



Revised

Approved by Council 26 May

# AGREEMENT AND SCHEDULE OF CONDITIONS OF BUILDING SUB-CONTRACT

(NOMINATED SUB-CONTRACT)

between

.....

.....

and

.....

.....

dated

.....



This contract is published by the Botswana Institute of Development Professions  
and endorsed by the Association of Electrical & Mechanical Contractors of Botswana  
1999 edition, Revised 2009

ARTICLES OF AGREEMENT made this ..... day of ....., 2 .....

Between

.....  
of (physical or postal address)

.....  
(hereinafter called "the Contractor") of the one part  
and

.....  
of (physical or postal address)

.....  
(hereinafter called "the Sub-Contractor") of the other part.

WHEREAS this agreement is supplemental to an agreement (hereinafter referred to as "the principal contract") made the  
..... day of ....., 2 .....

between

.....  
(hereinafter called "the employer") of the one part, and the contractor of the other part.

AND WHEREAS the contractor desires to have executed the works of which particulars are set out in the attached schedule (hereinafter referred to as "the sub-contract works") and which form part of the works comprised in and to be executed in accordance with the principal contract (hereinafter referred to as "the contract works") and any authorised variations of the sub-contract works.

AND WHEREAS the contractor, prior to the signing hereof, has given the sub-contractor reasonable opportunity of inspecting all the provisions of the principal contract except the detailed prices of the contractor included in schedules and bill of quantities, and furthermore, whereas it is agreed that the term "the agent" where it appears in this sub-contract, unless inconsistent with the context in which it is used, shall mean the person appointed by the employer in terms of the principal contract to act as principal agent for the employer in terms of that contract as defined in 1.1 on page 5.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. For the consideration hereinafter mentioned, the sub-contractor will execute and complete the sub-contract works upon and subject to the conditions of this sub-contract.
2. The contractor will pay the sub-contractor the sum of .....  
.....  
(P .....) hereinafter referred to as "the sub-contract sum" or such other sum as shall become payable hereunder subject to and at the times and in the manner specified in the conditions of this sub-contract, and shall be payable to the sub-contractor at  
.....
3. The contractor chooses domicilium citandi et executandi for all purposes of this sub-contract at  
.....
4. The sub-contractor chooses domicilium citandi et executandi for all purposes of this sub-contract at  
.....
5. The contractor and sub-contractor choose domicilium citandi et executandi at their respective addresses where all notices or processes or both arising out of or in connection with this agreement may be validly delivered to or served on them. Either contracting party may, at any time, by notice to the other contracting party, change its domicilium citandi et executandi to some other address, provided that such new address shall be in the Republic of Botswana.
6. References in this agreement to other documents shall be to the latest edition thereof, with all amendments thereto, at the date for submission of the tenders.
7. The date of issue of any certificate referred to in this agreement shall be the date on which the certificate is signed by the party authorised in this agreement to issue such certificate and unless the contrary is proved, the date of signature shall be the date appearing on the certificate.
8. All reference to days shall mean days of twenty-four (24) hours duration commencing at midnight (00:00) and which shall include non-working days unless otherwise stated.
9. The headings of clauses in this sub-contract agreement are for reference purposes only and shall not be taken into account in construing the content thereof.
10. In this agreement, unless inconsistent with the context, the words 'notice', 'notify', 'notification', 'certify', 'certification', and 'issue' shall connote an act to be carried out in writing.
11. In this agreement, unless inconsistent with the context, the masculine includes the other gender, the singular includes the plural and vice versa, and persons shall include bodies corporate.
12. Any documentation or notice sent by a party in terms of this agreement by prepaid registered post addressed to the other party at his domicilium et executandi shall be deemed to have reached the other party within seven (7) days from date of posting.
13. This sub-contract agreement constitutes the whole agreement between the parties and no variations or amendments thereto shall have any force or effect unless reduced to writing and signed by both the contractor and sub-contractor.
14. The only law applicable to this agreement is the law of the Republic of Botswana.
15. The original hereof is kept by the person named in the Schedule, but each party shall be entitled to a real copy thereof.



16      The following documents comprise the Contract:

This agreement and schedule of conditions.

.....  
.....

SIGNED BY THE CONTRACTOR

.....

IN THE PRESENCE OF (Witness Name in Block Letters) .....

WITNESS SIGNATURE .....

WITNESS ADDRESS .....

SIGNED BY THE SUB-CONTRACTOR

.....

IN THE PRESENCE OF (Witness Name in Block Letters) .....

WITNESS SIGNATURE .....

WITNESS ADDRESS .....

**THE AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:**

- 1.1 "AGENT" means the architect, the quantity surveyor, engineer or other party appointed as principal agent by the employer in terms of the principal agreement and named in the sub-contract schedule.
- 1.2 "CERTIFICATE OF FINAL COMPLETION" means a certificate issued by the agent to the contractor in terms of the principal agreement accepting that final completion of the works has been achieved.
- 1.3 "CERTIFICATE OF PRACTICAL COMPLETION" means a certificate issued by the agent to the contractor in terms of the principal agreement confirming that practical completion of the works has been achieved.
- 1.4 "CONTRACTOR" means the contracting party so named in the schedule.
- 1.5 "CONTRACTOR'S INSTRUCTIONS" means instructions issued by the contractor to the sub-contractor in accordance with the contractor's authority in terms of this agreement. Instructions issued to the sub-contractor by agents of the employer shall have no authority unless authorised by the contractor.
- 1.6 "DAY" means a calendar day starting at 00h00 and ending at 24h00 Botswana time.
- 1.7 "DEFECT" means any aspect of the works which is not to the reasonable satisfaction of the agent and without limiting the generality of the foregoing, includes the lack of an essential element of completeness of any aspect of the works.
- 1.8 "EMPLOYER" means the party so named in the schedule.
- 1.9 "FINAL COMPLETION" means the state of completion of the works where in the opinion of the agent the works are complete and free from all patent defects.
- 1.10 "INTEREST" means in monetary terms current bank lending prime rate plus two per cent.
- 1.11 "LATENT DEFECT" means a defect which a reasonable inspection of the works by the agent would not disclose.
- 1.12 "LATENT DEFECTS LIABILITY PERIOD" means the period which begins on the date of commencement of the construction period in terms of the principal agreement and terminates five (5) years from the date of the certificate of final completion.
- 1.13 "MATERIALS AND GOODS" means materials and goods delivered to the sub-contractor for inclusion in the sub-contract works whether stored on site, adjacent to the site, off site or in transit to the site but not yet part of the works.
- 1.14 "PATENT DEFECT" means a defect which a reasonable inspection of the works by the agent would disclose.
- 1.15 "PATENT DEFECTS LIABILITY PERIOD" means the period commencing on the day after the date of issue of the certificate of practical completion and terminating at midnight (24h00) ninety (90) days from that date.
- 1.16 "PAYMENT CERTIFICATE" means a certificate indicating the amount due and payable by the employer to the contractor in terms of the principal agreement.
- 1.17 "PRACTICAL COMPLETION" means the state of completion where in the opinion of the agent the works are substantially complete and can effectively be used for the purpose intended.
- 1.18 "PRACTICAL COMPLETION OF THE SUB-CONTRACT WORKS" means the state of completion where in the opinion of the agent the sub-contract works are substantially complete and can effectively be used for the purpose intended.
- 1.19 "PRINCIPAL AGREEMENT" means the agreement made between the employer and the contractor for the execution of the works.
- 1.20 "PROGRAMME" means the programme and provision thereto, all as agreed between contractor and sub-contractor, indicating the dates for commencement, execution, interim completion and practical completion of sub-contract works and which is intended to allow the sub-contractor to achieve practical completion of the sub-contract works so as to enable the contractor, in turn to achieve practical completion of the works within the construction period in terms of the principal agreement.
- 1.21 "SCHEDULE" means the schedule as attached to this agreement.
- 1.22 "SETTLEMENT DISCOUNT" means the discount to which the contractor is entitled when he pays the sub-contractor within the period stipulated in this agreement, and has the same meaning as "cash discount".
- 1.23 "SITE" means the place so described in the schedule.
- 1.24 "SUB-CONTRACT BILLS OF QUANTITIES" means the document describing and quantifying the sub-contract works priced by the sub-contractor in terms of the accepted tender or negotiated sum to reflect the value of

Definitions and Interpretation

the sub-contract works.

- 1.25 "SUB-CONTRACT BUDGETARY ALLOWANCE" means a sum of money provided in the sub-contract bills of quantities for work intended for execution by the sub-contractor, the extent of which is not defined.
- 1.26 "SUB-CONTRACT CONSTRUCTION PERIOD" means the period of time commencing and ending on the dates indicated in the schedule and shall include all extensions granted in terms of clause 10.5.
- 1.27 "SUB-CONTRACT DOCUMENTS" mean this sub-contract agreement, the drawings and specifications relating to the sub-contract, the sub-contract bills of quantities and such other documents as are identified in the schedule.
- 1.28 "SUB-CONTRACT FINAL ACCOUNT" means the document prepared by the agent in which is scheduled the valuation of all the variations to the sub-contract sum in terms of clause 13.16 resulting from contractor's instructions, reflecting the adjusted sub-contract sum which, in the opinion of the agent, is the value of the sub-contract works at final completion.
- 1.29 "SUB-CONTRACTOR" means the contracting party so described in the schedule.
- 1.30 "SUB-CONTRACTOR PRIME COST AMOUNT" means a sum of money provided in the sub-contract documents for materials and goods to be obtained from a supplier nominated by the agent and to be fixed by the sub-contractor.
- 1.31 "SUB-CONTRACT SUM" means the value of the sub-contract works as reflected in the sub-contract bills of quantities or other sub-contract tender documents and stated in the schedule.
- 1.32 "SUB-CONTRACT WORKS" means that portion of the works which is to be executed by the sub-contractor, together with the sub-contractor's temporary works as described in the schedule and detailed in the sub-contract documents and any variation thereto in terms of the sub-contract agreement.
- Sub-contract works in the context of the clauses herein shall further include materials and goods as defined in clause 1.1.13 as well as materials and goods supplied free or otherwise by the employer to the sub-contractor.
- 1.33 "WORKS" means the works and temporary works designed by the employer, the agent or other agents of the employer as described in the schedule and detailed in the contract documents and any variations thereto in terms of the principal agreement.

Knowledge of Principal Contract	2	The sub-contractor shall at all times be entitled to reasonable opportunity of inspecting and acknowledges that he has inspected all the provisions of the principal contract and shall be deemed for the purpose of the succeeding requirements of this sub-contract to be fully informed regarding all such provisions except the detailed prices of the contractor included in schedules and bills of quantities.
Execution of the Sub-Contract works	3	The sub-contractor shall execute and complete the sub-contract works subject to and in accordance with this sub-contract in all respects in conformity with all the reasonable directions and requirements of the contractor and to the reasonable satisfaction of the contractor and the agent or, if no agent is appointed in terms of the principal contract, then the employer.
Clearance of rubbish and excess material	4	The sub-contractor shall clear away all the rubbish and excess materials resulting from his execution of the sub-contract works as the work proceeds and upon practical completion of the sub-contract works shall leave the sub-contract works clean and tidy to the reasonable satisfaction of the contractor.
Sub-Contractors liability	5	<p>5.1 All the provisions of the principal contract requiring observance, performance or compliance on the part of the contractor shall be observed, performed and complied with by the sub-contractor in so far as they relate and apply to the sub-contract works (or any portion of the same) and are not repugnant to or inconsistent with the express provisions of this sub-contract as if all the same were severally set out herein.</p> <p>5.2 The sub-contractor shall, subject to the exclusions of liability in terms of clauses 6.1.1, 6.1.2 and 6.1.3, assume full responsibility for and hereby does identify the contractor against any breach, non-observance or non-performance by the sub-contractor, his servants or agents of the said provisions of the principal contract, or any of them; provided that nothing in this sub-contract shall create any privity of contract between the sub-contractor and the employer or any other sub-contractor.</p>
Indemnity	6	<p>6.1.1 The sub-contractor shall and hereby does indemnify the contractor against any liability, loss, claim or proceedings whatsoever, whether arising in common law or by statute, consequent on personal injuries to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the sub-contract works unless due to any act or omission of the employer, the contractor, other sub-contractors or of their respective servants or agents.</p> <p>6.1.2 The sub-contractor shall and hereby does indemnify the contractor against any liability, loss, claim or proceedings consequent on loss of or damage to any movable or immovable property arising out of or in the course of or caused by the execution of the sub-contract works and due to any act or</p>



omission of the sub-contractor, his servants or agents, provided that the term "property" for the purpose of this clause 5.1.2 shall exclude the sub-contract works, any temporary works and the materials and goods intended for incorporation therein.

- 6.1.3 Where, in terms of the principal contract, the loss or damage results from a risk insurable by a policy insuring fire, riot, strike, malicious damage and special perils as issued by a registered insurer in the Republic of Botswana and regardless of the cause of such loss or damage, the contractor does not indemnify the employer against such loss of or damage to any structure/s being altered or added to in pursuance of the principal contract or any part/s of the contract works handed to or taken over by or for the benefit of the employer before completion of the contract works as a whole or any property belonging to the employer or for which the employer is responsible contained in such structure/s or part/s or against any consequence of any such loss or damage, then the sub-contractor similarly does not indemnify the contractor for any loss or damage or consequence thereof in respect of the sub-contract works forming part of the contract works.
- 6.1.4 The contractor hereby warrants that the indemnity against any loss or damage in the circumstances referred to in clause 6.1.3 which is provided by the employer shall be in respect not only of the contractor but also of the sub-contractor.
- 6.2 The sub-contractor shall insure and shall remain insured in respect of public liability, common law liability and, in particular, without limiting the generality of the foregoing, workmens compensation or any other statute in force for the time being, in respect of injuries to persons and/or property, until the issue of the principal agent certificate of completion of the contract works for the amounts stated in the attached schedule. The public liability, common law liability, or other policies shall contain clauses indemnifying the contractor against risks arising out of the execution of this sub-contract. The provisions of this clause shall not in any way limit the liabilities assumed by the sub-contractor or the contractor or the indemnities given by them in terms of clause 6.1.1.
- 6.3 The sub-contractor or the contractor, as the case may be, shall provide the other one of them with proof in the form of a written statement from the insurance company concerned that the insurances required by this sub-contract have been effected.
- 7 7.1.1 The sub-contract works (including the temporary works as defined hereafter) and the materials and goods intended for incorporation in the sub-contract works and placed on or adjacent to the site shall be at risk of the contractor for all risks of loss or damage insurable under the contract works or contractor's all insurance policy as effected in terms of the principal contract, except where the contract is for alteration and/or additions to any existing structures/s or where a part or parts of the said contract works are stated in the schedule attached to the principal contract to be required to be handed over for occupation, before completion of the contract works as a whole in which event the contractor warrants that, under the provisions of the principal contract, the employer shall carry those risks insurable by a policy insuring fire, explosion, earthquake, riot, strike, malicious damage and special perils as issued by a registered insurer in the Republic of Botswana.
- 7.1.2 The contractor further warrants that, under the provision of the principal contract, any existing structure/s will be entirely at the risk of the employer.
- 7.1.3 Notwithstanding the provisions of clause 7.1.1 neither the contractor nor the sub-contractor shall in any case be liable for any loss or damage to the said sub-contract works, materials or goods:
- 7.1.3.1 caused by an excepted peril as hereinafter defined;
- 7.1.3.2 occurring after the date of the relevant certificate of practical completion or, if earlier, the date on which the contract works are handed over or taken into use or occupation by or for the benefit of the employer in whole or part provided that, where the contract works consist of two or more physically separate structures, the provisions of this sub-clause shall apply only to the structure or structures so certified or handed over or taken into use or occupation and not the remaining contract works, temporary works, materials and goods.
- 7.1.4 For the purposes of clause 7.1.1 the term "all risk" includes, but is not restricted to, the risks of damage by any act or omission of the contractor or any sub-contractor or the employer or the servant or agent of any of them and the party at risk shall have no right to recover any part of such or damage from any other party by reason of any such act or omission the excepted perils are:
- 7.1.4.1 any consequence whether direct or indirect or proximate or remote of "war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, military rising, insurrection, military or usurped power or martial law or state of siege or any other event or cause which determine the proclamation or maintenance of martial law or state of siege; any risk or peril only insurable in the Republic of Botswana by means of a political riot risk insurance policy issued by or on behalf of the Botswana Special Risks Insurance Association; ionizing radiations or contamination by radio-activity from any nuclear waste from the combustion of nuclear; fuel, nuclear weapons material; confiscation, nationalization or requisition or destruction or damage by or under the order of government de jure or de facto or of any public or local authority;
- 7.1.4.2 the design of the contract works including the sub-contract works or temporary works by the employer or by the employer's servants or agents;

Insurance

Certificate of insurance

Work risk



- 7.1.4.3 any latent defect in any materials or goods specified by trade name in the tender documents, provided that the sub-contractor shall and hereby does cede to the contractor who in turn in accordance with the provisions of the principal contract will cede to the employer any right of action that may exist against the supplier and/or manufacturer of such materials or goods;
- Insurance**
- 7.2 The sub-contract works, materials and goods referred to in the clause 7.1 will be included in the policy of insurance effected in terms of the principal contract.  
The contractor warrants that, under the provisions of the principal contract, such insurance will be taken out by the employer where the contract is for alterations and/or additions to any existing structure/s or where part/s of the contract works are stated in the schedule attached to the principal contract to be handed over for occupation before practical completion of the contract works as a whole. In every instance such insurance will be taken out by the contractor.  
The policy will be kept in force until the date of the certificate of practical completion of the contract works or of the final part of the contract works, as the case may be.
- Certificate of Insurance.**
- 7.3 The party responsible for insurance is, in terms of the principal contract, required to provided the agent with proof in the form of a written statement from the insurance company concerned that the insurances required by the principal contract have been effected. The contractor shall if so requested by the sub-contractor, confirm in writing that the insurance provisions of the principal contract are in effect.
- Reinstatement**
- 7.4 The contractor warrants that, under the provision of the principal contract, the costs of reinstatement of any loss or damage not at the risk of the contractor in terms of clause 7.1 will be borne and paid by the employer.
- 7.4.1 The contractor warrants that where the employer carries the risk in terms of the principal contract, the costs of reinstatement will be measured and valued in terms of the principal contract and all payments due to the contractor and the sub-contractor will be certified by the agent in accordance with the provisions of the principal contract.
- 7.4.2 The contractor warrants that, under the provision of the principal contract, where the contractor carries the risk and where reinstatement takes place, any insurance monies in respect of such reinstatement will be held in trust for his benefit and through him for the benefit of the sub-contractor. Such monies will be paid out in accordance with agent certificates.
- 7.4.3 Where reinstatement of damage is required, the sub-contractor shall carry out and complete the sub-contract works with due diligence. The principal contract provides that a reasonable extension of time for the completion of the contract works will be granted by the agent.
- 7.4.4 Where the contract is for alterations and/or additions to the existing structure and in the event of the whole or substantially the whole of the contract works and/or the existing structure being destroyed, then the continued employment of the contractor under the principal contract may, at the option of the employer, be determined by notice by registered post to the contractor in which event the contractor may similarly determine the employment of the sub-contractor. In such event the provisions of clauses 24.1 to 24.6 shall apply mutatis mutandis.
- Responsibility for plant and other property**
- 8
- 8.1 The plant and other property belonging to or provided by the sub contractor, his servants or agents shall be at the sole risk of the sub-contractor and any loss or damage to the same caused by the same shall, subject to the provisions of clause 7, be the sole responsibility of the sub-contractor who shall and hereby does indemnify the contractor against any loss, claim or proceeding in respect thereof.
- 8.2 The sub-contractor shall insure against any loss or claim as contemplated in clause 8.1 and shall, on request, supply the contractor with proof that such insurance has been effected.
- Variations and instructions**
- 9
- 9.1 If the Contractor
- 9.1.1 requires or authorizes in writing any variations of the sub-contract works; or
- 9.1.2 issues in writing to the sub-contractor any instructions of the agent, or if no agent is appointed in terms of the principal contract, any instructions of the employer in relation to the sub-contract works (whether in regard to variations or otherwise howsoever),
- then the sub-contractor shall forthwith comply with and carry out the same in all respects accordingly.
- 9.2 Any verbal instructions, directions or explanations involving a variation given to the sub-contractor or his foreman by the contractor may be confirmed in writing by the sub-contractor to the contractor and within 7 days thereafter shall be deemed to be a variation of the sub-contract works.
- 9.3 If compliance with written instruction, directions or explanations as aforesaid involves any variation, or if work executed by the sub-contractor consequent upon verbal instructions, directions or explanations given to the sub-contractor or his foreman by the contractor is subsequently proved and involves a variation, then such variation shall be dealt with under the clause 12 as an authorized extra or omission and the value thereof adjusted in accordance with the relevant payment provisions of this sub-contract.



- 9.4 If compliance with written instructions, directions or explanations as aforesaid involves expense or loss beyond that provided for in or reasonably contemplated by this sub-contract, then, unless the same were issued owing to some breach of this sub-contract by the sub-contractor the contractor shall avail himself of his rights under the principal contract to have the amount of such expense or loss ascertained by the agent under the principal contract or by the employer if no agent is appointed in terms of the principal contract and the amount so ascertained shall be added to the sub-contract sum and adjusted in accordance with the relevant payment provisions of this sub-contract.
- 10 10.1 The sub-contractor shall commence and complete the sub-contract works or the respective parts thereof in compliance with the requirements specified in the attached schedule. Commence-  
ment and  
completion
- 10.2 The contractor shall supply the sub-contractor with a copy of his original works programme and advise the sub-contractor thereafter of any subsequent amendments thereto.
- 10.3 The sub-contractor shall commence the sub-contract works on site within 7 days after receipt by him of an instruction in writing under this sub-contract from the contractor to that effect. If the sub-contractor has had prior notice of the approximate on site commencement date of the sub-contract Works, he shall proceed with the sub-contract works with due expedition. The contractor shall inform the sub-contractor in writing of any change in the contract works affecting the time of commencement of the sub-contract works and shall amend such time of commencement accordingly.
- 10.4 If the sub-contractor fails to complete the sub-contract works or any part thereof within the period specified or any extended period as hereafter provided, he shall pay to the contractor any loss or damage suffered or incurred by the contractor and caused by the failure of the sub-contractor as aforesaid of which loss or damage the contractor shall at the earliest opportunity give reasonable notice in writing to the sub-contractor that the same is being or has been suffered or incurred.
- 10.5 If the sub-contract works or any section thereof be delayed and such delay:
- 10.5.1 Shall be caused by or be due to any of the matters specified in clause 9 or caused by or be due to any act or omission of the contractor and/or any other sub-contractors on the contract works and/or his or their respective servants or agents; or
- 10.5.2 shall be within any of the causes for which the contractor would be entitled to obtain an extension of the period or periods for the completion under the principal contract; or
- 10.5.3 shall be due to any other causes which the agent or, if no agent is appointed in terms of the principal contract, the employer may under the principal contract consider sufficient;
- then the contractor shall grant a fair and reasonable extension of the said period or periods for completion of the sub-contract works or each part thereof (as the case may require) and such extended period or periods shall be the period or periods for completion of the same respectively and this clause shall be read and construed accordingly; provided that where the provisions of clause 9.1 apply, no extension of the period or periods for the completion of the sub-contract works shall be granted by the contractor in respect of delays which also affect the duration of the contract works unless an extension has first been granted by the agent, or if no agent is appointed in terms of the principal agreement, then by the employer. Any dispute in regard to such matters shall be deemed to be a dispute within the provisions of clause 30.
- 10.6 Immediately upon receipt of the certificate of practical completion by the contractor, he will send a copy thereof to the sub-contractor. The sub-contractor's work will be deemed to be practically complete at the day mentioned in the certificate and the sub-contractor will enjoy the same rights as the contractor regarding retention and return of performance guarantee.
- 10.7 Immediately upon receipt of the certificate of making good defects by the contractor, he will send a copy thereof to the sub-contractor, who will be relieved of all further duties in terms of the contract.
- 11 11.1 All defects, shrinkages or other faults in the sub-contract works, which the contractor (whether at his own cost or not) shall be bound to make good under the principal contract, shall be made good by the sub-contractor within a reasonable time after the receipt by him from the contractor of the agent's written instruction or a copy thereof relating to the same or, if no agent is appointed in terms of the principal contract, the written instruction of the employer. Where the contractor is required to make good such defects, shrinkages or other faults but not at his own cost, then the contractor shall secure a similar benefit to the sub-contractor and shall account to the sub-contractor for any money actually received by him in respect of the same, subject to the deduction of a 5 per cent settlement discount as provided by clause 13.8. Defects and  
non -  
compliance
- 11.2 If the contractor executes, or has executed any work to the contract works rendered necessary through the default of the sub-contractor or in consequence of defects or faults under clause 11.1, then the sub-contractor shall pay to the contractor the cost of such work. If, in lieu of executing such work, the contractor, after agreement thereto with the sub-contractor, agrees to pay or allow to the employer the value of such work or other agreed sum not exceeding the estimated cost thereof then the sub-contractor shall pay the same amount to the contractor and the contractor shall indemnify the sub-contractor against any liability arising out of the non-execution of his work.
- 11.3 If the sub-contractor executes work to or in connection with the sub-contract on the instructions of the



contractor or rendered necessary by reason of any act or omission of the employer or the agent or the contractor or his agent, including any other sub-contractor appointed in terms of the principal contract, then the contractor shall pay to the sub-contractor the costs of the execution of such work.

- 12 12.1 The price of the sub-contract shall be the sum named in the attached schedule or such other sum as shall become payable by reason of any authorized variations or other adjustments in accordance with the provisions of this sub-contract.

Contract sum:  
Valuation of Sub -  
Contract works  
of variations

- 12.2 The value of any omissions or authorized variations ordered in accordance with this sub-contract shall be valued in accordance with the principals and provisions governing the valuation of extras, omissions and variations contained in the principal contract.
- 12.3 The sub-contractor shall be given an opportunity of being present when the sub-contract works including omissions and variations being measured on the contract works to take such notes and measurements as he may require. Details of final measurements, in accordance with the provisions of the principal contract, shall, in so far as they concern the sub-contractor works, and upon application, be disclosed to the sub-contractor by the contractor at the latter's office.
- 12.4 The provisions of the principal contract governing prime cost amounts and provisional sums including in bills of quantities shall apply mutatis mutandis to any prime cost amounts and provisional sums specified as such in relation to any works, materials or goods comprised in the sub-contract.

- 13 13.1 The contractor will apply for certificates of payment in terms of the principal agreement.

Certificates and  
payments

- 13.2 The amount applied for shall, at the date of the aforesaid certificate, fairly represent, on the basis of detailed information timeously supplied by the sub-contractor, the value of the sub-contract works and of any variations authorized under this sub-contract then executed and of the materials and goods delivered upon the site for use in the sub-contract works.
- 13.3 The contractor shall, at the commencement of the sub-contract works, advise the sub-contractor of the date in the month by which the sub-contractor is to provide such detailed information.
- 13.4 The contractor's application shall in respect of the sub-contract works, only include the value of the aforesaid materials and goods as and from such time as they are reasonably, properly and not prematurely brought upon the site and then only if adequately stored and protected against weather and other damages. The contractor shall embody in or annex to the said application any representations of the sub-contractor in regard to such value.
- 13.5 After receipt of a certificate and detailed supporting statement in accordance with the provisions of the principal contract, the contractor shall disclose to the sub-contractor upon application all details concerning the sub-contract works included in such certificate and/or statement. Any payments made to the sub-contractor in terms of this contract shall, except where otherwise herein provided, be fully in accordance with certificates and supporting detailed statements issued to the contractor by the agent, or if no agent has been appointed under the principal agreement, by the employer.
- 13.6 No payment shall become due to the sub-contractor by the contractor in respect of the sub-contract works or of any authorized variation thereof until the same shall have been certified by the agent to be due from the employer to the contractor in respect of such works by a certificate issued in accordance with the provisions of the principal contract and then only for the amount so certified.
- 13.7 If an agent is not employed under the principal contract, the provisions of clause 13.5 and 13.6 shall be deemed to be superseded by the requirement that the contractor shall, exercise his rights to obtain from the employer monthly or other agreed periodic payments in respect of such portions of the sub-contractor works as are completed from month to month, or from time to time as the case may be.
- 13.8 Payment of the amount so certified less the appropriate proportion of retention money (as referred to in clause 14) and less a settlement discount as recorded in the schedule shall, subject to the provisions of clause 13.10, be made to the sub-contractor by the contractor in accordance with the provisions of the principal agreement.
- 13.9 The contractor shall forfeit the settlement discount as aforesaid if he fails to make payment within the period stipulated in clause 13.8.
- 13.10 Notwithstanding anything elsewhere provided and without prejudice to any rights the sub-contractor may have under this sub-contract, the contractor shall be liable to pay the sub-contractor interest at the rate of 2 per cent greater than the minimum lending rate charged by commercial banks to their clients on the amount certified but not paid. Interest shall become due and payable and be calculated from the due date for payment by the contractor to the sub-contractor.
- 13.11 If the sub-contractor feels aggrieved by the amount certified by the agent in any certificate or by his failure to certify, then, subject to the sub-contractor giving to the contractor such indemnity and security as the contractor shall reasonably require, the contractor shall allow the sub-contractor (if he so requires) to use the contractor's name and if necessary will join with the sub-contractor as claimant in any dispute resolution proceedings by the sub-contractor in respect of the said matters complained of by the sub-contractor. Such proceedings shall be held in accordance with the relevant provisions of the principal

Disputes as to  
certificates



contract. The provisions of this clause 13.12 shall not affect the sub-contractor's rights under clause 30.

- 13.12 Failure by the contractor to apply for any certificate of payment as provided in clause 13.1, or to make payment to the sub-contractor within 14 days after the due date for payment to the contractor by the employer shall entitle the sub-contractor, on giving 7 days written notice to the contractor, to cease work under this sub-contract until application shall have been made for such certificate or until such payment shall have been made to him, as the case may be. The time during which such works shall be suspended shall be regarded as an extension of time for completion within the meaning of clause 10 and shall not constitute a delay for which the sub-contractor is liable under that clause, or at all. The sub-contractor may avail himself of the provisions of this clause to suspend the execution of the sub-contract works without prejudice to his rights to determine his employment under this sub-contract in accordance with the provisions of clause 25.
- 13.13 If after the issue of the last monthly certificate but before the issue of either the penultimate or the final certificate in accordance with the principal contract, the sub-contractor shall have completed any work upon the sub-contract works, he may request the contractor in writing to make application to the agent for certificates certifying the value of such work and the contractor shall make such application. The provisions of this clause 13.14 shall apply to such certificates as if they were certificates for payment expressly provided for in the principal contract.
- 13.14 If before the issue of a final certificate to the contractor under the principal contract the agent desires to secure final payment to the sub-contractor on completion of the sub-contract works and, in accordance with and subject to the provisions of the principal contract relating to prime cost amounts and provisional sums, issues a certificate to the sub-contractor, the amount so certified by the agent as aforesaid less a settlement discount as determined by clause 13.8, shall be paid to the sub-contractor. In the absence of any express indemnity or security furnished in terms of the above provisions, the sub-contractor shall be deemed to have automatically indemnified the contractor in accordance with the requirements hereof upon the acceptance of payment as prescribed.
- 13.15 In the event of the contractor having provided the sub-contractor, by registered post, with the details as envisaged in clause 12.3 for verification, then the sub-contractor shall confirm or set out and substantiate in writing his objection to the said amount within 30 days after being presented therewith. Should the sub-contractor fail to confirm or set out his objection to the amount within the period stipulated, he shall thereby forfeit any rights he may have to dispute the amount subsequently certified by the agent and his failure either to confirm or object to the aforesaid details within the period stipulated shall be conclusive proof of his acceptance of the said details, notwithstanding anything elsewhere to the contrary herein contained.
- 14 14.1 While any retention money is held by the employer or invested in a joint account in the name of the employer and the contractor under the principal contract, retention money as certified by the agent shall also be held on the sub-contract works.
- 14.2 Where the sub-contract sum exceeds P30 000 (Thirty Thousand Pula) and interest is payable by the employer to the contractor in terms of the main contract the contractor shall pay the sub-contractor interest earned on his portion of the retention money in accordance with the procedure prescribed in the principal contract. Payments made in terms of this clause shall not be subject to a less settlement discount in terms of clause 13.8 The contractor, on application, shall make available to the sub-contractor such information as shall be necessary to calculate his share of interest.
- 15 The contractor shall so far as far as he lawfully can at the request and cost of the sub-contractor obtain for him any rights or benefits of the principal contract so far as the same are applicable to the sub-contract works but not further or otherwise.
- 16 Should the sub-contractor be liable to the contractor in respect of any breach of this sub-contract or otherwise for payment of any sum to the contractor arising out of this sub-contract, the contractor shall give written notice to the sub-contractor within fourteen days of the event giving rise to the liability first arising. The sub-contractor shall remedy the cause of the liability within a reasonable period of receiving notice, otherwise the contractor shall be entitled to set off the cost of such remedy against any monies due to the sub-contractor. The contractor shall not be entitled to set off any cost without first giving due notice as aforesaid.
- 17 The contractor and the agent (and authorized representative of the contractor and the agent) or, if no agent is appointed in terms of the principal contract, then the employer or his authorized representatives shall at all reasonable times have access to the sub-contract works and/or to the workshops or other places under the control of the sub-contractor where work is being prepared for the sub-contract.
- 18 The sub-contractor shall not without the written consent of the contractor and the agent or, if no agent is appointed in terms of the principal contract, then the written consent of the contractor and the employer cede, assign, sub-let or delegate his obligations or part thereof under this sub-contract, provided that such consent shall not be unreasonably withheld to the prejudice of the sub-contractor and provided further that any consent given to the sub-contractor in terms of this clause shall not relieve him of the conditions as set out in clause 5.2.
- 19 If and so far as it is so provided in the principal contract (but not otherwise) the contractor shall supply at his own cost all necessary water, lighting, electric power for hand tools where this can reasonably be made available on site, watching and attendance for the purpose of the sub-contract works. Subject as aforesaid the sub-contractor shall make all necessary provision in regard to the said matters and each of them.

Right of the Sub-Contractor to suspend execution of sub-Contract works

Special payment

Final payment to the Sub-Contractor

Verification of final account

Retention money

Sub-Contractor's claim to right

Set off

Access to work

Assignment or sub-letting

Provision of water and



other attendance Temporary workshops, sheds and telephones	20	<p>Unless otherwise provided for in the principal contract, the sub-contractor shall provide at his own expense all temporary workshops sheds or other buildings required for his workmen at such places on the site as the contractor shall appoint and the contractor shall give to the sub-contractor all reasonable facilities for the erection of the same.</p> <p>The contractor may, if it be reasonably possible, place at the disposal of the sub-contractor a room in the contract works which is to be erected under the principal contract without any charge or expense, under such conditions as may be agreed upon.</p> <p>If and when a telephone is installed on the site, it shall be available for the use of the sub-contractor, provided that he shall be liable to pay for all his outgoing calls.</p>
Scaffolding	21	<p>The sub-contractor shall provide scaffolding for his own use. the sub-contractor, his employers and workmen in common with all other persons having the like right shall for the purpose of the sub-contract works (but not further or otherwise) nevertheless be entitled to use any scaffolding belonging to or provided by the contractor while it remains so erected upon the site; provided that such use as aforesaid shall be on the express condition that no warranty or other liability whatsoever on the part of the contractor or his other sub-contractor shall be created or implied in regard to the fitness, condition or suitability of the said scaffolding.</p>
Wrongful use of or interference with property	22	<p>The contractor and the sub-contractor respectively, and/or their respective servants or agents shall not wrongfully use or interfere with the plant, ways, scaffolding, temporary works, guards, appliances or other property respectively belonging to or provided by the other of them or be guilty of any breach or infringement of any Act of Parliament or by-law, regulation, order or rule made under the same or by any local or other public or competent authority; provided that nothing herein contained shall prejudice or limit the rights of the contractor or of the sub-contractor in the carrying out of their respective statutory or contractual duties under this sub-contract or under the principal contract.</p>
Determination by Contractor	23	<p>23.1 If the sub-contractor</p> <p>23.1.1 without reasonable cause wholly suspends the sub-contract works before completion;</p> <p>23.1.2 fails to proceed with the sub-contract works with reasonable skill, diligence and expedition;</p> <p>23.1.3 refuses or to a substantial degree persistently neglects after notice in writing from the contractor to remove defective work or improper materials;</p> <p>then, if so constructed by the agent or, if no agent is appointed, by the employer, the contractor shall give written and registered notice to the sub-contractor of default as specified by the agent and if such default shall continue for 14 days after such notice the contractor shall upon further instructions from the agent, determine the employment of the sub-contractor.</p>
Insolvency of Sub-Contractor	23.2	<p>If the sub-contractor's estate is sequestrated as insolvent, or if, being a company, it is placed in voluntary or compulsory liquidation, the contractor shall, upon instruction from the agent or, if no agent is appointed, from the employer, by written and registered notice determine the employment of the sub-contractor under this sub-contract.</p>
Agent's or Employer's instruction	23.3	<p>Notwithstanding anything to the contrary herein provided, nothing contained in this sub-contract shall operate to exclude or to restrict or to affect in any way the obligation of the contractor to comply with the terms and conditions of an instruction by the agent or, if no agent is appointed in terms of the principal contract, then an instruction by the employer under the principal contract, to determine the services of the sub-contractor under this sub-contract.</p>
Liability of Contractor	23.4	<p>If the employment of the sub-contractor under this sub-contract is determined under clause 23.1 or 23.2, the sub-contractor shall be deemed to be in breach of this sub-contract and the contractor shall only be liable for:</p> <p>23.4.1 the value, less a settlement discount as recorded in the schedule of any work actually and properly executed and not paid for at the date of such determination, such value to be calculated in accordance with clause 12.</p> <p>23.4.2 the value, less a settlement discount, as recorded in the schedule of any unfixed materials and goods delivered upon the site for use in the sub-contract works, the ownership in which has passed to the employer under the terms of the principal contract;</p> <p>23.4.3 the value of any unfixed materials and goods delivered upon the site for use in the sub-contract works, the ownership in which has not passed to the employer in terms of the principal contract if the contractor wishes to acquire same, failing which the sub-contractor shall be at liberty to remove same;</p> <p>and for no other sum or sums whatsoever. The contractor shall have the right to recover, or to deduct from or set off against any such amount of damage suffered and /or of loss and expense incurred by him by reason of the determination of the employment of the sub-contractor under this sub-contract.</p>
Determination of	24	<p>If for any reason the contractor's employment under the principal contract is lawfully determined (whether by the contractor or by the employer and whether due to any default of the contractor or otherwise), then the employment of the sub-contractor under this sub-contract shall thereupon also determine and the sub-contractor</p>



	shall be entitled to be paid:	Contractor's
24.1	the value, less a settlement discount as recorded in the schedule, of the sub-contract works completed at the date of such determination, such value to be calculated according and executed but not completed at the date of such determination, such value to be calculated according to clause 12;	employment
24.3	the value, less a settlement discount as recorded in the schedule, of any unfixed materials and goods delivered upon the site for use in the sub-contract works, the ownership in which has passed to the employer in terms of the principal contract;	
24.4	the cost, less a settlement discount as recorded in the schedule, of materials or goods properly ordered and delivered for the sub-contract works actually paid for by the sub-contractor or of which he is legally bound to take delivery;	
24.5	any reasonable cost of removal from the site of his temporary buildings, plant, machinery, appliances, goods and materials;	
24.6	any loss or damage caused to the sub-contractor owing to such determination as aforesaid, provided that the provisions of this sub-clause 24.6 shall not apply where the employment of the contractor may, at the option of the employer, be determined under the principal contract when, in a contract for alterations and/or additions to existing structure, the whole or substantially the whole of the contract works and/or the existing structure is destroyed and the employment of the contractor is determined accordingly.	
25	25.1 If the contractor does not pay the sub-contractor within the period stated in clause 13.8 and thereafter for 7 days after written notice from the sub-contractor fails to pay the amount due in terms of this sub-contract, or if the contractor's estate is sequestered as insolvent or if, being a company, it is placed in voluntary or compulsory liquidation, the sub-contractor may, without prejudice to any other rights herein contained, by written and registered notice determine his employment under this sub-contract. The right to determine the employment of the sub-contractor under this sub-contract as hereby conferred may be exercised irrespective of whether or not the employment of the contractor has been determined under the principal contract.	Determination by Sub-Contractor
	25.2 Upon such determination the sub-contractor shall be entitled to be paid in accordance with the provisions of clauses 24.1 to 24.6, subject to the deduction of the settlement discount as recorded in the Schedule where applicable.	
26	Where the contractor has in terms of the principal contract been required to provide a performance guarantee in respect of the sub-contract works, then an equivalent performance guarantee, to the reasonable satisfaction of the Contractor, shall on request be submitted to the Contractor by the sub-contractor.	Performance guarantees
27	Notwithstanding any other remedies set down in this agreement, should the sub-contractor require a payment guarantee from the contractor, then the contractor shall be obliged to provide such a guarantee prior to the commencement of the sub-contract works. The cost, if any, for such a guarantee shall be for the account of the sub-contractor, provided that the terms of such a guarantee and the cost thereof shall be to the reasonable satisfaction of the sub-contractor. The extent of such guarantee shall be ten per cent of the sub-contract sum or such other amount as may be agreed between the parties, payable on first demand by the sub-contractor, but not due for payment until 28 days after any payment is due from the contractor to the sub-contractor. Should the contractor fail to provide such guarantee and/or to provide such guarantee at a reasonable cost, the contractor shall provide the sub-contractor with sufficient information to enable the sub-contractor to obtain such a payment guarantee.	Payment guarantees
28	The contractor shall cede to the employer any warranty and/or guarantee furnished to him by the sub-contractor in relation to the quality of materials, workmanship or any other factor having a bearing on the adequacy of the sub-contract Works, where the operative period of such warranty or guarantee extends beyond the duration of the principal contract. Written and registered notice shall forthwith be given by the contractor to the sub-contractor of such cession	Cessions of guarantees
29	29.1 Any cessions granted by the contractor prior to the signing hereof shall be recorded on the attached schedule.	Cessions
	29.2 The contractor undertakes to consult the sub-contractor on any further cessions which he may contemplate, and the contractor further undertakes not to grant cessions to which the sub-contractor may reasonably object on grounds that such cessions after payment would leave insufficient funds according to the contractor to enable him to pay the sub-contractor the amount ultimately due to the latter.	
	29.3 The sub-contractor shall not, without the prior written consent of the contractor, which consent shall not unreasonably be withheld, cede, assign or over to any other person or persons whatsoever any rights to receive payment of monies due to him under this sub-contract.	
	29.4 The sub-contractor shall indemnify the contractor against any loss or damage suffered as a result of having granted the consent referred to in clause 29.3 or having inadvertently made any payment to the sub-contractor instead of the cessionary or cessionaries.	
30	30.1 Should any disagreement between the contractor and the sub-contractor arise out of this agreement, the agent may determine such disagreement by a written decision given to the contractor and the sub-contractor within fourteen (14) days of a written request so to do.	Settlement of disputes



Such decision shall be final and binding on the parties, unless either party within fourteen (14) days of receipt thereof disputes the same by notice to the other party and to the agent in which case the disagreement shall be deemed a dispute.

