is payable pursuant to the following provisions:
  - (i) where an event of Force Majeure occurs the Contractor will promptly notify the Employer whether, in consequence of the event, the Contractor proposes to remain fully mobilised on site or demobilise to the level of a reasonable skeleton presence;
  - (ii) where the Contractor has elected to demobilise as described above the Employer may expressly instruct the Contractor to remain mobilised on site to a level in excess of the above mentioned reasonable skeleton level, in which case the Employer will pay the Cost plus **Adjusted Fee** of such excess mobilisation;
  - (iii) at any time after having instructed such excess mobilisation the Employer may instruct the Contractor to demobilise down to the above mentioned skeleton level, in which case the Contractor will bear all the Cost of such demobilisation and of its continuing skeleton mobilisation, and the Employer's payment obligation in the preceding paragraph will cease;
  - (iv) where the Employer has instructed the Contractor, or the Contractor has otherwise reasonably elected, to demobilise in consequence of an event of Force Majeure any time extension awarded shall take account of the reasonable time required to remobilise; and
  - (v) where the Employer has not issued an express instruction as mentioned above, the Contractor will bear its own costs of demobilisation/continued mobilisation/remobilisation and otherwise during the period affected by the Force Majeure event, pending either an instruction to protect/repair/recommence work by the Employer or termination, in which case the payment entitlements contained in this Sub-Clause 19.4 or Sub-Clause 19.6 below shall apply,

Comment [e33]: OK

Comment [e34]: OK

and the TC and applicable STC shall be increased by the amount of such Cost and **Adjusted Fee**.

Comment [e35]: OK

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

To the extent that any rectification of loss or damage to the Works, Goods or Contractor's Documents caused by Force Majeure is covered by the insurance referred to in Clause 18.2.1 [*Insurance for Works and Marine Open Cover*], the Contractor shall not by reason of the said Force Majeure be excused from the obligation to rectify the same in accordance with Sub-Clause 17.2 [*Contractor's Care of the Works*].

#### 19.5 Force Majeure Affecting Subcontractor

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

#### 19.6 Optional Termination, Payment and Release

If the execution of substantially all the Works in progress is prevented by an event or circumstance of Force Majeure (excluding for this purpose the period of any rectification of the consequences of such event or circumstance) of which notice has been given under Sub-

Clause 19.2 above for a continuous period equal to or greater than the period entitling the Employer to terminate the Development Agreement in respect of the same event of Force Majeure (and the Contractor shall be entitled to no payment of Cost, Fee or Adjusted Fee **in** respect of or during such period, save as expressly set out in this Sub-Clause and in Sub-Clause 19.4 above), 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*].

Comment [e36]: OK

Upon such termination, the Engineer 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;
- (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 **and** Adjusted Fee or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;

Comment [e37]: OK

- (d) the Cost and Adjusted Fee for 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 and Adjusted Fee for demobilisation and repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

Comment [e38]: OK

Comment [e39]: OK

Provided that any right of the Contractor to terminate as aforesaid:

- (i) shall be subject to the Construction Contract Direct Agreement;
- (ii) shall arise only if the Employer is entitled on the like grounds to terminate the Development Agreement; and
- (iii) may, even if the Funders elect not to step in and sub-paragraph (b) is satisfied, be abrogated for such period during which the Employer undertakes to pay the Contractor's Costs (including inflation) of such interruption and to make a fair and reasonable adjustment in the Fee, TC and any STC.

## 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 and/or any additional payment, under any Clause of these Conditions, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given 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.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion 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. Otherwise, the following provisions of this Sub-Clause shall apply. Provided that in the case of delays caused by Employer Variations or acts of breach or prevention by the Employer, the Employer may at its sole discretion elect to grant an extension of time notwithstanding any failure or delay in the giving of such notice.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the

Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

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 proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- (a) this fully detailed claim shall be considered as interim;
- (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
- (c) 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 Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

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.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

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 second paragraph of this Sub-Clause.

## 20.2 Senior Representative Negotiations

The senior representatives of the Parties are set out in Schedule 1 [*Contract Particulars*] hereto, as amended from time to time, and shall (subject to the applicable terms of the Funding Documents in the case of the Employer's senior representative) have the authority to reach agreements on behalf of and binding on the Parties represented by them.

Where a Dispute arises the Dispute shall be referred to senior representative negotiations by a Party sending a written notice to the senior representative of any other Party stating that they wish to invite that Party to senior representative negotiations.

The senior representatives shall meet as soon as reasonably practicable after receipt of the notice inviting the Parties to senior representative negotiations.

Unless otherwise agreed, the senior representative negotiations will be Without Prejudice and Confidential.

If the senior representatives fail to resolve the dispute, through consultation, within 28 days of the Notice inviting the senior representatives to senior representative negotiations (or if any of the senior representatives invited to the senior representative negotiations considers that they are unlikely to reach agreement or that it is not appropriate or practicable for them to continue to consult) then any Party may refer the dispute to arbitration in accordance with Sub-Clause 20.3 [*Arbitration*].

Any decision or agreement arising from senior representative negotiations (subject to the applicable terms of the Funding Documents in the case of the Employer's senior representative) shall be confirmed by written agreement and shall be final and binding unless otherwise stated in the written agreement.

## 20.3 Arbitration

Unless settled amicably, any dispute which is not resolved by the senior representative negotiations 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,

- (c) the arbitration shall be conducted in the language for communication defined in Sub-Clause 1.4 [*Law and Language*], and
- (d) the seat of the arbitration shall be London.

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

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

#### 21. EXCLUSIVE REMEDIES AND ENTIRE AGREEMENT

The remedies of the Parties expressly set out in the Contract (whether in respect of payment, time, termination or otherwise) are the sole and exclusive remedies of the Parties arising under or in connection with the Contract or the Works or otherwise in relation to the risks, liabilities and activities assumed or carried out by the Parties, notwithstanding any other remedy which would otherwise be available at law or in equity or otherwise (including pursuant to tort or delict (including negligence and negligent misstatement), quantum meruit, quasi contract, restitution or any other legal theory) and whether recoverable by way of cash recovery, set-off, security or otherwise.

Provided that if the liquidated delay damages stipulated in Schedule 7 [*Liquidated Damages*] are for any reason held to be irrecoverable, the Employer shall (subject to Sub-Clauses 2.5 [*Employer's Claims*], 3.5 [*Determinations*] and 20 [*Claims, Disputes and Arbitration*]) be entitled to prove and recover unliquidated damages up to the amount of such liquidated delay damages which would otherwise have applied for any delay in completing any Section for which the Contractor is responsible under the Contract.

The express terms of the Contract (together with the Construction Contract Direct Agreement and the escrow agreement entered into in connection with Financial Close) constitute the entire agreement between the Parties with respect to the subject matter of the Contract and supersede all prior arrangements, representations, communications, negotiations or agreements (whether oral or written). The Parties each waive their respective rights to rely on, and exclude any liability to the other otherwise arising in relation to, such prior matters.

22. **THIRD PARTY RIGHTS**

- 22.1 Except as otherwise provided in this Clause 22, and subject to the Funders' Direct Agreement the Employer and the Contractor confirm that nothing in these Conditions confers any rights on any person pursuant to the Contracts (Rights of Third Parties) Act 1999.
- 22.2 Subject to Sub-Clause 23.4 below, no right of the Employer *and/or the Contractor to terminate* these Conditions *or agree* any amendment, variation, waiver or settlement of any matter arising out of or in connection with these Conditions shall require the consent of any Third Party.