Should the agent fail to give a written decision within the said period of fourteen (14) days, then either party may within a further fourteen (14) days give notice to the other party that the disagreement be declared a dispute.

30.2 A dispute may in the first instance be decided by mediation as follows:

- 30.2.1 should the parties be unable to agree, in writing within fourteen (14) days of the date on which the dispute is declared, upon the use of mediation as a means of settling the dispute, or upon the person to be appointed by them as a mediator, the dispute shall be resolved by the submission thereof to arbitration.
- 30.2.2 should both parties agree upon mediation, such dispute shall be referred within a further period of fourteen (14) days for opinion to a mediator mutually selected by the parties. The parties shall not be entitled to be represented at such mediation by a practicing advocate or attorney.
- 30.2.3 the parties shall within fourteen (14) days of the appointment of the mediator or such other period as the mediator considers reasonable submit written representation to him. Thereafter the mediator shall give his opinion in writing on the matter and furnish the contractor and the sub-contractor each with a copy thereof, provided that the mediator may, in his discretion, convene a hearing of the parties and their witnesses, or may hold discussions with either or both parties, before giving his opinion, with the objective of reconciling the opposing views.
- 30.2.4 in giving this opinion in writing the mediator shall be deemed to be acting as an expert and not as arbitrator with the proviso that no claim for damages shall be made against him at the instance of either party for any want of care, skill or diligence in the exercise of his duties
- 30.2.5 the cost of the mediation and the apportionment thereof shall be determined by the mediator.
- 30.3 The opinion of the mediator shall be binding on the parties unless either party disputes the opinion of the mediator in writing to the other party within thirty (30) days of the furnishing to them by the mediator of his opinion, in which event the dispute shall be resolved by the submission thereof to arbitration.
- 30.4 Where the dispute is submitted to arbitration, then the arbitration shall be held in terms of the Arbitration Act and shall be conducted in accordance with the current Rules for the Conduct of Arbitrations published by the Association of Arbitrators (Southern Africa) and shall be heard by a sole arbitrator unless otherwise agreed by the parties.
- 30.5 The arbitrator shall be chosen by the sub-contractor from a panel of three (3) persons nominated by the President of the Botswana Institute of Development Professions at the written request of either party within seven (7) days of receipt of the notice advising the names of the said panel. Failing this the President of the Botswana Institution of Development Professions shall appoint the arbitrator. The appointed arbitrator's cost will be divided equally between the parties until the arbitrator decides to the contrary.
- 30.6 In the arbitration proceedings the rights of the parties shall not be prejudiced in any manner whatsoever by anything said or done at the mediation or by the opinion of the mediator.
- 30.7 The arbitrator shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice relating to all matters in dispute submitted to him and to determine all such matters in the same manner as if no such certificate, opinion, decision, requisition or notice had been issued.
- 30.8 Reference to either mediation or to arbitration shall not relieve either party from any liability for the due and timeous performance of his obligations in terms of this agreement.  
The validity of clause 30 shall not be affected by the cancellation of this agreement in terms of clauses 23, 24 and/or 25.

Identification particulars of 'the principal contract'	1	Date: ....., 2 .....
	2	Employer's name: .....
		address: .....
		.....
	3	Contractor's name: .....
		address: .....
	4	Nature of the contract works: .....
	5	Location of the contract works: .....
	6	Name of Principal Agent: .....

'Sub-Contract works'	The items of work comprised in the principal contract which it is agreed the Sub-Contractor shall execute are:
	.....
	.....
	.....
	.....
Amount of insurance shall be:	.....

Commencement and completion	The items of work comprised in this sub-contract and as enumerated above shall commence on: .....
	and be completed by: .....
	.....

Value of Sub-Contract works:	.....
Period for payment by the employer to the contractor:	.....
Details of guarantees mutually agreed upon by the contracting parties:	.....

Details of all cessions on the principal agreement granted prior to the signing of this contract:	.....
---	-------

Settlement discount for payment within 7 days after receipt of payment by contractor:	.....
---	-------

### **BIDP Publications**

Minor works form of contract  
Without quantities form of contract  
With quantities form of contract  
Form of nominated subcontract  
Form of domestic subcontract  
Electronic forms under a four year licence  
Logo for site notice board  
Architect instruction pads  
Architect's appointment  
Consultant's appointment  
BIDP regulations for the promotion and conduct of  
architectural competitions  
Site notice board layouts draft

The above are available from the BIDP, PO Box 827, Gaborone, phone 7181 6811.



<http://www.bidp.bw>

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Price band C



Approved by Council on 26M409  
front page, page 6, + back page.  
Waiting page 4 clause 7.3.2.



# Botswana Institute of Development Professions

## Consultant appointment

### Memorandum of Agreement

#### BETWEEN

1. ....  
..... THE CLIENT.

2. ....  
..... THE CONSULTANT.

#### WHEREAS

A. The Client intends to:

.....  
..... THE PROJECT.

At

.....  
..... THE LOCATION.

B. The Client wishes to appoint the Consultant for the Project and the Consultant has accepted the appointment subject to the schedule of conditions which follows this page.

#### RELATED DOCUMENTS.

The following documents are deemed to form part of this agreement:

- a) The letter of acceptance.
- b) Schedule of Services.
- c) Scale of fees and schedule of payments.
- d) Additional reference (where applicable): .....

DATED:

SIGNED:

..... THE CLIENT ..... THE CONSULTANT

WITNESSED:

Name: .....

Address: .....

Description: .....



## SCHEDULE OF CONDITIONS.

### 1. DEFINITIONS

- Project - is the project, as referred to in the Agreement, for which the consultant will supply the services.
- Services - are the services provided by the Consultant in accordance with Appendix A.
- Client - is the party named in the Agreement, who employs the Consultant, as well as the Legal successors to the Client and permitted assignees.
- Consultant - is the party, named in the Agreement, who is employed by the Client.
- Party - means the client and / or the Consultant or any other party.
- Agreement - is this agreement with all appendices.
- Day - is the period between any one midnight and the next.
- Month - is the period of one month in accordance with the Gregorian calendar, commencing with any day of the month and ending at the same day minus one in the next month.
- Currency - means the Botswana Pula.
- Agreed Compensation - means additional sums, which are agreed upon by both parties and which are payable under the agreement.

### 2. INTERPRETATION

- 2.1. The singular includes the plural and visa versa.
- 2.2. The masculine includes the feminine and visa versa.
- 2.3. In the event that there is a conflict between clauses and documents, which form part of the Agreement (whether they have been attached or not), the last written documents supersede the earlier conflicting one.
- 2.4. This agreement will be subject to the laws of Botswana.
- 2.5. Any question arising out of these Conditions may be referred in writing by consultant or client to the BIDP for advice provided always that any difference or dispute between them is determined in accordance with Clause 8.

### 3. OBLIGATIONS OF THE CONSULTANT

- 3.1. Scope of services  
The Consultant shall carry out the services in a professional manner and in accordance with the scope of services as attached in Appendix A.
- 3.2. Client's property.  
Anything supplied by or paid for by the Client, shall remain the property of the Client.
- 3.3. Indemnity insurance  
The Consultant shall maintain sufficient indemnity insurance cover to protect the Client's interest.

### 4. OBLIGATIONS OF THE CLIENT.

- 4.1. Information.  
The Client shall do everything in her power to reduce delays in the obtaining of information by the Consultant, and shall give her full cooperation in making speedy decisions, when requested in writing by the Consultant.
- 4.2. Equipment and facilities.  
The Client shall make available, free of cost to the Consultant, the equipment and facilities as described in Appendix B.
- 4.3. Client's personnel

In consultation with the Consultant, the Client shall, at her own cost, arrange for the selection and provision of personnel in her employment to the Consultant in accordance with Appendix B hereof. In connection with the services to be provided by the Consultant to the Client, the Client's personnel shall take instructions from the Consultant.

4.4. Services by others

The Client shall, at her cost, arrange for the provision of services by others, as described in Appendix B, and the Consultant shall cooperate with the Suppliers of such services, but shall not be responsible for them or their performance.

4.5. Commitment to pay

The Client shall pay the Consultant on demand the fees, expenses and disbursements due in accordance with the attached scale of fees and schedule of payments.

5. **PAYMENT**

5.1. Payment

Payment for the services shall be calculated, charged and paid as set out in Appendix C.

5.2. Instalments

If the payment for the services is to be paid in instalments, clearly defined stages of the work must be identified on a time basis agreed and set out in Appendix C.

5.3. Revised rates

Unless otherwise agreed and stated in Appendix C, time rates and mileage rates for vehicles shall be revised in line with rates issued by an independent authority.

5.4. Variations

Where any changes are made to the Consultant's services, the fees specified in Appendix C shall be varied.

5.5. Expenses

The Client shall pay the expenses specified in Appendix C. Expenses other than those specified shall only be charged with the prior authorisation of the Client.

5.6. Disbursements

The Client shall reimburse the Consultant as specified in Appendix C for any disbursements made on the Client's behalf.

5.7. Interest on Outstanding Accounts

Any sums remaining unpaid at the expiry of twenty-eight days from the date of submission of an account shall bear interest thereafter. Such interest to accrue from day to day at the rate specified in Appendix C.

5.8. Payment on Suspension / Termination

On suspension or termination of the appointment the Consultant shall be entitled to, and shall be paid, fees for all services provided to that time calculated as incomplete services, and shall be entitled to expenses and disbursements reasonably incurred to that time.

5.9. Sales Tax or VAT

All fees, expenses and disbursements under the Appointment are exclusive of Sales Tax and VAT. Any Sales Tax or VAT due on the Consultant's services will be added and shall be paid by the Client.

6. **LIABILITY**

6.1. Consultant's Liability

The Consultant shall only be liable to pay compensation to the Client arising out of or in connection with the Agreement if a breach of Condition 3.1 is established against her. Special liability insurance beyond that described in Condition 3.3 would be an extra provision.

6.2. Client's Liability

The Client shall be liable to the Consultant if a breach of her duty to the Consultant is established against the Client.

6.3. Compensation

If it is considered that either party is liable to the other, compensation shall be payable only on the following terms:



## 7 TERMINATION, ABANDONED AND RESUMED WORKS

### 7.1 Termination

*An engagement entered into between the consultant and the client may be terminated at any time by either party on the expiry of reasonable notice, when the consultant shall be entitled to remuneration in accordance with Section 5.*

### 7.2 Abandoned works

7.2.1 Where the construction of works is cancelled or postponed on the client's instructions, or the consultant is instructed to stop work indefinitely at any time, the commission may be deemed to be abandoned and fees for partial services shall be due.

7.2.2 Notwithstanding Clause 7.2.1, if instructions for the consultant to continue work are not received from the client six months after such instructions were requested, the commission shall be deemed to have been abandoned.

7.2.3 Where a commission is abandoned or any part of the works is omitted at any time before completion, fees for partial service in respect of the whole or part of the works shall be charged for all services provided with due authority.

### 7.3 Resumed commissions

7.3.1 If a commission which has been abandoned is resumed without substantial alteration within two years, any fees paid under Section 7.2 shall rank solely as payments on account towards the total fees payable on the execution of the works and calculated on their total construction or such other basis or is agreed in appendix C.

7.3.2 Where a commission which has been abandoned is resumed at any time with substantial alteration or is resumed after two years, any fees paid under Section 7.2 shall be regarded as final payment for the service originally rendered. The resumed commission shall then be deemed separate, and fees charges in accordance with Section these Conditions.

7.3.3 All additional work arising out of a commission which is resumed in accordance with Clause 7.3.1 shall be charged on a time basis.

\* need to reconsider

3.5 (partial services)  
here: 5.4 (variations)

[Time basis?]

- i) Such compensation shall be limited to the amount of reasonably foreseeable loss and damage suffered as a result of such breach, but not otherwise.
- ii) If either party is considered to be liable jointly with third parties to the other, the proportion of compensation payable by her shall be limited to that proportion of liability which is attributable to her breach.

6.4. Duration of Liability.

Neither the Client nor the Consultant shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on her before the expiry of the relevant period stated in Appendix D or such earlier date as may be prescribed by Law.

6.5. Indemnity.

The Client can request in writing that the Consultant insures against special liability under Clause 6.1. The cost of such extra insurance shall be at the expense of the Client.

## 7 **TERMINATION, ABANDONED AND RESUMED WORKS**

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7.2.3 Where a commission is abandoned or any part of the works is omitted at any time before completion, fees for partial service in respect of the whole or part of the works shall be charged for all services provided with due authority.

7.3 Resumed commissions

7.3.1 If a commission which has been abandoned is resumed without substantial alteration within two years, any fees paid under Section 7.2 shall rank solely as payments on account towards the total fees payable on the execution of the works and calculated on their total construction or such other basis or is agreed in appendix C.

7.3.2 Where a commission which has been abandoned is resumed at any time with substantial alteration or is resumed after two years, any fees paid under Section 7.2 shall be regarded as final payment for the service originally rendered. The resumed commission shall then be deemed separate, and fees charged in accordance with Section these Conditions.

7.3.3 All additional work arising out of a commission which is resumed in accordance with Clause 7.3.1 shall be charged on a time basis.

## 8. **DISPUTES.**

8.1. Disputed accounts.

If any item or part of an item in an invoice submitted by the Consultant is contested by the Client, the Client shall give prompt notice with reasons and shall not delay payment on the remainder of the invoice.

8.2. Claims for Loss or Damage.

Subject to Clause 6.4 any claim for loss or damage arising out of breach or termination of the Agreement shall be agreed between the Client and the Consultant or, failing agreement, shall be referred to arbitration in accordance with Clause 8.3.

8.3. Arbitration.

Any dispute or claim arising out of or relating to this Agreement or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the rules stipulated in Appendix D in force at the effective date of the Agreement.

If no rules are stipulated in Appendix D, the dispute or difference shall be referred to the arbitration of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a

written request to concur in the appointment of an arbitrator, a person to be nominated at the request of either party by the President of the Botswana Institute of Development Professions. The appointed arbitrator's cost will be divided equally between the parties until the arbitrator decides to the contrary. The parties agree to comply with the awards resulting from arbitration and waive their rights to any form of appeal insofar as such waiver can validly be made.

**9. COPYRIGHT.**

**9.1 Publication.**

Unless otherwise specified in Appendix D, the Consultant, either alone or jointly with others, can publish material relating to the works and services. Publication shall be subject to approval of the Client if it is within two years of completion or termination of the services.

**9.2. Copyright.**

The Consultant retains copyright of all documents prepared by her. The Client shall be entitled to use them or copy them only for the works and the purpose for which they are intended, and need not obtain the Consultant's permission to copy for such use.



## APPENDIX A

### Scope of the Work / Services

- 1).....  
.....  
.....

## APPENDIX B

- 1) Equipment and facilities to be provided by the Client.

.....  
.....  
.....

- 2) Provision of services by others to be provided by the Client.

.....  
.....  
.....

## APPENDIX C

- 1) Payment to the Consultant

Fees will be calculated on a time basis if no other method of calculating fees is indicated here: *if not otherwise specified here, payment is to be made within 30 calendar days.*

- 2) Stage payments

.....

- 3) Revision of rates

.....

- 4) Expenses

.....

- 5) Disbursements

.....

- 6) Interest on outstanding fees

The interest rate to be used in clause 5.7 is prime plus 2% unless otherwise specified here:

.....

- 7) Indemnity Insurance

A policy giving cover of P1,000,000.00 for any one occurrence and in the annual aggregate P1,000,000.00 for any one period of insurance will constitute sufficient insurance for clause 3.3 unless otherwise specified here:

.....

## APPENDIX D

- 1) Duration of liability

.....

- 2) Arbitration rules

.....

- 3) Right to publish

.....

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## **Consultant appointment**

### **BIDP Publications**

Minor works form of contract  
Without quantities form of contract  
With quantities form of contract  
Form of nominated subcontract  
Form of domestic subcontract  
Electronic forms under a four year licence  
Logo for site notice board  
Architect instruction pads  
Architect's appointment  
Consultant's appointment  
BIDP regulations for the promotion and conduct of  
architectural competitions  
Site notice board layouts draft

The above are available from the BIDP, PO Box 827, Gaborone, phone 7181 6811.

This form is published by the Botswana Institute of Development Professions

Price Band A

Agreement between consultant and client

January 2000 edition, revised February 2009

© Copyright the Botswana Institute of Development Professions 2009

## BIDP minor works labour only form of contract

This form of Agreement and Conditions is designed for use where the contractor is to carry out the works only and the employer is to procure the construction materials for the works. This form is for minor buildings works or maintenance works where a specification and/or drawings have been prepared, which are to be carried out for an agreed lump sum and where an Architect / Supervising Officer has been appointed on behalf of the Employer. The Form is not appropriate for works for which bills of quantities have been prepared or for which a schedule of rates is required for valuing variations or where the contractor is both procuring the construction materials and carrying out the works.

**This Agreement** is made the.....day of .....2 .....

**BETWEEN**.....

of (or whose registered office is situated at) .....

(hereinafter called the Employer) of the one part .....

and .....

of (or whose registered office is situated at) .....

(hereinafter called the Contractor) of the one part .....

**WHEREAS** the Employer wishes the following work .....

(hereinafter called 'the Works') to be carried out under the direction of the Architect / supervising officer\* and has caused a

specification and/or Drawings numbered ..... to ..... inclusive (hereinafter called the 'Contract Drawings') showing and describing the Works to be prepared:

**AND WHEREAS** the Specification and/or Contract Drawings have been signed by or on behalf of the parties hereto:

### NOW IT IS HEREBY AGREED AS FOLLOWS:

1 For the consideration hereinafter mentioned the Contractor will upon and subject to the Conditions annexed hereto carry out and complete the Works described in the Specification and/or shown on the Contract Drawing.

2 The Employer will pay the contractor the sum of ..... (P.....) or such other sum as shall become payable at the times and manner specified in the said Conditions for the execution of the works, and will timeously supply to the Contractor the materials for the works.

3 The term 'Architect/Supervising Officer' in the said Conditions shall mean ..... or in the event of his death or ceasing to be the Architect/Supervising Officer for the purpose of this Contract such other person as the Employer shall within 14 days of the death or cessation as aforesaid nominate for that purpose **PROVIDED** that no person subsequently appointed to be the Architect/Supervising Officer under this Contract shall be entitled to disregard or overrule any certificate or instruction given by the Architect/Supervising Officer for the time being.

**AS WITNESS** the hands of the parties hereto

Signed for and on behalf of the Employer in the presence of

..... [Witness name and signature at left]

..... [Employer signature at left]

Signed for and on behalf of the Contractor in the presence of

..... [Witness name and signature at left]

..... [Contractor signature at left]

\* Where the person named is an Architect eligible for ordinary membership of the Botswana Institute of Development Professions (BIDP) delete 'Supervising officer'; in all other cases delete 'Architect'. Where 'Architect' is deleted the expression 'Architect' shall be deemed to have been deleted throughout this Agreement

# The conditions hereinbefore referred to

- |   |   |   |
|---|---|---|
| 1 | The Contractor shall with due diligence and in a good and workmanlike manner carry out and complete the Works to the reasonable satisfaction of the Architect/Supervising Officer.  | Contractor's obligation   |
| 2 | <p>(a) The Architect/Supervising Officer may issue written instructions which the Contractor shall forthwith carry out. If instructions are given orally they shall forthwith be confirmed in writing by the Architect/Supervising Officer.</p> <p>(b) The Architect/Supervising Officer may, without invalidating the contract, order an addition to or omission from or other change in the Works or the order or period in which they are to be carried out and any such instruction shall be valued by the Architect/Supervising Officer on a fair and reasonable basis.</p> <p>(c) The Architect/Supervising Officer shall issue instructions as to the expenditure of any provisional or prime cost sums and such instructions shall be valued on a fair and reasonable basis. Provided that no instruction under this sub-clause shall require the Contractor to enter into a sub-contract for work and materials which does not allow the Contractor a cash discount of 2.5% if payment is made within fourteen days after the date fixed for payment under the sub-contract or into a contract of sale which does not allow the contractor a cash discount of 5% if payment is made within thirty days of the end of the month during which delivery is made.</p> <p>(d) Instead of the valuation referred to in sub-clauses (b) and (c) hereof, an inclusive price may be agreed between the Architect/Supervising Officer and the Contractor prior to the contractor carrying out any instructions such as referred to in those sub-clauses.</p>   | <p>Architect/Supervising Officer's Instructions</p> <p>Provisional or prime Cost Sums</p>             |
| 3 | The Contractor shall comply with all notices required by any statute, any statutory instrument, rule or order or any regulation or byelaw applicable to the Works. The Contractor shall inform the Employer of fees and charges to be paid and the Employer shall pay all fees and charges in respect of the Works legally recoverable from him. The Contractor shall liaise with the relevant authority in establishing the corner pegs for an undeveloped site.   | Statutory Obligations Fees and Charges  |
| 4 | The Contractor shall at all reasonable times keep upon the Works a competent person in charge.  | Contractor's Representative   |
| 5 | The Contractor shall not sub-contract the Works or any part thereof without the written consent of the Architect/Supervising Officer which consent shall not unreasonably be withheld.  | Sub-Contracting   |
| 6 | <p>(a) The Works may be commenced on ..... and shall be completed by .....</p> <p>(b) The Contractor shall prepare a programme for the works setting out the sequence for delivery of construction materials by the Employer.</p> <p>(c) If it becomes apparent that the Works will not be completed by the date for completion inserted in sub-clause (a) hereof (or any extended date inserted therein in accordance with the provisions of this sub-clause) for reasons beyond the control of the Contractor, then the Contractor shall so notify the Architect/Supervising Officer who shall extend the time for completion by a reasonable period</p> <p>(d) If the Works are not completed by the completion date inserted in sub-clause (a) hereof or by any extended completion date fixed under sub-clause (c) hereof then the Contractor shall pay to the Employer liquidated damages at the rate of P..... per calendar day for every day or part of a day during which the works remain uncompleted.</p>  | <p>Commence-ment, Progress and Completion</p>   |
| 7 | <p>(a) The Contractor shall be liable for and shall indemnify the Employer against any liability, loss, claim or proceeding whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whatsoever arising out of or in the course of or caused by the carrying of the Works unless due to any act or neglect of the Employer, or of any person for whom the Employer is responsible. Without prejudice to his liability to indemnify the Employer the Contractor shall maintain and shall cause any sub-contractor to maintain such insurances as are necessary to cover the liability of the Contractor or, as the case may be, of such sub-contractor, in respect of personal injuries or deaths arising out of or in the course of or caused by the carrying out of the Works. Provided that nothing in this sub-clause contained shall impose any liability on the sub-contractor in respect of negligence or breach of duty on the part of the Employer, the Contractor, his other sub-contractors or their respective servants or agents.</p> <p>(b) The Contractor shall, subject to clause 8, be liable for and indemnify the Employer against and insure and cause any sub-contractor to insure against any expense, liability, loss, claim or proceedings in respect of any damage whatsoever to any real or personal property to an amount of P..... for any one occurrence* insofar as such damage arises out of or in the course of or by reason of the carrying out of the works and is due to any negligence, omission or default of the Contractor or any person for whom the Contractor is responsible or of any sub-contractor or person for whom the sub-contractor is responsible.</p> <p>(c) The Contractor shall produce, and shall cause any subcontractor to produce, such evidence as the employer may reasonably require that the insurances referred to in sub-clauses (a) and (b) hereof have been taken out and are in force at all material times.</p> | <p>Injury to or Death of Persons</p> <p>Damage to Property</p> <p>Insurance- Persons and Property</p> |
| 8 | (a) The Works (and the existing structures together with the contents thereof owned by him and for which he is responsible)* and all unfixed materials and goods intended for, delivered to, placed on or adjacent to the Works   | Insurance of the Works-   |

\* The cover suggested in 7(b) should be reviewed having regard to the nature of the works and the place where they are to be carried out. An amount of P90,000.00 could be used if this is satisfactory for the insurers.

<p>and intended therefore (except temporary buildings, plant, tools and equipment owned or hired by the Contractor or any sub-contractor) shall be at the sole risk of the Employer as regards loss or damage by fire, lightning, explosion, storm, tempest, flood, bursting or overflowing water tanks, apparatus or pipes, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion, and the Employer shall maintain adequate insurance against that risk.</p>	<p>Fire, etc Existing Structures</p>
<p>(b) If any loss or damage as referred to sub-clause (a) hereof occurs then the Architect/Supervising Officer shall issue instructions under Clause 2 as soon as may be practicable.</p>	
<p>9 (a) The Architect/Supervising Officer shall certify the date when in his opinion the Works have been practically completed.</p> <p>(b) Any defects, excessive shrinkages or other faults which appear within six (6) months** ..... of the date of practical completion and are due to materials or workmanship not in accordance with the contract or frost occurring before practical completion shall be made good by the Contractor entirely at his own cost unless the Architect/Supervising Officer shall otherwise instruct.</p> <p>(c) The Architect/Supervising Officer shall certify the date when in his opinion the Contractor's obligations under this Clause have been discharged.</p>	<p>Practical Completion Defects Liability</p>
<p>10 (a) If the period for completion of the Works exceeds 2 months the Architect/Supervising Officer shall if requested by the Contractor at intervals of four weeks calculated from the date for commencement inserted in Clause 6(a) certify interim payments to the Contractor in respect of the value of the Works executed, including any amounts either ascertained or agreed under Clause 2, Retention 5% and the Employer shall pay to the Contractor the amount so certified within 14 days of the date of the certificate.</p> <p>(b) Provided the Contractor shall have supplied all documentation reasonably necessary for the computation of the amount to be certified the Architect/Supervising Officer shall 10 days after the date of practical completion certified under Clause 9(a) certify payment to the Contractor of an amount not exceeding 95% of the total amount to be paid to the Contractor under the contract including any amount ascertained or agreed under Clause 2 less only the amount of any interim payments made under sub-clause (a) hereof and the Employer shall pay to the Contractor the amount so certified within 14 days of that certificate.</p> <p>(c) Provided the Contractor shall have supplied all documentation reasonably necessary for the computation of the amount to be certified the Architect/Supervising Officer shall 10 days after the date certified under Clause 9(c) issue a final certificate certifying the amount remaining due to the Contractor or due to the Employer as the case may be and such sum shall as from the 14th day after the date of the final certificate be a debt payable as the case may be by the Employer to the Contractor or by the Contractor to the Employer.</p>	<p>Payment- Interim Certificate</p> <p>Payment- Penultimate Certificate</p> <p>Payment- Final Certificate</p>
<p>11 The Contractor shall be responsible for the supply of safety equipment and apparel for the site</p>	<p>Safety equipment</p>
<p>12 If the Contractor shall make default in any one or more of the following respects, that is to say:</p> <p>(a) If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or</p> <p>(b) If he fails to proceed regularly and diligently with the Works, or</p> <p>(c) If he refuses or persistently neglects to comply with a written notice from the Architect/Supervising Officer requiring him to remove defective work and by such refusal or neglect the works are materially affected then the Architect/Supervising Officer may give to him a notice in writing specifying the default either by delivering the same to him or by sending the same by registered post addressed to the Contractor's last known address and if the Contractor shall either continue such default for fourteen days after the delivery of such notice or the date of posting the same as the case may be or shall at any time thereafter repeat such default (whether previously repeated or not) then the Employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice delivered to the Contractor or sent to him by registered post addressed to the Contractor's last known address forthwith determine the employment of the Contractor under this contract, provided that such notice shall not be given unreasonably or vexatiously.</p>	<p>Termination by Employer</p>
<p>13 Without prejudice to any other rights and remedies which the Contractor may possess, if</p> <p>(a) The Employer without lawful excuse does not pay to the Contractor the amount due on any certificate within the period specified in Clause 10 of these Conditions and continues such default for fourteen days after the delivery to him or the date of posting by registered post addressed to his last known address of a notice from the Contractor stating that notice of determination under this condition will be served if payment is not made within fourteen days from the date thereof; or</p> <p>(b) The Employer interferes with or obstructs the issue of any certificate due under this contract; or</p> <p>(c) The carrying out of the whole or substantially the whole of the uncompleted Works (other than the execution of work required under Clause 9 of these conditions) is suspended for a continuous period of fifty six days by reason of:</p> <p>(i) Force majeure, or</p> <p>(ii) Loss or damage occasioned by any one or more of the contingencies referred to in Clause 8 of these conditions, or</p> <p>(iii) Architect's/Supervising Officer's instructions issued under Clause 2 of these conditions, or</p> <p>(iv) The Contractor not having received in due time necessary instructions, drawings, details or levels from the Architect/Supervising Officer; or</p> <p>(v) The Contractor not having received in due time necessary construction materials for the works from the Employer, or</p>	<p>Termination by Contractor</p>

\* Strike out the words in brackets in 8(a) in the case of new works

\*\* If a different period is agreed for 9(b), delete '6' and substitute the agreed period.

- (d) The Employer becomes bankrupt or makes a composition or arrangement with his creditors or has a winding up order made, or (except for the purposes of reconstruction a resolution for voluntary winding up passed or a receiver or manager of his business or undertaking is duly appointed, or possession is taken by or on behalf of the holders of any debentures secured by a floating charge of any property comprised in or subject to the floating charge, then the Contractor may thereupon by notice delivered to the Employer or sent by registered post addressed to the Employer's last known address forthwith determine the employment of the Contractor under this contract; provided that such notice shall not be given unreasonably or vexatiously.

- 14(a) Should any disagreement between the Contractor and the Employer arise out of this agreement, the Architect/Supervising Officer may determine such disagreement by a written decision given to the Contractor and the Employer within fourteen (14) days of a written request so to do.

Dispute  
resolution

Such decision shall be final and binding on the parties, unless either party within fourteen (14) days of receipt thereof disputes the same by notice to the other party and to the agent in which case the disagreement shall be deemed a dispute.

Should the Architect/Supervising Officer fail to give a written decision within the said period of fourteen (14) days, then either party may within a further fourteen (14) days give notice to the other party that the disagreement be declared a dispute.

- (b) A dispute may in the first instance be decided by mediation as follows:

- (i) should the parties be unable to agree, in writing within fourteen (14) days of the date on which the dispute is declared, upon the use of meditation as a means of settling the dispute, or upon the person to be appointed by them as a mediator, the dispute shall be resolved by the submission thereof to arbitration.
- (ii) should both parties agree upon mediation, such dispute shall be referred within a further period of fourteen (14) days for opinion to a mediator mutually selected by the parties. The parties shall not be entitled to be represented at such mediation by a practising advocate or attorney.
- (iii) the parties shall within fourteen (14) days of the appointment of the mediator or such other period as the mediator considers reasonable submit written representation to him. Thereafter the mediator shall give his opinion in writing on the matter and furnish the contractor and the sub-contractor each with a copy thereof, provided that the mediator may, in his discretion, convene a hearing of the parties and their witnesses, or may hold discussions with either or both parties, before giving his opinion, with the objective of reconciling the opposing views.
- (iv) in giving this opinion in writing the mediator shall be deemed to be acting as an expert and not as arbitrator with the proviso that no claim for damages shall be made against him at the instance of either party for any want of care, skill or diligence in the exercise of his duties
- (v) the cost of the mediation and the apportionment thereof shall be determined by the mediator.

- (c) The opinion of the mediator shall be binding on the parties unless either party disputes the opinion of the mediator in writing to the other party within thirty (30) days of the furnishing to them by the mediator of his opinion, in which event the dispute shall be resolved by the submission thereof to arbitration.

- (d) Where the dispute is submitted to arbitration, then the arbitration shall be held in terms of the Arbitration Act and shall be conducted in accordance with the current Rules for the Conduct of Arbitrations published by the Association of Arbitrators (Southern Africa) and shall be heard by a sole arbitrator unless otherwise agreed by the parties.

- (e) The arbitrator shall be chosen by the sub-contractor from a panel of three (3) persons nominated by the President of the Botswana Institute of Development Professions at the written request of either party within seven (7) days of receipt of the notice advising the names of the said panel. Failing this the President of the Botswana Institution of Development Professions shall appoint the arbitrator. The appointed arbitrator's cost will be divided equally between the parties until the arbitrator decides to the contrary.

- (f) In the arbitration proceedings the rights of the parties shall not be prejudiced in any manner whatsoever by anything said or done at the mediation or by the opinion of the mediator.

- (g) The arbitrator shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice relating to all matters in dispute submitted to him and to determine all such matters in the same manner as if no such certificate, opinion, decision, requisition or notice had been issued.

- (h) Reference to either mediation or to arbitration shall not relieve either party from any liability for the due and timeous performance of his obligations in terms of this agreement.

The validity of clause 14 shall not be affected by the cancellation of this agreement in terms of clauses 6, 12 and/or 13.

- 15 (a) The contractor should allow for the provision of a cash deposit of 10% of the Contract Sum or Bankers Guarantees (to be approved by the Employer) for a total of 10% of the Contract Sum.

Provision of  
Surety\*

- (b) Provision of the surety will be required within 14 days from the acceptance of the tender and will terminate on the date of Practical completion of the Works as certified by the Architect/ Supervising Officer.

\* delete if clause 15 is not required



## **BIDP minor works labour only form of contract**

# **Agreement for minor works labour only form of contract**

Between

.....  
.....

and

.....  
.....

This form is issued by the

**BOTSWANA INSTITUTE OF DEVELOPMENT PROFESSIONS**

Price band A

Private Edition for MINOR WORKS LABOUR ONLY FORM OF CONTRACT

Standard Form of Building Contract

2011 Edition

@ Copyright the Botswana Institute of Development Professions 2011





*BIDP*  
*Consultant Appointment*  
**Memorandum of Agreement**

(Consultant appointment)

**BETWEEN**

1. ....

..... THE CLIENT.

2. ....

..... THE CONSULTANT.

**WHEREAS**

A. The Client intends to:

.....

..... THE PROJECT.

At

.....

..... THE LOCATION.

B. The Client wishes to appoint the Consultant for the Project and the Consultant has accepted the appointment subject to the schedule of conditions which follow on this page.

**RELATED DOCUMENTS.**

The following documents are deemed to form part of this agreement:

- a) The letter of acceptance.
- b) Schedule of Services.
- c) Scale of fees and schedule of payments.
- d) Additional reference (where applicable) : *X*

DATED: *1/11/08*

SIGNED: *[Signature]*

.....  
THE CLIENT

.....  
THE CONSULTANT

WITNESSED:

*Name*

*Address*

*Description*

## SCHEDULE OF CONDITIONS.

### 1. DEFINITIONS

- Project - is the project, as referred to in the Agreement, for which the consultant will supply the services.
- Services - are the services provided by the Consultant in accordance with Appendix A.
- Client - is the party named in the Agreement, who employs the Consultant, as well as the Legal successors to the Client and permitted assignees.
- Consultant - is the party, named in the Agreement, who is employed by the Client.
- Party - means the client and / or the Consultant or any other party.
- Agreement - is this agreement with all appendices.
- Day - is the period between any one midnight and the next.
- Month - is the period of one month in accordance with the Gregorian calendar, commencing with any day of the month and ending at the same day minus one in the next month.
- Currency - means the Botswana Pula.
- Agreed Compensation - means additional sums, which are agreed upon by both parties and which are payable under the agreement.

### 2. INTERPRETATION

- 2.1. The singular includes the plural and visa versa.
- 2.2. The masculine includes the feminine and visa versa.
- 2.3. In the event that there is a conflict between clauses and documents, which form part of the Agreement (whether they have been attached or not), the last written documents supersede the earlier conflicting one.
- 2.4. This agreement will be subject to the laws of Botswana.
- 2.5. Any question arising out of these Conditions may be referred in writing by consultant or client to the BIDP for advice provided always that any difference or dispute between them is determined in accordance with Clause 8.

### 3. OBLIGATIONS OF THE CONSULTANT

- 3.1. Scope of services  
The Consultant shall carry out the services in a professional manner and in accordance with the scope of services as attached in Appendix A.
- 3.2. Client's property  
Anything supplied by or paid for by the Client, shall remain the property of the Client.
- 3.3. Indemnity insurance  
The Consultant shall maintain sufficient indemnity insurance cover to protect the Client's interest.

### 4. OBLIGATIONS OF THE CLIENT.

- 4.1. Information.  
The Client shall do everything in her power to reduce delays in the obtaining of information by the Consultant, and shall give her full cooperation in making speedy decisions, when requested in writing by the Consultant.
- Equipment and facilities.  
The Client shall make available, free of cost to the Consultant, the equipment and facilities as described in Appendix B.
- 4.3. Client's personnel

In consultation with the Consultant, the Client shall, at her own cost, arrange for the selection and provision of personnel in her employment to the Consultant in accordance with Appendix B hereof. In connection with the services to be provided by the Consultant to the Client, the Client's personnel shall take instructions from the Consultant.

4.4. Services by others

The Client shall, at her cost, arrange for the provision of services by others, as described in Appendix B, and the Consultant shall cooperate with the Suppliers of such services, but shall not be responsible for them or their performance.

4.5. Commitment to pay

The Client shall pay the Consultant on demand the fees, expenses and disbursements due in accordance with the attached scale of fees and schedule of payments.

5. **PAYMENT**

5.1. Payment

Payment for the services shall be calculated, charged and paid as set out in Appendix C.

5.2. Instalments

If the payment for the services is to be paid in instalments, clearly defined stages of the work must be identified or a time basis agreed and set out in Appendix C.

5.3. Revised rates

Unless otherwise agreed and stated in Appendix C, time rates and mileage rates for vehicles shall be revised in line with rates issued by an independent authority.

5.4. Variations

Where any changes are made to the Consultant's services, the fees specified in Appendix C shall be varied.

5.5. Expenses

The Client shall pay the expenses specified in Appendix C. Expenses other than those specified shall only be charged with the prior authorisation of the Client.

5.6. Disbursements.

The Client shall reimburse the Consultant as specified in Appendix C for any disbursements made on the Client's behalf.

5.7. Interest on Outstanding Accounts.

Any sums remaining unpaid at the expiry of twenty-eight days from the date of submission of an account shall bear interest thereafter. Such interest to accrue from day to day at the rate specified in Appendix C.

5.8. Payment on Suspension / Termination.

On suspension or termination of the appointment the Consultant shall be entitled to, and shall be paid, fees for all services provided to that time calculated as incomplete services, and shall be entitled to expenses and disbursements reasonably incurred to that time.

5.9. Sales Tax or VAT.

All fees, expenses and disbursements under the Appointment are exclusive of Sales Tax and VAT. Any Sales Tax or VAT due on the Consultant's services will be added and shall be paid by the Client.

6. **LIABILITY**

6.1. Consultant's Liability

The Consultant shall only be liable to pay compensation to the Client arising out of or in connection with the Appointment if a breach of Condition 3.1 is established against her. Special liability insurance beyond that described in Condition 3.3 would be an extra provision.

6.2. Client's Liability.

The Client shall be liable to the Consultant if a breach of her duty to the Consultant is established against the Client.

6.3. Compensation.

If it is considered that either party is liable to the other, compensation shall be payable only on the following terms:

- i) Such compensation shall be limited to the amount of reasonably foreseeable loss and damage suffered as a result of such breach, but not otherwise.
- ii) If either party is considered to be liable jointly with third parties to the other, the proportion of compensation payable by her shall be limited to that proportion of liability which is attributable to her breach.