**SCHEDULE 1**  
**CONTRACT PARTICULARS**

This is Schedule 1 comprising the Contract Particulars referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City") Project

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

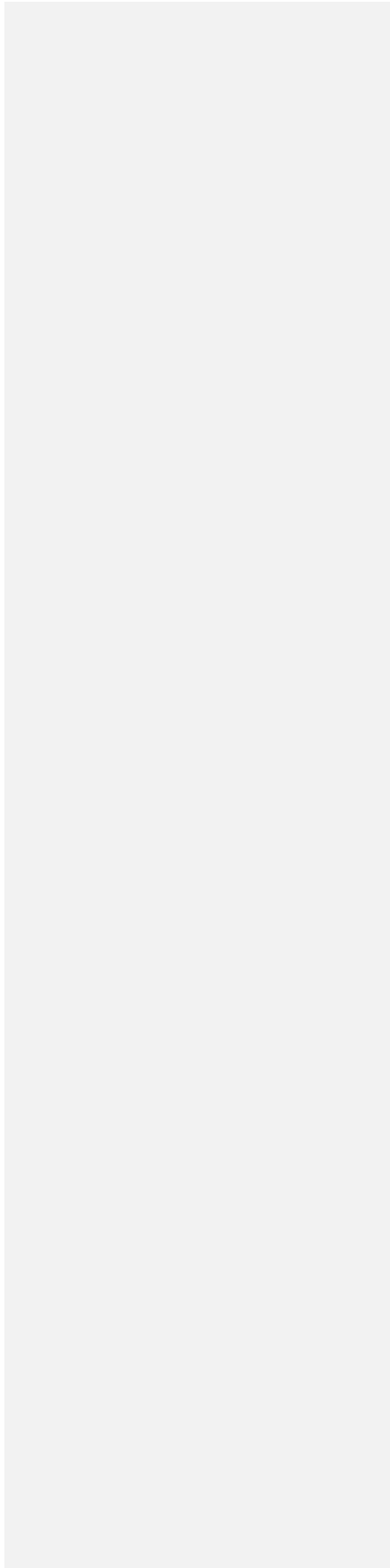
**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**



### Contract Particulars

Agreed systems of electronic transmission: [•]

All communications which are required or permitted, unless otherwise stated, shall be made by fax or letter as follows:

if to Employer: [•]

Address: [•]

Attention: [•]

Fax No.: [•]

if to the Contractor: [•]

Address: [•]

Attention: [•]

Fax No.: [•]

if to [other]: [•]

Address: [•]

Attention: [•]

Fax No.: [•]

The Advance Payment will accrue towards the Target Cost .

The Senior Representatives of the Parties are as follows:

(a) The Employer:

[•]

The Contractor:

[•]

**SCHEDULE 2**  
**VALUE OF TC AND STCS**

This is Schedule 2 comprising the Value of TC and STCs referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City") Project

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

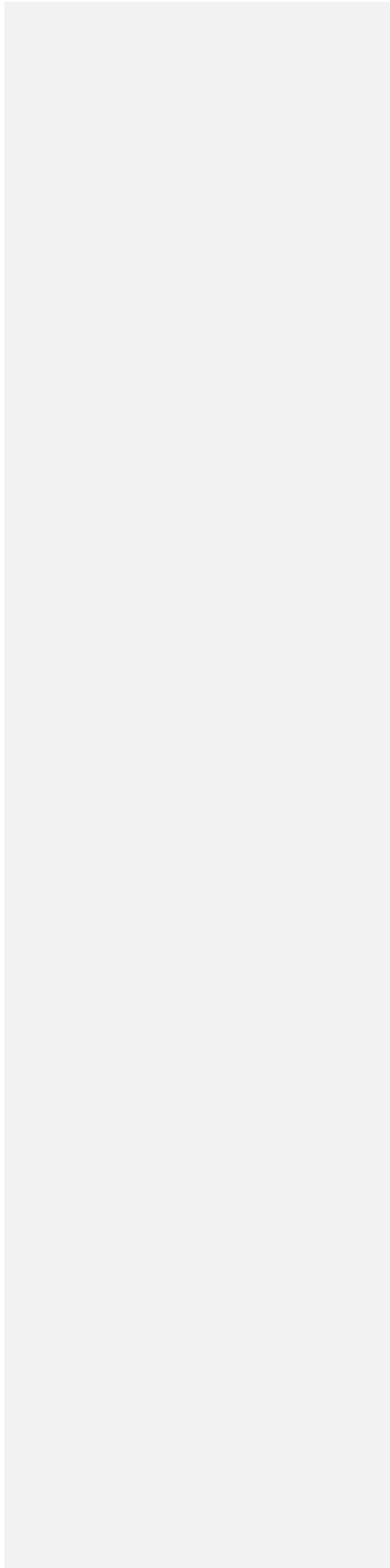
**Signed by Blue City Company 1 S.A.O.C.:**