6.4. Duration of Liability.

Neither the Client nor the Consultant shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on her before the expiry of the relevant period stated in Appendix D or such earlier date as may be prescribed by Law.

6.5. Indemnity.

The Client can request in writing that the Consultant insures against special liability under Clause 6.1. The cost of such extra insurance shall be at the expense of the Client.

## 7 **TERMINATION, ABANDONED AND RESUMED WORKS**

7.1 Termination

An engagement entered into between the consultant and the client may be terminated at any time by either party on the expiry of reasonable notice, when the consultant shall be entitled to remuneration in accordance with Section 5.

7.2 Abandoned works

7.2.1 Where the construction of works is cancelled or postponed on the client's instructions, or the consultant is instructed to stop work indefinitely at any time, the commission may be deemed to be abandoned and fees for partial services shall be due.

7.2.2 Notwithstanding Clause 7.2.1, if instructions for the consultant to continue work are not received from the client six months after such instructions were requested, the commission shall be deemed to have been abandoned.

7.2.3 Where a commission is abandoned or any part of the works is omitted at any time before completion, fees for partial service in respect of the whole or part of the works shall be charged for all services provided with due authority.

7.3 Resumed commissions

7.3.1 If a commission which has been abandoned is resumed without substantial alteration within two years, any fees paid under Section 7.2 shall rank solely as payments on account towards the total fees payable on the execution of the works and calculated on their total construction or such other basis or is agreed in appendix C.

7.3.2 Where a commission which has been abandoned is resumed at any time with substantial alteration or is resumed after two years, any fees paid under Section 7.2 shall be regarded as final payment for the service originally rendered. The resumed commission shall then be deemed separate, and fees charges in accordance with Section these conditions.

7.3.3 All additional work arising out of a commission which is resumed in accordance with Clause 7.3.1 shall be charged on a time basis.

## 8. **DISPUTES.**

8.1. Disputed accounts.

If any item or part of an item in an invoice submitted by the Consultant is contested by the Client, the Client shall give prompt notice with reasons and shall not delay payment on the remainder of the invoice.

8.2. Claims for Loss or Damage.

Subject to Clause 6.4 any claim for loss or damage arising out of breach or termination of the Agreement shall be agreed between the Client and the Consultant or, failing agreement, shall be referred to arbitration in accordance with Clause 8.3.

8.3. Arbitration.

Any dispute or claim arising out of or relating to this Agreement or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the rules stipulated in Appendix D in force at the effective date of the Agreement.

If no rules are stipulated in Appendix D, the dispute or difference shall be referred to the arbitration of a person to be agreed between the parties, or, failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an arbitrator, a person to be nominated at the request of either party by the President of the Botswana Institute of Development Professions. The appointed arbitrator's cost will be divided equally between the parties until the arbitrator decides to the contrary. The parties agree to comply with the awards resulting from arbitration and waive their rights to any form of appeal insofar as such waiver can validly be made.

9. COPYRIGHT.

9.1 Publication.

Unless otherwise specified in Appendix D, the Consultant, either alone or jointly with others, can publish material relating to the works and services. Publication shall be subject to approval of the Client if it is within two years of completion or termination of the services.

9.2. Copyright.

The Consultant retains copyright of all documents prepared by her. The Client shall be entitled to use them or copy them only for the works and the purpose for which they are intended, and need not obtain the Consultant's permission to copy for such use.

Botswana Institute of Development Professions Publications Review Committee November 2008



## APPENDIX A

### Scope of the Work / Services

- 1).....

## APPENDIX B

- 1) Equipment and facilities to be provided by the Client.

.....

- 2) Provision of services by others to be provided by the Client.

.....

## APPENDIX C

- 1) Payment to the Consultant

(If not stated, other method will be calculated on a time basis) if not otherwise specified in this document, payment is to (architects appointment).

*if no other method of calculating fees is indicated here, fees will be calculated on a time basis*

- 2) Stage payments

- 3) Revision of rates

- 4) Expenses

- 5) Disbursements

- 6) Interest on outstanding fees

The interest rate used in clause 5 is prime plus 2% unless otherwise specified here.

- 7) Indemnity Insurance

(If it is not spelled out anywhere else the word "sufficient" will mean P1,000,000.00 any one occurrence and in the annual aggregate P1,000,000.00 any one period of insurance)

*A policy giving cover of P1,000,000.00 for sufficient insurance for clause 7 unless otherwise specified here: 3.3 #*

## APPENDIX

- 1) Duration of liability

- 2) Arbitration rules

- 3) Right to publish

Botswana Institute of Development Professions Publications Review Committee November 2008

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## Consultant appointment memorandum of agreement

### BIDP Publications *smaller*

#### Current list of publications:

*fr*

- Minor works form of contract
- Without quantities form of contract
- With quantities form of contract
- Form of nominated subcontract
- Form of domestic subcontract
- Electronic forms version 0.0.1 under a four year licence
- Logo for site notice board
- ~~Certificate for payment pads~~
- Architect instruction pads
- Architect's appointment (editable file appendix A & B here)
- Consultant's appointment
- BIDP regulations for the promotion and conduct of architectural competitions
- Site notice board layouts draft

*phone - 7 -*

The above are available from the BIDP, PO Box 827, Gaborone, Shop c/o Plot 915, Phalane Close, Cell 7181 6811, fax 397 1181.

This form is published by the Botswana Institute of Development Professions

Price Band A

Agreement between consultant and client

January 2000 edition, revised November 2008

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## Agreement and Schedule of Conditions of Building Sub-contract

(Nominated sub-contract, based on the conditions of the BIDP Building Agreement)

between

and

dated

In respect of

This contract, which is subject to copyright, is published by the Botswana Institute of Development Professions and endorsed by the Association of Electrical & Mechanical Sub-Contractors of Botswana 2010 edition

ARTICLES OF AGREEMENT made this ..... day of ..... 20.....

1

shall become payable hereunder subject to and at the times and in the manner specified in the conditions of this sub-contract, and shall be payable to the sub-Sub-Contractor at:

3. The Contractor chooses *domicilium citandi et executandi* for all purposes of this sub-contract at:

4. The sub-Sub-Contractor chooses *domicilium citandi et executandi* for all purposes of this sub-contract at:

The Contractor and sub-Sub-Contractor choose *domicilium citandi et executandi* at their respective addresses where all notices or processes or both arising out of or in connection with this agreement may be validly delivered to or served on them. Either contracting party may, at any time, by notice to the other contracting party, change its *domicilium citandi et executandi* to some other address, provided that such new address shall be in the Republic of Botswana.

6. References in this agreement to other documents shall be to the latest edition thereof, or alternatively as specified in the principal contract with all amendments thereto, at the date for submission of the tenders.

7. The date of issue of any certificate referred to in this agreement shall be the date on which the certificate is signed by the party authorised in this agreement to issue such certificate and unless the contrary is proved, the date of signature shall be the date appearing on the certificate.

8. All reference to days shall mean days of twenty-four (24) hours duration commencing at midnight (00:00) and which shall include non-working days unless otherwise stated.

9. The headings of clauses in this sub-contract agreement are for reference purposes only and shall not be taken into account in construing the content thereof.

10. In this agreement, unless inconsistent with the context, the words 'notice', 'notify', 'notification', 'certify', 'certification', and 'issue' shall connote an act to be carried out in writing.

11. In this agreement, unless inconsistent with the context, the masculine includes the other gender, the singular includes the plural and vice versa, and persons shall include bodies corporate.

12. Any documentation or notice sent by a party in terms of this agreement by prepaid registered post addressed to the other party at his *domicilium et executandi* shall be deemed to have reached the other party within seven (7) days from date of posting.

13. This sub-contract agreement constitutes the whole agreement between the parties and no variations or amendments thereto shall have any force or effect unless reduced to writing and signed by both the Sub-Contractor and sub-Sub-Contractor.

14. The only law applicable to this agreement is the law of the Republic of Botswana.

15. The original hereof is kept by the person named in the Schedule, but each party shall be entitled to a real copy thereof.

16. The following documents comprise the Contract (delete which are not applicable):

This agreement and schedule of conditions.  
the Letter of Acceptance,  
the Letter of Tender,  
the Particular Conditions,  
these General Conditions.

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Between

of (physical or postal address)

(Hereinafter called "the Contractor") of the one part

and

of (physical or postal address)

(Hereinafter called "the sub-Sub-Contractor") of the other part.

WHEREAS this agreement is supplemental to an agreement (hereinafter referred to as "the principal contract")

made the ..... day of ..... 20....

between

(hereinafter called "the Employer") of the one part, and the Contractor of the other part.

AND WHEREAS the Contractor desires to have executed the works of which particulars are set out in the attached schedule (hereinafter referred to as "the sub-contract works") and which form part of the works comprised in and to be executed in accordance with the principal contract (hereinafter referred to as "the contract works") and any authorised variations of the sub-contract works.

AND WHEREAS the Contractor, prior to the signing hereof, has given the Sub-Contractor reasonable opportunity of inspecting all the provisions of the principal contract except the detailed prices of the Contractor included in schedules and bills of quantities, and furthermore, whereas it is agreed that the term "the Employer" where it appears in this sub-contract, unless inconsistent with the context in which it is used, shall mean the person appointed by the Employer in terms of the principal contract to act as Employer for the Contractor in terms of that contract as defined in 1.1 on page 5, ~~whereas the contractor's representative has the same position as the Engineer in the sub-contract as the engineer has in the principal contract.~~

### NOW IT IS HEREBY AGREED AS FOLLOWS:

1. For the consideration hereinafter mentioned, the sub-Sub-Contractor will execute and complete the sub-contract works upon and subject to the conditions of this sub-contract.

2. The Sub-Contractor will pay the sub-Sub-Contractor the sum of .....

(P ..... ) hereinafter referred to as "the sub-contract sum" or such other sum as

2

the Specification,

the drawings marked .....

the Schedules

any other documents as specified below.

SIGNED BY THE CONTRACTOR .....

IN THE PRESENCE OF (Witness Name in Block Letters) .....

WITNESS SIGNATURE .....

WITNESS ADDRESS .....

SIGNED BY THE SUB-CONTRACTOR .....

IN THE PRESENCE OF (Witness Name in Block Letters) .....

WITNESS SIGNATURE .....

WITNESS ADDRESS .....

### General Conditions

#### 1.1 Definitions

In the Conditions of Contract (these Conditions), which include Particular Conditions and these General Conditions, the following words and expressions shall have meanings stated. Words indicating persons or parties include

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NB BIDDER ex'g subcontracts have lower case for contractor etc

corporations and of legal entities, except where the context requires otherwise.

who acts on behalf of the Sub-Contractor

## 1.1.1 The Contract

1.1.1.1 "Contract" means the ~~Contract~~ <sup>Contract</sup> Agreement, the Letter of Acceptance, Letter of Tender, ~~and the Specifications~~, the Specification, the Drawings, Schedules, and the further documents (if any) which are listed in Contract Agreement or in the Letter of Acceptance.

1.1.1.2 "Contract Agreement" means the contract agreement (if any) referred to Sub-Clause 1.6 [Contract Agreement]

1.1.1.3 "Letter of Acceptance" means the letter of formal acceptance, signed by the Contractor, of the Letter of Tender, including any annexed memoranda comprising agreements between and signed by both Parties. If there is such letter of acceptance, the expression "Letter of Acceptance" means Contract Agreement and the date of issuing or receiving the Letter of Acceptance means the date of signing the Contract Agreement.

1.1.1.4 "Letter of Tender" means the document entitled letter of tender, which completed by the Sub-Contractor and includes the signed offer to the Contractor for the Works.

1.1.1.5 "Specification" means the document entitled specification, as included in the Contract, and any additions and modifications to the specification accordance with the Contract. Such document specifies the Works.

1.1.1.6 "Drawings" means the drawings of the Works, as included in the Contract, and any additional and modified drawings issued by (or on behalf of) the Contractor in accordance with the Contract.

1.1.1.7 "Schedules" means the document(s) entitled schedules, completed by the Sub-Contractor and submitted with the Letter of Tender, as included in Contract. Such document may include the Bill of Quantities, data lists, schedules of rates and/or prices.

1.1.1.8 "Tender" means the Letter of Tender and all other documents which the Sub-Contractor submitted with the Letter of Tender, as included in the Contract.

1.1.1.9 "Appendix to Tender" means the completed pages entitled appendix to tender which are appended to and form part of the Letter of Tender.

1.1.1.10 "Bill of Quantities" and "Daywork Schedule" mean the documents named (if any) which are comprised in the Schedules.

1.1.1.11 "Principal contract" means the agreement between the Employer and the Contractor under which this contract appears.

## 1.1.2 Parties and Persons

1.1.2.1 "Party" means the Contractor or the Sub-Contractor, as the context requires.

1.1.2.2 "Contractor" means the person named as Contractor on page 2 hereof and the legal successors in title to this person.

1.1.2.3 "Sub-Contractor" means the person(s) named as Sub-Contractor on page 2 hereof and the legal successors in title to this person.

1.1.2.4 "Engineer" means the person appointed by the Employer to act as the ~~Principal Agent~~ <sup>Principal Agent</sup> for the purposes of the Contract and named in the Appendix to Tender, or any other person appointed from time to time by the Employer and notified to the Sub-Contractor under Sub-Clause 3.4 [Replacement of the Engineer]. The word "Engineer" is autonomous to "architect", "Principal Agent", "Developer" or any other function as described in the contract and will indicate the person who is responsible for the proper and timely completion of the project, on behalf of the employer.

1.1.2.4.1 "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].

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## 1.1.4 Money and Payments

1.1.4.1 "Accepted Contract Amount" means the amount accepted in the Letter of Acceptance for the execution and completion of the Works and the remedying of any defects.

1.1.4.2 "Contract Price" means the price defined in Sub-Clause 14.1 [The Contract Price], and includes adjustments in accordance with the Contract.

1.1.4.3 "Cost" means all expenditure reasonably incurred (or to be incurred) by the Sub-Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.

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

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

1.1.4.6 "Foreign Currency" means a currency in which part (or all) of the Contract Price is payable, but not the Local Currency.

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

1.1.4.8 "Local Currency" means the currency of the Country. <sup>PKR.</sup>

1.1.4.9 "Payment Certificate" means a payment certificate issued under Clause 14 [Contract Price and Payment].

1.1.4.10 "Provisional Sum" means a sum (if any) which is specified in the Contract as a provisional sum, for the execution of any part of the Works or for the supply of Plant, Materials or services under Sub-Clause 13.5 [Provisional Sums].

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

1.1.4.12 "Statement" means a statement submitted by the Sub-Contractor as part of an application, under Clause 14 [Contract Price and Payment], for a payment certificate.

## 1.1.5 Works and Goods

1.1.5.1 "Sub-Contractor's Equipment" means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Sub-Contractor's Equipment excludes Temporary Works, Construction Equipment, (if any), Plant, Materials and other things intended to form or forming part of the Permanent Works.

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

1.1.5.3 "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 Sub-Contractor under the Contract.

1.1.5.4 "Permanent Works" means the permanent works to be executed by the Sub-Contractor under the Contract.

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

1.1.5.6 "Section" means a part of the Works specified in the Appendix to Tender as a Section (if any).

1.1.2.5 "Sub-Contractor's Representative" means the person named by the Sub-Contractor in the Contract or appointed from time to time by the Sub-Contractor under Sub-Clause 4.3 [Sub-Contractor's Representative], who acts on behalf of the Sub-Contractor.

1.1.2.6 "Contractor'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 Contractor; and any other personnel notified to the Sub-Contractor, by the Contractor or the Engineer, as Contractor's Personnel.

1.1.2.7 "Sub-Contractor's Personnel" means the Sub-Contractor's Representative and all personnel whom the Sub-Contractor utilises on Site, who may include the staff, labour and other employees of the Sub-Contractor and of each Sub-Contractor; and any other personnel assisting the Sub-Contractor in the execution of the Works.

1.1.2.8 "Sub-Contractor" means any person named in the Contract as a Sub-Contractor, or any person appointed as a Sub-Contractor, for a part of the Works; and the legal successors in title to each of these persons.

1.1.2.9 "DAB" means the person or three persons so named in the Main Contract and appointed by the Main Contractor and the Employer for the purpose of adjudication of all disputes occurring during and after the period of construction, or which have arisen or are expected to arise under Sub-Clause 20.2 [Disputes - Adjudication - Referral to DAB] or Sub-Clause 20.3 [Disputes - Arbitration - Referral to Arbitration]. <sup>must have full text</sup>

1.1.2.10 "FIDIC" means the Fédération Internationale des Ingénieurs-Conseils, the international federation of consulting engineers.

## 1.1.3 Dates, Tests, Periods and completion

1.1.3.1 "Base Date" means the date 28 days prior to the latest date for submission and Completion of the Tender.

1.1.3.2 "Commencement Date" means the date notified under Sub-Clause 8.1 [Commencement of Works].

1.1.3.3 "Time for Completion" means the time for completing the Works or a Section (as the case may be) under Sub-Clause 8.2 [Time for Completion], as stated in the Appendix to Tender (with any extension under Sub-Clause 8.4 [Extension of Time for Completion]), calculated from the Commencement Date.

1.1.3.4 "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 Contractor.

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

1.1.3.6 "Tests after Completion" means the tests (if any) which are specified in the Contract and which are carried out in accordance with the provisions of the Particular Conditions after the Works or a Section (as the case may be) are taken over by the Contractor.

1.1.3.7 "Defects Notification Period" means the period for notifying defects in the Works or a Section (as the case may be) under Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects], as stated in the Appendix to Tender (with any extension under Sub-Clause 11.3 [Extension of Defects Notification Period]), calculated from the date on which the Works or Section is completed as certified under Sub-Clause 10.1 [Taking Over of the Works and Sections].

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

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

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

1.1.5.8 "Works" means the Permanent Works and the Temporary Works, or either of them as appropriate.

## 1.1.6 Other Definitions

1.1.6.1 "Sub-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 Sub-Contractor under the Contract.

1.1.6.2 "Country" means the country in which the Site (or most of it) is located, where the Permanent Works are to be executed. <sup>Bhutan.</sup>

1.1.6.3 "Contractor's Equipment" means the apparatus, machinery and vehicles (if any) made available by the Contractor for the use of the Sub-Contractor in the execution of the Works, as stated in the Specification; but does not include Plant which has not been taken over by the Contractor.

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

1.1.6.5 "Laws" means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority.

1.1.6.6 "Performance Security" means the security (or securities, if any) under Sub-Clause 4.2 [Performance Security].

1.1.6.7 "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.

1.1.6.8 "Unforeseeable" means not reasonably foreseeable by an experienced Sub-Contractor by the date for submission of the Tender.

1.1.6.9 "Variation" means any change to the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments].

## 1.2 Interpretation

1.2.1 In the Contract, words and phrases shall have the meanings assigned to them in the Interpretation.

1.2.2 Words and phrases shall be interpreted in accordance with the Interpretation, and where the Interpretation does not provide a meaning, they shall be interpreted in accordance with the ordinary meaning of the words and phrases in the English language.

## 1.3 Communications

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

- 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 the Appendix to Tender; and
- delivered, sent or transmitted to the address for the recipient's communications as stated in

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the Appendix to Tender. However:

- (i) If the recipient gives notice of another address, communications shall thereafter be delivered accordingly;
- and
- (ii) If the recipient has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued.

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.

#### 2.4 Language

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

If there are versions of any part of the Contract which are written in more than one language, the version which is in the English language shall prevail in the Appendix to Tender shall prevail.

The language for communications shall be that stated in the Appendix to Tender. The language in which the documents forming part of the Contract shall be the language in which the Contract is expressed in the Appendix to Tender.

#### 1.5 Priority of Documents

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

- (a) the Sub-Contract Agreement (if any);
- (b) the Letter of Acceptance;
- (c) the Letter of Tender;
- (d) the Particular Conditions;
- (e) the General Conditions;
- (f) the Specification;
- (g) the Drawings; and
- (h) the Schedules and any other documents forming part of the Contract.

If an ambiguity or discrepancy is found in the documents, the Contractor shall issue any necessary clarification or instruction.

#### 1.6 Contract Agreement

The Parties shall enter into a Contract Agreement within 28 days after the Sub-Contractor receives the Letter of Acceptance, unless they agree otherwise. The Contract Agreement shall be based upon the form annexed to the Particular Conditions. The costs of stamp duties and similar charges (if any) imposed by law in connection with entry into the Contract Agreement shall be borne by the Contractor.

#### 1.7 Assignment

Neither Party shall assign the whole or any part of the Contract or any benefit or interest in or under the Contract. However, either Party, without prior written consent of the other Party,

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

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- (b) enable any person in proper possession of the relevant part of the Works to copy, use and communicate the Sub-Contractor's Documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing and demolishing the Works; and
- (c) in the case of Sub-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 Sub-Contractor.

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

#### Sub-Contractor's Use of Contractor's Documents

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

#### 1.12 Confidential Details

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

#### 1.13 Compliance with Laws

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

- (a) the Contractor shall have obtained (or shall obtain) the planning, zoning or similar permission for the Permanent Works, and any other permissions described in the Specification as having been (or being) obtained by the Contractor, and the Contractor shall indemnify and hold the Sub-Contractor harmless against and from the consequences of any failure to do so; and
- (b) the Sub-Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works, his subcontract only and the remedying of any defects; and the Sub-Contractor shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so.

#### 1.14 Joint and Several Liability

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

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

#### The Contractor

#### 1.8 Care and Supply of Documents

The Specification and Drawings shall be in the custody and care of the Contractor. Unless otherwise stated in the Contract, two copies of the Contract and of each subsequent Drawing shall be supplied to the Sub-Contractor, who may make or request further copies at the cost of the Sub-Contractor.

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

The Sub-Contractor shall keep on the Site, a copy of the Contract, publications named in the Specification, the Sub-Contractor's Documents, the Drawings and Variations and other communications given under the Contract. The Contractor'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.

#### 1.9 Delayed Drawings or Instructions

The Sub-Contractor shall give notice to the Contractor - with a copy to the Engineer - whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued to the Sub-Contractor within a particular time, which shall be reasonable. The notice shall include details of the necessary drawing or instruction, details of why and by when it should be issued, and details of the nature and amount of the delay or disruption likely to be suffered if it is late.

If the Sub-Contractor suffers delay and/or incurs Cost as a result of a failure of the Contractor or the Engineer to issue the notified drawing or instruction within a time which is reasonable and is specified in the notice with supporting details, the Sub-Contractor shall give a further notice to the Contractor with a copy to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Sub-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 reasonable profit, which shall be included in the Contract Price.

After receiving this further 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 Engineer's failure was caused by any error or delay by the Sub-Contractor, including an error in, or delay in the submission of, any of the Sub-Contractor's Documents, the Sub-Contractor shall not be entitled to such extension of time, cost or profit.

#### 1.10 Contractor's Use of Sub-Contractor's Documents

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

The Contractor shall use the Sub-Contractor's Drawings and other documents only for the purposes for which they were provided to him and shall not use, copy or communicate them to a third party without the Sub-Contractor's consent.

The Sub-Contractor shall be deemed (by signing the Contract) to give to the Contractor a non-terminable, transferable, non-exclusive, royalty-free licence - in copy, use and communication - the Sub-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;

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#### 2.1 Right of Access to the Site

The Contractor shall give the Sub-Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Appendix to Tender. The right and possession may not be exclusive to the Sub-Contractor. If under the Contract, the Contractor is required to give (to the Sub-Contractor) possession of any foundation, structure, plant or means of access, the Contractor shall do so in the time and manner stated in the Specification. However, the Contractor may withhold any such right or possession until the Performance Security (if applicable) has been received.

If no such time is stated in the Appendix to Tender, the Contractor shall give the Sub-Contractor right of access to, and possession of, the Site within such times as may be required to enable the Sub-Contractor to proceed in accordance with the programme submitted under Sub-Clause 9.2 [Programme].

If the Sub-Contractor suffers delay and/or incurs Cost as a result of a failure by the Contractor to give any such right or possession within such time, the Sub-Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Sub-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 reasonable profit, which shall be included in the Contract Price.

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 Contractor's failure was caused by any error or delay by the Sub-Contractor, including an error in, or delay in the submission of, any of the Sub-Contractor's Documents, the Sub-Contractor shall not be entitled to such extension of time, cost or profit.

#### 2.2 Permits, Licences or Approvals

The Contractor shall (where he is in a position to do so) provide reasonable assistance to the Sub-Contractor at the request of the Sub-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 Sub-Contractor's applications for any permits, licences or approvals required by the Laws of the Country:
  - (i) which the Sub-Contractor is required to obtain under Sub-Clause 1.13 [Compliance with Laws];
  - (ii) for the delivery of Goods, including clearance through customs; and
  - (iii) for the export of Sub-Contractor's Equipment when it is removed from the Site.

#### 2.3 Sub-Contractor's Personnel

The Contractor shall be responsible for ensuring that the Contractor's Personnel and the Contractor's other Sub-Contractors on the Site:

- (a) co-operate with the Sub-Contractor's efforts under Sub-Clause 4.6 [Co-operation]; and
- (b) take actions similar to those which the Sub-Contractor is required to take under sub-paragraphs (a), (b) and (c) of Sub-Clause 4.3 [Safety Procedures] and under Sub-Clause 4.16 [Protection of the Environment];



## 2.4 Contractor's Financial Arrangements

The Contractor shall submit, within 28 days after receiving any request from the Sub-Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Contractor to pay the Contract Price (as estimated at that time) in accordance with Clause 14 (Contract Price and Payment). If the Contractor intends to make any material change to his financial arrangements, the Contractor shall give notice to the Sub-Contractor with detailed particulars.

## 2.5 Contractor's Claims

If the Contractor considers himself to be entitled to any payment by the Sub-Contractor under any Clause of these Conditions or otherwise in connection with the Contract, ~~and/or to any extension of the Defects Notification Period~~, the Contractor ~~or the Engineer~~ shall give notice and particulars to the Sub-Contractor with a copy to the Engineer. However notice is not required for payments due under Sub-Clause 4.19 (Electricity Water and Gas), under Sub-Clause 4.20 (Contractor's Equipment and Free-Issue Material), or for other services requested by the Sub-Contractor.

The notice shall be given as soon as practicable after the Contractor 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 Contractor 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 Contractor is entitled to be paid by the Sub-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 in the Sub-Contract Price and Payment Certificates. ~~The Contractor 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 Sub-Contractor, in accordance with this Sub-Clause.~~

## 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 suitably qualified engineers and other professionals who are competent to carry out these duties.~~

~~The Engineer shall have no authority to amend the Contract.~~

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 the Particular Conditions. ~~The Contractor undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Sub-Contractor. However, whenever the Engineer exercises a specified authority for which the Contractor's approval is required, then (for the purposes of the Contract) the Contractor shall be deemed to have given approval.~~

Except as otherwise stated in these Conditions:

- (a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the 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

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~~experience of the intended replacement Engineer. The Contractor shall not replace the Engineer with a person against whom the Sub-Contractor raises reasonable objection by notice to the Contractor, with supporting particulars.~~

### 3.5 Determinations

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult 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 regard of all relevant circumstances.

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).

## The Sub-Contractor

### 4.1 Sub-Contractor's General Obligations

The Sub-Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the ~~Engineer's~~ instructions, and shall remedy any defects in the Works.

The Sub-Contractor shall provide the Plant and Sub-Contractor's Documents specified in the Contract, and all Sub-Contractor's Personnel, Goods, consumables and other things and CD services, whether of a temporary or permanent nature, required in and for this design, execution, completion and remedying of defects. The Sub-Contractor shall be responsible for the adequacy, stability and safety of all Site operations and of all methods of construction. Except to the extent specified in the Contract, the Sub-Contractor (i) shall be responsible for all Sub-Contractor's Documents, Temporary Works, and such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract, and (ii) shall not otherwise be responsible for the design or specification of the Permanent Works.

The Sub-Contractor shall, whenever required by the ~~Contractor or the Engineer~~, submit details of the arrangements and methods which the Sub-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 ~~Contractor and the Engineer~~.

If the Contract specifies that the Sub-Contractor shall design any part of the Permanent Works, then unless otherwise stated in the Particular Conditions:

- (a) the Sub-Contractor shall submit to the ~~Engineer~~ with a copy to the ~~Contractor~~, the Sub-Contractor's Documents for this part in accordance with the procedures specified in the Contract;
- (b) these Sub-Contractor's Documents shall be in accordance with the Specification and Drawings, ~~shall be written in the language for communications defined in Sub-Clause 3.4 (Law and Language)~~ and shall include additional information required by the Engineer to add to the Drawings for co-ordination of each Party's designs;
- (c) the Sub-Contractor shall be responsible for this part and it shall, when the Works are completed, be fit for such purposes for which the part is intended as are specified in the Contract; and
- (d) prior to the commencement of the Tests on Completion, the Sub-Contractor shall submit to the ~~Contractor and the Engineer~~ the as-built documents and operation and maintenance manuals in accordance with the Specification and in sufficient detail for the Contractor to operate, maintain, dismantle, reassemble, adjust and repair this part of the Works. Such part 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 these documents and manuals have been submitted to the Engineer.

### 4.2 Performance Security

under the Contract; and

- (c) any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Engineer (including absence of disapproval) shall not relieve the Sub-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 suitably qualified persons, who are competent to carry out these duties and exercise this authority, and who are fluent in the language of communications defined in Sub-Clause 3.4 (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 Sub-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 shall not constitute approval, and shall therefore not prejudice the right of the Engineer to reject work, Plant or Materials;
- (b) if the Sub-Contractor questions any determination or instruction of an assistant, the Sub-Contractor may refer the matter to the Engineer, who shall promptly confer reverse or vary the determination or instruction.

### 3.3 Instructions of the Engineer

The Contractor may issue to the Sub-Contractor (at any time) instructions and additions or modified Drawings which may be necessary for the execution of the Works or the remedying of any defects, all in accordance with the Contract. ~~The Contractor shall only issue instructions from the Engineer or from his assistants to whom the responsibility has been delegated under the Contract. If an instruction constitutes a Variation, Clause 13 (Variations and Adjustments) shall apply.~~

The Sub-Contractor shall comply with the instructions given by the Contractor, on any matter related to the Contract. Whenever practicable, the instructions shall be given in writing. If the Contractor ~~is a designated person~~:

- (a) gives an oral instruction,
- (b) receives a written confirmation of the instruction, from ~~for on behalf of~~ the Sub-Contractor, within two working days after giving the instruction, and
- (c) does not reply by issuing a written rejection and/or instruction within two working days after receiving the confirmation,

then the confirmation shall constitute the written instruction of the Contractor.

### 3.4 Replacement of the Engineer

If the Employer intends to replace the Engineer, the Contractor shall, not less than 42 days before the intended date of replacement, give notice to the Sub-Contractor of its name, address and relevant

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~~If the Contractor so requests the Sub-Contractor shall obtain (at his cost) a Performance Security for proper performance, in the amount and currencies stated in the Appendix to Tender. If any amount is not stated in the Appendix to Tender, this Sub-Clause shall not apply.~~

The Sub-Contractor shall deliver the Performance Security to the Contractor within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Engineer. The Performance Security shall be issued by an entity and from within a country (or other jurisdiction) approved by the Contractor, and shall be in the form annexed to it Particular Conditions or in another form approved by the Contractor.

The Sub-Contractor shall ensure that the Performance Security is valid and enforceable until the Sub-Contractor has executed and completed the Works and remedied any defects, the terms of the Performance Security specify its expiry date, and the Sub-Contractor has not become entitled to receive the Performance Certificate by the date 28 days prior to the expiry date, the Sub-Contractor shall extend the validity of the Performance Security until the Works have been completed and any defects have been remedied.

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

- (a) failure by the Sub-Contractor to extend the validity of the Performance Security as described in the preceding paragraph, in which event the Contractor may clear the full amount of the Performance Security;
- (b) failure by the Sub-Contractor to pay the Contractor an amount due, as either agreed by the Sub-Contractor or determined under Sub-Clause 2.5 (Sub-Contractor's Claims) or Clause 20 (Claims, Disputes and Arbitration), within 42 days after this agreement or determination;
- (c) failure by the Sub-Contractor to remedy a default within 42 days after receiving the Contractor's notice requiring the default to be remedied; or
- (d) circumstances which entitle the Contractor to termination under Sub-Clause 15.2 (Termination by Contractor), irrespective of whether notice of termination has been given.

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

The Contractor shall return the Performance Security to the Sub-Contractor within 21 days after receiving a copy of the Performance Certificate.

### 4.3 Sub-Contractor's Representative

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

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

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

The whole time of the Sub-Contractor's Representative shall be given to directing the Sub-Contractor's performance of the Contract. If the Sub-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 Contractor's prior consent, and the Engineer shall be notified accordingly.

The Sub-Contractor's Representative shall, on behalf of the Sub-Contractor, receive instructions under Sub-Clause 3.3 (Instructions of the Contractor).

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

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

#### 4.4 Sub-Contractors

The Sub-Contractor shall not subcontract the whole of the Works.

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

- (a) the Sub-Contractor shall not be required to obtain consent to suppliers of Material or to a subcontract for which the Sub-Contractor is named in the Contract;
- (b) the prior consent of the Engineer shall be obtained to other proposed Sub-Contractors;
- (c) the Sub-Contractor shall give the Contractor/Engineer not less than 28 days notice of the intended date of the commencement of each Sub-Contractor's work, and of the commencement of such work on the Site; and
- (d) each subcontract shall include provisions which would entitle the Contractor to require the subcontract to be assigned to the Contractor under Sub-Clause 4.5 (Assignment of Benefit of Subcontract) (if or when applicable) or in the event of termination under Sub-Clause 15.2 (Termination by Contractor).

#### 4.5 Assignment of Benefit of Subcontract

If a Sub-Contractor's obligations extend beyond the expiry date of the relevant Defects Notification Period and the Engineer, prior to this date, instructs the Sub-Contractor to assign the benefit of such obligations to the Contractor, then the Sub-Contractor shall do so. Unless otherwise stated in the assignment, the Sub-Contractor shall have no liability to the Contractor for the work carried out by the Sub-Contractor after the assignment takes effect.

#### 4.6 Co-operation

The Sub-Contractor shall, as specified in the Contract or as instructed by the Engineer, allow appropriate opportunities for carrying out work to:

- (a) the Contractor's Personnel,
- (b) any other Sub-Contractors employed by the Contractor, 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 Sub-Contractor to incur Unforeseeable Cost. Services for these personnel and Sub-Contractors may include the use of Sub-Contractor's Equipment, Temporary Work access arrangements which are the responsibility of the Sub-Contractor.

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

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such data which come into Contractor's possession after the Base Date. The Sub-Contractor shall be responsible for interpreting all such data.

To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works. To the same extent, the Sub-Contractor shall be deemed to have inspected and examined the Site, its surroundings, the above data and other available information, which may influence the work to be carried out under this subcontract and will give notice to the Engineer (with a copy to the Contractor) about any expected changes in his subcontract price due to factors which were unforeseen at the time of tender and to have been satisfied before submitting the Tender as to all relevant matters, including (without limitation):

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

#### 4.11 Sufficiency of the Accepted Contract Amount

The Sub-Contractor shall be deemed to:

- (a) have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount, and
- (b) have based the Accepted Contract Amount on the data, interpretation necessary information, inspections, examinations and satisfaction as to relevant matters referred to in Sub-Clause 4.10 [Site Data].

Unless otherwise stated in the Contract, the Accepted Contract Amount covers all Sub-Contractor's obligations under the Contract (including those under Provisional Sum if any) and all things necessary for the proper execution and completion of the works and the remedying of any defects.

#### 4.12 Unforeseeable Physical Conditions

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

If the Sub-Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Sub-Contractor shall give notice to the Engineer as soon as practicable

This notice shall describe the physical conditions, so that they can be inspected by the Engineer, and shall set out the reasons why the Sub-Contractor considers them to be Unforeseeable. The Sub-Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions, and shall comply with any instructions which the Engineer may give. If an instruction constitutes a Variation, Clause 12 (Variations and Adjustments) shall apply.

If and to the extent that the Sub-Contractor encounters physical conditions which are unforeseeable, gives such a notice, and suffers delay and/or incurs cost due to these conditions the Sub-Contractor shall be entitled subject to Sub-Clause 20.1 (Sub-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 Contract Price.

After receiving such notice and inspecting and/or investigating these physical conditions, the Engineer shall proceed in accordance with Sub-Clause 3.5 (Determinations) to agree or determine:

- (i) whether and (if so) to what extent these physical conditions were Unforeseeable; and
- (ii) the matters described in sub-paragraphs (a) and (b) above related to this extent.

However, before additional Costs are finally agreed or determined under sub-paragraph (b), the Engineer may also review whether other physical conditions similar parts of the Works (if any) were more favourable than

#### 4.7 Setting Out

The Sub-Contractor shall set out the Works in relation to original points, lines and levels of reference specified in the Contract or notified by the Engineer. The Sub-Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify an error in the positions, levels, dimensions or alignment of the Works.

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

If the Sub-Contractor suffers delay and/or incurs Cost from executing work which was necessitated by an error in these items of reference, and an experienced contract could not reasonably have discovered such error and avoided this delay and/or cost the Sub-Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 (Sub-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 reasonable profit, which shall be included in the Contract Price.

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

#### 4.8 Safety Procedures

The Sub-Contractor shall:

- (a) comply with all applicable safety regulations;
- (b) take care for the safety of all persons entitled to be on the Site;
- (c) use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger to these persons;
- (d) provide fencing, lighting, guarding and warning of the Works until completion and taking over under Clause 10 (Contractor'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, the use and protection of the public and of owners and occupiers of adjacent land.

#### 4.9 Quality Assurance

The Sub-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 Contractor with a copy 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 Sub-Contractor himself shall be apparent on the document itself.

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

#### 4.10 Site Data

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

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could reasonably have been foreseen when the Sub-Contractor submitted the Tender. If and to the extent that these more favourable conditions were encountered, the Engineer may proceed in accordance with Sub-Clause 3.5 (Determinations) to agree or determine the reductions in Cost which were due to these conditions, which may be included (deductions) in the Contract Price and Payment Certificates. However, the net effect of all adjustments under sub-paragraph (b) and all these reductions, for all the physical conditions encountered in similar parts of the Works, shall not result in a net reduction in the Contract Price.

The Engineer may take account of any evidence of the physical conditions foreseen by the Sub-Contractor when submitting the Tender, which may be made available by the Sub-Contractor, but shall not be bound by any such evidence.

#### 4.13 Rights of Way and Facilities

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

#### 4.14 Avoidance of Interference

The Sub-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 Contractor or others.

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

#### 4.15 Access Route

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

Except as otherwise stated in these Conditions:

- (a) the Sub-Contractor shall (as between the Parties) be responsible for any maintenance which may be required for his use of access routes;
- (b) the Sub-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 Contractor shall not be responsible for any claims which may arise from the use or otherwise of any access routes;
- (d) the Contractor 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 Sub-Contractor, of access routes shall be borne by the Sub-Contractor.

#### 4.16 Transport of Goods

Unless otherwise stated in the Particular Conditions:

- (a) the Sub-Contractor shall give the Contractor 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 Sub-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 Sub-Contractor shall indemnify and hold the Contractor harmless against and from all damages,

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losses and expenses (including legal fees and expenses) resulting from the transport of Goods, and shall negotiate and pay all claims arising from their transport.

#### 4.17 Sub-Contractor's Equipment

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

#### 4.18 Protection of the Environment

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

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

#### 4.19 Electricity, Water and Gas

The Sub-Contractor shall, except as stated below, be responsible for the provision of all power, water and other services he may require.

The Sub-Contractor shall be entitled to use for the purposes of the Works such supplies of electricity, water, gas and other services as may be available on the Site and of which details and prices are given in the Specification. The Sub-Contractor shall, at his risk and cost, provide any apparatus necessary for his use of these services and for measuring the quantities consumed.

The quantities consumed and the amounts due (at these prices) for such services shall be agreed or determined by the Engineer in accordance with Sub-Clause 2.5 [Contractor's Claims] and Sub-Clause 3.5 [Determinations]. The Sub-Contractor shall pay these amounts to the Contractor.

#### 4.20 Contractor's Equipment

##### Free-Issue Material

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

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

The appropriate quantities and the amounts due (at such stated prices) for the use Contractor's Equipment shall be agreed or determined by the Engineer in accordance with Sub-Clause 2.5 [Contractor's Claims] and Sub-Clause 3.5 [Determinations]. The Sub-Contractor shall pay these amounts to the Contractor.

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

After this visual inspection, the free-issue materials shall come under the care, custody and control of the Sub-Contractor. The Sub-Contractor's obligations of inspection, care custody and control shall not relieve

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Defects Notification Period, such Goods as are required for the Sub-Contractor to fulfil obligations under the Contract.

#### 4.24 Fossils

~~All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological or archaeological interest found on the Site shall be placed under the care and authority of the Contractor. The Sub-Contractor shall take reasonable precautions to prevent Sub-Contractor's Personnel or other persons from removing or damaging any of these findings.~~

~~The Sub-Contractor shall, upon discovery of any such finding, promptly give notice to the Engineer, who shall issue instructions for dealing with it. If the Sub-Contractor suffers delay and/or incurs Cost from complying with the instructions, the Sub-Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Sub-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]; and~~
- ~~payment of any such Cost, which shall be included in the Contract Price.~~

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

#### Nominated Sub-Contractors

##### 5.1 Definition of nominated Sub-Contractor of the Nominated Subcontractor

In the Contract, "nominated Sub-Contractor" means a Sub-Contractor:

- who is stated in the Contract as being a nominated Sub-Contractor, or
- whom the Engineer, under Clause 13 [Variations and Adjustments], instructs the Sub-Contractor to employ as a Sub-Contractor.