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**Signed for AECO Development LLC:**

.....

**Dated:**



**SCHEDULE 3**  
**OPEN BOOK POLICY, COST MANAGEMENT AND PAYMENT**

This is Schedule 3 comprising the Open Book Policy, Cost Management and Payment referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 4**  
**DESIGN DEVELOPMENT AND VALUE ENGINEERING**

This is Schedule 4 comprising Design Development and Value Engineering  
referred to in the Conditions of Contract relating to Phase 1,  
Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:-**

**SCHEDULE 5**  
**SECTIONAL COMMENCEMENT DATES AND TIME FOR COMPLETION**

This is Schedule 5 comprising the Sectional Commencement Dates and Time For Completion referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between  
Blue City Company S.A.O.C.  
and  
AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 6**  
**EMPLOYER'S AGREEMENTS**

This is Schedule 6 comprising the Employer's Agreements referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

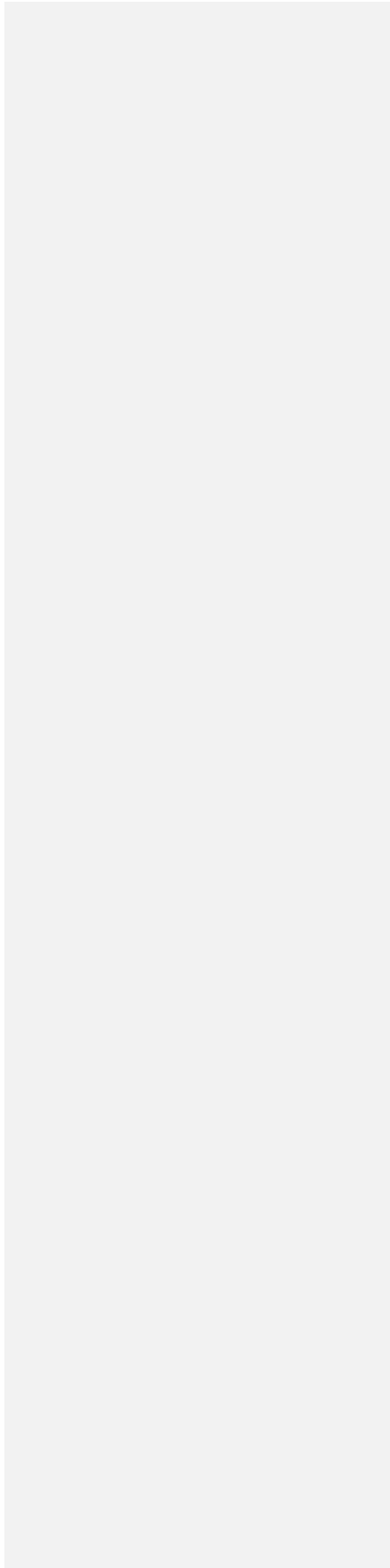
**Signed by Blue City Company 1 S.A.O.C.:**

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**Signed for AECO Development LLC:**

.....