##### 5.2 Objection to Nomination

The Sub-Contractor shall not be under any obligation to employ a nominated Sub-Contractor against whom the Sub-Contractor raises reasonable objection by notice to the Engineer as soon as practicable, with supporting particulars. An objection shall be deemed reasonable if it arises from (among other things) any of the following matters, unless the Contractor agrees to indemnify the Sub-Contractor against and from the consequences of the matter:

- there are reasons to believe that the Sub-Contractor does not have sufficient competence, resources or financial strength;
- the subcontract does not specify that the nominated Sub-Contractor shall indemnify the Sub-Contractor against and from any negligence or misuse of Goods by the nominated Sub-Contractor, his agents and employees; or
- the subcontract does not specify that, for the subcontracted work (including design, if any), the nominated Sub-Contractor shall:
  - undertake to the Sub-Contractor such obligations and liabilities as will enable the Sub-Contractor to discharge his obligations and liabilities under the Contract, and
  - indemnify the Sub-Contractor against and from all obligations and liabilities arising under or in connection with the Contract and from the consequences of any failure by the Sub-Contractor to perform these obligations or to fulfil these liabilities.

##### 5.3 Payments to nominated Sub-Contractors

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the Contractor of liability for any shortage, defect or default not apparent from a visual inspection.

#### 4.21 Progress Reports

Unless otherwise stated in the Particular Conditions, monthly progress reports shall be prepared by the Sub-Contractor and submitted to the Engineer in six copies. 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 Sub-Contractor has completed all work which is known to be outstanding at the completion date stated in the Taking-Over Certificate for the Works.

Each report shall include:

- charts and detailed descriptions of progress, including each stage of design (if any), Sub-Contractor's Documents, procurement, manufacture, delivery to Site construction, erection and testing; and including these stages for work by each nominated Sub-Contractor (as defined in Clause 5 [Nominated Sub-Contractors]);
- photographs showing the status of manufacture and of progress on the Site;
- 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:
  - commencement of manufacture,
  - Sub-Contractor's inspections,
  - tests, and
  - shipment and arrival at the Site;
- the details described in Sub-Clause 6.10 [Records of Sub-Contractor's Personnel and Equipment];
- copies of quality assurance documents, test results and certificates of Materials;
- list of notices given under Sub-Clause 2.5 [Contractor's Claims] and notices given under Sub-Clause 20.1 [Sub-Contractor's Claims];
- safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations; and
- 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.

#### 4.22 Security of the Site

Unless otherwise stated in the Particular Conditions:

- the Sub-Contractor shall be responsible for keeping unauthorised persons off the Site, and
- authorised persons shall be limited to the Sub-Contractor's Personnel and the Contractor's Personnel; and to any other personnel notified to the Sub-Contractor, by the Contractor or the Engineer, as authorised personnel of the Contractor's other Sub-Contractors on the Site.

#### 4.23 Sub-Contractor's Operations on Site

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

During the execution of the Works, the Sub-Contractor shall keep the Site free from all unnecessary obstruction, and shall store or dispose of any Sub-Contractor's Equipment or surplus materials. The Sub-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 Sub-Contractor shall clear away and remove, from that part of the Site and Works to which the Taking-Over Certificate refers, all Sub-Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works. The Sub-Contractor shall leave that part of the Site and the Works in a clean and safe condition. However, the Sub-Contractor may retain on Site, during the

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The Sub-Contractor shall pay to the nominated Sub-Contractor the amounts which the Engineer certifies to be due in accordance with the subcontract. These amounts plus other charges shall be included in the Contract Price in accordance with sub-paragraph (b) of Sub-Clause 13.5 [Provisional Sums], except as stated in Sub-Clause 5.4 [Evidence of Payments].

#### 5.4 Evidence of Payments

Before issuing a Payment Certificate which includes an amount payable to a nominated Sub-Contractor, the Engineer may request the Sub-Contractor to supply reasonable evidence that the nominated Sub-Contractor has received all amounts due in accordance with previous Payment Certificates, less applicable deductions for retention or otherwise. Unless the Sub-Contractor:

- submits this reasonable evidence to the Engineer, or
- satisfies the Engineer in writing that the Sub-Contractor is reasonably entitled to withhold or refuse to pay these amounts, and
  - submits to the Engineer reasonable evidence that the nominated Sub-Contractor has been notified of the Sub-Contractor's entitlement, then the Contractor may (at his sole discretion) pay, direct to the nominated Sub-Contractor, part or all of such amounts previously certified (less applicable deductions) as are due to the nominated Sub-Contractor and for which the Contract has failed to submit the evidence described in sub-paragraphs (a) or (b) above. The Sub-Contractor shall then repay, to the Contractor, the amount which the nominated Sub-Contractor was directly paid by the Contractor.

#### Staff and Labour

##### 6.1 Engagement of Staff and Labour

Except as otherwise stated in the Specification, the Sub-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 Sub-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 Sub-Contractor shall pay rates of wages and observe conditions which are not lower than the general level of wages and conditions observed locally by Contractors whose trade or industry is similar to that of the Sub-Contractor.~~

##### 6.3 Persons in the Service of Contractor

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

##### 6.4 Labour Laws

The Sub-Contractor shall comply with all the relevant labour Laws applicable to the Sub-Contractor's Personnel, including Laws relating to their employment, health, safety welfare, immigration and emigration, and shall allow them all their legal rights. The Sub-Contractor shall require his employees to obey all applicable Laws, including those concerning safety at work.

##### 6.5 Working Hours

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

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- (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 Sub-Contractor shall immediately advise the Engineer.

*Contractor*

#### 6.6 Facilities for Staff

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

The Sub-Contractor shall not permit any of the Sub-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 Sub-Contractor shall at all times take all reasonable precautions to maintain the health and safety of the Sub-Contractor's Personnel. In collaboration with local health authorities,

The Sub-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 Sub-Contractor's and Contractor's Personnel, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the provision of epidemics.

The Sub-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 Sub-Contractor shall provide whatever is required by this person to exercise this responsibility and authority.

The Sub-Contractor shall send, to the Contractor, details of any accident as soon as practicable after its occurrence. The Sub-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 Sub-Contractor's Superintendence

Throughout the execution of the Works, and as long thereafter as is necessary to fulfil the Sub-Contractor's obligations, the Sub-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.

#### Sub-Contractor's Personnel

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

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Sub-Contractor that the Engineer does not require to do so. If the Sub-Contractor fails to give the notice, he shall if and when required by the Engineers uncover the work and thereafter reinstate and make good, all at the Sub-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 Sub-Contractor shall provide all apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, labour, materials, and suitably qualified and experienced staff, as are necessary to carry out the specified tests efficiently. The Sub-Contractor shall agree, with the Engineer, the time and 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 Sub-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 Sub-Contractor, notwithstanding other provisions of the Contract.

The Engineer shall give the Sub-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 Sub-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 Sub-Contractor suffers delay and/or incurs Cost from complying with these instructions or as a result of a delay for which the Contractor is responsible, the Sub-Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 (Sub-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 reasonable profit, which shall be included in the Contract Price.

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

The Sub-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 Sub-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 or workmanship is found to be defective or otherwise not in accordance with the Contract, the Engineer may reject the Plant, Materials or workmanship by giving notice to the Sub-Contractor, with reasons. The Sub-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 or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If the rejection and retesting cause the Contractor to incur additional costs, the Sub-Contractor shall subject to Sub-Clause 2.5 (Contractor's Claims) pay these costs to the Contractor.

#### 7.6 Remedial Work

Notwithstanding any previous test or certification, the Engineer may instruct the Sub-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

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

#### 6.10 Records of Sub-Contractor's Personnel and Equipment

The Sub-Contractor shall submit, to the Engineer, details showing the number of each class of Sub-Contractor's Personnel and of each type of Sub-Contractor's Equipment on the Site. Details shall be submitted each calendar month, in a form approved by the Engineer, until the Sub-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 Disciplinary Conduct

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

#### Plant, Materials and Workmanship

##### 7.1 Manner of Execution

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

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

##### 7.2 Samples

The Sub-Contractor shall submit the following samples of Materials, and relevant information, to the Engineer for consent prior to using the Materials in or for the Works:

- (a) manufacturer's standard samples of Materials and samples specified in the Contract, all at the Sub-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 Contractor'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 Sub-Contractor shall give the Contractor's Personnel full opportunity to carry out these activities, including providing access, facilities, permissions and safety equipment. No such activity shall relieve the Sub-Contractor from any obligation or responsibility.

The Sub-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 give notice to the

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accident, unforeseeable event or otherwise.

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

If the Sub-Contractor fails to comply with the instruction, the Contractor shall be entitled to employ and pay other persons to carry out the work. Except to the extent that the Sub-Contractor would have been entitled to payment for the work, the Sub-Contractor shall subject to Sub-Clause 2.5 (Contractor's Claims) pay to the Contractor 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 Sub-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).

#### 7.8 Royalties

Unless otherwise stated in the Specification, the Sub-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.

#### Commencement, Delays and Suspension

##### 8.1 Commencement of Works

The Contractor shall give the Sub-Contractor not less than 7 days' notice of the Commencement Date. Unless otherwise stated in the Particular Conditions, the Commencement Date shall be within 42 days after the Sub-Contractor receives the Letter of Acceptance.

The Sub-Contractor shall commence the 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 Sub-Contractor shall complete the whole of the Works, and each Section (if any), within the Time for Completion for the Works or Section (as the case may be), including:

- (a) achieving the passing of the Tests on Completion, and
- (b) completing all work which is stated 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 Sub-Contractor shall submit a detailed time programme to the Contractor within 28 days after receiving the notice under Sub-Clause 8.1 (Commencement of Works). The Sub-Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Sub-Contractor's obligations. Each programme shall include:

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- (a) the order in which the Sub-Contractor intends to carry out the Works, including the anticipated timing of each stage of design (if any), Sub-Contractor's Documents procurement, manufacture of Plant, delivery to Site, construction, erection and testing,
- (b) each of these stages for work by each nominated Sub-Contractor (as defined in Clause 5 [Nominated Sub-Contractors]),
- (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 Sub-Contractor intends to adopt, and of the major stages, in the execution of the Works, and
  - (ii) details showing the Sub-Contractor's reasonable estimate of the number of each class of Sub-Contractor's Personnel and of each type of Sub-Contractor's Equipment, required on the Site for each major stage.

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

The Sub-Contractor shall promptly give notice to the Engineer of specific probable future events or circumstances which may adversely affect the work, increase the Contract Price or delay the execution of the Works. The Engineer may require the Sub-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 Sub-Contractor that a programme fails (to the extent stated) to comply with the Contract or to be consistent with actual progress and the Sub-Contractor's stated intentions, the Sub-Contractor shall submit a revised programme to the Engineer in accordance with this Sub-Clause.

#### 8.4 Extension of Time for Completion

The Sub-Contractor shall be entitled subject to Sub-Clause 20.1 [Sub-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]) or other substantial change in the quantity of an item of work included in the Contract,
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,
- (c) exceptionally adverse climatic conditions,
- (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or
- (e) any delay, impediment or prevention caused by or attributable to the Contractor, the Contractor's Personnel, or the Contractor's other Sub-Contractors on the Site.

If the Sub-Contractor considers himself to be entitled to an extension of the Time for Completion, the Sub-Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Sub-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.

#### 8.5 Delays Caused by Authorities

If the following conditions apply, namely:

- (a) the Sub-Contractor has diligently followed the procedures laid down by the relevant legally

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

The Sub-Contractor shall not be entitled to an extension of time for, or to payment of the Cost incurred in, making good the consequences of the Sub-Contractor's faulty design, workmanship or materials, or of the Sub-Contractor's failure to protect, store or secure in accordance with Sub-Clause 8.8 [Suspension of Work].

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

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

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

#### 8.11 Prolonged Suspension

If the suspension under Sub-Clause 8.8 [Suspension of Work] has continued for more than 84 days, the Sub-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 Sub-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 Sub-Contractor may give notice of termination under Sub-Clause 16.2 [Termination by Sub-Contractor].

#### 8.12 Resumption of Work

After the permission or instruction to proceed is given, the Sub-Contractor and the Engineer shall jointly examine the Works and the Plant and Materials affected by the suspension. The Sub-Contractor shall make good any deterioration or defect in or loss of the Works or Plant or Materials, which has occurred during the suspension.

#### Tests on Completion

##### 9.1 Sub-Contractor's Obligations

The Sub-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-paragraph (d) of Sub-Clause 4.1 [Sub-Contractor's General Obligations].

The Sub-Contractor shall give to the Engineer not less than 21 days' notice of the date after which the Sub-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 Contractor on the performance or other characteristics of the Works. As soon as the Works, or a Section, have passed any Tests on Completion, the Sub-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 Contractor, Sub-Clause [Testing] (Fifth paragraph) and/or Sub-Clause 10.3 [Interference with Test: Completion] shall be applicable.

If the Tests on Completion are being unduly delayed by the Sub-Contractor, the Engineer may by notice

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constituted public authorities in the County,

- (b) these authorities delay or disrupt the Sub-Contractor's work, and
- (c) the delay or disruption was Unforeseeable,

then this delay or disruption will be considered as a cause of delay under paragraph (b) of Sub-Clause 8.4 [Extension of Time for Completion].

#### 8.6 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 (or will fall) behind the current programme under Clause 8.3 [Programme],

other than as a result of a cause listed in Sub-Clause 8.4 [Extension of Time Completion], then the Engineer may instruct the Sub-Contractor to submit, under Sub-Clause 8.3 [Programme], a revised programme and supporting report describing the revised methods which the Sub-Contractor proposes to adopt in order to expedite progress and complete within the Time for Completion.

Unless the Engineer notifies otherwise, the Sub-Contractor shall adopt these revised methods, which may require increases in the working hours and/or in the numbers of Sub-Contractor's Personnel and/or Goods, at the risk and cost of the Sub-Contractor. If these revised methods cause the Contractor to incur additional costs, the Sub-Contractor shall subject to Sub-Clause 2.5 [Contractor's Claims] pay these costs to the Contractor, in addition to delay damages (if any) under Sub-Clause 8.7 below.

#### 8.7 Delay Damages

If the Sub-Contractor fails to comply with Sub-Clause 8.2 [Time for Completion] the Sub-Contractor shall subject to Sub-Clause 2.5 [Contractor's Claims] pay delay damages to the Contractor for this default. These delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day 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 (if any) stated in the Appendix to Tender.

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

#### 8.8 Suspension of Work

The Engineer may at any time instruct the Sub-Contractor to suspend progress of part or all of the Works. During such suspension, the Sub-Contractor shall protect, store and secure such part or the Works against any deterioration, loss or damage.

The Engineer may also notify the cause for the suspension. If and to the extent that the cause is notified and is the responsibility of the Sub-Contractor, the following Sub-Clauses 8.9, 8.10 and 8.11 shall not apply.

#### 8.9 Consequences Suspension

If the Sub-Contractor suffers delay and/or incurs cost from complying with the Engineer's instructions under Sub-Clause 8.8 [Suspension of Work] and/or from resuming the work, the Sub-Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Sub-Contractor's Claims] to:

- (a) an extension of time for any such delay, if completion is or will be delay under Sub-Clause 8.4 [Extension of Time for Completion], and
- (b) payment of any such Cost, which shall be included in the Contract Price.

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require the Sub-Contractor to carry out the Tests within 21 days after receiving the notice. The Sub-Contractor shall carry out the Tests on such day or days within that period as the Sub-Contractor may fix and of which he shall give notice to the Engineer.

If the Sub-Contractor fails to carry out the Tests on Completion within the period of 21 days, the Contractor's personnel may proceed with the Tests at the risk and cost the Sub-Contractor. The Tests on Completion shall then be deemed to have been carried out in the presence of the Sub-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 [Rejection] shall apply, and the Engineer or the Sub-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 [Retesting], the Engineer shall be entitled to:

- (a) order further repetition of Tests on Completion under Sub-Clause 9.3;
- (b) if the failure deprives the Contractor of substantially the whole benefit of Works or Section, reject the Works or Section (as the case may be), in which event the Contractor shall have the same remedies as are provided in Sub-paragraph (c) of Sub-Clause 11.4 [Failure to Remedy Defects]; or
- (c) issue a Taking-Over Certificate, if the Contractor so requests.

In the event of sub-paragraph (c), the Sub-Contractor shall proceed in accordance with all other obligations under the Contract, and the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Contractor as a result of this failure. Unless the relevant reduction for this failure is stated (or its method of calculation is defined) in the Contract, the Contractor 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 [Contractor's Claims] and Sub-Clause 3.5 [Determinations].

#### Contractor'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 Contractor 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) (i) a Taking-Over Certificate for the Works has been issued, or is deemed to have been issued in accordance with this Sub-Clause.

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

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

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(a) issue the Taking-Over Certificate to the Sub-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 undisturbed 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 Sub-Contractor to enable the Taking-Over Certificate to be issued. The Sub-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 Sub-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.

## 10.2 Taking-Over

The Engineer may, at the sole discretion of the Contractor, issue a Taking-Over of Parts of the Works Certificate for any part of the Permanent Works.

The Contractor shall not use any part of the Works or Section (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 Contractor does use any part of the Works or Section 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 Sub-Contractor shall cease to be liable for the care of such part as from this date, when responsibility shall pass to the Contractor; and

(c) if requested by the Sub-Contractor, the Engineer shall issue a Taking-Over Certificate for this part.

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

If the Sub-Contractor incurs Cost as a result of the Contractor taking over and/or using a part of the Works, other than such use as is specified in the Contract or agreed by the Sub-Contractor, the Sub-Contractor shall:

(i) give notice to the Contractor and

(ii) be entitled subject to Sub-Clause 20.1 [Sub-Contractor's Claims] to payment of any such Cost plus reasonable profit, which shall be included in the Contract Price. After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine this Cost and profit.

If a Taking-Over Certificate has been issued for a part of the Works (other than Section), the delay damages thereafter for completion of the remainder of the Works shall be reduced. Similarly, the delay damages for the remainder of the Section (if any) damages shall be calculated as the proportion which the value of the part so certified in which this part is included shall also be reduced. For any period of delay after the date stated in this Taking-Over Certificate, the proportional reduction in these delay damages 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 8.7 [Delay Damages], and shall not affect the maximum amount of these damages.

## 10.3 Interference with Tests on Completion

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## 11.3 Extension of Defects Notification Period

The Contractor shall be entitled subject to Sub-Clause 2.5 [Contractor's Claims] to 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 Work] or Sub-Clause 16.1 [Sub-Contractor's Entitlement to Suspend Work], the Sub-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.

## Failure to Remedy Defects

If the Sub-Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Contractor, on or by which the defect or damage is to be remedied. The Sub-Contractor shall be given reasonable notice of this date.

If the Sub-Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Sub-Contractor under Sub-Clause 11.2 [Cost of Remedying Defects], the Contractor may (at his option):

(a) carry out the work himself or by others, in a reasonable manner and all the Sub-Contractor's cost, but the Sub-Contractor shall have no responsibility for this work, and the Sub-Contractor shall subject to Sub-Clause 2.5 [Contractor's Claims] pay to the Contractor the costs reasonably incurred by the Contractor in remedying the defect or damage;

(b) require the Engineer to agree or determine a reasonable reduction in the Contract Price in accordance with Sub-Clause 3.5 [Determinations]; or

(c) If the defect or damage deprives the Contractor of substantially the whole benefit of the Works or any major part of the Works, terminate the Contract as a whole, or in respect of such major part which cannot be put to the intended use. Without prejudice to any other rights, under the Contract or otherwise, the Contractor shall then be entitled to recover all sums paid for the Works or for such part (as the case may be), plus financing costs and the cost of dismantling the same, clearing the Site and removing Plant and Materials to the Sub-Contractor.

## 11.5 Removal of Defective Work

If the defect or damage cannot be remedied expeditiously on the Site and the Contractor gives consent, the Sub-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 Sub-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. 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 [Cost of Remedying Defects], for the cost of the remedial work.

## 11.7 Right of Access

Until the Performance Certificate has been issued, the Sub-Contractor shall have such right of access to the Works as is reasonably required in order to comply with this Clause, except as may be inconsistent with the

If the Sub-Contractor is prevented, for more than 14 days, from carrying out the Tests on Completion by a cause for which the Contractor is responsible, the Contractor 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 Sub-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 Test on Completion to be carried out by giving 14 days' notice and in accordance with the relevant provisions of the Contract.

If the Sub-Contractor suffers delay and/or incurs Cost as a result of this delay in carrying out the Tests on Completion, the Sub-Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Sub-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 reasonable profit, which shall be included in the Contract Price.

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.

## Defects Liability

### 11.1 Completion of Outstanding Work and Remedying Defects

In order that the Works and Sub-Contractor's Documents, and each Section, shall 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 Sub-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 Contractor 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 Sub-Contractor shall be notified accordingly, by (or on behalf of) the Contractor.

### 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 at the risk and cost the Sub-Contractor, if and to the extent that the work is attributable to:

(a) any design for which the Sub-Contractor is responsible;

(b) Plant, Materials or workmanship not being in accordance with the Contract; or

(c) failure by the Sub-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 Contractor, and Sub-Clause 13 [Variation Procedure] shall apply.

Contractor's reasonable security restrictions

### 11.8 Sub-Contractor to Search

The Sub-Contractor shall, if required by the Contractor, search for the cause of any defect, under the direction of the Contractor. Unless the defect is to be remedied at the cost of the Sub-Contractor under Sub-Clause 11.2 [Cost of Remedying Defects], the Cost of the search plus reasonable profit shall be agreed or determined by the Engineer in accordance with Sub-Clause 3.5 [Determinations] and shall be included in the Contract Price.

### 11.9 Performance Certificate

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

The Contractor 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 Sub-Contractor has supplied all the Sub-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 Contractor.

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

### 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.

### 11.11 Clearance of Site

Upon receiving the Performance Certificate, the Sub-Contractor shall remove any remaining Sub-Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works from the Site.

If all these items have not been removed within 28 days after the Contractor receives a copy of the Performance Certificate, the Contractor may sell or otherwise dispose of any remaining items. The Contractor 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 Sub-Contractor. If these moneys are less than the Contractor's costs, the Sub-Contractor shall pay the outstanding balance to the Contractor.

## Measurement and evaluation

### 12.1 Works to be Measured

The Works shall be measured and valued for payment, in accordance with this Clause. Whenever the Engineer requires any part of the Works to be measured, reasonable notice shall be given to the Sub-Contractor's Representative, who shall:

(a) promptly either attend or send another qualified representative to assist the Engineer in making the measurement; and

(b) supply any particulars requested by the Engineer.

If the Sub-Contractor fails to attend or send a representative, the measurement made by (or on behalf of) the Engineer shall be accepted as accurate.

Except as otherwise stated in the Contract, whenever any Permanent Works are to be measured from

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records, these shall be prepared by the Engineer. The Sub-Contractor shall as and when requested, attend to examine and agree the records with the Engineer, and shall sign the same when agreed. If the Sub-Contractor does not attend, the records shall be accepted as accurate.

If the Sub-Contractor examines and disagrees the records, and/or does not sign them as agreed, then the Sub-Contractor shall give notice to the Engineer of the respects in which the records are asserted to be inaccurate. After receiving this notice, the Engineer shall review the records and either confirm or vary them. If the Sub-Contractor does not so give notice to the Engineer within 14 days after being requested to examine the records, they shall be accepted as accurate.

## 12.2 Method of Measurement

Except as otherwise stated in the Contract and notwithstanding local practice:

- measurement shall be made of the net actual quantity of each item of the Permanent Works, and
- the method of measurement shall be in accordance with the Bill of Materials or other applicable Schedules.

## 12.3 Evaluation

Except as otherwise stated in the Contract, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine the Contract Price by evaluating each item of work, applying the measurement agreed or determined in accordance with the above Sub-Clauses 12.1 and 12.2 and the appropriate rate or price for the item.

For each item of work, the appropriate rate or price for the item shall be the rate or price specified for such item in the Contract or, if there is no such item, specified for similar work. However, a new rate or price shall be appropriate for an item of work if:

- the measured quantity of the item is changed by more than 10% from the quantity of this item in the Bill of Materials or other Schedule,
  - this change in quantity multiplied by such specified rate for this item exceeds 0.01 % of the Accepted Contract Amount,
  - this change in quantity directly changes the Cost per unit quantity of this item by more than 1 %, and
  - this item is not specified in the Contract as a "fixed rate item"; or
- the work is instructed under Clause 13 [Variations and Adjustments],
  - no rate or price is specified in the Contract for this item, and
  - no specified rate or price is appropriate because the item of work is not of similar character, or is not executed under similar conditions, as any item in the Contract. Each new rate or price shall be derived from any relevant rates or prices in the Contract, with reasonable adjustments to take account of the matters described in sub-paragraph (a) and/or (b) - as applicable. If no rates or prices are relevant for the derivation of a new rate or price, it shall be derived from the reasonable Cost of executing the work, together with reasonable profit, taking account of any other relevant matters.

Until such time as an appropriate rate or price is agreed or determined, the Engineer shall determine a provisional rate or price for the purposes of Interim Payment Certificates.

## 12.4 Omissions

Whenever the omission of any work forms part (or all) of a Variation, the value of which has not been agreed, if:

- the Sub-Contractor will incur (or has incurred) cost which, if the work had not been omitted, would have been deemed to be covered by a sum forming part of the Accepted Contract Amount;
- the omission of the work will result (or has resulted) in this sum not forming part of the Contract

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However, if amount (i) is less than amount (ii), there shall not be a fee.

## 13.3 Variation Procedure

If the Engineer requests a proposal, prior to instructing a Variation, the Sub-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 description of the proposed work to be performed and a programme for its execution,
- the Sub-Contractor's proposal for any necessary modifications to the programme according to Sub-Clause 8.3 [Programme] and to the Time for Completion, and
- the Sub-Contractor's proposal for evaluation of the Variation.

The Engineer shall, as soon as practicable after receiving such proposal (under Sub-Clause 13.2 [Value Engineering] or otherwise), respond with approval, disapproval or comments. The Sub-Contractor shall not delay any work whilst awaiting a response.

Each instruction to execute a Variation, with any requirements for the recording of Costs shall be issued by the Engineer to the Sub-Contractor, who shall acknowledge receipt.

Each Variation shall be evaluated in accordance with Clause 12 [Measurement and Evaluation], unless the Engineer instructs or approves otherwise in accordance with this Clause.

## 13.4 Payment in Applicable Currencies

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

## 13.5 Provisional Sums

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

- work to be executed (including Plant, Materials or services to be supplied) by the Sub-Contractor and valued under Sub-Clause 13.3 [Variation Procedure]; and/or
- Plant, Materials or services to be purchased by the Sub-Contractor, from a nominated Sub-Contractor (as defined in Clause 5 [Nominated Sub-Contractors]) or otherwise; and for which there shall be included in the Contract Price:
  - the actual amounts paid (or due to be paid) by the Sub-Contractor, and
  - a sum for overhead charges and profit, calculated as a percentage of these actual amounts by applying the relevant percentage rate (if any) stated in the appropriate Schedule. If there is no such rate, the percentage rate stated in the Appendix to Tender shall be applied.

The Sub-Contractor shall, when required by the Contractor, produce quotations, invoices, vouchers and accounts or receipts in substantiation.

## 13.6 Daywork

For work of a minor or incidental nature, the Contractor may instruct that a Variation shall be executed on a

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- Price; and
- this cost is not deemed to be included in the evaluation of any substituted work.

then the Sub-Contractor shall give notice to the Engineer accordingly, with supporting particulars. Upon receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine this cost, which shall be included in the Contract Price.

## Variations and Adjustments

### 13.1 Right to Vary

Variations may be initiated by the Engineer at any time prior to issuing the Taking-Over Certificate for the Works, either by an instruction or by a request for the Sub-Contractor to submit a proposal.

The Sub-Contractor shall execute and be bound by each Variation, unless the Sub-Contractor promptly gives notice to the Engineer stating (with supporting particulars) that the Sub-Contractor cannot readily obtain the Goods required for the Variation. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.

Each Variation may include:

- changes to the quantities of any item of work included in the Contract (however, such changes do not necessarily constitute a Variation),
- changes to the quality and other characteristics of any item of work,
- changes to the levels, positions and/or dimensions of any part of the Works,
- omission of any work unless it is to be carried out by others,
- any additional work, Plant, Materials or services necessary for the Permanent Works, including any associated Tests on Completion, boreholes and other testing and exploratory work, or
- changes to the sequence or timing of the execution of the Works.

The Sub-Contractor shall not make any alteration and/or modification of the Permanent Works, unless and until the Engineer instructs or approves a Variation.

### 13.2 Value Engineering

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

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

If a proposal, which is approved by the Engineer, includes a change in the design of part of the Permanent Works, then unless otherwise agreed by both Parties:

- the Sub-Contractor shall design this part,
- sub-paragraphs (a) to (d) of Sub-Clause 4.1 [Sub-Contractor's General Obligations] shall apply, and
- if this change results in a reduction in the contract value of this part, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine a fee, which shall be included in the Contract Price. This fee shall be half (50%) of the difference between the following amounts:
  - such reduction in contract value, resulting from the change, excluding adjustments under Sub-Clause 13.7 [Adjustments for Changes in Legislation] and Sub-Clause 13.8 [Adjustments for Changes in Cost]; and
  - the reduction (if any) in the value to the Contractor of the varied works, taking account of any reductions in quality, anticipated life or operational efficiencies.

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daywork basis. The work shall then be valued in accordance with the Daywork Schedule included in the Contract, and the following procedure shall apply. If a Daywork Schedule is not included in the Contract, this Sub-Clause shall not apply.

Before ordering Goods for the work, the Sub-Contractor shall submit quotations to the Contractor. When applying for payment, the Sub-Contractor shall submit invoices, vouchers and accounts or receipts for any Goods.

Except for any items for which the Daywork Schedule specifies that payment is not due, the Sub-Contractor shall deliver each day to the Contractor accurate statements in duplicate which shall include the following details of the resources used in executing the previous day's work:

- the names, occupations and time of Sub-Contractor's Personnel,
- the identification, type and time of Sub-Contractor's Equipment and Temporary Works, and
- the quantities and types of Plant and Materials used.

One copy of each statement will, if correct, or when agreed, be signed by the Contractor and returned to the Sub-Contractor. The Sub-Contractor shall then submit priced statements these resources to the Contractor prior to their inclusion in the next Statement under Sub-Clause 14.3 [Application for Interim Payment Certificates].

### 13.7 Adjustments for Changes in Legislation

The Contract Price shall be adjusted to take account of any increase or decrease Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Sub-Contractor in the performance of obligations under the Contract.

If the Sub-Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Costs as a result of these changes in the Laws or in such interpretations, made after the Base Date, the Sub-Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Sub-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], and
- payment of any such Cost, which shall be included in the Contract Price.

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

### 13.8 Adjustments for Changes in Cost

In this Sub-Clause, "table of adjustment data" means the completed table adjustment data included in the Appendix to Tender. If there is no such table adjustment data, this Sub-Clause shall not apply.

If this Sub-Clause applies, the amounts payable to the Sub-Contractor shall be adjusted for rises or falls in the cost of labour, Goods and other inputs to the Works, by the addition or deduction of the amounts determined by the formulae prescribed in this Sub-Clause.

To the extent that full compensation for any rise or fall in Costs is not covered by the provisions of this or other Clauses, the Accepted Contract Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs.

The adjustment to be applied to the amount otherwise payable to the Sub-Contractor, a valued in accordance with the appropriate Schedule and certified in Payment Certificates, shall be determined from formulae for each of the currencies in which the Contract Price is payable. No adjustment is to be applied to work valued on the basis of Cost or current prices. The formulae shall be of the following general type:

$$P_n = a + b \ln/L_0 + c \ln/E_0 + d \ln/M_0$$

where:

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"Pn" is the adjustment multiplier to be applied to the estimated contract value in the relevant currency of the work carried out in period "n", this period being a month unless otherwise stated in the Appendix to Tender;

"a" is a fixed coefficient, stated in the relevant table of adjustment data representing the non-adjustable portion in contractual payments;

"b", "c", "d", ... are coefficients representing the estimated proportion of each cost element related to the execution of the Works, as stated in the relevant table of adjustment data; such tabulated cost elements may be indicative of resources such as labour, equipment and materials;

"Ln", "En", "Mn", ... are the current cost indices or reference prices for period "n", expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the date 49 days prior to the last day of the period (to which the particular Payment Certificate relates); and

"Lo", "Eo", "Mo", ... are the base cost indices or reference prices, expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the Base Date.

The cost indices or reference prices stated in the table of adjustment data shall be used. If their source is in doubt, it shall be determined by the Engineer. For this purpose, reference shall be made to the values of the indices at stated dates (quoted in the fourth and fifth columns respectively of the table) for the purposes of clarification of the source; although these dates (and thus these values) may not correspond to the base cost indices.

In cases where the "currency of index" (stated in the table) is not the relevant currency of payment, each index shall be converted into the relevant currency of payment at the selling rate, established by the central bank of the Country, of this relevant currency on the above date for which the index is required to be applicable.

Until such time as each current cost index is available, the Engineer shall determine a provisional index for the issue of Interim Payment Certificates. When a current cost index is available, the adjustment shall be recalculated accordingly.

If the Sub-Contractor fails to complete the Works within the Time for Completion, adjustment of prices thereafter shall be made using either (i) each index or price applicable on the date 49 days prior to the expiry of the Time for Completion of the Works, or (ii) the current index or price, whichever is more favourable to the Contractor.

The weightings (coefficients) for each of the factors of cost stated in the table(s) of adjustment data shall only be adjusted if they have been rendered unreasonable, unbalanced or inapplicable, as a result of Variations.

## Contract Price and Payment

### 14.1 The Contract Price

Unless otherwise stated in the Particular Conditions:

- the Contract Price shall be agreed or determined under Sub-Clause 12.3 [Evaluation] and be subject to adjustments in accordance with the Contract;
- the Sub-Contractor shall pay all taxes, duties and fees required to be paid by him under the Contract, and the Contract Price shall not be adjusted for any of these costs except as stated in Sub-Clause 13.7 [Adjustments for Changes in Legislation];
- any quantities which may be set out in the Bill of Quantities or other Schedule are estimated quantities and are not to be taken as the actual and correct quantities:
  - of the Works which the Sub-Contractor is required to execute, or
  - for the purposes of Clause 12 [Measurement and Evaluation]; and

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- any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 [Adjustments for Changes in Legislation] and Sub-Clause 13.8 [Adjustments for Changes in Cost];
- any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Appendix to Tender to the total of the above amounts, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Appendix to Tender;
- any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [Advance Payment];
- any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.5 [Plant and Materials intended for the Works];
- 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
- the deduction of amounts certified in all previous Payment Certificates.

### 14.4 Schedule of Payments

If the Contract includes a schedule of payments specifying the instalments in which the Contract Price will be paid, then unless otherwise stated in this schedule:

- the instalments quoted in this schedule of payments shall be the estimated contract values for the purposes of sub-paragraph (a) of Sub-Clause 14.3 [Application for Interim Payment Certificates];
- Sub-Clause 14.5 [Plant and Materials intended for the Works] shall not apply; and
- 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 this 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.

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 Materials intended for the Works

If this Sub-Clause applies, Interim Payment Certificates shall include, under sub-paragraph (e) of Sub-Clause 14.3,

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

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

The Engineer shall determine and certify each addition if the following conditions are satisfied:

- the Sub-Contractor has:
  - kept satisfactory records (including the orders, receipts, Costs and use of Plant and Materials) which are available for inspection, and

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- the Sub-Contractor shall submit to the Engineer, within 28 days after the Commencement Date, a proposed breakdown of each lump sum price in the Schedules. The Engineer may take account of the breakdown when preparing Payment Certificates, but shall not be bound by it.

### 14.2 Advance Payment

The Contractor shall make an advance payment, as an interest-free loan for mobilisation, when the Sub-Contractor submits a guarantee in accordance with this Sub-Clause. The total advance payment, the number and timing of instalments (if more than one), and the applicable currencies and proportions, shall be as stated in the Appendix to Tender.

Unless and until the Contractor receives this guarantee (if applicable), or if the total advance payment is not stated in the Appendix to Tender, this Sub-Clause shall not apply.

The Contractor shall issue an Interim Payment Certificate for the first instalment after receiving a Statement (under Sub-Clause 14.3 [Application for Interim Payment Certificates]) and after the Contractor receives

- the Performance Security in accordance with Sub-Clause 4.2 [Performance Security] and
- a guarantee in amounts and currencies equal to the advance payment.

This guarantee shall be issued by an entity and from within a country (or other jurisdiction) a bank or insurance company approved by the Contractor, and shall be in the form annexed to the Particular Conditions or in another form approved by the Contractor.

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

The advance payment shall be repaid through percentage deductions in Payment Certificates. Unless other percentages are stated in the Appendix to Tender:

- deductions shall commence in the Payment Certificate in which the total of all certified interim payments (excluding the advance payment and deductions and repayments of retention) exceeds ten per cent (10%) of the Accepted Contract Amount less Provisional Sums; and
- deductions shall be made at the amortisation rate of one quarter (25%) of the amount of each Payment Certificate (excluding the advance payment and deductions and repayments of retention) in the currencies and proportions of the advance payment, until such time as the advance payment has been repaid.

If the advance payment has not been repaid prior to the issue of the Taking Over Certificate for the Works or prior to termination under Clause 15 [Termination by Contractor], Clause 16 [Suspension and Termination by Sub-Contractor] or Clause 19 [Force Majeure] (as the case may be), the whole of the balance then outstanding shall immediately become due and payable by the Sub-Contractor to the Contractor.

### 14.3 Application for Interim Payment Certificates

The Sub-Contractor shall submit a Statement in six copies to the Contractor after the end of each month, in a form approved by the Contractor, showing in detail the amounts which the Sub-Contractor considers himself to be entitled, together with supporting documents which shall include the report on the progress during this month in accordance with Sub-Clause 4.21 [Progress Reports].

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

- the estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including Variations but excluding items described in sub-paragraphs (b) to (g) below);

- submitted a statement of the Cost of acquiring and delivering the Plant and Materials to the Site, supported by satisfactory evidence;

and either:

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

Or

- the relevant Plant and Materials:
  - are those listed in the Appendix to Tender for payment when delivered to the Site, and
  - have been delivered to and are properly stored on the Site, are protected against loss, damage or deterioration, and appear to be in accordance with the Contract.

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

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

### 14.6 Issue of Interim Payment Certificates

No amount will be certified or paid until the Contractor has received and approved the Performance Security. Thereafter, the Engineer-Contractor shall, within 28 days after receiving a Statement and supporting documents, issue to the Sub-Contractor an Interim Payment Certificate which shall state the amount which the Engineer-Contractor fairly determines to be due, with supporting particulars.

However, prior to issuing the Taking-Over Certificate for the Works, the Contractor shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Appendix to Tender. In this event, the Contractor shall give notice to the Sub-Contractor accordingly.

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

- if any thing supplied or work done by the Sub-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
- if the Sub-Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer or the Contractor, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Contractor 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

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Contractor's acceptance, approval, consent or satisfaction.

#### 14.7 Payment

The Contractor shall pay to the Sub-Contractor (when applicable):

- (a) the first instalment of the advance payment within 42 days after issuing the Letter of Acceptance or within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [Performance Security] and Sub-Clause 14.2 [Advance Payment], whichever is later;
- (b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents; and
- (c) the amount certified in the Final Payment Certificate within 56 days after the Contractor receives this Payment Certificate.

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

#### 14.8 Delayed Payment

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

Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, and shall be paid in such currency.

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

#### 14.9 Payment of Retention Money

When the Taking-Over Certificate has been issued for the Works, the first half of the Retention Money shall be certified by the Contractor for payment to the Sub-Contractor. If a Taking-Over Certificate is issued for a Section or part of the Works, a proportion of the Retention Money shall be certified and paid. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section or part, by the estimated final Contract Price.

Promptly after the latest of the expiry dates of the Defects Notification Periods, the outstanding balance of the Retention Money shall be certified by the Engineer for payment to the Sub-Contractor. If a Taking-Over Certificate was issued for a Section, a proportion of the second half of the Retention Money shall be certified and paid promptly after the expiry date of the Defects Notification Period for the Section. This proportion shall be two-fifths (40%) of the proportion calculated by dividing the estimated contract value of the Section by the estimated final Contract Price.

However, if any work remains to be executed under Clause 11 [Defects Liability], the Contractor shall be entitled to withhold certification of the estimated cost of this work until it has been executed.

When calculating these proportions, no account shall be taken of any adjustments under Sub-Clause 13.7 [Adjustments for Changes in Legislation] and Sub-Clause 13.8 [Adjustments for Changes in Cost].

#### 14.10 Statement at Completion

Within 84 days after receiving the Taking-Over Certificate for the Works, the Sub-Contractor shall submit to

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the Contractor 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 value of all work done in accordance with the Contract up to the date stated in the Taking-Over Certificate for the Works,
- (b) any further sums which the Sub-Contractor considers to be due, and
- (c) an estimate of any other amounts which the Sub-Contractor considers will become due to him under the Contract. Estimated amounts shall be shown separately in this Statement at completion.

The Contractor 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 receiving the Performance Certificate, the Sub-Contractor shall submit, to the Contractor, six copies of a draft final statement with supporting documents showing in detail in a form approved by the Contractor:

- (a) the value of all work done in accordance with the Contract, and
- (b) any further sums which the Sub-Contractor considers to be due to him under the Contract or otherwise.

If the Contractor disagrees with or cannot verify any part of the draft final statement, the Sub-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 Sub-Contractor shall then prepare and submit to the Contractor the final statement as agreed. This agreed statement is referred to in these Conditions as the "Final Statement".

However if, following discussions between the Contractor and the Sub-Contractor and any changes to the draft final statement which are agreed, it becomes evident that a dispute exists, the Contractor shall deliver to the Contractor (with a copy to the Sub-Contractor) an Interim Payment Certificate for the agreed parts of the draft final statement. Thereafter, if the dispute is finally resolved under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] or Sub-Clause 20.5 [Amicable Settlement], the Sub-Contractor shall then prepare and submit to the Contractor (with a copy to the Engineer) a Final Statement.

#### 14.12 Discharge

When submitting the Final Statement, the Sub-Contractor shall submit a written discharge which confirms that the total of the Final Statement represents full and final settlement of all moneys due to the Sub-Contractor under or in connection with the Contract. This discharge may state that it becomes effective when the Sub-Contractor has received the Performance Security and the outstanding balance of this total, in which event the discharge shall 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-Clause 14.11 [Application for Final Payment Certificate] and Sub-Clause 14.12 [Discharge], the Contractor shall issue, to the Sub-Contractor, the Final Payment Certificate which shall state:

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

If the Sub-Contractor has not applied for a Final Payment Certificate in accordance with Sub-Clause 14.11 [Application for Final Payment Certificate] and Sub-Clause 14.12 [Discharge], the Contractor shall request the Sub-Contractor to do so. If the Sub-Contractor fails to submit an application within a period of 28 days,

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the Contractor shall issue the Final Payment Certificate for such amount as he fairly determines to be due.

#### 14.14 Cession of Contractor's Liability

The Contractor shall not be liable to the Sub-Contractor for any matter or thing under or in connection with the Contract or execution of the Works, except to the extent that the Sub-Contractor shall have included an amount expressly for it:

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

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

#### 14.15 Currencies of Payment

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

- (a) if the Accepted Contract Amount was expressed in Local Currency only:
  - (i) the proportions or amounts of the Local and Foreign Currencies, and the fixed rates of exchange to be used for calculating the payments, shall be as stated in the Appendix to Tender, except as otherwise agreed by both Parties;
  - (ii) payments and deductions under Sub-Clause 13.5 [Provisional Sums] and Sub-Clause 13.7 [Adjustments for Changes in Legislation] shall be made in the applicable currencies and proportions; and
  - (iii) other payments and deductions under sub-paragraphs (a) to (d) of Sub-Clause 14.3 [Application for Interim Payment Certificates] shall be made in the currencies and proportions specified in sub-paragraph (a)(i) above;
- (b) payment of the damages specified in the Appendix to Tender shall be made in the currencies and proportions specified in the Appendix to Tender;
- (c) other payments to the Contractor by the Sub-Contractor shall be made in the currency in which the sum was expended by the Contractor, or in such currency as may be agreed by both Parties;
- (d) if any amount payable by the Sub-Contractor to the Contractor in a particular currency exceeds the sum payable by the Contractor to the Sub-Contractor in that currency, the Contractor may recover the balance of this amount from the sums otherwise payable to the Sub-Contractor in other currencies; and
- (e) if no rates of exchange are stated in the Appendix to Tender, they shall be those prevailing on the Base Date and determined by the central bank of the Country.

#### Termination by Contractor

##### 15.1 Notice to Correct

If the Sub-Contractor fails to carry out any obligation under the Contract, the Engineer and/or the Contractor may by notice require the Sub-Contractor to make good the failure and to remedy it within a specified reasonable time.

##### 15.2 Termination by Contractor

The Contractor shall be entitled to terminate the Contract – after having received written notification from the Engineer – if the Sub-Contractor:

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- (a) fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1 [Notice to Correct];
- (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract;
- (c) without reasonable excuse fails:
  - (i) to proceed with the Works in accordance with 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 Sub-Contractor's Personnel, agents or Sub-Contractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this paragraph (f). However, lawful inducements and rewards to Sub-Contractor's Personnel shall not entitle termination.

In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Sub-Contractor, terminate the Contract and expel the Sub-Contractor from the Site. However, in the case of sub-paragraph (e) or (f), the Contractor may by notice terminate the Contract immediately.

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

The Sub-Contractor shall then leave the Site and deliver any required Goods, all Sub-Contractors' Documents, and other design documents made by or for him, to the Engineer. However, the Sub-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 Contractor may complete the Works and/or arrange for any other entities to do so. The Contractor and these entities may then use any Goods, Sub-Contractor's Documents and other design documents made by or on behalf of the Sub-Contractor.

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

##### 15.3 Valuation at Date of Termination

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

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#### 15.4 Payment after Termination

After a notice of termination under Sub-Clause 15.2 [Termination by Contractor] has taken effect, the Contractor may:

- proceed in accordance with Sub-Clause 2.5 [Contractor's Claims],
- withhold further payments to the Sub-Contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Contractor, have been established, and/or
- recover from the Sub-Contractor any losses and damages incurred by the Contractor and any extra costs of completing the Works, after allowing for any sum due to the Sub-Contractor under Sub-Clause 15.3 [Valuation at Date of Termination]. After recovering any such losses, damages and extra costs, the Contractor shall pay any balance to the Sub-Contractor.

#### 15.5 Contractor's Entitlement to Termination

The Contractor shall be entitled to terminate the Contract, at any time for the Contractor's convenience, by giving notice of such termination to the Sub-Contractor. The termination shall take effect 28 days after the later of the dates on which the Sub-Contractor receives this notice or the Contractor returns the Performance Security. The Contractor shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another Sub-Contractor.

After this termination, the Sub-Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Sub-Contractor's Equipment] and shall be paid in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release].

### Suspension and Termination by Sub-Contractor

#### 16.1 Sub-Contractor's Entitlement

If the Engineer fails to certify in accordance with Sub-Clause 14.6 [Issue of Interim to Suspend Work Payment Certificates] or the Contractor fails to comply with Sub-Clause 2.4 [Contractor's Financial Arrangements] or Sub-Clause 14.7 [Payment], the Sub-Contractor may, after giving not less than 21 days' notice to the Contractor, suspend work (or reduce the rate of work) unless and until the Sub-Contractor has received the Payment Certificate, reasonable evidence or payment, as the case may be and as described in the notice.

The Sub-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 Sub-Contractor].

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

If the Sub-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 Sub-Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Sub-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], and
- payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.

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

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The Sub-Contractor shall indemnify and hold harmless the Employer, the Employer's personnel, 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, of any person whatsoever arising out of or in the course of or by reason of the Sub-Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, or any of their respective agents, and
- damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss:
  - arises out of or in the course of or by reason of the Sub-Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, and
  - is attributable to any negligence, wilful act or breach of the Contract by the Sub-Contractor, the Sub-Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.

The Contractor shall indemnify and hold harmless the Sub-Contractor, the Sub-Contractor's personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of: (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover as described in sub-paragraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [Insurance against Injury to Persons and Damage to Property].

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

The Sub-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 Contractor. 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 Contractor.

After responsibility has accordingly passed to the Contractor, the Sub-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.

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

The Sub-Contractor shall be liable for any loss or damage caused by any action performed by the Sub-Contractor after a Taking-Over Certificate has been issued. The Sub-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 Sub-Contractor was liable.

#### 17.3 Employer's Risks

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

- war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,
- riot, commotion or disorder within the Country by persons other than the Sub-Contractor's Personnel and other employees of the Sub-Contractor and Sub-Contractors,
- munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Sub-Contractor's use of such munitions, explosives,

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#### 16.2 Termination by Sub-Contractor

The Sub-Contractor shall be entitled to terminate the Contract if:

- the Sub-Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [Sub-Contractor's Entitlement to Suspend Work] in respect of a failure to comply with Sub-Clause 2.4 [Contractor's Financial Arrangements],
- the Contractor fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate,
- the Sub-Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [Payment] within which payment is to be made (except for deductions in accordance with Sub-Clause 2.5 [Contractor's Claims]),
- the Contractor substantially fails to perform his obligations under the Contract,
- the Contractor fails to comply with Sub-Clause 1.6 [Contract Agreement] or Sub-Clause 1.7 [Assignment],
- a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [Prolonged Suspension], or
- the Contractor becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, the Sub-Contractor may, upon giving 14 days' notice to the Contractor, terminate the Contract. However, in the case of sub-paragraph (f) or (g), the Sub-Contractor may by notice terminate the Contract immediately.

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

#### 16.3 Cessation of Work and Removal of Sub-Contractor's Equipment

After a notice of termination under Sub-Clause 15.5 [Contractor's Entitlement to Termination], Sub-Clause 16.2 [Termination by Sub-Contractor] or Sub-Clause 19.6 [Optional Termination, Payment and Release] has taken effect, the Sub-Contractor shall promptly:

- 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,
- hand over Sub-Contractor's Documents, Plant, Materials and other work, for which the Sub-Contractor has received payment, and
- 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 Sub-Contractor] has taken effect, the Contractor shall promptly:

- return the Performance Security to the Sub-Contractor,
- pay the Sub-Contractor in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release], and
- pay to the Sub-Contractor the amount of any loss of profit or other loss or damage sustained by the Sub-Contractor as a result of this termination.

#### 17.1 Indemnities

- radiation or radio-activity,
- pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,
- use or occupation by the Contractor of any part of the Permanent Works, except as may be specified in the Contract,
- design of any part of the Works by the Contractor's Personnel or by others for whom the Contractor is responsible, and
- any operation of the forces of nature which is unforeseeable or against which an experienced Sub-Contractor could not reasonably have been expected to have taken adequate preventative precautions.

#### 17.4 Consequences of Contractors 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 Sub-Contractor's Documents, the Sub-Contractor shall promptly give notice to the Engineer and shall rectify this loss or damage to the extent required by the Engineer.

If the Sub-Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Sub-Contractor shall give a further notice to the Engineer - with a copy to the Contractor - and shall be entitled subject to Sub-Clause 20.1 [Sub-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], and
- payment of any such Cost, which shall be included in the Contract Price, in the case of sub-paragraphs (f) and (g) of Sub-Clause 17.3 [Contractor's Risks], reasonable profit on the Cost shall also be included.

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

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

The Sub-Contractor shall indemnify and hold the Contractor harmless against and from any other claim which arises out of or in relation to (i) the manufacture, use, sale or import of any Goods; or (ii) any design for which the Sub-Contractor is responsible.

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

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### 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 or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under Sub-Clause 16.4 (Payment on Termination) and Sub-Clause 17.1 (Indemnities).

The total liability of the Sub-Contractor to the Contractor, under or in connection with the Contract other than under Sub-Clause 4.19 (Electricity, Water and Gas), Sub-Clause 4.20 (Contractor's Equipment and Free Issue Materials), Sub-Clause 17.1 (Indemnities) and Sub-Clause 17.5 (Intellectual and Industrial Property Rights), shall not exceed the sum stated in the Particular Conditions or (if a sum is not so stated) the Accepted Contract Amount.

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

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## 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 the relevant Sub-Clause.

Wherever the Sub-Contractor is the insuring Party, each insurance shall be effected with insurers and in terms approved by the Contractor. These terms shall be consistent with any terms agreed by both Parties before the date of the Letter of Acceptance. This agreement of terms shall take precedence over the provisions of this Clause.

Wherever the Contractor is the insuring Party, each insurance shall be effected with insurers and in terms consistent with the details annexed to the Particular Conditions.

If a policy is required to indemnify joint insurance, 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, namely in addition to the insured specified in this Clause, (i) the Sub-Contractor shall act under the policy on behalf of these additional joint insured except that the Contractor shall act for Contractor'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.

Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify the loss or damage. Payments received from insurers shall be used for the rectification of the loss or damage.

The relevant insuring Party shall, within the respective periods stated in the Appendix to Tender (calculated from the Commencement Date), submit to the other Party:

- evidence that the insurances described in this Clause have been effected, and
- copies of the policies for the insurances described in Sub-Clause 18.2 (Insurance for Works and Sub-Contractor's Equipment) and Sub-Clause 18.3 (Insurance against Injury to Persons and Damage to Property).

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.

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### [Plant and Materials intended for the Works]

If, more than one year after the Base Date, the cover described in sub-paragraph (d) above ceases to be available at commercially reasonable terms, the Sub-Contractor shall (as insuring Party) give notice to the Contractor, with supporting particulars. The Contractor shall then (i) be entitled subject to Sub-Clause 2.5 (Contractor's Claims) to payment of an amount equivalent to such commercially reasonable terms as the Sub-Contractor should have expected to have paid for such cover, and (ii) be deemed, unless he obtains the cover at commercially reasonable terms, to have approved the omission under Sub-Clause 18.1 (General Requirements for Insurances).

### 18.3 Insurance against Injury to Persons and Damage to Property

The insuring Party shall insure 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 (Insurance for Works and Sub-Contractor's Equipment)) or to any person (except persons insured under Sub-Clause 18.4 (Insurance for Sub-Contractor's Personnel)), which may arise out of the Sub-Contractor's performance of the Contract and occurring before the issue of the Performance Certificate.

This insurance shall be for a limit per occurrence of not less than the amount stated in the Appendix to Tender, with no limit on the number of occurrences, if an amount is not stated in the Appendix to Tender, this Sub-Clause shall not apply.

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

- shall be effected and maintained by the Sub-Contractor as insuring Party,
- shall be in the joint names of the Parties,
- shall be extended to cover liability for all loss and damage to the Contractor's property (except things insured under Sub-Clause 18.2) arising out of the Sub-Contractor's performance of the Contract, and
- may however exclude liability to the extent that it arises from:
  - the Contractor's right to have the Permanent Works executed on, over, under, in or through any land, and to occupy this land for the Permanent Works,
  - damage which is an unavoidable result of the Sub-Contractor's obligations to execute the Works and remedy any defects, and
  - a cause listed in Sub-Clause 17.3 (Contractor's Risks), except to the extent that cover is available at commercially reasonable terms.

### 18.4 Insurance for Sub-Contractor's Personnel

The Sub-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 Sub-Contractor or any other of the Sub-Contractor's Personnel.

The Contractor and the Engineer shall also be indemnified under the policy of insurance, except that this insurance may exclude losses and claims to the extent that they arise from any act or neglect of the Contractor or 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 Sub-Contractor's employees, the insurance may be effected by the Sub-Contractor, but the Sub-Contractor shall be responsible for compliance with this Clause.

## Force Majeure

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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 Contract Price shall be adjusted accordingly.

Nothing in this Clause limits the obligations, liabilities or responsibilities of the Sub-Contractor or the Contractor, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Sub-Contractor and/or the Contractor 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 (Contractor's Claims) or Sub-Clause 20.1 (Sub-Contractor's Claims), as applicable.

### 18.2 Insurance for Works and Sub-Contractor's Equipment

The insuring Party shall insure the Works, Plant, Materials and Sub-Contractor's Documents for not less than the full reinstatement cost including the costs of demolition, removal of debris and professional fees and profit. 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 (General Requirements for Insurances), until the date of issue of the Taking-Over Certificate for the Works.

The insuring Party shall maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Sub-Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Sub-Contractor in the course of any other operations (including those under Clause 11 (Defects Liability)).

The insuring Party shall insure the Sub-Contractor's Equipment for not less than the full replacement value, including delivery to Site. For each item of Sub-Contractor's Equipment, the insurance shall be effective while it is being transported to the Site and until it is no longer required as Sub-Contractor's Equipment.

Unless otherwise stated in the Particular Conditions, insurances under this Sub-Clause:

- shall be effected and maintained by the Sub-Contractor as insuring Party,
- shall be in the joint names of the Parties, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated between the Parties for the sole purpose of rectifying the loss or damage,
- shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 (Contractor's Risks),
- shall also cover loss or damage to a part of the Works which is attributable to the use or occupation by the Contractor of another part of the Works, and loss or damage from the risks listed in sub-paragraphs (c), (g) and (h) of Sub-Clause 17.3 (Contractor's Risks), excluding (in each case) risks which are not insurable at commercially reasonable terms, with deductibles per occurrence of not more than the amount stated in the Appendix to Tender (if an amount is not so stated, this sub-paragraph (d) shall not apply), and
- may however exclude loss of, damage to, and reinstatement of:
  - a part of the Works which is in a defective condition due to a defect in its design, materials or workmanship (but cover shall include any other parts which are lost or damaged as a direct result of this defective condition and not as described in sub-paragraph (i) below),
  - a part of the Works which is lost or damaged in order to reinstate any other part of the Works if this other part is in a defective condition due to a defect in its design, materials or workmanship,
  - a part of the Works which has been taken over by the Contractor, except to the extent that the Sub-Contractor is liable for the loss or damage, and
  - Goods while they are not in the Country, subject to Sub-Clause 14.5

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### 19.1 Definition of Force Majeure

In this Clause, "Force Majeure" means an exceptional event or circumstance:

- which is beyond a Party's control,
  - which such Party could not reasonably have provided against before entering into the Contract,
  - which, having arisen, such Party could not reasonably have avoided or overcome, and
  - which is not substantially attributable to the other Party.
- Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:
- war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
  - rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
  - riot, commotion, disorder, strike or lockout by persons other than the Sub-Contractor's Personnel and other employees of the Sub-Contractor and Sub-Sub-Contractors,
  - munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Sub-Contractor's use of such munitions, explosives, radiation or radio-activity, and
  - natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

### 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 circumstance 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, 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 Sub-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 (Notice of Force Majeure), and suffers delay and/or incurs Cost by reason of such Force Majeure, the Sub-Contractor shall be entitled subject to Sub-Clause 20.1 (Sub-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), and
- if the event or circumstance is of the kind described in sub-paragraphs (i) to (iv) of Sub-Clause 19.1 (Definition of Force Majeure) and, in the case of sub-paragraphs (ii) to (iv), occurs in the Country, payment of any such Cost.

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

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## 19.5 Force Majeure Affecting Sub-Contractor

If any Sub-Contractor is entitled under any contract or agreement relating to the Work 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 Sub-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 for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, 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 Sub-Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Sub-Contractor's Equipment].

Upon such termination, the Contractor shall determine the value of the work done and issue a Payment Certificate which shall include:

- the amounts payable for any work carried out for which a price is stated in the Contract;
- the Cost of Plant and Materials ordered for the Works which have been delivered to the Sub-Contractor, or of which the Sub-Contractor is liable to accept delivery; this Plant and Materials shall become the property of (and be at the risk of) the Contractor when paid for by the Contractor, and the Sub-Contractor shall place the same at the Contractor's disposal;
- any other Cost or liability which in the circumstances was reasonably incurred by the Sub-Contractor in the expectation of completing the Works;
- the Cost of removal of Temporary Works and Sub-Contractor's Equipment from the Site and the return of these items to the Sub-Contractor's works in his country for to any other destination at no greater cost; and
- the Cost of repatriation of the Sub-Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

## 19.7 Release from Performance under the Law

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

- the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract; and
- the sum payable by the Contractor to the Sub-Contractor shall be the same as would have been payable under Sub-Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.6.

## Claim, Disputes and Arbitration

### 20.1 Sub-Contractor's Claims

If the Sub-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 or otherwise in connection with the Contract,

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refuse to pursue

- between the Employer or the Engineer on his behalf and the contractor;
- between the Engineer and the Sub-Contractor;
- between the Contractor and the nominated Sub-Contractor.

A Dispute Adjudication Board (DAB), consisting of 1 to 3 members has been established as part of the main contract between the employer, or the engineer on his behalf, and the contractor. Members of the DAB have been chosen by both parties in the main contract and are remunerated by the contractor in full.

In the event that a dispute develops between the Engineer and/or the contractor on the one side and the Sub-Contractor on the other side the dispute will first be submitted to the DAB in accordance with clause 20.4. [Obtaining Dispute Adjudication Board's Decision]. Neither Party shall consult the DAB on any matter without informing the other Party. (note that the contract states "without the agreement by the other party") This seems wrong as the other party may refuse its agreement in events where it knows that it would be wrong.)

By signing this agreement both parties consent to submit themselves to the DAB's decision. The DAB, in its decision, shall indicate which party is responsible for the cost of the DAB's involvement. The cost of such a decision may be deducted from or added to the Sub-Contractor's payment certificates.

The names of the members of the DAB (as stated by the Employer and the Main Contractor in the Principal Contract) are recorded in the Schedule attached to this agreement. In the event that the Sub-Contractor appoints to one or more of the members of the DAB and has valid reasons for such appointment the Sub-Contractor may within 30 days of signing the agreement suggest alternative names to the Contractor or the Contractor can then effect replacement.

shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The Parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.

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

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

However, if a list of potential members is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DAB.

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

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

If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.

If any of these circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the

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the Sub-Contractor shall give notice to the Engineer, with a copy to the Contractor, 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 Sub-Contractor became aware, or should have become aware, of the event or circumstance.

If the Sub-Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Sub-Contractor shall not be entitled to additional payment, and the Contractor shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply.

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

Within 42 days after the Sub-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 Sub-Contractor and approved by the Engineer, the Sub-Contractor shall send to the Engineer, with a copy to the Contractor, 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:

- this fully detailed claim shall be considered as interim;
- the Sub-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
- the Sub-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 Sub-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 Contractor and approved by the Sub-Contractor, the Engineer, with a copy to the Contractor, 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 Sub-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 Sub-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 Sub-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 Appointment of the Dispute Adjudication Board

Disputes resulting from the construction contract will be categorised as:

The appointment is in the principal contract

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Contractor or the Sub-Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire when the discharge referred to in Sub-Clause 14.12 [Discharge] shall have become effective.

### 20.3 Failure to Agree Dispute Adjudication Board

If any of the following conditions apply, namely:

- the Parties fail to agree upon the appointment of the sole or replacement member of the DAB by the date stated in the first paragraph of Sub-Clause 20.2; within seven days after the Sub-Contractor has made a proposal for a replacement member or replacement members;
- either Party fails to nominate a member (or approval by the other Party) of a DAB of three persons by such date;
- the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date; or
- the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment;

then the appointing entity or official named in the Appendix to Tender shall, upon the request of either or both of the Parties (or the President of the Bar or the Institute of Development Professionals) and after due consultation with both Parties, appoint the member or members of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

### 20.4 Obtaining Dispute Adjudication Board Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

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

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Sub-Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction. In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

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## 20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 (Notice), both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the 56th day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

## 20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (ICC) or the Rules of Arbitration of the International Centre for Dispute Resolution (ICDR) or the Rules of Arbitration of the International Arbitration Centre (IAC) or the Rules of Arbitration of the International Arbitration Centre (IAC) or the Rules of Arbitration of the International Arbitration Centre (IAC);
- (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
- (c) the arbitration shall be conducted in the language of communication defined in Sub-Clause 1.9 (Language).

The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, 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.

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

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

## 20.7 Failure to Comply with Dispute Adjudication Boards Decision

In the event that:

- (a) neither Party has given notice of dissatisfaction within the period stated in Sub-Clause 20.4 (Obtaining Dispute Adjudication Board's Decision),
- (b) the DAB's related decision (if any) has become final and binding, and
- (c) a Party fails to comply with this decision,

then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 (Arbitration). Sub-Clause 20.4 (Obtaining Dispute Adjudication Boards Decision) and Sub-Clause 20.5 (Amicable Settlement) shall not apply to this reference.

## PENDIX

### General Conditions of Dispute Adjudication Agreement

#### 1 Definitions

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

- (a) the "Contractor";
- (b) the "Sub-Contractor"; and

- (c) the "Member" or Members of the Board -who is defined in the Dispute Adjudication Agreement as being:
  - (i) the sole member of the "DAB" (or "arbitrator") and, where this is the case, all references to the "Other Members" do not apply; or
  - (ii) one of the three persons who are jointly called the "DAB" (or "dispute adjudication board") and, where this is the case, the other two persons are called the "Other Members".

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

This sub-contract agreement has been adjusted for local conditions and has been drafted by a committee consisting of the following persons:

Mr. David Young -	Chairman representing the BOP
Mr. Gert Vlieg -	Secretary, representing the BOP
B. Almaraz -	DAQS
Lawrence Huchings	DAQS
Abdullah Hattar	
Martin Wagoner	
Ulf Gundersen	
J. Wang	ACMA
Imad Al-Khatib	DBS
P. Kariel	DBS

#### SCHEDULE

Names of members of DAB for the Principal Contract



# AGREEMENT AND SCHEDULE OF CONDITIONS OF BUILDING SUB-CONTRACT

15/8/07

(DOMESTIC SUB-CONTRACT)

between

and

BOTSWANA INSTITUTE OF DEVELOPMENT PROFESSIONS AD HOC CONTRACTS REVIEW COMMITTEE MAY 2007

sent out Agent vs Advertiser X

Ellen: in general, make instances in the text of  
Contract & Contractor  
Employer  
Sub-Contractor  
Sub-Contract Works  
all small letters

dated



This contract is published by the Botswana Institute of Development Professions  
and endorsed by the Association of Electrical & Mechanical Contractors of Botswana?  
July, 2007 edition

ARTICLES OF AGREEMENT made this ..... day of ....., 2 .....

Between

of (physical or postal address)

(hereinafter called "the Contractor") of the one part  
and

of (physical or postal address)

(hereinafter called "the Sub-Contractor") of the other part.

WHEREAS this agreement is supplemental to an agreement (hereinafter referred to as "the principal contract") made the  
..... day of ..... 2 .....

between

(hereinafter called "the Employer") of the one part, and the Contractor of the other part.

AND WHEREAS the Contractor desires to have executed the works of which particulars are set out in the attached  
schedule (hereinafter referred to as "the Sub-Contract Works") and which form part of the works comprised in and to be  
executed in accordance with the principal contract (hereinafter referred to as "the Contract-Works") and any authorised  
variations of the Sub-Contract Works.

AND WHEREAS the Contractor, prior to the signing hereof, has given the Sub-Contractor reasonable opportunity of  
inspecting all the provisions of the principal contract except the detailed prices of the contractor included in schedules and bills  
of quantities, and furthermore, whereas it is agreed that the term "the Agent" where it appears in this Sub-Contract, unless  
inconsistent with the context in which it is used, shall mean the person appointed by the Employer in terms of the principal  
contract to act as Agent for the Employer in terms of that contract and who may be an architect or engineer or other person,  
as the case may be.

BOTSWANA INSTITUTE OF DEVELOPMENT PROFESSIONS AD HOC CONTRACTS REVIEW COMMITTEE MAY 2007

principal agent?



## NOW IT IS HEREBY AGREED AS FOLLOWS:

1. For the consideration hereinafter mentioned, the Sub-Contractor will execute and complete the Sub-Contract Works upon and subject to the conditions of this Sub-Contract.
2. The Contractor will pay the Sub-Contractor the sum of

(P ) hereinafter referred to as "the sub-contract sum" or such other sum as shall become payable hereunder subject to and at the times and in the manner specified in the conditions of this sub-contract, and shall be payable to the Sub-Contractor at

3. The Contractor chooses domicilium citandi et executandi for all purposes of this sub-contract at
4. The Sub-Contractor chooses domicilium citandi et executandi for all purposes of this sub-contract at
5. The contractor and sub-contractor choose domicilium citandi et executandi at their respective addresses where all notices or processes or both arising out of or in connection with this agreement may be validly delivered to or served on them. Either contracting party may, at any time, by notice to the other contracting party, change its domicilium citandi et executandi to some other address provided that such new address shall be in the Republic of Botswana.
6. References in this agreement to other documents shall be to the latest edition thereof, with all amendments thereto, at the date for submission of the tenders.
7. The date of issue of any certificate referred to in this agreement shall be the date on which the certificate is signed by the party authorised in this agreement to issue such certificate and unless the contrary is proved, the date of signature shall be the date appearing on the certificate.
8. The headings of clauses in this sub-contract agreement are for reference purposes only and shall not be taken into account in construing the content thereof.
9. In this agreement, unless inconsistent with the context, the words 'notice', 'notify', 'notification', 'certify', 'certification', and 'issue' shall connote an act to be carried out in writing.
10. In this agreement, unless inconsistent with the context, the masculine includes the other gender, the singular includes the plural and vice versa, and persons shall include bodies corporate.
11. Any documentation or notice sent by a party in terms of this agreement recorded delivery or by prepaid registered post addressed to the other party at his domicilium et executandi shall be deemed to have reached the other party within seven (7) days from date of posting.
12. This sub-contract agreement constitutes the whole agreement between the parties and no variations or amendments thereto shall have any force or effect unless reduced to writing and signed by both the contractor and sub-contractor.
13. The only law applicable to this agreement is the law of the Republic of Botswana.
14. The original hereof is kept by the Contractor, but the Sub-contractor shall be entitled to a real copy thereof.

15 The following documents comprise the Contract:

This agreement and schedule of conditions.

.....

.....

( SIGNED BY THE CONTRACTOR

IN THE PRESENCE OF (Name in Block Letters)

SIGNATURE

ADDRESS

SIGNED BY THE SUB-CONTRACTOR

( IN THE PRESENCE OF (Name in Block Letters)

SIGNATURE

ADDRESS

**BOTSWANA INSTITUTE OF DEVELOPMENT PROFESSIONS AD HOC CONTRACTS REVIEW COMMITTEE MAY 2007**



**THE AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:**

- 1.1 "AGENT" means the architect, the quantity surveyor, engineer or other agent appointed by the employer in terms of the principal agreement and named in the sub-contract schedule.
- 1.2 "ARCHITECT" means the principal agent named in the schedule
- 1.3 "CERTIFICATE OF INTERIM COMPLETION" means a certificate issued by the contractor to the sub-contractor accepting that interim completion of the works has been achieved, but this shall not take precedence over the certificates of practical completion and final completion.
- 1.4 "CERTIFICATE OF FINAL COMPLETION" means a certificate issued by the architect to the contractor in terms of the principal agreement accepting that final completion of the works has been achieved.
- 1.5 "CERTIFICATE OF PRACTICAL COMPLETION" means a certificate issued by the architect to the contractor in terms of the principal agreement confirming that practical completion of the works has been achieved
- 1.6 "CONTRACTOR" means the contracting party so named in the schedule
- 1.7 "CONTRACTOR'S INSTRUCTIONS" means instructions issued by the contractor to the sub-contractor in accordance with the contractor's authority in terms of this agreement. Instructions issued to the sub-contractor by agents of the employer shall have no authority unless authorised by the contractor
- 1.8 "DAY" means a calendar day starting at 00h00 and ending at 24h00 Botswana time
- 1.8 "DEFECT" means any aspect of the works which is not to the reasonable satisfaction of the architect and without limiting the generality of the foregoing, includes the lack of an essential element of completeness of any aspect of the works
- 1.9 "EMPLOYER" means the party so named in the schedule
- 1.10 "FINAL COMPLETION" means the state of completion of the works where in the opinion of the architect the works are complete and free from all patent defects
- 1.11 "INTEREST" means in monetary terms current bank lending prime rate plus two per cent.
- 1.12 "INTERIM COMPLETION LIST" means a list issued by the contractor to the sub-contractor defining the outstanding and defective work required to be attended to by the sub-contractor in order to achieve interim completion.
- 1.13 "LATENT DEFECT" means a defect which a reasonable inspection of the works by the architect would not disclose
- 1.14 "LATENT DEFECTS LIABILITY PERIOD" means the period which begins on the date of commencement of the construction period in terms of the principal agreement and terminates five (5) years from the date of the certificate of final completion
- 1.15 "MATERIALS AND GOODS" means materials and goods delivered to the sub-contractor for inclusion in the sub-contract works whether stored on site, adjacent to the site, off site or in transit to the site but not yet part of the works
- 1.16 "PATENT DEFECT" means a defect which a reasonable inspection of the works by the architect would disclose
- 1.17 "PATENT DEFECTS LIABILITY PERIOD" means the period commencing on the day after the date of issue of the certificate of practical completion and terminating at midnight (00:00) ninety (90) days from that date
- 1.18 "PAYMENT CERTIFICATE" means a certificate indicating the amount due and payable by the employer to the contractor in terms of the principal agreement
- 1.19 "PRACTICAL COMPLETION" means the state of completion where in the opinion of the architect the works are substantially complete and can effectively be used for the purpose intended
- 1.20 "PRACTICAL COMPLETION OF THE SUB-CONTRACT WORKS" means the state of completion where in the opinion of the architect the sub-contract works are substantially complete and can effectively be used for the purpose intended.
- 1.21 "PRINCIPAL AGREEMENT" means the agreement made between the employer and the contractor for the execution of the works
- 1.22 "PROGRAMME" means the programme and provision thereto, all as agreed between contractor and sub-contractor, indicating the dates for commencement, execution, interim completion and practical completion of sub-contract works and which is intended to allow the sub-contractor to achieve practical completion of the sub-contract works so as to enable the Contractor, in turn to achieve practical completion of the works within the construction period in terms of the principal agreement.

Definitions and Interpretation



- 1.23 "SCHEDULE" means the schedule as attached to this agreement.
- 1.24 "SITE" means the place so described in the schedule.
- 1.25 "SUB-CONTRACT BILLS OF QUANTITIES" means the document describing and quantifying the sub-contract works priced by the sub-contractor in terms of the accepted tender or negotiated sum to reflect the value of the sub-contract works.
- 1.26 "SUB-CONTRACT BUDGETARY ALLOWANCE" means a sum of money provided in the sub-contract bills of quantities for work intended for execution by the sub-contractor, the extent of which is not defined.
- 1.27 "SUB-CONTRACT CONSTRUCTION PERIOD" means the period of time commencing and ending on the dates indicated in the schedule and shall include all extensions granted in terms of clause 10.5.
- 1.28 "SUB-CONTRACT DOCUMENTS" mean this sub-contract agreement, the drawings and specifications relating to the sub-contract, the sub-contract bills of quantities and such other documents as are identified in the schedule.
- 1.29 "SUB-CONTRACT FINAL ACCOUNT" means the document prepared by the agent in which is scheduled the valuation of all the variations to the sub-contract sum in terms of clause 13.16 resulting from architect's instructions, reflecting the adjusted sub-contract sum which, in the opinion of the agent, is the value of the sub-contract works at final completion.
- 1.30 "SUB-CONTRACTOR" means the contracting party so described in the schedule.
- 1.31 "SUB-CONTRACTOR PRIME COST AMOUNT" means a sum of money provided in the sub-contract documents for materials and goods to be obtained from a supplier nominated by the architect and to be fixed by the sub-contractor.
- 1.32 "SUB-CONTRACT SUM" means the value of the sub-contract works as reflected in the sub-contract bills of quantities or other sub-contract tender documents and stated in the schedule.
- 1.33 "SUB-CONTRACT WORKS" means that portion of the works which is to be executed by the sub-contractor, together with the sub-contractor's temporary works as described in the schedule and detailed in the sub-contract documents and any variation thereto in terms of the sub-contract agreement.
- Sub-contract works in the context of the clauses herein shall further include materials and goods as defined in clause 1.1.13 as well as materials and goods supplied free or otherwise by the employer to the sub-contractor.
- 1.34 "WORKS" means the works and temporary works designed by the employer, the architect or other agents of the employer as described in the schedule and detailed in the contract documents and any variations thereto in terms of the principal agreement.

Knowledge of Principal Contract	2	The Sub-Contractor shall at all times be entitled to reasonable opportunity of inspecting and acknowledges that he has inspected all the provisions of the principal contract and shall be deemed for the purpose of the succeeding requirements of this Sub-Contract to be fully informed regarding all such provisions except the detailed prices of the Contractor included in schedules and bills of quantities.
Execution of the Sub-Contract works	3	The Sub-Contractor shall execute and complete the Sub-Contract Works subject to and in accordance with this sub-contract in all respects in conformity with all the reasonable directions and requirements of the Contractor and to the reasonable satisfaction of the Contractor and the Agent or, if no Agent is appointed in terms of the principal contract, then the Employer.
Clearance of rubbish and excess material	4	The Sub-Contractor shall clear away all the rubbish and excess materials resulting from his execution of the Sub-Contract Works as the work proceeds and upon practical completion of the Sub-Contract Works shall leave the Sub-Contract Works clean and tidy to the reasonable satisfaction of the Contractor.
Sub-Contractors liability	5	<p>5.1 All the provisions of the principal contract requiring observance, performance or compliance on the part of the Contractor shall be observed, performed and complied with by the Sub-Contractor in so far as they relate and apply to the Sub-Contract Works (or any portion of the same) and are not repugnant to or inconsistent with the express provisions of this sub-contract as if all the same were severally set out herein.</p> <p>5.2 The Sub-Contractor shall, subject to the exclusions of liability in terms of clauses 6.1.1, 6.1.2 and 6.1.3, assume full responsibility for and hereby does identify the Contractor against any breach, non-observance or non-performance by the Sub-Contractor, his servants or agents of the said provisions of the principal contract, or any of them; provided that nothing in this sub-contract shall create any privacy of contract between the Sub-Contractor and the Employer or any other sub-contractor.</p>
Indemnity	6	<p>6.1.1 The Sub-Contractor shall and hereby does indemnify the Contractor against any liability, loss, claim or proceedings whatsoever, whether arising in common law or by statute, consequent on personal injuries to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the Sub-Contract Works unless due to any act or omission of the Employer, the Contractor, other</p>



sub-contractors or of their respective servants or agents.

6.1.2 The Sub-Contractor shall and hereby does indemnify the Contractor against any liability, loss, claim or proceedings consequent on loss of or damage to any movable or immovable property arising out of or in the course of or caused by the execution of the Sub-Contract Works and due to any act or omission of the Sub-Contractor, his servants or agents, provided that the term "property" for the purpose of this clause 5.1.2 shall exclude the Sub-Contract Works, any temporary works and the materials and goods intended for incorporation therein.

6.1.3 Where, in terms of the principal contract, the loss or damage results from a risk insurable by a policy insuring fire, riot, strike, malicious damage and special perils as issued by a registered insurer in the Republic of Botswana and regardless of the cause of such loss or damage, the Contractor does not indemnify the Employer against such loss of or damage to any structure/s being altered or added to in pursuance of the principal contract or any part/s of the Contract Works handed to or taken over by or for the benefit of the Employer before completion of the Contract Works as a whole or any property belonging to the Employer or for which the Employer is responsible contained in such structure/s or part/s or against any consequence of any such loss or damage, then the Sub-Contractor similarly does not indemnify the Contractor for any loss or damage or consequence thereof in respect of the Sub-Contract Works forming part of the Contract Works.

6.1.4 The Contractor hereby warrants that the Indemnity against any loss or damage in the circumstances referred to in clause 6.1.3 which is provided by the Employer shall be in respect not only of the Contractor but also of the Sub-Contractor.

6.2 The Sub-Contractor shall insure and shall remain insured in respect of public liability, common law liability and, in particular, without limiting the generality of the foregoing, Workmen's Compensation or any other statute in force for the time being, in respect of injuries to persons and/or property, until the issue of the Architect's certificate of completion of the Contract Works for the amounts stated in the attached schedule. The public liability, common law liability, or other policies shall contain clauses indemnifying the Contractor against risks arising out of the execution of this sub-contract. The provisions of this clause shall not in any way limit the liabilities assumed by the Sub-Contractor or the Contractor or the indemnities given by them in terms of clause 6.1.1

Insurance

6.3 The Sub-Contractor or the Contractor, as the case may be, shall provide the other one of them with proof in the form of a written statement from the insurance company concerned that the insurances required by this sub-contract have been effected.

Certificate of insurance

7 7.1.1 The Sub-Contract Works (including the temporary works as defined hereafter) and the materials and goods intended for incorporation in the Sub-Contract works and placed on or adjacent to the site shall be at risk of the Contractor for all risks of loss or damage insurable under the contract works or contractor's all insurance policy as effected in terms of the principal contract, except where the contract is for alteration and/or additions to any existing structure/s or where a part or parts of the said Contract Works are stated in the schedule attached to the principal contract to be required to be handed over for occupation, before completion of the Contract Works as a whole in which event the Contractor warrants that, under the provisions of the principal contract the Employer shall carry those risks insurable by a policy insuring fire, explosion, earthquake, riot, strike, malicious damage and special perils as issued by a registered insurer in the Republic of Botswana.

Work risk

7.1.2 The Contractor further warrants that, under the provision of the principal contract, any existing structure/s will be entirely at the risk of the Employer.

7.1.3 Notwithstanding the provisions of clause 7.1.1 neither the Contractor nor the Sub-Contractor shall in any case be liable for any loss or damage to the said Sub-Contract Works, materials or goods:

7.1.3.1 caused by an excepted peril as hereinafter defined;

7.1.3.2 occurring after the date of the relevant certificate of practical completion or, if earlier, the date on which the Contract Works are handed over or taken into use or occupation by or for the benefit of the Employer in whole or part provided that, where the Contract Works consist of two or more physically separate structures, the provisions of this sub-clause shall apply only to the structure or structures so notified or handed over or taken into use or occupation and not the remaining Contract Works, temporary works, materials and goods.