**Dated:**



**SCHEDULE 7**  
**LIQUIDATED DAMAGES**

This is Schedule 7 comprising the Liquidated Damage referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 8**

**INSURANCE**

This is Schedule 8 comprising the Insurance referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 9**  
**PARENT COMPANY GUARANTEE**

This is Schedule 9 comprising the Parent Company Guarantee referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 10**  
**RETENTION SECURITY**

This is Schedule 10 comprising the Retention Security referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 11**  
**ADVANCE PAYMENT SECURITY**

This is Schedule 11 comprising the Advance Payment Security  
referred to in the Conditions of Contract relating to  
Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 12**  
**PERFORMANCE SECURITY**

This is Schedule 12 comprising the Performance Security referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated**

**SCHEDULE 13**  
**NOT USED**

**SCHEDULE 14**  
**NOT USED**

**SCHEDULE 15**  
**LIST OF PERMITS AND APPROVALS**

This is Schedule 15 comprising the List of Permits and Approvals  
referred to in the Conditions of Contract relating to Phase 1,  
Al Madina Al Zarqa ("The Blue City")

Between  
  
Blue City Company S.A.O.C.  
  
and  
  
AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

**SCHEDULE 16**  
**CASHFLOW LIMITS CALCULATION**

This is Schedule 16 comprising the Cashflow Limits Calculation  
referred to in the Conditions of Contract relating to Phase 1,  
Al Madina Al Zarqa ("The Blue City")

Between  
  
Blue City Company S.A.O.C.  
  
and  
  
AECO Development LLC

**For identification purposes:**

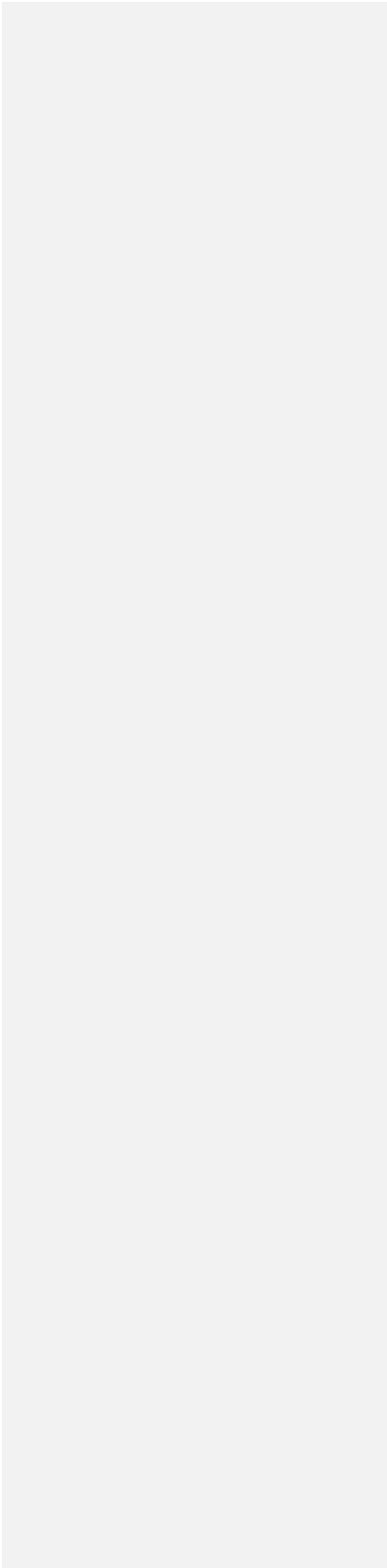
**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**



**SCHEDULE 17**  
**LIST OF KEY SUBCONTRACTORS**

This is Schedule 17 comprising the List of Key Subcontractors referred to in the Conditions of Contract relating to Phase 1, Al Madina Al Zarqa ("The Blue City")

Between

Blue City Company S.A.O.C.

and

AECO Development LLC

**For identification purposes:**

**Signed by Blue City Company 1 S.A.O.C.:**

.....

**Signed for AECO Development LLC:**

.....

**Dated:**