7.1.4 For the purposes of clause 7.1.1 the term "all risk" includes, but is not restricted to, the risks of damage by any act or omission of the Contractor or any Sub-Contractor or the Employer or the servant or agent of any of them and the party at risk shall have no right to recover any part of such or damage from any other party by reason of any such act or omission the excepted perils are:

7.1.4.1 any consequence whether direct or indirect or proximate or remote of "war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war, mutiny, military rising, insurrection, military or usurped power or martial law or state of siege or any other event or cause which determine the proclamation or maintenance of martial law or state of siege; any risk or peril only insurable in the Republic of Botswana by means of a political riot risk insurance policy issued by or on behalf of the Botswana Special Risks Insurance Association; ionizing radiations or contamination by radio-activity from any nuclear waste from the combustion of nuclear; fuel, "nuclear weapons material;

confiscation, nationalization or requisition or destruction or damage by or under the order of government de jure or de facto or of any public or local authority;

- 7.1.4.2. the design of the Contract Works including the Sub-Contract Works or temporary works by the Employer or by the Employer's servants or agents;
- 7.1.4.3 any latent defect in any materials or goods specified by trade name in the tender documents, provided that the sub-contractor shall and hereby does cede to the Contractor who in turn in accordance with the provisions of the principal contract will cede to the Employer any right of action that may exist against the supplier and/or manufacturer of such materials or goods;

Insurance

- 7.2 The Sub-Contract Works, materials and goods referred to in the clause 7.1 will be included in the policy of insurance effected in terms of the principal contract.  
The contractor warrants that, under the provisions of the principal contract, such insurance will be taken out by the employer where the contract is for alterations and/or additions to an existing structure/s or where part/s of the Contract Works are stated in the schedule attached to the principal contract to be handed over for occupation before practical completion of the Contract Works as a whole. In every instance such insurance will be taken out by the Contractor.  
The policy will be kept in force until the date of the certificate of practical completion of the Contract Works or of the final part of the Contract Works, as the case may be.

Certificate of Insurance.

- 7.3 The party responsible for insurance is, in terms of the principal contract, required to provided the Architect with proof in the form of a written statement from the insurance company concerned that the insurances required by the principal contract have been effected. The Contractor shall if so requested by the Sub-Contractor, confirm in writing that the insurance provisions of the principal contract are in effect.

Reinstatement

- 7.4 The Contractor warrants that, under the provision of the principal contract, the costs of reinstatement of any loss or damage not at the risk of the Contractor in terms of clause 7.1 will be borne and paid by the Employer.
- 7.4.1 The Contractor warrants that where the Employer carries the risk in terms of the principal contract, the costs of reinstatement will be measured and valued in terms of the principal contract and all payments due to the Contractor and the Sub-Contractor will be certified by the Architect in accordance with the provisions of the principal contract.
- 7.4.2 The Contractor warrants that, under the provision of the principal contract, where the Contractor carries the risk and where reinstatement takes place, any insurance monies in respect of such reinstatement will be held in trust for his benefit and through him for the benefit of the Sub-Contractor. Such monies will be paid out in accordance with Architect's certificates.
- 7.4.3 Where reinstatement of damage is required, the Sub-Contractor shall carry out and complete the sub-contract Works with due diligence. The principal contract provides that a reasonable extension of time for the completion of the Contract Works will be granted by the Architect.
- 7.4.4 Where the contract is for alterations and/or additions to the existing structure and in the event of the whole or substantially the whole of the Contract Works and/or the existing structure being destroyed, then the continued employment of the Contractor under the principal contract may, at the option of the Employer, be determined by notice by registered post to the Contractor in which event the Contractor may similarly determine the employment of the Sub-Contractor. In such event the provisions of clauses 24.1 to 24.6 shall apply mutatis mutandis.

Responsibility for plant and other property

- 8 8.1 The plant and other property belonging to or provided by the Sub Contractor, his servants or agents shall be at the sole risk of the Sub-Contractor and any loss or damage to the same caused by the same shall, subject to the provisions of clause 7, be the sole responsibility of the Sub-Contractor who shall and hereby does indemnify the Contractor against any loss, claim or proceeding in respect thereof.
- 8.2 The Sub-Contractor shall insure against any loss or claim as contemplated in clause 8.1 and shall, on request, supply the Contractor with proof that such insurance has been effected.

Variations and instructions

- 9 9.1 If the Contractor
- 9.1.1 requires or authorizes in writing any variations of the Sub-Contract Works; or
- 9.1.2 issues in writing to the Sub-Contractor any instructions of the Agent, or if no Agent is appointed in terms of the principal contract, any instructions of the Employer in relation to the Sub-Contract Works (whether in regard to variations or otherwise howsoever),
- then the Sub-Contractor shall forthwith comply with and carry out the same in all respects accordingly.
- 9.2 Any verbal instructions, directions or explanations involving a variation given to the Sub-Contractor or his foreman by the Contractor may be confirmed in writing by the sub-contractor to the Contractor and within 7 days thereafter shall be deemed to be a variation of the Sub-Contract works.
- 9.3 If compliance with written instruction, directions or explanations as aforesaid involves any variation, or if work executed by the Sub-contractor consequent upon verbal instructions, directions or explanations



given to the Sub-Contractor or his foreman by the Contractor is subsequently proved and involves a variation, then such variation shall be dealt with under the clause 12 as an authorized extra or omission and the value thereof adjusted in accordance with the relevant payment provisions of this sub-contract.

- 9.4 If compliance with written instructions, directions or explanations as aforesaid involves expense or loss beyond that provided for in or reasonably contemplated by this sub-contract, then, unless the same were issued owing to some breach of this sub-contract by the Sub-Contractor the Contractor shall avail himself of his rights under the principal contract to have the amount of such expense or loss ascertained by the Agent under the principal contract or by the Employer if no Agent is appointed in terms of the principal contract and the amount so ascertained shall be added to the sub-contract sum and adjusted in accordance with the relevant payment provisions of this sub-contract.
- 10 10.1 The Sub-Contractor shall commence and complete the Sub-Contract Works or the respective parts thereof in compliance with the requirements specified in the attached schedule.
- 10.2 The Contractor shall supply the Sub-contractor with a copy of his original works programme and advise the Sub-Contractor thereafter of any subsequent amendments thereto.
- 10.3 The Sub-Contractor shall commence the Sub-Contract Works on site within 7 days after receipt by him of an instruction in writing under this sub-contract from the Contractor to that effect. If the Sub-Contractor has had prior notice of the approximate on site commencement date of the Sub-Contract Works, he shall proceed with the Sub-Contract Works with due expedition. The Contractor shall inform the Sub-Contractor in writing of any change in the Contract Works affecting the time of commencement of the Sub-Contract Works and shall amend such time of commencement accordingly.
- 10.4 If the Sub-Contractor fails to complete the Sub-Contract Works or any part thereof within the period specified or any extended period as hereafter provided, he shall pay to the Contractor any loss or damage suffered or incurred by the Contractor and caused by the failure of the Sub-contractor as aforesaid of which loss or damage the Contractor shall at the earliest opportunity give reasonable notice in writing to the Sub-Contractor that the same is being or has been suffered or incurred.
- 10.5 If the Sub-Contract Works or any section thereof be delayed and such delay:
- 10.5.1 Shall be caused by or be due to any of the matters specified in clause 9 or caused by or be due to any act or omission of the Contractor and/or any other sub-contractors on the Contract Works and/or his or their respective servants or agents; or
- 10.5.2 shall be within any of the causes for which the Contractor would be entitled to obtain an extension of the period or periods for the completion under the principal contract; or
- 10.5.3 shall be due to any other causes which the Agent or, if no Agent is appointed in terms of the principal contract, the Employer may under the principal contract consider sufficient;
- then the Contractor shall grant a fair and reasonable extension of the said period or periods for completion of the Sub-Contract Works or each part thereof (as the case may require) and such extended period or periods shall be the period or periods for completion of the same respectively and this clause shall be read and construed accordingly; provided that where the provisions of clause 9.1 apply, no extension of the period or periods for the completion of the Sub-Contract Works shall be granted by the Contractor in respect of delays which also affect the duration of the Contract Works unless an extension has first been granted by the Agent, or if no Agent is appointed in terms of the principal agreement, then by the Employer. Any dispute in regard to such matters shall be deemed to be a dispute within the provisions of clause 30.
- 10.6 Immediately upon receipt of the Certificate of Practical Completion by the Contractor, he will send a copy thereof to the Sub-Contractor. The Sub-Contractor's work will be deemed to be practically complete at the day mentioned in the certificate and the Sub-Contractor will enjoy the same rights as the Contractor regarding retention and return of performance guarantee.
- 10.7 Immediately upon receipt of the Certificate of making Good Defects by the Contractor, he will send a copy thereof to the Sub-Contractor, who will be relieved of all further duties in terms of the Contract.
- 11 11.1 All defects, shrinkages or other faults in the Sub-Contract works, which the Contractor (whether at his own cost or not) shall be bound to make good under the principal contract, shall be made good by the Sub-Contractor within a reasonable time after the receipt by him from the Contractor of the Agent's written instruction or a copy thereof relating to the same or, if no Agent is appointed in terms of the principal contract, the written instruction of the Employer. Where the Contractor is required to make good such defects, shrinkages or other faults but not at his own cost, then the Contractor shall secure a similar benefit to the Sub-Contractor and shall account to the Sub-Contractor for any money actually received by him in respect of the same.
- 11.2 If the Contractor executes, or has executed any work to the Contract Works rendered necessary through the default of the Sub-Contractor or in consequence of defects or faults under clause 11.1, then the Sub-Contractor shall pay to the Contractor the cost of such work. If, in lieu of executing such work, the Contractor, after agreement thereto with the Sub-Contractor, agrees to pay or allow to the Employer the value of such work or other agreed sum not exceeding the estimated cost thereof then the Sub-Contractor shall pay the same amount to the Contractor and the Contractor shall indemnify the Sub-Contractor against any liability

Commence-  
ment and  
completion

Defects and  
non -  
compliance

arising out of the non-execution of his work.

- 11.3 If the Sub-Contractor executes work to or in connection with the Sub-Contract on the instructions of the Contractor or rendered necessary by reason of any act or omission of the Employer or the Agent or the Contractor or his agent, including any other Sub-Contractor appointed in terms of the principal contract, then the Contractor shall pay to the Sub-Contractor the costs of the execution of such work.

Contract sum:  
Valuation of Sub -  
Contract works of  
variations

- 12 12.1 The price of the Sub-Contract shall be the sum named in the attached schedule or such other sum as shall become payable by reason of any authorized variations or other adjustments in accordance with the provisions of this sub-contract.
- 12.2 The value of any omissions or authorized variations ordered in accordance with the sub-contract shall be valued in accordance with the principals and provisions governing the valuation of extras, omissions and variations contained in the principal contract.
- 12.3 The Sub-Contractor shall be given an opportunity of being present when the Sub-Contract Works including omissions and variations being measured on the Contract Works to take such notes and measurements as he may require. Details of final measurements, in accordance with the provisions of the principal contract, shall, in so far as they concern the Sub-Contractor's Works, and upon application, be disclosed to the Sub-Contractor by the Contractor at the latter's office.
- 12.4 The provisions of the principal contract governing prime cost amounts and provisional sums including in bills of quantities shall apply *mutatis mutandis* to any prime cost amounts and provisional sums specified as such in relation to any works, materials or goods comprised in the sub-contract.

Certificates and  
payments

- 13 13.1 The Contractor will apply for certificates of payment in terms of the Principal agreement.
- 13.2 The amount applied for shall, at the date of the aforesaid certificate, fairly represent, on the basis of detailed information timeously supplied by the Sub-Contractor, the value of the Sub-Contract Works and of any variations authorized under this sub-contract then executed and of the materials and goods delivered upon the site for use in the Sub-Contract Works.
- 13.3 The Contractor shall, at the commencement of the Sub-Contract Works, advise the Sub-Contractor of the date in the month by which the Sub-Contractor is to provide such detailed information.
- 13.4 The Contractor's application shall in respect of the Sub-Contract Works, only include the value of the aforesaid materials and goods as and from such time as they are reasonably, properly and not prematurely brought upon the site and then only if adequately stored and protected against weather and other damages. The Contractor shall embody in or annex to the said application any representations of the Sub-Contractor in regard to such value.
- 13.5 After receipt of a certificate and detailed supporting statement in accordance with the provisions of the principal contract, the Contractor shall disclose to the Sub-Contractor upon application all details concerning the Sub-Contract Works included in such certificate and/or statement. Any payments made to the Sub-Contractor in terms of this contract shall, except where otherwise herein provided, be fully in accordance with certificates and supporting detailed statements issued to the Contractor by the Agent, or if no Agent has been appointed under the principal agreement, by the Employer.
- 13.6 No payment shall become due to the Sub-Contractor by the Contractor in respect of the Sub-Contract Works or of any authorized variation thereof until the same shall have been certified by the Agent to be due from the Employer to the Contractor in respect of such Works by a certificate issued in accordance with the provisions of the principal contract and then only for the amount so certified.
- 13.7 If an Agent is not employed under the principal contract, the provisions of clause 13.5 and 13.6 shall be deemed to be superseded by the requirement that the Contractor shall exercise his rights to obtain from the employer monthly or other agreed periodic payments in respect of such portions of the Sub-Contractor Works as are completed from month to month, or from time to time as the case may be.
- 13.8 Payment of the amount so certified less the appropriate proportion of retention money (as referred to in clause 14) shall, subject to the provisions of clause 13.10, be made to the Sub-Contractor by the Contractor in accordance with the provisions of the principal agreement.
- 13.9 Notwithstanding anything elsewhere provided and without prejudice to any rights the Sub-Contractor may have under this sub-contract, the Contractor shall be liable to pay the Sub-Contractor interest at the rate of 2 per cent greater than the minimum lending rate charged by commercial banks to their clients on the amount certified but not paid. Interest shall become due and payable and be calculated from the due date for payment by the Contractor to the Sub-Contractor.

Disputes as to  
certificates

- 13.10 If the Sub-Contractor feels aggrieved by the amount certified by the Agent in any certificate or by his failure to certify, then, subject to the Sub-Contractor giving to the Contractor such indemnity and security as the Contractor shall reasonably require, the Contractor shall allow the Sub-Contractor (if he so requires) to use the Contractor's name and if necessary will join with the Sub-Contractor as claimant in any dispute resolution proceedings by the Sub-Contractor in respect of the said matters complained of by the Sub-Contractor. Such proceedings shall be held in accordance with the relevant provisions of the principal contract. The provisions of this clause 13.12 shall not affect the Sub-Contractor's rights under



clause 30.

- 13.12 Failure by the Contractor to apply for any certificate of payment as provided in clause 13.1, or to make payment to the Sub-Contractor within 14 days after the due date for payment to the Contractor by the Employer shall entitle the Sub-Contractor, on giving 7 days written notice to the Contractor, to cease work under this sub-contract until application shall have been made for such certificate or until such payment shall have been made to him, as the case may be. The time during which such works shall be suspended shall be regarded as an extension of time for completion within the meaning of clause 10 and shall not constitute a delay for which the Sub-Contractor is liable under that clause, or at all. The Sub-Contractor may avail himself of the provisions of this clause to suspend the execution of the Sub-Contract Works without prejudice to his rights to determine his employment under this sub-contract in accordance with the provisions of clause 25.
- 13.13 If after the issue of the last monthly certificate but before the issue of either the penultimate or the final certificate in accordance with the principal contract, the Sub-Contractor shall have completed any work upon the Sub-Contract Works, he may request the Contractor in writing to make application to the Agent for certificates certifying the value of such work and the Contractor shall make such application. The provisions of this clause 13.14 shall apply to such certificates as if they were certificates for payment expressly provided for in the principal contract.
- 13.14 In the event of the contractor having provided the Sub-Contractor, by registered post, with the details as envisaged in clause 12.3 for verification, then the Sub-Contractor shall confirm or set out and substantiate in writing his objection to the said amount within 30 days after being presented therewith. Should the Sub-contractor fail to confirm or set out his objection to the amount within the period stipulated, he shall thereby forfeit any rights he may have to dispute the amount subsequently certified by the Agent and his failure either to confirm or object to the aforesaid details within the period stipulated shall be conclusive proof of his acceptance of the said details, notwithstanding anything elsewhere to the contrary herein contained.
- 14 While any retention money is held by the Employer or invested in a joint account in the name of the Employer and the Contractor under the principal contract, retention money as certified by the Agent shall also be held on the Sub-Contract Works.
- 15 The contractor shall so far as he lawfully can at the request and cost of the Sub-Contractor obtain for him any rights or benefits of the principal contract so far as the same are applicable to the Sub-Contract Works but not further or otherwise.
- 16 Should the Sub-contractor be liable to the Contractor in respect of any breach of this sub-contract or otherwise for payment of any sum to the Contractor arising out of this sub-contract, the Contractor shall give written notice to the Sub-Contractor within fourteen days of the event giving rise to the liability first arising. The Sub-Contractor shall remedy the cause of the liability within a reasonable period of receiving notice, otherwise the Contractor shall be entitled to set off the cost of such remedy against any monies due to the Sub-Contractor. The Contractor shall not be entitled to set off any cost without first giving due notice as aforesaid.
- 17 The Contractor and the Agent (and authorized representative of the contractor and the Agent) or, if no Agent is appointed in terms of the principal contract, then the Employer or his authorized representatives shall at all reasonable times have access to the Sub-contract works and/or to the workshops or other places under the control of the Sub-contractor where work is being prepared for the sub-contract.
- 18 The Sub-Contractor shall not without the written consent of the Contractor and the Agent or, if no Agent is appointed in terms of the principal contract, then the written consent of the Contractor and the Employer, cede, assign, sub-let or delegate his obligations or part thereof under this sub-contract, provided that such consent shall not be unreasonably withheld to the prejudice of the Sub-Contractor and provided further that any consent given to the Sub-Contractor in terms of this clause shall not relieve him of the conditions as set out in clause 5.2.
- 19 If and so far as it is so provided in the principal contract (but not otherwise) the contractor shall supply at his own cost all necessary water, lighting, electric power for hand tools where this can reasonably be made available on site, watching and attendance for the purpose of the Sub-Contract Works. Subject as aforesaid the Sub-contractor shall make all necessary provision in regard to the said matters and each of them.
- 20 Unless otherwise provided for in the principal contract, the Sub-contractor shall provide at his own expense all temporary workshops sheds or other buildings required for his workmen at such places on the site as the Contractor shall appoint and the contractor shall give to the Sub-Contractor all reasonable facilities for the erection of the same. The Contractor may, if it be reasonably possible, place at the disposal of the Sub-contractor a room in the Contract Works which is to be erected under the principal contract without any charge or expense, under such conditions as may be agreed upon. If and when a telephone is installed on the site, it shall be available for the use of the Sub-Contractor, provided that he shall be liable to pay for all his outgoing calls.
- 21 The Sub-Contractor shall provide scaffolding for his own use. the Sub-contractor, his employers and workmen in common with all other persons having the like right shall for the purpose of the Sub-Contract Works (but not further or otherwise) nevertheless be entitled to use any scaffolding belonging to or provided by the Contractor while it remains so erected upon the site; provided that such use as aforesaid shall be on the express condition that no warranty or other liability whatsoever on the part of the Contractor or his other sub-contractor shall be created or implied in regard to the fitness, condition or suitability of the said scaffolding.

Right of the Sub-Contractor to suspend execution of sub-Contract works

Special payment

Verification of final account

Retention money

Sub-Contractor's claim to right

Set off

Access to work

Assignment or sub-letting

Provision of water and other attendance

Temporary workshops, sheds and telephones

Scaffolding



Wrongful use of or interference with property	22	The Contractor and the Sub-Contractor respectively, and/or their respective servants or agents shall not wrongfully use or interfere with the plant, ways, scaffolding, temporary works, guards, appliances or other property respectively belonging to or provided by the other of them or be guilty of any breach or infringement of any Act of Parliament or by-law, regulation, order or rule made under the same or by any local or other public or competent authority; provided that nothing herein contained shall prejudice or limit the rights of the Contractor or of the sub-contractor in the carrying out of their respective statutory or contractual duties under this sub-contract or under the principal contract.	
Determination by Contractor	23	<p>23.1 If the Sub-Contractor</p> <p>23.1.1 without reasonable cause wholly suspends the Sub-Contract Works before completion;</p> <p>23.1.2 fails to proceed with the Sub-contract Works with reasonable skill, diligence and expedition;</p> <p>23.1.3 refuses or to a substantial degree persistently neglects after notice in writing from the Contractor to remove defective work or improper materials;</p> <p>then the Contractor shall give written and registered notice to the Sub-Contractor specifying the same and if such default shall continue for 14 days after such notice the Contractor shall determine the employment of the Sub-Contractor.</p>	
Insolvency of Sub-Contractor	23.2	If the Sub-Contractor's estate is sequestrated as insolvent, or if, being a company, it is placed in voluntary or compulsory liquidation, the Contractor shall by written and registered notice determine the employment of the Sub-Contractor under this sub-contract.	
Liability of Contractor	23.3	If the employment of the Sub-Contractor under this sub-contract is determined under clause 23.1 or 23.2, the Sub-Contractor shall be deemed to be in breach of this sub-contract and the Contractor shall only be liable for:	
	23.3.1	the value of any work actually and properly executed and not paid for at the date of such determination, such value to be calculated in accordance with clause 12.	
	23.3.2	the value of any unfixed materials and goods delivered upon the site for use in the Sub-Contract Works, the ownership in which has passed to the Employer under the terms of the principal contract;	
	23.3.3	the value of any unfixed materials and goods delivered upon the site for use in the Sub-Contract Works, the ownership in which has not passed to the Employer in terms of the principal contract if the Contractor wishes to acquire same, failing which the Sub-Contractor shall be at liberty to remove same;	
		and for no other sum or sums whatsoever. The Contractor shall have the right to recover, or to deduct from or set off against any such amount of damage suffered and /or of loss and expense incurred by him by reason of the determination of the employment of the Sub-Contractor under this sub-contract.	
Determination of Contractor's employment	24	If for any reason the Contractor's employment under the principal contract is lawfully determined (whether by the Contractor or by the Employer and whether due to any default of the Contractor or otherwise), then the employment of the Sub-Contractor under this sub-contract shall thereupon also determine and the Sub-Contractor shall be entitled to be paid:	
	24.1	the value of the Sub-contract Works completed at the date of such determination, such value to be calculated according to clause 12;	
	24.2	the value of the work begun and executed but not completed at the date of such determination, such value to be calculated according to clause 12;	
	24.3	the value of any unfixed materials and goods delivered upon the site for use in the Sub-Contract works, the ownership in which has passed to the Employer in terms of the principal contract;	
	24.4	the cost of materials or goods properly ordered and delivered for the Sub-Contract Works actually paid for by the Sub-Contractor or of which he is legally bound to take delivery;	
	24.5	any reasonable cost of removal from the site of his temporary buildings, plant, machinery, appliances, goods and materials;	
	24.6	any loss or damage caused to the Sub-Contractor owing to such determination as aforesaid, provided that the provisions of this sub-clause 24.6 shall not apply where the employment of the Contractor may, at the option of the Employer, be determined under the principal contract when, in a contract for alterations and/or additions to existing structure, the whole or substantially the whole of the contract works and/or the existing structure is destroyed and the employment of the Contractor is determined accordingly.	
Determination by Sub-Contractor	25	25.1 If the Contractor does not pay the Sub-Contractor within the period stated in clause 13.8 and thereafter for 7 days after written notice from the Sub-Contractor fails to pay the amount due in terms of this sub-contract, or if the Contractor's estate is sequestrated as insolvent or if, being a company, it is placed in voluntary or compulsory liquidation, the Sub-Contractor may, without prejudice to any other rights herein contained, by written and registered notice determine his employment under this sub-contract. The right	



to determine the employment of the Sub-Contractor under this sub-contract as hereby conferred may be exercised irrespective of whether or not the employment of the Contractor has been determined under the principal contract.

25.2 Upon such determination the Sub-Contractor shall be entitled to be paid in accordance with the provisions of clauses 24.1 to 24.6.

26 Where the Contractor has in terms of the principal contract been required to provide a performance guarantee in respect of the Sub-contract Works, then an equivalent performance guarantee, to the reasonable satisfaction of the Contractor, shall on request be submitted to the Contractor by the Sub-Contractor.

Performance guarantees

27 Notwithstanding any other remedies set down in this agreement, should the Sub-Contractor require a payment guarantee from the Contractor, then the Contractor shall be obliged to provide such a guarantee prior to the commencement of the sub-contract works. The cost, if any, for such a guarantee shall be for the account of the Sub-Contractor, provided that the terms of such a guarantee and the cost thereof shall be to the reasonable satisfaction of the Sub-Contractor. The extent of such guarantee shall be ten per cent of the sub-contract sum or such other amount as may be agreed between the parties, payable on first demand by the Sub-Contractor, but not due for payment until 28 days after any payment is due from the Contractor to the Sub-Contractor. Should the contractor fail to provide such guarantee and/or to provide such guarantee at a reasonable cost, the Contractor shall provide the Sub-Contractor with sufficient information to enable the Sub-Contractor to obtain such a payment guarantee.

Payment guarantees

28 The Contractor shall cede to the Employer any warranty and/or guarantee furnished to him by the Sub-contractor in relation to the quality of materials, workmanship or any other factor having a bearing on the adequacy of the Sub-Contract Works, where the operative period of such warranty or guarantee extends beyond the duration of the principal contract. Written and registered notice shall forthwith be given by the Contractor to the Sub-Contractor of such cession

Cessions of guarantees

29 29.1 Any cessions granted by the Contractor prior to the signing hereof shall be recorded on the attached schedule.

Cessions

29.2 The Contractor undertakes to consult the Sub-Contractor on any further cessions which he may contemplate, and the Contractor further undertakes not to grant cessions to which the Sub-Contractor may reasonably object on grounds that such cessions after payment would leave insufficient funds according to the Contractor to enable him to pay the Sub-Contractor the amount ultimately due to the latter.

29.3 The Sub-Contractor shall not, without the prior written consent of the Contractor, which consent shall not unreasonably be withheld, cede, assign or over to any other person or persons whatsoever any rights to receive payment of monies due to him under this sub-contract.

29.4 The Sub-Contractor shall indemnify the Contractor against any loss or damage suffered as a result of having granted the consent referred to in clause 29.3 or having inadvertently made any payment to the Sub-Contractor instead of the cessionary or cessionaries.

30 30.1 Should any disagreement between the contractor and the sub-contractor arise out of this agreement, the architect may determine such disagreement by a written decision given to the contractor and the sub-contractor within fourteen(14) days of a written request so to do.

Settlement of disputes

Such decision shall be final and binding on the parties, unless either party within fourteen(14) days of receipt thereof disputes the same by notice to the other party and to the architect in which case the disagreement shall be deemed a dispute.

Should the architect fail to give a written decision within the said period of fourteen(14) days, then either party may within a further fourteen(14) days give notice to the other party that the disagreement be declared a dispute.

30.2 A dispute may in the first instance be decided by mediation as follows:

30.2.1 should the parties be unable to agree, in writing within fourteen (14) days of the date on which the dispute is declared, upon the use of mediation as a means of settling the dispute, or upon the person to be appointed by them as a mediator, the dispute shall be resolved by the submission thereof to arbitration.

30.2.2 should both parties agree upon mediation, such dispute shall be referred within a further period of fourteen (14) days for opinion to a mediator mutually selected by the parties. The parties shall not be entitled to be represented at such mediation by a practicing advocate or attorney.

30.2.3 the parties shall within fourteen (14) days of the appointment of the mediator or such other period as the mediator considers reasonable submit written representation to him. Thereafter the mediator shall give his opinion in writing on the matter and furnish the contractor and the sub-contractor each with a copy thereof, provided that the mediator may, in his discretion, convene a hearing of the parties and their witnesses, or may hold discussions with either or both parties, before giving his opinion, with the objective of reconciling the opposing views.

30.2.4 in giving this opinion in writing the mediator shall be deemed to be acting as an expert and not as arbitrator with the proviso that no claim for damages shall be made against him at the instance of either party for

any want of care, skill or diligence in the exercise of his duties

30.2.5 the cost of the mediation and the apportionment thereof shall be determined by the mediator.

30.3 The opinion of the mediator shall be binding on the parties unless either party disputes the opinion of the mediator in writing to the other party within thirty (30) days of the furnishing to them by the mediator of his opinion, in which event the dispute shall be resolved by the submission thereof to arbitration.

30.4 Where the dispute is submitted to arbitration, then the arbitration shall be held in terms of the Botswana Arbitration Act and shall be conducted in accordance with the current Rules for the Conduct of Arbitrations published by the Botswana Institute of Arbitrators and shall be heard by a sole arbitrator unless otherwise agreed by the parties.

30.5 The arbitrator shall be chosen by the sub-contractor from a panel of three (3) persons nominated by the President of the Botswana Institute of Development Professions at the written request of either party within seven (7) days of receipt of the notice advising the names of the said panel. Failing this the President of the Botswana Institute of Development Professions shall appoint the arbitrator. The appointed arbitrator's cost will be divided equally between the parties until the arbitrator decides to the contrary.

30.6 In the arbitration proceedings the rights of the parties shall not be prejudiced in any manner whatsoever by anything said or done at the mediation or by the opinion of the mediator.

30.7 The arbitrator shall have power to open up, review and revise any certificate, opinion, decision, requisition or notice relating to all matters in dispute submitted to him and to determine all such matters in the same manner as if no such certificate, opinion, decision, requisition or notice had been issued.

30.8 Reference to either mediation or to arbitration shall not relieve either party from any liability for the due and timeous performance of his obligations in terms of this agreement.  
The validity of clause 30 shall not be affected by the cancellation of this agreement in terms of clauses 23, 24 and/or 25.

BOTSWANA INSTITUTE OF DEVELOPMENT PROFESSIONS AD HOC CONTRACT REVIEW COMMITTEE JAN 2007



## THE SCHEDULE

### ARTICLES OF AGREEMENT

Identification particulars of 'the principal contract'

1 Date: ..... 2 .....

2 Employer's  
name: .....

3 address: .....

4 Contractor's  
name: .....

5 address: .....

6 Nature of the contract work:

Location of the contract works:

Name of Principal Agent:

'Sub-Contract works'

The items of work comprised in the principal contract which it is agreed the Sub-Contractor shall execute are:

Amount of insurance shall be:

Name of insurance company:

Commencement and completion

The items of work comprised in this sub-contract and as enumerated above shall

commence on: .....

and be completed by: .....

Amount of liquidated damages per calendar day  
as in the main contract:

Value of Sub-Contract works:

Period for payment by the employer to the  
contractor:

Details of guarantees mutually agreed upon by  
the contracting parties:

Name of surety:

Details of all cessions on the principal agreement  
granted prior to the signing of this contract:



BOTSWANA INSTITUTE OF DEVELOPMENT PROFESSIONS AD HOC CONTRACTS REVIEW COMMITTEE MAY 2007

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## INTRODUCTION TO THE FIDIC CONDITIONS OF SUBCONTRACT FOR WORK OF CIVIL ENGINEERING CONSTRUCTION

1996

## THE NEW FIDIC INTERNATIONAL CIVIL ENGINEERING SUBCONTRACT

by  
Christopher R. Seppala<sup>1</sup>

### I INTRODUCTION

Some 37 years after the *Fédération Internationale des Ingénieurs-Conseils* ("FIDIC") Conditions of Contract for Works of Civil Engineering Construction (the "Red Book")<sup>2</sup> first appeared in 1957, there is now available from FIDIC a form of subcontract for use on international projects where the main contract is

Partner, White & Case, Paris; Chairman, FIDIC's Task Group on Subcontract Documents; Member, FIDIC's Civil Engineering Contracts Committee (1991-1993); and Legal Adviser and Member, FIDIC's Task Group for Updating Red and Yellow Books (since June 1994). The views expressed herein are the author's alone and do not necessarily reflect those of his firm or of any other organization with which he is associated. © Copyright reserved 1994.

An earlier version of this paper was presented to the International Construction Projects Committee of the Inter-Pacific Bar Association at its fourth Annual Conference in Singapore on May 3 to 6, 1994.

The author is grateful for the assistance of Maurizio Ragazzi, a former associate of White & Case (now with the World Bank) and a fellow member of FIDIC's Task Group on Subcontract Documents, in the preparation of the earlier version of this paper.

<sup>1</sup> In English, the International Federation of Consulting Engineers.

<sup>2</sup> The full title of the current edition in conjunction with which the Subcontract is to be used is "Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition, 1987. Reprinted 1988 with editorial amendments, Reprinted 1992 with further amendments".

## ACKNOWLEDGEMENT

This document, written as an article by Christopher Seppala, Partner of White & Case, Paris, and published in the January, 1995 issue of *The International Construction Law Review*, London, has been offered to FIDIC as an "Introduction to the Subcontract" for those seeking guidance to this new FIDIC document. Christopher and Maurizio Ragazzi (formerly of White & Case, now with the World Bank) drafted the FIDIC Subcontract ("Conditions of Subcontract for Works of Civil Engineering Construction") as a two man committee, freely giving their time and energy to FIDIC and the international consulting industry that it represents.

FIDIC is very much indebted to Christopher, Maurizio and White & Case for their Subcontract "donation", and again now to Christopher for offering FIDIC this guidance document. It is through such voluntary efforts of FIDIC's committee members that FIDIC has gained its international reputation for well-balanced contract documents.

Marshall Gysi, Managing Director of FIDIC

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based on the Red Book. The purpose of this article is to provide a brief introduction to this new form of subcontract (the "Subcontract" or "Conditions of Subcontract")<sup>3</sup>

In the discussion below, I shall, first, remind readers of certain features of the Red Book with which the Conditions of Subcontract are meant to operate (Section II), then, briefly describe the drafting process in the preparation of the Conditions of Subcontract (Section III), then, discuss selected clauses of the Conditions (Section IV) and, finally, provide a brief conclusion (Section V)<sup>4</sup>

<sup>3</sup> The Subcontract, like other FIDIC publications, is available from FIDIC, P.O. Box 311, 1215 Geneva 15, Switzerland (tel: (41-22) 799 49 00; fax: (41-22) 799 49 01)

<sup>4</sup> Unless otherwise indicated, the terms with initial capital letters used herein correspond to defined terms in either the Red Book or the Subcontract, or both.

## II. THE RED BOOK: GENERAL REMARKS

The Red Book comprises the following documents: a form of tender, form of agreement, and conditions of contract. The conditions of contract are divided into two parts:

- Part I called "General Conditions", which comprises clauses that are meant to be generally applicable to any contract, and
- Part II called "Conditions of Particular Application", which comprises clauses that may or may not apply, depending upon the circumstances and locality of the applicable project.

The general intention is that, in any given contract, Part I will be used as it is, whereas Part II will be specially drafted to suit the needs of the applicable project.

As its official name implies, the Red Book is for use in connection with all kinds of civil engineering works such as roads and highways, dams, tunnels, harbors and airports. But its use is not limited to such works. It is also widely used for building works for the simple reason, it would appear, that there exists no generally accepted international form of contract for such works.

In the international construction industry, the Red Book is generally accepted, as it is seen as establishing a fair balance in the relationship between the Employer and the Contractor. It provides an international norm or standard, in fact, by which other forms of construction contract are judged. Thus, even when it is not being used for incorporation into a particular contract, it often serves as a point of reference in contract negotiations.

Since the first edition was published, many contractors, engineers and owners have had experience of working with successive editions of the Red Book with the result that its clauses and their particular numbering have become well known in the international construction industry. Furthermore, the Red Book has been the subject of numerous legal commentaries, reported court cases and published international arbitral awards<sup>5</sup>.

FIDIC has itself published an official commentary on the Red Book<sup>6</sup>.

<sup>5</sup> There are two good commentaries on the Red Book in book form, one by an engineer and another by a lawyer; see Noel G. Bunni (a consulting engineer), *The FIDIC Form of Contract*, BSP Professional Books, Oxford 1991, and E.C. Corbett (a lawyer) *FIDIC 4th. A Practical Legal Guide*, Sweet & Maxwell, London 1991. Both books are available from FIDIC.

<sup>6</sup> *Guide to the Use of FIDIC Conditions of Contract for Works of Civil Engineering Construction*, Fourth Edition, published by FIDIC in 1989.

The Red Book is to be distinguished from FIDIC's standard form of conditions of contract for electrical and mechanical works, or "Yellow Book". While the Red Book is for civil engineering work, the Yellow Book is designed for the supply and erection of plant and machinery, such as the turbines and gates of a hydro-electric station (although the Red Book does include provision for "Plant").

As a general rule, the Red Book is used for projects which are let out for international competitive bidding in developing countries which do not have sophisticated procurement laws, or forms of construction contract, of their own. Typically, the Employer will be the state or a state-owned entity while the Contractor and, often, the Engineer, will be from a developed country. While the first edition of the Red Book published in 1957 was derived from an English model (the English Institution of Civil Engineers, or I.C.E., Conditions of Contract), in subsequent editions an effort was made to make the document more "international". Now, despite resistance in some Civil Law countries (e.g., francophone Africa), it is widely used in developing countries around the world. Subject to minor modification, it is specifically approved for use on World Bank-funded projects.

The basic justification for resort to contract conditions like those of the Red Book is that well tested and tried standard conditions, which are widely accepted, will promote more efficient and cost effective construction.

<sup>5</sup> The Red Book, Sub-Clause 1.1(f)(iv).

This is not to say that the Red Book is above reproach. In the author's view, it is still excessively English ("Victorian" might be more accurate) in form and content for a contract that purports to be "international". It makes few, if any, concessions to contracting practices in Civil Law countries, which are different from those in Common Law countries. Moreover, some of its procedures are too complex (e.g., the disputes procedure in Clause 67) and its sentences too long, given that it is intended for use in developing countries, by persons whose native language may not be English. Finally, some may not wish to have their contracts administered by an "independent" (albeit hired and paid by the employer) engineer.

Nevertheless, it is easier to criticize the document than to propose positive improvements to it. The drafting of a form of contract for international use in a field as complex as civil engineering is no small undertaking. When it is appreciated that this has been done to date principally by a few civil engineers working without remuneration, and with little help from lawyers, the achievement is all the more remarkable. Furthermore, the author believes FIDIC is conscious of the above-mentioned criticisms or limitations and will be addressing them in its future work.

<sup>6</sup> The lengthy sentences and somewhat Gothic style derive (like the system for certification by an independent engineer), through the I.C.E. Conditions, from conditions of contract used for civil engineering projects in 19th century England, during the industrial revolution.



The official and authentic text of the Red Book is the English language version. This being so, the format and legal terminology of the Red Book is also that of a Common Law form of contract. Nevertheless, translations of the Red Book into the Arabic, Chinese, Croatian, French, Hungarian, Japanese, Laotian, Polish, Spanish and Turkish languages are also available from FIDIC.

### III. THE FIDIC CONDITIONS OF SUB-CONTRACT: THE DRAFTING PROCEDURE

While the Red Book has been increasingly widely used during the last 20 years, no form of subcontract had been published by FIDIC to go with it. Understandably, therefore, FIDIC has received more and more requests for the issuance of such a form.

Having identified a real need for such a form of subcontract, how was FIDIC to address it?

The Red Book itself did not provide much guidance as it says relatively little about how the Contractor should go about subcontracting work<sup>9</sup>. The only provisions on the subject are the following:

- (a) under Sub-Clause 4.1, the Contractor may not subcontract the whole of the Works and must ordinarily obtain prior consent of the Engineer to subcontract part of the Works (or risk having its employment terminated for default under Sub-Clause 63.1(e));

<sup>9</sup> For an example of a form of main contract which provides for far more regulation and policing of the main contractor's relations with its subcontractors, see AIA Document 201 ("General Conditions of the Contract for Construction", 1987 edition) of the American Institute of Architects, 1735 New York Avenue, N.W., Washington D.C., 20006 U.S.A., especially Article 5, paragraph 9.3.1.2, Article 9.8, paragraph 10.2.1 and Article 14 thereof. In principle, employers and subcontractors are likely to favour more extensive regulation of subcontracting by the main contract.

- (b) under Sub-Clause 4.2, the Contractor must, after the expiration of the Defects Liability Period<sup>10</sup>, assign to the Employer any continuing obligations of Subcontractors;

- (c) Clause 59 relating to nominated Subcontractors, which are of practical importance principally in England and certain former English colonies, e.g., Singapore and South Africa; and

- (d) under Sub-Clause 63.4, in case the Contractor is terminated for default, the Engineer may instruct the Contractor to assign to the Employer any subcontracts (among other agreements for the supply of goods, materials or services) it may have entered into for purposes of the main contract (although, under the present edition of the Red Book, subcontracts are curiously not expressly required to be assignable to the Employer in such a situation).

While the terms of the Red Book themselves did not provide much guidance, as the objective was that the new conditions function in tandem with the Red Book, it followed that the Conditions of Subcontract should be "back-to-back" with the provisions of the Red Book. In other words, the policy of the new Conditions should be, wherever practicable:

- (a) for the Contractor to have, in relation to the Subcontract Works, the rights and obligations (except as to price) of the Employer, and

- (b) for the Subcontractor to have, in relation to the Subcontract Works, the rights (except as to price) and obligations of the Contractor, under the Red Book.

It was also felt desirable to have a form that (subject to minor modification) would be appropriate even where the Subcontractor had been nominated by the Employer, inasmuch as the Red Book contains, as mentioned earlier, a clause (Clause 59) especially addressed to nominated Subcontractors.

With these objectives in mind, it was decided that the "Form of Sub-Contract (September 1991)", issued by The English Federation of Civil Engineering Contractors (the "FCEC form")<sup>11</sup>, should serve as the original model for the drafting of the FIDIC subcontract. Use of this model seemed desirable for two reasons:

Firstly, the FCEC form had been drafted for use in conjunction with the standard I.C.E. Conditions of Contract (the "I.C.E. Conditions"), a standard form that has much in common with the Red Book. Indeed, as

<sup>10</sup> See the Red Book, Clause 49.1.

<sup>11</sup> This form is available from The Federation of Civil Engineering Contractors, Cowdrey House, 6 Portugal Street, London WC2A 2H-I, England (tel: (44-71) 404-40-20; fax: (44-71) 242-02-56).

indicated previously, the early editions of the Red Book were modelled closely on the I.C.E. Conditions. Therefore, as the Conditions of Subcontract are intended for use in conjunction with the Red Book, it was natural to take the FCEC form as a model, especially as, in the absence of a FIDIC form of subcontract until now, the FCEC form, with adaptations, has frequently been used in conjunction with the Red Book on international projects.

Secondly, although issued by an organization of contractors — The English Federation of Civil Engineering Contractors — the FCEC form was felt to be relatively fair as well to subcontractors. Indeed, although not stated in the FCEC form itself, it has been approved by two English organizations of subcontractors<sup>12</sup>.

Having said that, it would be wrong to assume that the Conditions of Subcontract are merely a revision of the FCEC form. By comparison with the FCEC form, they present considerable differences, both in substance and form.

<sup>12</sup> The 1984 edition of the FCEC form, at least, was approved by the Committee of Associations of Specialist Engineering Contractors ("CASEC") and the Federation of Associations of Specialists and Subcontractors ("FASS"); see the commentary on *NEI Thompson Ltd. v. Wimpey Construction UK Ltd.* 39 B.L.R. 65, 66 (1987).

Therefore, as in the case of the Red Book, Part I (the "General Conditions") of the Conditions of Subcontract are meant to be generally applicable while Part II (the "Conditions of Particular Application") should be specially drafted to suit each individual contract, e.g., by providing information to complete, and indicating any changes or deletions in, Part I, the General Conditions.

Second, unlike the FCEC form, in the Conditions of Subcontract each sub-clause has been given a heading, consistent with FIDIC practice. This also makes the Conditions of Subcontract more readily accessible, in that the headings facilitate the reading of this relatively complex document, consisting of almost 70 sub-clauses. In selecting the headings, an attempt was made to adopt the style and wording of the corresponding headings in the Red Book.

Finally, given the need for the Conditions of Subcontract to be "back-to-back" with the Red Book, it was necessary that the language and terminology of the FCEC form be adapted so as to correspond as closely as possible to the language and terminology of the Red Book. Indeed, the need to tie in "back-to-back" with the Red Book (the main contract) precluded consideration of numerous proposals and comments for this form of subcontract which, while good in the abstract, were inconsistent with the language or style of the Red Book.

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As to substance, being essentially a domestic form, numerous changes were necessary to the FCEC form in order to develop a form suitable for international works. For example, unlike the FCEC form, the Conditions of Subcontract contain provisions for Performance Security (Sub-Clause 2.2)<sup>13</sup>, Subcontractor's Programme (Sub-Clause 2.3), Language/s (Sub-Clause 3.1), Governing Law (Sub-Clause 3.2)<sup>14</sup>, Changes in Cost and Legislation (Clause 21) and Currency and Rates of Exchange (Clause 22).

As to form, two major differences relate to the presentation and structure of the new document.

First, unlike the format of the FCEC form, the form of the Conditions of Subcontract is not that of a subcontract with attached schedules, but of "conditions", general and particular, of subcontract. The drafting of "conditions" of subcontract is in accordance with FIDIC practice and with the structure of the Red Book.

<sup>13</sup> The FCEC form contains a different provision providing for an "undertaking" by the Subcontractor; see Article 15(5) thereof.

<sup>14</sup> In the absence of an express choice of governing law, and assuming a subcontract is "back-to-back" with a Red Book-based main contract, then under English law the subcontract is likely to be governed by the same law as the one selected to govern the main contract. See *JMU Contractors Ltd. v. Marples Roadway Ltd.* 31 B.L.R. 100 (1985).

The principal draftsmen of the Subcontract were the present author and Maurizio Ragazzi, both lawyers in private practice in Paris. The drafting was carried out under the general direction of the FIDIC Contracts Committee comprising K.B. (Tony) Norris, consulting engineer, U.K., Michael Mortimer-Hawkins of SwedPower, Sweden and John Bowcock of Sir Alexander Gibb & Partners Ltd., U.K.

Among those consulted in the preparation of the Conditions were the World Bank, the European International Contractors, the European Confederation of Construction Specialists (an organization of subcontractors), the International Bar Association and three independent construction experts external to FIDIC (an engineer, a lawyer and an insurance broker)<sup>15</sup>.

<sup>15</sup> Among those whose contributions were particularly valuable were Mario Asin, a consulting engineer of TAMS USA, Anthony Blackler, a solicitor and partner of Rowe & Maw, London, acting for a subcommittee of Committee T (International Construction Projects) of the International Bar Association, and Edward Corbett, a solicitor, of Corbett & Co., London, acting as one of the independent construction experts.



#### IV. THE FIDIC CONDITIONS OF SUBCONTRACT: DISCUSSION OF SELECTED CLAUSES

As was said earlier, the underlying principle of the Conditions of Subcontract is that, whenever applicable, the terms and conditions of the Red Book (the main contract) flow down to the Conditions of Subcontract. But how does this work in practice?

To consider this issue, we will review certain clauses of the Conditions of Subcontract. The provisions we will examine are Clause 4 (Relationship of the Subcontract to the main Contract), Sub-Clause 7.2 (Extension of Subcontractor's Time for Completion), Clauses 11.2 and 16 (Payment) and Clause 19 (Settlement of Disputes).

##### (1) Clause 4 (Relationship of the Subcontract to the Main Contract)

Few provisions are more regularly the source of disputes in subcontracts than those by which the provisions of the main contract are said to be incorporated by reference, in some manner, into the subcontract. While simple in concept, such provisions are not easy to draft. Yet, if the parts of the main contract to be incorporated are not sufficiently identified or if the purpose of the incorporation is not evident or if the intended operation of the parts of the main contract to be incorporated with that of the subcontract is not sufficiently clear, it will be difficult or impossible to determine which provisions of the main

further provides that the Subcontractor shall be deemed to have full knowledge of the main contract (less details of the Contractor's prices).

Sub-Clause 4.2 then provides that the Subcontractor shall generally have all the obligations and liabilities of the Contractor under the main contract in relation to the Subcontract Works:

"Save where the provisions of the Subcontract otherwise require, the Subcontractor shall so design (to the extent provided for by the Subcontract), execute and complete the Subcontract Works and remedy any defects therein that no act or omission of his in relation thereto shall constitute, cause or contribute to any breach by the Contractor of any of his obligations under the Main Contract. The Subcontractor shall, save as aforesaid, assume and perform hereunder all the obligations and liabilities of the Contractor under the Main Contract in relation to the Subcontract Works."

Sub-Clause 4.3 then provides that no privity shall exist between the Subcontractor and the Employer. This provision will, of course, be subject to the provisions of mandatory law (in the usual case, the law of the place where the Works are being executed). Thus under the laws of some countries (e.g., France and certain countries that derive their law from French law)

contract are part of the subcontract and which are not, leading to disputes<sup>14</sup>.

This matter is addressed in Clause 4 of the Subcontract. Sub-Clause 4.1 provides that the Contractor shall make the main contract, other than details of the Contractor's prices, available to the Subcontractor for inspection and, if requested by the Subcontractor, provide the Subcontractor with a true copy thereof (less price information), at the cost of the Subcontractor. In any event, the Contractor must provide the Subcontractor with a copy of the appendix to tender to the main contract (Red Book) together with Part II of the conditions of the main contract. Sub-Clause 4.1

<sup>14</sup> For an authoritative ruling on the subject of the incorporation of provisions of a main contract into a subcontract, see the decision of the United States Supreme Court in *Guerini Stone Co. v. P.J. Carin Construction Co.*, 240 U.S. 264 (1916). In that case, the subcontract had provided that the work should proceed in a manner "agreeable to the drawings and specifications" in the main contract and the employer had made changes and suspended work under the main contract, as it was authorized to do thereunder. Due to the delays caused by the employer's actions, the subcontractor terminated the subcontract and brought an action for damages against the main contractor. The Supreme Court held that the reference to "drawings and specifications" merely indicated what work was to be done, and in what manner it was to be done, by the subcontractor and that the holding of the lower court that the subcontractor was bound by the main contract (not just the drawings and specifications), so as to be obliged to submit to delays resulting from the actions of the employer, was erroneous. See also T. Bart Gray, *Incorporation by Reference and Flow-Down Clauses*, *The Construction Lawyer* (publication of the Forum on the Construction Industry, American Bar Association) vol. 10, no. 3, August 1990, p. 1.

the Subcontractor may have, by virtue of mandatory law, irrespective of what the subcontract may provide, a right of direct payment from, or direct legal action against, the Employer<sup>15</sup>.

Sub-Clause 4.4 then deals with breaches by the Subcontractor of the Subcontract which cause damage to the Contractor under the main contract. Sub-Clause 4.4 provides:

"If the Subcontractor commits any breaches of the Subcontract, he shall indemnify the Contractor against any damages for which the Contractor becomes liable under the Main Contract, as a result of such breaches. In such event the Contractor may, without prejudice to any other method of recovery, deduct such damages from recoveries otherwise becoming due to the Subcontractor."

<sup>15</sup> E.g., under French law, see Law No. 75-1334 of December 31, 1975, as amended (for a commentary on this law, see the author's *French Law on Subcontracting*, [1991] ICUR 78). Subcontractors also have a right of direct action against the Employer under certain Arab Civil Codes, e.g., Article 565 of the Algerian Code, Article 662 of the Egyptian Code, Article 882 of the Iraqi Code, Article 682 of the Kuwaiti Code, Article 681 of the Libyan Code and Article 628 of the Syrian Code. Under most of these Codes the subcontractor's right is probably mandatory and would, therefore, override a contract provision to the contrary.

Frequently, subcontracts will not contain liquidated damage provisions since the financial consequences of a Subcontractor's delay are often unpredictable and may depend on whether the Subcontractor's work is on the "critical path" of the Contractor's actual progress. For this reason, no liquidated damages clause is contained in Part I of the Subcontract. However, Sub-Clause 4.4 may serve in lieu of a liquidated damage provision as it provides that if the Subcontractor breaches the Subcontract (e.g., by being late for a reason which does not entitle the Subcontractor to an extension of time) then the damages, if any, resulting from the Subcontractor's breaches (including liquidated damages the Contractor may have to pay under the main contract), will be recoverable by the Contractor from the Subcontractor.

However, in the event that it is desired to include a liquidated damages clause in the Subcontract itself, an example liquidated damages clause is contained in Part II, together with proposed language for amending Sub-Clause 4.4 accordingly.

(2) Sub-Clause 7.2 (Extension of Subcontractor's Time for Completion)

Under Clause 44 of the Red Book, where the Contractor has been delayed it may in certain circumstances, upon compliance with stipulated notice provisions, be entitled to an extension of its time for completion.

The extension under the Subcontract cannot (according to Sub-Clause 7.2) exceed the extension of time to which the Contractor is entitled under the main contract.

The Subcontractor is to be advised of relevant extensions under the main contract as Sub-Clause 7.3 provides that the Contractor must notify the Subcontractor of all extensions of time obtained thereunder which affect the Subcontract.

The second case deals with where the Contractor gives an instruction (or confirms an instruction of the Engineer under the main contract) in circumstances which do not entitle the Contractor to an extension under the main contract.

The third case, breach of the Subcontract by the Contractor, requires no explanation.

Sub-Clause 7.2 contains detailed notice requirements designed to ensure that the Subcontractor will give adequate notice to the Contractor of requested extensions in time to enable the Contractor to give proper notice to the Engineer under the main contract (the Red Book).

In parallel with this clause of the Red Book, Sub-Clause 7.2 of the Subcontract provides that the Subcontractor may also, in certain circumstances, be entitled to an extension of time. The Subcontractor is entitled thereto where it has been delayed by any of three specified events or circumstances:

- "(a) by any circumstances in regard to which the Contractor is entitled to receive from the Employer an extension of his time for completion of the Main Works under the Main Contract,
- (b) by any instruction pursuant to Sub-Clause 8.2 to which paragraph (a) of this Sub-Clause does not apply, or
- (c) by any breach of the Subcontract by the Contractor or for which the Contractor is responsible."

The first case is straightforward: it deals with where the Subcontractor has been delayed by an event on the critical path of the Contractor's progress for which the Contractor is entitled to an extension of time under the main contract. The Subcontractor is entitled to an extension of time if the Contractor is entitled thereto<sup>18</sup>.

<sup>18</sup> Note that, as in the case of the FIDIC form (Clause 8(2)), the Subcontractor's right is not dependent upon the Contractor's receipt of the extension. To compare the rule as to payments, see Section IV (3) on page 22.

(3) Clauses 11.2 and 16 (Payment)

The manner of payment of the Subcontract price is perhaps the critical issue in a subcontract for the Subcontractor.

Under any main contract incorporating the Red Book, the Contractor must necessarily assume certain payment risks, including that:

- (i) the Engineer will be late in certifying the Contractor's monthly statements or will not certify them in full, or at all, because it does not accept them, and
- (ii) the Employer will be late in paying certified amounts, or will refuse to pay them in full, or at all, because it disagrees with the Engineer's certification, or becomes unable to pay them because of its financial difficulty, insolvency, bankruptcy, or bad faith.

When subcontracting work, the Contractor will normally endeavor to pass on some portion of these risks (up to the value of subcontracted work) to its Subcontractors by virtue of so-called "pay when paid", "payment on payment" or "if and when" clauses, the precise legal consequences of which are often difficult to



determine". Thus, the Subcontractor may be made to bear some at least of the risk of delay or failure in certification or payment.

<sup>18</sup> Nowhere have such clauses been the subject of more analysis than in the United States, where they have been considered in literally hundreds of reported Federal and State decisions. According to these cases generally, the essential legal issue presented by such clauses is whether they establish a condition precedent to the Contractor's obligation to pay the Subcontractor or, instead, merely regulate the time for payment by the Contractor of the Subcontractor. The majority view (reflecting, I suggest, a policy in those jurisdictions to protect subcontractors, as generally the weaker party) is that they regulate only the time for payment. see *Thomas J. Dyer Co. v. Bishop International Engineering Co.*, 303 F.2d 655 (8th Cir. 1962) and subsequent cases following it. A respectable minority, however, attaches more weight to the precise wording of the clause in question and may be cited for the opposite view that they establish a condition precedent. see *Mascioni v. I.B. Miller* 261 N.Y. 1, 184 N.E. 473 (1933) and subsequent cases following it.

For a recently reported British Commonwealth case which, drawing on the wealth of U.S. case law, gives a useful analysis of "pay when paid" clauses, see *Smith & Smith Glass Ltd. and Winstone Architectural Cladding Systems Limited*, High Court of New Zealand (Master Towle), October 4, 1991 (reported in the *Construction Industry Law Letter*, November 1993, London, page 886).

In some Civil Law jurisdictions, a "pay when paid" clause may be void. Thus, according to some legal authors, it is invalid in French domestic law as it is incompatible with Law no. 75-1334 of December 31, 1975, as amended (referred to in note 17 supra), see Michèle Klein, *L'Assurance-Crédit et les Autres Risques dans le Commerce International*, thesis, Paris, 1983, pages 493-4.

- (b) how the Subcontractor is to be paid for claims under the Subcontract which correspond to claims that the Contractor may advance under the main contract, e.g., under Clause 12 of the Red Book dealing with unforeseeable physical conditions or obstructions.

I shall deal first with the situation of payment for the original Subcontract Works and other amounts regularly payable under the Subcontract.

(a) Subcontract Works (excluding claims for additional payment) (Clause 16)

Under Clause 60 of the Red Book, the Contractor is paid during the progress of the Works based on monthly statements which the Contractor submits to the Engineer for certification. Likewise, Clause 16 of the Conditions of Subcontract provides that the Subcontractor shall submit monthly statements to the Contractor in such manner and time as to enable the Contractor to incorporate these in its monthly statements to the Engineer under Clause 60 of the Red Book.

In the normal situation, the Contractor will incorporate the Subcontractor's monthly statement in the Contractor's own statement under the main contract and the amounts requested by the Contractor (which will include the amounts requested by the Subcontractor) will be certified by the Engineer under the main contract and paid by the

In addition to the payment risks borne initially by the Contractor, the Subcontractor must also bear the risks of late payment and of non-payment by the Contractor itself (even if paid by the Employer) in the event, for example, of a dispute between the Subcontractor and the Contractor or if the Contractor suffers financial difficulty, insolvency, bankruptcy, or is in bad faith.

Given the widespread industry practice world-wide of "pay when paid" clauses, and the no less prevalent view that subcontractors are an abused class entitled to protection, how should a new international form of subcontract address the issue of payments to subcontractors?

Clauses 11 and 16 of the Conditions of Subcontract attempt to answer this question, basically by incorporating the policy already embodied in the FCEC form.

The Conditions of Subcontract distinguish between:

- (a) how the Subcontractor is to be paid for the value of the original Works included in the Subcontract, variation orders instructed by the Contractor and other amounts regularly payable (that is, excluding claims) to the Subcontractor under the Subcontract, and

Employer. Upon receipt of payments from the Employer, the Contractor will then pay to the Subcontractor the amounts due to it.

However, Sub-Clause 16.3 of the Subcontract (like Clause 15(3)(b) of the FCEC form) provides that the Contractor is entitled to withhold or defer payment of any part of the sums due to the Subcontractor on five different grounds. Of these, three are of great practical significance, namely, paragraphs (c), (d), and (e) of Sub-Clause 16.3:

"(c) the amounts included in any Statement [author's note: a monthly statement of the Subcontractor] are not certified in full by the Engineer, providing such failure to certify is not due to the act or default of the Contractor,

(d) the Contractor has included the amounts set out in the Statement in his own statement in accordance with the Main Contract and the Engineer has certified but the Employer has failed to make payment in full to the Contractor, providing such failure is not due to the act or default of the Contractor, or

(e) a dispute arises or has arisen between the Subcontractor and the Contractor and/or the Contractor and the Employer involving any question

of measurement or quantities or any other matter included in any such Statement."<sup>20</sup> (Emphasis added)

Where only a portion of a Subcontractor's monthly statement is questioned, the Contractor may not refuse to pay the balance. Sub-Clause 16.3 expressly provides that any withholding:

"...shall be limited to the extent that the amounts in any Statement are not certified, not paid by the Employer or are the subject of a dispute, as the case may be".

Often the Contractor will withhold payments to the Subcontractor without explaining to the Subcontractor why such payments are withheld. The Subcontractor will thus not know the cause of the delay in payment and, hence, whether he should be entitled to payment. Sub-Clause 16.3 deals with this by providing that, where the Contractor withholds or defers any payment, the Contractor must notify the Subcontractor in writing of his reasons for doing so not later than the date such payment would otherwise have been payable<sup>21</sup>.

<sup>20</sup> The other grounds for withholding payment are where the amounts due are less than the minimum amounts for monthly statements under the Subcontract or main contract.

<sup>21</sup> The requirement that such notification be in writing is provided for in Sub-Clause 1.5.

has been issued (which may be sometime after the Subcontract Works are completed)<sup>22</sup>, the Subcontractor is entitled to be paid the balance of the Subcontract Price, authorized variations and other amounts regularly payable under the Subcontract, whether payment has been certified by the Engineer or not and whether the Contractor has been paid by the Employer or not under the main contract. This is plain from Sub-Clause 16.5 which provides in its entirety, as follows:

"Within 84 days after the Subcontractor has finally performed his obligations under Clause 14 [author's note: this refers to the Subcontractor's obligations after Taking-Over which will normally have been performed after the Defects Liability Certificate under the main contract is issued], or within 14 days after the Contractor has recovered full payment under the Main Contract in respect of the Subcontract Works, whichever is the sooner, and provided that 35 days have expired since the submission by the Subcontractor of his statement of final account to the Contractor, the Contractor shall pay to the Subcontractor the Subcontract Price, and any additions to or deductions from such sum as are provided for in the Subcontract, or are otherwise

<sup>22</sup> See Sub-Clause 60.1 of the Red Book.

Under the Red Book, the Employer is expressly liable to interest at a stipulated rate per annum where the Employer is late in paying certified amounts<sup>23</sup>. Similarly, Sub-Clause 16.3 of the Subcontract provides that, where the Employer has failed to pay any amount the Engineer has certified or the Contractor has failed to pay any amount that is properly due and payable to the Subcontractor, the Contractor will be liable to interest on the overdue amount at the rate payable by the Employer to the Contractor under the main contract.

Sub-Clause 16.3 provides that the Subcontractor must claim for this interest in writing for it to accrue. However, even if the Subcontractor fails to do so, the Sub-Clause provides that the Subcontractor will be entitled to be paid any interest actually received by the Contractor from the Employer attributable to monies due to the Subcontractor.

Thus, so far, it may be said that, as regards the original Subcontract Price, authorized variation orders and other amounts regularly payable to the Subcontractor under the Subcontract, the Subcontractor is to be paid only "if and when" the Contractor is paid. To this extent, the Subcontractor bears the risk of payment delays in respect of the Subcontract works.

However, payments are only on an "if and when" basis temporarily. After the main contract works have been completed and the Defects Liability Certificate thereunder

<sup>23</sup> Sub-Clause 60.10.

payable in respect thereof, less such sums as have already been received by the Subcontractor on account." (Emphasis added).

Thus, as regards the original Subcontract Price, as varied ("additions" or "deductions") and other amounts "payable" in respect of the Subcontract (which would generally exclude the Subcontractor's claims unless they had been accepted by the Contractor, see the discussion of Sub-Clause 11.2 below), less previous payments to the Subcontractor, while the Subcontractor takes the risk of delays in payment by the Employer (although normally being entitled to interest on the overdue amounts), the Subcontractor does not take the risk of the complete failure of the Employer to pay on account, for example, of its financial difficulty, insolvency, bankruptcy or bad faith. The Subcontractor only takes the risk of delays in payment, or failures to pay, of the other party to the Subcontract, namely, the Contractor, as in any contract<sup>24</sup>.

#### (b) Claims for additional payment (Clause 11)

Having dealt with payment of the Subcontract Price and other amounts regularly payable under the Subcontract, what are the Subcontractor's rights with respect to the payment of claims under the Subcontract, which the

<sup>24</sup> Clause 16 is unlikely to exclude the Contractor's right of set off under the Common Law. See *NEI Thompson Ltd v. Wimpsey Construction UK Ltd* (1987) 39 B.L.R. 65 which concerned Clause 15, the corresponding clause in the 1984 edition of the FCEC form.



Contractor may advance under the main contract, such as for:

- unforeseeable physical obstructions or conditions at the site (Clause 12 of the Red Book),
- damage to the works by one of the Employer's Risks (Clause 20 of the Red Book),
- failure by the Employer to give adequate possession of the site (Clause 42 of the Red Book), and
- late issuance of drawings or instructions by the Engineer (Sub-Clause 6.4 of the Red Book)<sup>25</sup>

This subject is addressed in Sub-Clause 11.2. This Sub-Clause requires the Contractor to:

"take all reasonable steps to secure from the Employer such contractual benefits (including additional payments, extensions of time, or both), if any, as may be claimable in accordance with the Main Contract on account of any adverse physical

<sup>25</sup> This list is illustrative only. For a comprehensive list of the claims that the Contractor (and, thus, through the Contractor, the Subcontractor) may assert under the fourth edition of the Red Book, see the author's "Contractor's Claims under the FIDIC Civil Engineering Contract, Fourth Edition". The International Business Lawyer (published by the International Bar Association) 1991, pages 395 and 457.

The Contractor has a duty to keep the Subcontractor regularly informed of his steps to pursue claims under the main contract, which involve the Subcontractor, and to get them settled. Sub-Clause 11.2 provides as follows:

"The Contractor shall notify the Subcontractor regularly of his steps to secure such contractual benefits and of the Contractor's receipt thereof".

Naturally, the Contractor remains liable to the Subcontractor for the Contractor's own defaults, including failure to take reasonable steps to pursue the Subcontractor's claims under the main contract<sup>26</sup>.

The payment scheme described above, which distinguishes generally between the payment of the original Works as varied, on the one hand, and the payment of claims, on the other, generally follows that embodied in the FIDIC form<sup>27</sup>.

#### (4) Clause 19 (Settlement of Disputes)

Sub-Clause 19.1 deals with disputes between the Contractor and the Subcontractor, whereas Sub-Clause

<sup>26</sup> See the last sentence of Sub-Clause 11.2 of the Subcontract. "Reasonable steps" may, as a last resort, include international arbitration.

<sup>27</sup> Compare Clauses 10 and 15 of the FIDIC form.

obstructions or physical conditions or any other circumstances that may be encountered during the execution of the Subcontract Works."

On receiving such benefits, the Contractor must pass on to the Subcontractor:

"such proportion thereof as may in all the circumstances be fair and reasonable",

but that is the limit of the Contractor's liability. If the Contractor is not paid by the Employer for the Subcontractor's claims, despite the Contractor having taken "all reasonable steps", then the Subcontract provides that the Contractor will have no liability to the Subcontractor therefor:

"Save as provided in this Sub-Clause, or in Sub-Clause 7.2 [author's note: dealing with extensions of time], the Contractor shall have no liability to the Subcontractor in respect of any obstruction, condition or circumstance that may be encountered during the execution of the Subcontract Works."

Thus, so far as concerns claims for additional payment, unless the Contractor has accepted them or has been at fault in some manner, the Subcontractor bears the risk of the Employer's failure to pay on account, for example, of its financial difficulty, insolvency, bankruptcy or bad faith.

19.2 deals with disputes between the Employer and the Contractor under the main contract which "touch or concern" the Subcontract Works.

Sub-Clause 19.1 assumes that the Contractor and Subcontractor will be from different countries or will otherwise wish to provide for the international arbitration of their disputes. This will not necessarily be so. They may, for example, both be from the same country and therefore prefer to have recourse to their own national courts or tribunals, even though the Contractor may have agreed to the international arbitration of disputes under the main contract, as provided for by Clause 67 of the Red Book. Where they prefer to have recourse to their own national courts or tribunals, Clause 19 will need to be appropriately modified in Part II.

Sub-Clause 19.1 provides, essentially, that if any dispute arises between the Contractor and the Subcontractor then either may give a notice of the dispute to the other in which case the two parties shall for the next 56 days attempt to settle such dispute amicably<sup>28</sup>. If such dispute is not settled amicably within such period, then it is provided that it shall be finally settled by arbitration under the rules of arbitration of the International Chamber of Commerce, the same rules as are provided for by the Red Book. Arbitration may be commenced before or after completion of the Subcontract Works.

<sup>28</sup> In providing a 56-day period for amicable settlement, Sub-Clause 19.1 corresponds to Sub-Clause 67.2 of the Red Book.

As is well known, the Red Book (Clause 67) provides for a lengthy and complex procedure for the settlement of disputes<sup>29</sup>. Under this procedure, a dispute must first be referred to the decision of the Engineer, who has 84 days to give notice of his decision. Then each party has 70 days thereafter to challenge the decision. A further 56 days must be allowed for amicable settlement before either party may take the matter to arbitration.

Accordingly, to allow time for the procedure in Clause 67 to be completed (which, if the Engineer's decision is favorable to the Contractor, and not objected to by the Employer, would relieve the Subcontractor from going to arbitration), the parties to the Conditions of Subcontract may wish to agree to a longer period than 56 days before either may commence arbitration. For example (and as explained in Part II of the Conditions of Subcontract) a period of 210 days from the date that a party gives a notice of a dispute under Sub-Clause 19.1 would be the sum of the various time periods in Clause 67 (namely, 84 days for

<sup>29</sup> See the author's *The Pre-Arbitral Procedure for the Settlement of Disputes in the FIDIC Civil Engineering Conditions of Contract*, [1986] ICLR 316 (for a commentary on the procedure in the third edition of the Red Book); *Id.*, *The Principal Changes in the Procedure for the Settlement of Disputes* (Clause 67), [1989] ICLR 177 (for a commentary on the changes effected in such procedure by the fourth edition); and *Id.*, *Pre-Arbitral Decisions and their Impact on the Arbitration: the Decisions Made by the Consulting Engineer in International Council for Commercial Arbitration Congress Series no. 5 (Effective Proceedings in Construction Cases)*, Kluwer, The Netherlands 1991, p. 377.

the Engineer's decision, plus 70 days for the notice of intention to commence arbitration, plus 56 days for reaching an amicable settlement) before arbitration may be commenced thereunder.

Sub-Clause 19.2 provides that, if a dispute arises between the Employer and the Contractor in connection with the main contract and the Contractor is of the opinion that such dispute "touches or concerns the Subcontract Works"<sup>30</sup> and an arbitration of such dispute under the main contract commences, then the Contractor may require the Subcontractor to provide information and attend meetings in connection with the arbitration. As the Subcontractor's rights against the Contractor may, to some extent at least, depend upon the outcome of that arbitration (e.g., in the case of the Subcontractor's claims for additional payment under Clause 11 of the Subcontract), the Subcontractor will ordinarily have an incentive to provide the Contractor with all due assistance.

Although both the Red Book and the Conditions of Subcontract provide for the final settlement of disputes by ICC arbitration and although it may be highly desirable for disputes under both contracts to be finally settled in certain instances (e.g., where they involve common questions of law and fact) in a single ICC proceeding, paradoxically there is no means under the ICC Rules themselves for ensuring that this will occur.

<sup>30</sup> This expression is taken from the FCEC form, Article 18(B).

There is no provision under the ICC system for the joinder by the ICC International Court of Arbitration of claims arising in separate proceedings except in the very rare instance where they arise out of the same contract ("legal relationship") and between the same parties<sup>31</sup>. Disputes under the Red Book and Conditions of Subcontract would arise neither out of the same contract nor between the same parties.

In the absence of an appropriate provision for joinder in the ICC rules, there is, of course, nothing to prevent an Employer, a Contractor and Subcontractor, at the contract negotiation stage, from agreeing on a provision for the multi-party arbitration of disputes among the three of them. However, the possibility of multi-party arbitration is not envisaged by the current edition of the Red Book presumably because, when this edition was prepared in 1987, no FIDIC form of subcontract then existed. As this edition does not envisage multi-party arbitration nor provide even for the possibility of the Employer's consent thereto, no multi-party arbitration clause is provided for in the Conditions of Subcontract. (But parties are not prevented from providing for the multi-party arbitration of disputes under the Red Book and the Conditions of Subcontract, should they choose to do so in Part II of those documents.)

<sup>31</sup> In addition to these requirements, the Terms of Reference must not yet have been signed. See Article 13 of the Internal Rules of the International Court of Arbitration.

However, while the drafting of such a multi-party arbitration clause is often attempted, in the author's experience, such attempt is rarely successful due to underestimation of the difficulties involved. In order that parties may be better prepared should they wish to draft a multi-party arbitration clause, Part II of the new Subcontract includes a list of some of the principal issues or matters that will need to be considered<sup>32</sup>:

- (1) The consent of the Employer, the Contractor and the Subcontractor to multi-party arbitration will be required.
- (2) The multi-party arbitration procedure must tie in with the procedure under the Red Book requiring the reference of a dispute to the Engineer under Clause 67 as a condition precedent to arbitration.
- (3) A test in the form of words must be developed for determining when a dispute under the Subcontract is to be deemed sufficiently similar to a dispute under the Red Book to be referable to arbitration under the Red Book (assuming the dispute is to be resolved under the dispute resolution provisions of the main contract).

<sup>32</sup> This list owes much to a stimulating paper by Humphrey Lloyd, Q.C. (now His Honour Judge Humphrey Lloyd, Q.C.) entitled "A National Experience" contained in Chapter 2 "Multi-party arbitral clauses and conventions" of a dossier entitled "Multi-party Arbitration - Views from International Arbitration Specialists" of the Institute of International Business Law and Practice published by the International Chamber of Commerce, Paris, 1991, pp. 61-79.



For example, will it be sufficient to state that a dispute in connection with or arising out of the Red Book "touches or concerns the Subcontract Works" or presents "common issues of law and fact" with a dispute under the Subcontract?

- (4) As a practical matter, someone — perhaps the Contractor — will probably have to be given the power to decide when the test is satisfied, that is, when the disputes under the two contracts are to be deemed sufficiently similar to justify being heard in one arbitration under the Red Book. If someone is not designated to have this power, the issue would normally fall to be decided by the competent courts, resulting often, as a practical matter, in much delay.
- (5) A determination will have to be made as to the action (e.g., a notice to the other parties) which must be taken to permit the hearing of the two disputes in a single arbitral proceeding.
- (6) A determination will have to be made as to when action must be taken to permit the joint hearing of the two disputes. Before arbitrators are appointed in any Red Book proceeding? Earlier than that?
- (7) A decision must be made as to the maximum number of parties that would be acceptable in any multi-party arbitration proceeding:

- (a) horizontally, all subcontractors of the Contractor in relation to the project; and
- (b) vertically, subcontractors, sub-subcontractors, and so on down the line?

To the extent any multi-party arbitration will include parties in addition to the Employer, the Contractor and the Subcontractor, the participation of those parties must also be consented to by all the parties involved in the proceeding.

- (8) The procedure for appointing the arbitral tribunal so as to ensure equal treatment of all parties<sup>33</sup>.
- (9) As yet, no international arbitration rules (e.g., ICC or UNCITRAL) address satisfactorily multi-party arbitration problems.

As an alternative to a multi-party arbitration, the parties may wish to provide for separate Red Book and Subcontract arbitrations but arrange for some or all of the arbitrators to be common to both proceedings.

<sup>33</sup> See in this connection the decision of the French Supreme Court in *Siemens AG and BKMI Industrieanlagen GmbH v. Dutoo Consortium Construction Company Ltd.*, Cass. Civ. 1ère, January 7, 1992 and the author's commentary on that decision, *French Supreme Court Nullifies ICC Practice for Appointment of Arbitrators in Multi-Party Arbitration Cases* [1993] ICCLR 222. Item (8) is, in fact, additional to the list of items in Part II of the Subcontract, which is not exhaustive.

The foregoing indicates some of the complexities involved in providing for the resolution of multi-party disputes under the Red Book and the Subcontract by international arbitration. Much more work needs to be done by the international arbitration community<sup>34</sup> and the international construction industry before satisfactory standardized solutions are available<sup>35</sup>.

<sup>34</sup> Despite years of effort, a Working Party on Multi-party Arbitration set up by the ICC Commission on International Arbitration achieved little more in its Final Report than to describe the problems and complexities of multi-party arbitration under the ICC Rules, many of which were already well known. Although the existing constraints on multi-party arbitration seriously hamper the development of international arbitration, regrettably, the Working Party was unable to present any practical solutions to those problems, such as changes in or improvements to the ICC's Arbitration Rules or to ICC procedures. See the ICC Commission on International Arbitration's Final Report on Multi-Party Arbitrations (Report by the Working Group approved by the Commission submitted to the 77th Session of the Executive Board, Paris, 14 June 1994) ICC, Paris 1994.

<sup>35</sup> Although there has been no opportunity in this Article to discuss Clause 17 ("Termination of Main Contract") of the Subcontract, it may be noted that the difficulty that arose in *E.A. Dyer Ltd. v. The Simon Build/Peter Lind Partnership*, 23 B.L.R. 23 (1982) in relation to the corresponding Clause of the FCEC form (Clause 16) should not arise under the Subcontract. In that case, following the Employer's termination of the Contractor's employment under Clause 63 of the ICE Conditions (which is very similar to Clause 63 of the Red Book), the Contractor maintained that the main contract had been determined (terminated) and that therefore it was entitled, under Clause 16 of the FCEC form (which refers to "(i) If the Main Contract is determined for any reason whatsoever", to terminate the employment of the Subcontractor without being liable for profit on the balance of the work as provided for in Clause 16. The arbitrator held that this was wrong (and the court refused leave to appeal from his decision) as the main contract had not been terminated — only the contractor's employment had been terminated — and therefore Clause 16 did not apply.

As Clause 17 of the Subcontract provides that the Contractor

(...suite)

may terminate the Subcontractor's employment whether the Contractor's employment under the main contract is terminated or the main contract is itself terminated, the difficulty that arose in *E.A. Dyer* in relation to Clause 16 of the FCEC form (from which Clause 17 is derived) should not arise under the Subcontract.

## V. CONCLUSION

The Conditions of Subcontract represent the first attempt by FIDIC to draft a form of subcontract to function "back-to-back" with the Red Book. As the Conditions of Subcontract must tie in with, and be subordinate to, the Red Book, there has been little room for innovation. Consequently, FIDIC has largely had recourse to provisions or procedures that are in current use in the FCEC form or the Red Book, which have hitherto proved workable.

If the Conditions of Subcontract provide a serviceable form of subcontract for the current edition of the Red Book, they will have accomplished their purpose. When the Red Book is next revised, consideration should be given to the desirability of more extensive treatment of subcontracting in the Red Book. This, coupled with experience of the use of the Subcontract in practice, should contribute to improving the Subcontract in future.

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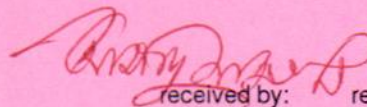
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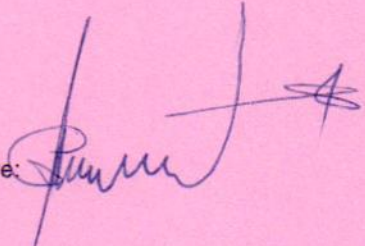
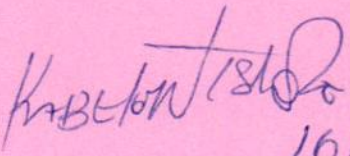
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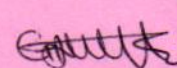
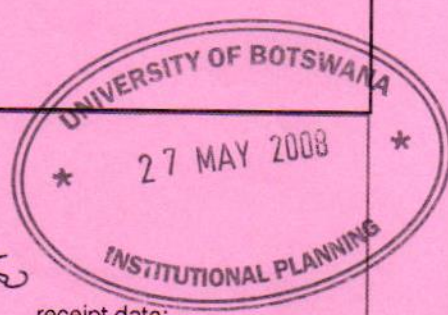
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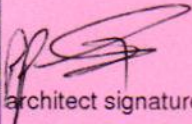
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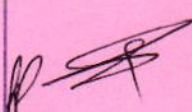
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FOR : \_\_\_\_\_

FROM:

Megan Kelosiwang

OF:

Paul Monnik Architect

TELEPHONE NO:

71413357

- ☐ Telephoned  
☐ Called to see you

- ☐ Please phone back  
☐ Desires appointment

- ☐ Returned your call  
☐ Will phone back

MESSAGE : \_\_\_\_\_

-email electronic copy BDP-WTH  
to megan@pma.co.bw  
cc paul@pma.co.bw.

Received by: \_\_\_\_\_ Time & Date: \_\_\_\_\_

**CROXLEY**

JD 197





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Delivered by D 7



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Phone and fax: (+267) 397 1161

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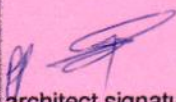
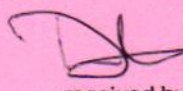
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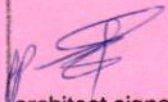
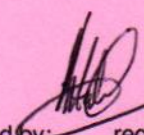
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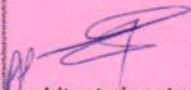
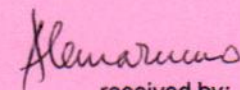
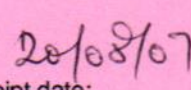
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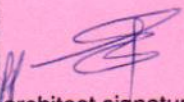
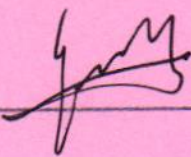
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date: 15/08/07		by: hand	
to: G Vlug			
project: BIDP Contract Review Committee		file: (A0kp)02	
no.	drawing		
off	no.	revision	title
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Attached are the following forms:			
Certificate for payment (sample)			
Domestic sub-contract			
architect signature:		received by:	receipt date:
			16/8/7
issued to: other			





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date: 15/08/07		by: hand <i>Post</i>	
to: M Yates			
project: BIDP Contract Review Committee		file: (A0kp)02	
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Certificate for payment (sample)			
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Domestic sub-contract			
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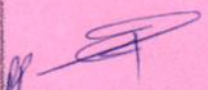
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Certificate of Practical Completion			
Certificate of Making Good Defects			
Domestic sub-contract			
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**TURNKEY CONTRACTING UNDER  
THE FIDIC SILVER BOOK:  
WHAT DO OWNERS WANT?  
WHAT DO THEY GET?**

*A paper presented to a meeting  
of the Society of Construction Law  
in London on 2nd April 2007*

**Jonathan Hosie**

August 2007

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# TURNKEY CONTRACTING UNDER THE FIDIC SILVER BOOK: WHAT DO OWNERS WANT? WHAT DO THEY GET?

Jonathan Hosie

## Introduction<sup>1</sup>

This paper concerns turnkey contracting and asks the questions 'What do owners want? What do they get?' The analysis is given a contractual setting by reference to the FIDIC (International Federation of Consulting Engineers) *Conditions of Contract for EPC Turnkey Projects*, otherwise known as the Silver Book.<sup>2</sup> Reference was also made to the ICC (International Chamber of Commerce) *Model Contract* (2003) when this paper was first planned, though the ICC's new *Model Contract for Major Projects* has not yet (August 2007) been published.<sup>3</sup>

The FIDIC Silver Book was produced in 1999, in response to a perceived need for a form of contract 'where certainty of final price, and often of completion date, are of extreme importance'.<sup>4</sup> Its publishers also recognised that turnkey projects are popular in project financed deals, where lenders require greater certainty about a project's final costs than is allowed for under contracts that reflect the traditional allocation of risks, such as FIDIC's Red and Yellow Books.<sup>5</sup>

The introductory notes to the Silver Book further recognised the practice that prevailed prior to its publication, namely for parties to take the pre-1999 versions of the FIDIC Red or Yellow Books and alter these in order to transfer significant additional risks to the contractor, in an attempt to obtain a higher level of assurance as to outturn cost, quality and time.

- 1 The views expressed in this paper are personal to the author and are not intended to be imputed to Mayer, Brown, Rowe & Maw LLP or to any client of that firm.
- 2 FIDIC 1999 suite of standard forms (eg *Conditions of Contract for Construction* (new Red Book), *Conditions of Contract for Plant and Design-Build* (Yellow Book), *Conditions of Contract for EPC Turnkey Projects* (Silver Book)), obtainable via [www.fidic.org](http://www.fidic.org). Direct quotations from the FIDIC Silver Book in this paper, as from all standard forms, retain the formatting of the original.
- 3 *The ICC Model Contract for the Turnkey Supply of an Industrial Plant* was first published in 2003 (ICC Publication 653, obtainable from [www.iccbooks.com](http://www.iccbooks.com)). The ICC's Task Force on turnkey transactions, under the Commission on Commercial Law and Practice (CLP), has drafted the *ICC Model Turnkey Contract for Major Projects* (due for publication later in 2007), designed to be more suitable for large civil works or for contracts for the supply of plant, where the contractor undertakes to supply a complete facility.
- 4 Introductory note to First Edition of FIDIC Silver Book (see note 2).
- 5 See note 2.

This paper looks at some aspects of turnkey contracting at the macro level and, in terms of specific features of the FIDIC Silver Book, at certain issues at the micro level. The thesis developed is that owners do not get the turnkey solution they want. This is primarily because a turnkey solution is not as simple as it sounds, due to the inevitable complexities of large projects and the decreased risk appetite of contractors in the global projects arena. There is a shortfall between expectation and actuality in many of the FIDIC provisions, which means that the appearance of risk transfer to the contractor is not as complete as might be suggested by FIDIC using 'Turnkey' to describe the Silver Book.

## **Turnkey contracting**

The idea behind the turnkey approach, putting it crudely, is for the contractor to be given the job to engineer, procure and construct the required works and then, once ready for operations, to hand over the keys to the owner so that it may operate the facility. Turnkey, in principle, means a contract whereby the contractor provides whatever is necessary for a certain purpose.

Turnkey contracting is sometimes also referred to as 'Lump Sum Turnkey' or 'LSTK', emphasising the intended bargain of the parties, with responsibilities allocated to the contractor to deliver the project on time and to a required performance level, in return for payment of a fixed price. A lump sum turnkey price will include contingency allowances to hedge against the risk of things costing more or taking longer to deliver. Owners expect to pay a premium for a turnkey contract.<sup>6</sup>

Another acronym seen frequently in this context is EPC: 'Engineer, Procure and Construct'. Thus, an EPC contractor is responsible for the engineering design of the works, its procurement and subsequent construction.<sup>7</sup> Indeed, the Silver Book's full title is 'Conditions of Contract for EPC Turnkey Projects'. Thus it uses the terms EPC and turnkey interchangeably, meaning the same thing.

A feature of the turnkey approach to contracting, including revenue-generating facilities, is the requirement for the contractor to prove the reliability and performance of the plant and equipment. Thus particular prominence is given in the drafting of turnkey contracts to the testing, commissioning and handover of the works and how this is to be undertaken. Such approaches are common in process engineering projects, where the output may be energy generation, water treatment, petrochemicals or natural resource processing (mining). It is of critical importance in such projects not only for the project to be delivered within time and cost constraints but also to be delivered so that it is capable of meeting its designed production and output levels.

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6 However, it is increasingly common for turnkey contracting to be based on, or involve, an initial cost reimbursable or target cost element. See also notes 7 and 12.

7 The acronym 'EPCM' is also encountered frequently on international projects, but this is very different from EPC. EPCM is a services-only contract, under which the contractor performs engineering, procurement and construction management services.



Performance of the asset is particularly key in those turnkey projects which are funded through project financing, where the lenders' security depends largely on the ability of the completed facility to operate and generate revenue, whether power, chemicals, processed metals or road toll revenue. This prominence is reflected in the General Conditions of the FIDIC Silver Book: the 'Time for Completion' of the works includes not simply completing the works so that the owner can take them over, but also 'achieving the passing of the Tests on Completion'.<sup>8</sup>

Against this background, we can start to ask (and suggest some answers to the question): 'What do owners want?'

### **Projects have a large number of moving parts**

A point worth stressing at the outset is perhaps obvious, but nonetheless important. This is the fact that a turnkey contract will be but one part of the contractual framework and one component of the risk management arrangements used on any large project. Thus, the extent to which risk is allocated to the contractor under turnkey arrangements will depend upon a range of other factors, including the availability and strengths of guarantees from the project's sponsors. Where a sponsor will not provide any, or only a limited form of, completion guarantee to lenders, this obviously increases the need to allocate completion risk away from the sponsor. In these circumstances, the obvious candidate for the risk, given that it will be in the best position to manage it, will be the turnkey contractor. The turnkey contract is the means by which the risk is allocated.

A linked point is that projects commonly require a range of skills and products which are not always available from a single turnkey contractor. By way of example, large petrochemical projects may have a series of turnkey contracts for various technologies represented by different process units, plus an infrastructure or utilities turnkey contract. Each process unit will be engineered, procured and constructed by a different turnkey contractor, working alongside each other, albeit within the site locations or 'battery limits' of their respective process plants.<sup>9</sup>

The key risk in any construction project is *completion risk* – that the works may not be completed:

1. Within the agreed lump sum price; or
2. Within the agreed time scale programme; or
3. To the required performance quality.

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<sup>8</sup> Clause 8.2 of the FIDIC Silver Book (see note 2).

<sup>9</sup> For the US\$5bn SABIC petrochemical project in Saudi Arabia, turnkey contracts were entered into for various plants forming the project, including Technip for the olefins plant; Toyo for the glycol ethylene plant; Aker Kvaerner and Sinopec for the polyethylene and polypropylene plants; and Foster Wheeler the project management, plus utilities and offsites.



In a turnkey arrangement, it is the contractor who has responsibility for and control over (at least in theory) each of these elements of completion risk. However, even at this fairly fundamental level, difficulties can be encountered depending upon the sources of information that make up the design for certain plants which may threaten the intended turnkey product the owner is procuring.

The idea that turnkey contracting provides the owner (and its lenders) with single-point responsibility is attractive, because it suggests that costly disputes and recourse difficulties when something goes wrong will not be increased by arguments within the supply chain as to who may be at fault. However, and as noted above, large projects will frequently involve a number of turnkey contractors undertaking different parts of the overall project, each according to its own specialist skills.

Further potential for interface clashes (and additional erosion of the single-point responsibility quality that owners expect from a turnkey solution) arises where a plant contains one party's proprietary technology but is otherwise delivered by another contractor. In these circumstances the so-called 'turnkey' contractor will not necessarily be willing to provide the full wrap in terms of assuring the outturn performance of the plant. This can be seen particularly in the petrochemical sector, where process units often involve the use of technology owned and licensed by third parties. If the third party company which owns the technology licence is not the same company that undertakes the works under turnkey terms, there is an obvious difficulty in obtaining a single-point responsibility wrap under one contract from one EPC contractor.<sup>10</sup>

### **Impact of an over-heated market**

Another factor that militates against some of the perceived advantages of turnkey contracting is that of market pressure. At the time of delivering this paper, it is probably no exaggeration to state that the global construction economy is overheating. Demand for construction goods and services is high, driven particularly by the industrialised growth of large economies in both the People's Republic of China and in India.

This demand (and the high price of crude oil) is also driving the further exploitation of raw materials and processed goods. Thus, the mining sector has, over the last 18 months, enjoyed a significant resurgence, which has led to a large number of new and old reserves being developed. Equally, petrochemical companies have seen a series of mega-projects in areas close to feed stock supplies in the Middle East, as global construction activity drives the demand for products such as polyethylene, polypropylene and other processed carbon derivatives.<sup>11</sup>

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10 The turnkey contractor may well seek to carve out from its liability problems arising due to technology performance, or to cap its liability by reference to the recourse available from the technology provider.

11 *Plastics & Rubber Weekly* (3rd February 2007 and 22nd May 2007 – see [www.prw.com](http://www.prw.com) – reported that Nova Innovene will de-bottleneck all its expandable polystyrene (EPS)



These market pressures are having a big impact on the risk appetite of the turnkey contracting market (as well as on prices and programmes, as the entire supply chain feels the strain of excess demand). In particular, the decreased appetite for risk amongst contractors means that it is no longer a feasible procurement strategy to transfer all completion and other risks to the turnkey contractor. Different sorts of deals are being engineered, notably ones where contractors are engaged effectively on a two-stage basis, the first stage being a reimbursable Front End Engineering Design ('FEED') contract. During this stage, the contractor undertakes its design, obtains firm vendor quotations, maybe even places orders for certain long lead equipment and generally firms up on the scope of supply. When the contractor can be sufficiently certain as to the scope of design and expected outturn cost and date for completion, such matters may then become fixed as the contract is 'converted' into an LSTK or turnkey arrangement.<sup>12</sup>

Such arrangements may be engineered through a single contract, containing a mechanism to convert the contract from a reimbursable to a fixed LSTK basis. Alternatively, owners and their preferred contractors may enter into a separate FEED contract which, once completed, can form the basis of the parties entering full EPC terms. However, in the latter case owners will seek to find some enforceable mechanism to help ensure that the contractor will enter into the LSTK arrangement (with all its attendant risks). Otherwise the owner's preferred contractor may seek to re-negotiate underlying terms and conditions under the full EPC contract to reduce its overall risk.

### **A scoresheet for the FIDIC Silver Book**

Against the background of all these issues, it may be instructive to see how the FIDIC Silver Book Conditions deal with such matters. As a general rule, FIDIC discourages amendments to its forms. However, market practice (for better or for worse) is to amend these documents to cater for issues which commonly arise in practice; and, of course, to take account of the particular features of each project.

Rather than reviewing the entire provisions of the FIDIC Silver Book, this paper concentrates on a number of key areas. First to be considered is how unforeseen ground conditions are dealt with. The second is how design liability risks are addressed. Also reviewed are the arrangements for testing, completion and taking over of the plant. The analysis concludes by considering force majeure, limitations on liability and extension of time provisions.

This review establishes that there is probably a shortfall between expectation and actuality when the FIDIC Silver Book is used: risk is not fully transferred to the contractor (absent further amendment to the contract conditions).

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production units in Europe to boost output, and will increase its production capacity. Demand for this product is expanding, driven by the buoyant construction market.

12 For a more in-depth look at such procurement strategies, see Philip Loots and Nick Henchie, 'Worlds Apart: EPC and EPCM Contracts: Risk Issues and Allocation', [2007] ICLR 252.



Overall, this bears out the proposition that owners who opt for the turnkey approach using the FIDIC Silver Book do not get what they want.

### **Unforeseen ground conditions<sup>13</sup>**

The approach taken by standard forms of engineering contract to unforeseen ground conditions has, traditionally, been to adopt a test of foreseeability. Thus, clause 12 of the ICE Conditions provides:

'If during the carrying out of the Works the Contractor encounters physical conditions (other than weather conditions or conditions due to weather conditions) or artificial obstructions which conditions or obstructions could not, in his opinion, reasonably have been foreseen by an experienced contract, the Contractor shall as early as practicable give written notice thereof to the Employer's Representative.'<sup>14</sup>

The FIDIC forms were originally based on the ICE Conditions of Contract.<sup>15</sup> Thus it is not surprising that under the FIDIC Red and Yellow Books this traditional foreseeability test is applied. Clause 4.10 of those FIDIC forms requires the employer to have made available all relevant data in his possession on sub-surface conditions, not later than 28 days prior to the submission of the tender. Clause 4.11(b) then provides that the contractor is deemed to have based the contract amount on such data. The owner warrants the accuracy of the information he has provided and the contractor is only responsible for interpreting the data. Further, under the FIDIC Red and Yellow Books the contractor is deemed to have obtained all necessary information as to risks which may influence or effect his tender for the works. He is also deemed to have inspected and examined the site and other available information. However, these deeming provisions are limited to the extent that the investigation by the contractor is practicable, taking into account cost and time.

On the allocation of risk for unforeseen ground conditions, the FIDIC Red and Yellow Books thus adopt the ICE clause 12 approach: the owner carries the risk of physical conditions which could not have reasonably been foreseen by an experienced contractor at the date of tender.

The FIDIC Silver Book, in keeping with its turnkey approach to risk allocation, takes this one important step further. Whilst the owner provides information to tendering contractors, it is the contractor who is responsible for verifying, as well as interpreting, that data. There is no warranty by the owner as to the sufficiency or completeness of the information provided. Under the Silver Book, the risk of adverse ground conditions is intended to be allocated

13 See also Julian Bailey, 'What Lies Beneath: Site Conditions and Contract Risk', Society of Construction Law Paper 137 (May 2007).

14 Institution of Civil Engineers, *ICE Conditions of Contract 7th ed* (ICE7), Design and Construct version, London, ICE/Thomas Telford (2001).

15 Indeed, editions of FIDIC forms have followed the lead of newer editions of the ICE forms and vice versa. As Edward Corbett notes in the introduction to his book, *FIDIC 4th: A Practical Legal Guide*, London, Sweet & Maxwell (1991), the drafting of the FIDIC Red Book 4th edition was heavily influenced by the ICE 5th edition, after which the ICE's own 6th edition adopted some of the innovations introduced by the FIDIC 4th.



to the contractor. Clause 4.12(c) provides a catch-all statement to the effect that the contractor accepts responsibility for having foreseen all difficulties and costs, even those not actually foreseeable:

'The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs.'

It will not be surprising to learn that, in practice, the provisions of the Silver Book are commonly subject to heavy negotiation between the parties. This is particularly so in the current global construction market, where contractors' appetite for risk is much reduced by the sheer volume of work opportunities available. At this point the expectation of owners that they will receive turnkey assurance starts to dissipate. In relation to unforeseen ground conditions, this may occur in a variety of ways:

- One device is simply to revert to the more traditional test of foreseeability so that the risk of the unforeseeable remains with the owner.
- Another is for the risk to be taken by the contractor, but only after it has had ample opportunity to satisfy itself as to risks, contingencies and other circumstances concerning the site conditions. This would be commonly undertaken during the FEED stage, where testing is undertaken on a reimbursable basis (ie paid for by the owner), so that the contractor can take an informed view as to the likelihood of there being adverse ground conditions.
- A further variant on this is to take the existence of ground condition reports and all the surveys and to use these to extrapolate assumed conditions. If variances are found in practice from the assumed conditions which affect time or cost, their impact is allocated back to the owner, rather than transferred to the contractor.

Thus and in a number of ways, the global projects market finds ways around the standard form risk allocation represented by the FIDIC Silver Book conditions. Such approaches tend to ameliorate the rigidity of the turnkey solution: a number of risks remain with the owner.

### **Design liability**

In the same way that unforeseen ground conditions may impact the certainty as to outturn of the contract price and time for completion, the issue of design liability can play a major role in determining the extent to which the turnkey solution is deliverable.

Again, and as noted in the introduction to this paper, turnkey arrangements necessarily suggest that the contractor is required to take full responsibility for the entirety of the design of the works. This will often be a point of contention, particularly where initial design work has been undertaken on behalf of the owner, such designs being provided to the contractor during the tender stage with the requirement that it is to take on full responsibility for design.

Numerous disputes arise in practice where there are changes in the design of the works following award of the contract. Such variations in design will be argued to give rise to relief for the contractor in terms of time and money entitlement. The counter-argument to this (in the case of changes in design) is to characterise the change as simply design development, which does not serve to increase the contractor's entitlement to time or money. It may be instructive to consider clause 5.1 of the FIDIC Silver Book, which addresses general design obligations:

'The Contractor shall be deemed to have scrutinised, prior to the Base Date, the Employer's Requirements (including design criteria and calculations, if any). The Contractor shall be responsible for the design of the Works and for the accuracy for such Employer's Requirements (including design criteria and calculations), except as stated below.'

Having established this deemed universe where the contractor has scrutinised the owner's designs (presumably to verify and satisfy itself, although this is not stated explicitly),<sup>16</sup> the Silver Book pushes home the point further, clause 5.1 going on:

'The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information, except as stated below. Any data or information received by the Contractor, from the Employer or otherwise, shall not relieve the Contractor from his responsibility for the design and execution of the Works.'

The rest of the same clause then goes on to carve out from those matters for which the contractor is responsible a number of matters for which the owner retains responsibility; but the list is very limited in scope. Hence the approach of the FIDIC Silver Book is for the EPC/turnkey contractor to create a single design liability wrap around the project, the contractor being responsible for both the integration of the design and the construction of the works.

However, in practice this risk allocation is frequently changed. Depending on the market, the change may increase the risk to the contractor; or increase the extent of the carve-out in respect of liability for which the contractor is not liable, thereby decreasing the contractor's risk. Conversely, there may be other provisions in the contract, such as notes on drawings or process diagrams forming part of the employer's requirements, that indicate that the design has not yet been fixed and remains to be confirmed, say by the equipment vendors.

Owners may seek to tighten up and improve on such provisions by using devices seen elsewhere in the FIDIC Silver Book (as well as in the ICE

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16 In *Co-operative Insurance Society v Henry Boot (Scotland) Ltd* [2002] EWHC 1270 (TCC), 81 Con LR 164, 19 Const LJ 109, Judge Richard Seymour QC held that an obligation for a contractor to 'complete' the design provided by an owner necessarily imported a duty for the contractor (under the JCT80 contractor design supplement form) to use reasonable care to verify the adequacy of that design.



forms), namely further deeming provisions. Thus, clauses that deal with the sufficiency of the contract price and all of the risks, contingencies and other factors that the contract is deemed to make allowance for, help ensure that the owner has an LSTK assurance from the contractor. The FIDIC Silver Book scores well in this aim.

Of course, it is a matter for negotiation on each project exactly how complete a design liability wrap can be achieved. In a particularly soft market where contractors and equipment vendors are in short supply and high demand, owners will face substantial resistance to their attempts to achieve the full wrap. Equally, such risk transfer may be agreed, provided the financial risk contingency for the obligation is sufficiently generous to persuade the contractor to do so.

At the macro level on large projects, one also sees that the contract structure adopted for delivery of the project also militates against the turnkey assurance. This is because, as previously noted, large projects will frequently be delivered by a number of different EPC/turnkey contractors. That creates interface issues, which means it is just not possible to have one EPC/turnkey contractor giving a single-point responsibility risk assurance wrap for the entire project.

### **Handover, testing and commissioning**

If one starts from the proposition that owners want an LSTK product, then that assumes that the owner allocates to the contractor control of the works up to the point at which the contractor hands over the keys. Is this realistic on projects for which the FIDIC Silver Book is adopted?

In many cases, the owner does not want to wait to take over the plant (in the sense of having control) only after the plant is tested, commissioned, performance-tested and ready for start-up. Often the owner will in fact be an experienced operator of the plant. It will therefore want its own people operating the plant as soon as it is able. In the energy sector, it will want to start selling electricity as soon as it is being generated following commissioning, but often prior to performance testing. In the petrochemical sector, owners will want this level of control at the point at which hydrocarbons are introduced into the various systems making up a plant. For mining projects, the same applies in relation to the start-up and commissioning activities where ore enters the processing plant to be treated. Whether it is the generation of electric current or the introduction of the hydrocarbons or ore into the processing system, at this point the plant will simply be at the stage of testing and commissioning. The project will not yet have reached final completion and passed its performance tests.

How does the FIDIC Silver Book address the issue? The short answer is that it does not. The Silver Book simply moves through the stages whereby the plant is first engineered or designed (clause 5, *Design*), to how it is to be constructed (clause 7, *Plant, Materials and Workmanship*, and clause 8, *Commencement, Delays and Suspension*), then on to what would normally be mechanical completion (clause 9, *Tests on Completion*). It then deals with the



process of handover to the owner (clause 10, *Employer's Taking Over*). Following this, it provides an option for further testing (clause 12, *Tests after Completion*).

The FIDIC Silver Book does not deal explicitly with the issue commonly encountered on many large projects: the need for provisions to reflect the pre-completion control required by the owner. The testing and commissioning of plant is always a risky enterprise: vessels and pipework are pressurised and 'hot' testing may be implemented. This is an important issue, because control brings with it responsibility and risk. This has contractual implications (eg possible triggering of warranty or defects liability provisions), as well as impacting on insurance coverage (signalling, potentially, the end of the contractor's All-Risk cover and the commencement of the Operational or Business Interruption cover). This is another area where it is suggested that owners do not get what they want (in the absence of amended provisions to deal with the issue).

Clause 17 (*Risk and Responsibility*) and clause 18 (*Insurance*) will also need careful review and likely revision in this regard. It is worth mentioning that clause 30 of MF/1 (*Use before taking-over*)<sup>17</sup> recognises the possibility of early owner use of the works for commercial operation. This applies where, due to default of the contractor, issue of a taking-over certificate has been delayed by over one month but is subject to the works being 'reasonably capable of being used.'

In practice, the FIDIC Silver Book terms will often be subject to amendment to allow the owner's team to have control and commercial operation (but not responsibility), by providing expressly for such an apparent dichotomy. There will also be a need to provide some protection for the contractor. Balancing of interests can be achieved by allowing the contractor to disclaim liability where the owner's team fail to act in accordance with the contractor's reasonable instructions.

### ***Force majeure***

If turnkey means the allocation of risk to the contractor, then clause 19 of the FIDIC Silver Book (*Force majeure*) leaves the door open for that risk to migrate back to the owner. Indeed, in a sense, much of this risk never leaves the owner.

The impact of the risk of a *force majeure* occurrence receives a similar treatment across all FIDIC forms: both the time and cost impacts of such an event are allocated to the owner.<sup>18</sup> I am not aware of any other standard form

17 Institution of Mechanical Engineers/Institution of Engineering and Technology, *Model form of General Conditions of Contract (MF/1)*, 2000 Edition (Revision 4); obtainable via [www.theiet.org/publishing/](http://www.theiet.org/publishing/).

18 The treatment of *force majeure* is slightly different under FIDIC short form and dredging contracts, in that these erroneously fail to provide that a *force majeure* event releases the affected party from its obligations under the contract. For further details, see the author's paper presented to the FIDIC International Users Conference (London, 11th-



of construction contract that adopts this approach, other than the UK's Engineering and Construction Contract (otherwise known as the NEC).<sup>19</sup> Most other standard form contracts allocate the time risk of the *force majeure* event to the owner, but leave the cost impact as neutral. Not so with FIDIC, even under the Silver Book.

The other point is that the FIDIC Silver Book's definition of what constitutes *force majeure* is wider than one might have expected, given the supposed turnkey qualities of this form. Whilst under clause 19.1 *force majeure* has to be 'an exceptional event or circumstance', all that is also required is that it is beyond the reasonable control of the party and could not have been reasonably provided for before entering the contract, or having arisen, have been reasonably avoided or overcome; and is not substantially attributable to the other party.

It is, of course, possible to draft *force majeure* clauses more tightly than this. As frequently seen on non-recourse financed projects, tighter definition of the risk can be achieved by providing a list of what is not *force majeure*. From an owner's perspective, it may not get its supposed turnkey solution unless the Silver Book's standard provisions are amended.

### **Limitations of liability**

The turnkey credentials of the FIDIC Silver Book are further undermined by the provisions of clause 17.6 (*Limitation of liability*). This is in two parts. The first part consists of a mutual waiver and release by each party in favour of the other in respect of liability for any indirect or consequential loss, subject to exceptions. Those exceptions relate to the owner's obligation to pay the contractor any loss of profit or other loss sustained, where the contractor is entitled to terminate the contract due to the owner's default. A further exception relates to the indemnities provided by the contractor in favour of the owner in respect of loss or damage to people or property not attributable to any act or omission on the part of the owner. These two categories of exception are therefore limited in scope.

Of course, on large projects with revenue generating facilities, the indirect losses have the potential to be very great indeed. However, the wholesale exclusion of such losses from those recoverable against the contractor underlines the lack of realistic assurance obtained by owners when engaging contractors to undertake works under the FIDIC Silver Book turnkey conditions.

The second part of clause 17.6 provides a financial cap on liability. Again, there are a number of stated exclusions to this (certain types of loss, which are, in effect, carved out of the cap); but the default position under the FIDIC

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12th December 2006) A revised version of this paper is available from [www.mayerbrownrowemaw.com/london/practice](http://www.mayerbrownrowemaw.com/london/practice).

19 Institution of Civil Engineers, *Engineering and Construction Contract/The New Engineering Contract (NEC3)*, London, ICE/Thomas Telford (2005); obtainable via [www.neccontract.com](http://www.neccontract.com).

Silver Book is that the total liability of the contractor shall not exceed the contract price.

Of course, having excluded liability for indirect or consequential losses, it might indeed be difficult for any contractor to perform so badly such that the recoverable loss would exceed the contract price. Such direct loss would presumably involve the cost of repairs or replacement of works. Such loss may also be incurred through the imposition of delay damages.

Furthermore, in the current market, it is rare for contractors to agree anything approaching 100% of the contract price when negotiating caps on liability, particularly on the mega-projects where the contract price is in multiple hundreds of millions of dollars or in the multi-billion range. Contractors will simply not risk their balance sheet. Each case, of course, turns on its own facts and much will depend upon the contract price and the overall risk profile. That said, owners may start off suggesting a cap at less than 50% of the contract price, only to find themselves engaged in a downward trajectory as the contractor uses its market power to reduce its potential exposure.

### **Extensions of time**

The FIDIC Silver Book adopts the term '*Time for Completion*', allowing the flexibility to apply this to a series of milestones. These can include passing of the tests on completion or other significant milestones during the course of the project.

In common with other standard form construction contracts, the Silver Book contains a mechanism for extending this Time for Completion, found in clause 8.4. The events giving rise to an entitlement to an extension of time include the issue of formal variations and any other delay or act of prevention attributable to the owner. The latter is a useful catch-all, helping counter arguments that any such act of prevention by the owner might otherwise put time at large.<sup>20</sup> Nevertheless, a breach of this provision creates a potential gateway for increased time (and subsequent cost) claims.

In addition, and rather unhelpfully, the other event giving rise to potential extension entitlement is defined in clause 8.4(b) as:

'a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions ...'

One therefore has to search the rest of the Silver Book to find those sub-clauses which confer on the contractor an entitlement to an extension of time. One example is sub-clause 4.24 (*Fossils*). If any fossils, coins or articles of value or antiquity, structures or other remains or items of geological or archaeological interest are found on the site and if the contractor suffers delay, it is to give notice to the owner and is entitled to an extension of time for any delay 'if completion is or will be delayed ...'. This is the same formula as in

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20 Assuming, for this purpose, that the governing law of the contract is one that recognises such a concept; not all legal systems do.



clause 8.4 and involves, potentially, a prospective assessment as to the impact of the event upon the Time for Completion.

It is perhaps surprising that, under the Silver Book, the extension of time provisions do not expressly require the contractor to take steps to avoid or mitigate the cause of delay, nor do they seek to make entitlement to any such extension conditional upon taking such steps.<sup>21</sup> Owners seeking a turnkey solution are likely to want the extension of time provisions under the FIDIC Silver Book to be strengthened considerably and clarified to gather in all those conditions which might give rise to an entitlement. Such clarity would allow the events to be more closely managed and delays to be avoided, or at least mitigated.

As to how progress and, indeed, extensions of time may be measured, the FIDIC Silver Book contains provisions requiring the contractor to submit a programme and to revise this:

‘whenever the previous programme is inconsistent with actual progress or with the Contractor’s obligations’.<sup>22</sup>

This, of course, creates potential confusion, as the programme may be updated for actual progress which represents a position of default (due to culpable delay on the part of the contractor). This makes it difficult to assess the impact on the Time for Completion, which may not have changed if there had been no events giving rise to an entitlement to extend. This is another area where care needs to be taken in the operation of the contract. Amendments to the Silver Book may be appropriate.

Of course, such extension of time provisions are necessary in order to provide the contractor with relief against its potential liability for liquidated damages, if it fails to complete the works by the Time for Completion. However, and equally, the reality is that if there are changes in design which, arguably, go beyond design development and constitute a formal variation, or if there are acts or omissions on the part of the employer which delay, impede or prevent the contractor from maintaining progress and achieving the Time for Completion (or to the extent that the contractor can demonstrate that such completion ‘will be delayed’, as above), then the supposed certainty of the turnkey solution is again rendered more illusory than real.

Such practical difficulties are frequently compounded on large projects, where there may be a number of separate EPC/turnkey contractors engaged by the owner, undertaking different parts of the project. The possibility that one EPC contractor may cause (allegedly or otherwise) delay to another is a potent risk. In practice, owners will engage one contractor to oversee and project manage all project activities, from engineering and procurement through to construction management. Whilst that contractor will not underwrite the

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21 The exception is in the case of *force majeure*. The definition in clause 19.1 of the FIDIC Silver Book (see note 2) requires that the event, as well as being ‘exceptional’, must be something which the party affected could not reasonably have provided against, or once having arisen, is not something which could reasonably have been avoided or overcome.

22 Clause 8.3 (see note 2).

performance of the various EPC/turnkey contractors engaged on the project, it will commonly be incentivised to ensure tight control and monitoring of their activities. This provides a system whereby the project can be managed effectively so that the owner has some assurance that the project will complete within its time, cost and performance targets. Frequently the project management role is also given to the same contractor who undertakes the infrastructure EPC contract for the works. This is because that same contractor has most direct physical and technical interface with each of the separate EPC/turnkey contractors. As noted earlier, large projects have a number of moving parts, when viewed as a series of contracts.

## Conclusions

This paper did not set out to be critical of the FIDIC Silver Book, in the sense of producing gratuitous complaints. It is easy for lawyers to criticise any standard form, equally any form of bespoke construction contract. It is right too to recognise that, in many respects, the Silver Book does what it says on the tin: the provisions dealing with unforeseen ground conditions, responsibility for the owner's design and the provisions as to the sufficiency of the contract price are all good devices. They help assure the Silver Book as a true turnkey contract. However, there are undoubtedly a number of areas where the turnkey qualities of the form can be improved by tighter drafting. This may be something FIDIC wishes to take on board in its next edition of the Silver Book.

The other major factor militating against the FIDIC Silver Book achieving turnkey credentials for owners' projects is the size, shape and structure of the projects on which it is used. These factors cannot be attributed to FIDIC, though a clearer recognition of their impact by both owners and contractors (and their respective advisers) can only help improve the eventual quality of the contractual and management arrangements established for such projects.

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**NEC3:  
CONSTRUCTION CONTRACT  
OF THE FUTURE?**

*A paper presented to the Society of  
Construction Law international conference,  
Singapore, February 2007*

**Nicholas Gould**

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# NEC3: CONSTRUCTION CONTRACT OF THE FUTURE?

Nicholas Gould

## Introduction

The New Engineering Contract (NEC)<sup>1</sup> was first published in March 1993. Rather than building on existing standard forms, the NEC adopted a new simple and direct drafting approach, focusing on strong project management principles.

At this time Sir Michael Latham was carrying out his review of procurement in the UK construction industry for Government. In his final report, *Constructing the Team*, he recommended that the NEC – lightly amended – should become the national standard in not just the private but also the public sector.<sup>2</sup> Partly as a result, and to allow some general tidying up of the drafting, the NEC was re-branded as the 'Engineering and Construction Contract' and its second edition issued in November 1995. The publisher was in effect attempting to make it clear that the contract was equally applicable to the wider construction industry, rather than just the engineering sector.

NEC2 was clearly well received by many sectors of the construction and engineering industry. It has its critics, but NEC2 has been used by many of the utility bodies in the UK, in particular the water industry, and has also been adopted for a large number of substantial projects. For example, the contract for the Channel Tunnel Rail Link was based upon NEC2, as was the national procurement project by the National Grid (Transco). NEC2 is being used by the English National Health Service for its *ProCure21* projects.<sup>3</sup> The British Airports Authority has used it for all of its work, most notably adapting it for use for the new £5bn investment in Terminal 5 at Heathrow. Internationally, NEC has apparently been widely used in South Africa;<sup>4</sup> and in other countries in the transport, energy, process and mining sectors.

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1 NEC contracts are published in London by the Institution of Civil Engineers (Thomas Telford Ltd); they are also obtainable via [www.neccontract.com](http://www.neccontract.com). The direct quotations from NEC3 in this paper preserve the formatting – capital letters, italicisation etc – as in the published original; but terms specific to NEC3, like Compensation Event, Contract Data, Disallowed Costs, Works Information etc, are capitalised in the body of the paper, though may not be so capitalised in the contract itself.

2 Sir Michael Latham, *Constructing the Team*, London, HMSO (1994).

3 See [www.nhs-procure21.gov.uk](http://www.nhs-procure21.gov.uk), also Simon Fullalove, 'ProCure 21 supply chain tightens', NEC Users' Group Newsletter 36 (July 2006), downloadable via [www.neccontract.com](http://www.neccontract.com).

4 Simon Fullalove, 'South Africa sets stage for global NEC use', NEC Users' Group Newsletter 37 (December 2006), downloadable via [www.neccontract.com](http://www.neccontract.com).

In June 2005 the third edition (NEC3) was published.<sup>5</sup> The general approach remains the same, although there have been some notable changes to a number of key clauses, considered below. NEC3 is already in use, most notably being adopted for the decommissioning of nuclear power stations; and more recently it has become the contract of choice of the Olympic Delivery Authority (ODA).

ODA is the single body that has been created to ensure the delivery of the venues and infrastructure for the 2012 Games and beyond. In particular, the ODA is responsible for the planning, designing and building of the venues, facilities and accommodation and developing of the infrastructure to support these. The ODA is also required to look at issues of regeneration and sustainability, and to ensure that the permanent structures created for the 2012 Games are utilised beyond these. It is responsible for the procurement of the contracts for the infrastructure, construction and transport, services being let by the London 2012 Organising Committee. The ODA released its draft Procurement Policy for consultation on 11 July 2006.<sup>6</sup> This outlines the ODA's requirement that the 2012 Games are delivered on time and budget, in a way that benefits the community and environment, in keeping with the spirit of London's Olympic Bid.

The Office of Government Commerce has also endorsed NEC3; the contract can therefore be selected if the procurement pathway is to meet the requirements of *Achieving Excellence in Construction*.<sup>7</sup> NEC3 is also being used to construct the innovative Halley 6 Research Station – a project being constructed on a moving ice shelf in Antarctica, said to be very challenging technically because of the extreme conditions.<sup>8</sup>

### **NEC: an overview**

The NEC is a major attempt to draft a simple and direct standard form contract from first principles, without attempting to build on existing standard forms. The authors of the NEC, gathered under the auspices of the Institution of Civil Engineers, were principally led by Dr Martin Barnes. The specification prepared by him in 1987 set out the aims for the NEC:

- Achieve a higher degree of clarity than existing contracts;
- Use simple commonly occurring language and avoid legal jargon;
- Repeat identical phrases if possible;
- Produce core conditions and exclude contract-specific data, to avoid the need to change the core terms;
- Precisely and clearly set out key duties and responsibilities;
- Aim for clarity above fairness;

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5 Since initial publication, NEC3 has been modified in detail and to correct typographical errors: see [www.neccontract.com](http://www.neccontract.com).

6 Downloadable from [www.main.london2012.com](http://www.main.london2012.com).

7 See [www.ogc.gov.uk](http://www.ogc.gov.uk).

8 Simon Fullalove, 'NEC3 chosen for Halley 6 Ice Station', NEC Users' Group Newsletter 37 (December 2006), downloadable via [www.neccontract.com](http://www.neccontract.com).



- Avoid including details which can be more adequately covered in a technical specification.

In summary, the NEC3's three core principles are intended to be:

1. Flexibility;
2. Simplicity and clarity; and
3. A stimulus for good management.<sup>9</sup>

On the basis of these principles, the authors drafted core clauses that apply to all NEC contracts. The core clauses were then used as the basis for six main options (each with varying risk allocation and reflecting modern procurement practice). Under NEC3 there are six lettered main options:

- Option A: priced contract with activity schedule;
- Option B: priced contract with bill of quantities, providing that the contractor will be paid at tender prices;
- Option C: target contract with activity schedule;
- Option D: target contract with bill of quantities - the financial risks are shared between the contractor and the employer in agreed proportions;
- Option E: cost reimbursable contract;
- Option F: management contract - a cost reimbursable contract where the risk is therefore largely taken by the employer, under which the contractor is paid for his properly incurred costs, together with a margin.

Options A and B are lump sum fixed price contracts. An activity schedule (breaking down the price into elements or activities comprising the works) is to be prepared by the contractor, although in practice it will be directed to follow a particular format. Options C and D operate a pain/gain-share mechanism. Other NEC3 forms exist, together with published Guidance Notes:

- Subcontract
- Short Form
- Professional services
- Adjudicator's contract.

One of the most noticeable features of NEC has been its short direct clauses. The simplicity of language aims to reduce the occurrence of disputes.

The foundations of NEC3 and its predecessors are the nine sections containing the core clauses. Beyond these, a user selects the appropriate main option clauses (Options A-F above) to produce the contract appropriate for the chosen procurement pathway. In respect of dispute resolution there are two

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<sup>9</sup> See NEC3, Engineering and Construction Contract Guidance Notes, downloadable from [www.neccontract.com](http://www.neccontract.com).

options<sup>10</sup> and then 15 secondary option clauses (all further considered below). There are then two further options, one relating to the Housing Grants, Construction and Regeneration Act 1996<sup>11</sup> and one dealing with the Contracts (Rights of Third Parties) Act 1999.<sup>12</sup>

There are then a series of additional conditions of contract known as Z clauses. These provide the parties – more usually the employer – with the opportunity to insert bespoke terms or amendments into the contract.

Two schedules of cost components are then set out. The second one is a shorter version of the first. The first is for use when Option C, D (target costs) or E (cost reimbursable) is used, while the shorter schedule is appropriate for any of Options A to E. The project-specific information (start date etc) is contained in the Contract Data. Part 1 comprises data provided by the employer, such as the identity of the employer, the project manager, dates, payment intervals and insurance requirements. Part 2 contains data provided by the contractor, such as key contact details, information for the risk register and information in respect of the contractor's design.

## **The core clauses**

The core clauses are set out in nine sections:

1. General
2. The Contractor's main responsibilities
3. Time
4. Testing and Defects
5. Payment
6. Compensation Events
7. Title
8. Risks and Insurance and
9. Termination.

The General core clauses deal with definitions, interpretation, ambiguities and general introductory matters. However, they also include an early warning procedure.<sup>13</sup>

Core clauses 2 deal with the contractor's main responsibilities, such as design, use of equipment and key personnel working on the project. Sub-contracting is also covered.

Time is covered by core clauses 3. A feature of NEC3 is the introduction of Key Dates, which outline periods of time within which the contractor must

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10 Options W1 and W2.

11 Referred to as Y(UK)2, dealing with payment, withholding and suspension; note that Y(UK)1 has not been used.

12 Referred to as Y(UK)3.

13 Clause 16.



complete specified works. The specification or condition must be completed so that the deadline or Key Date can be met. The use of Key Dates should provide for several contractors to work on one project at the same time, facilitating cooperation and thus progression of the project as a whole. Another aspect is the concept of an access date, which may differ significantly from the commencement of the works, if for example the contractor is required to prepare significant plans or designs. In addition, access implies more flexibility than other terms such as possession, and may be more appropriate where there will be many contractors on site at once.

Core clauses 4 deal with testing and defects and establish a basic regime for the carrying out of tests and inspections, the rectification of defects, the acceptance of them, and then dealing with defects that have not been corrected.

In respect of payment (core clauses 5), the project manager is to assess the amount due at each assessment date. The assessment dates are established in the Contract Data provided by the employer.<sup>14</sup> If the contractor does not include a programme in the Contract Data, then one quarter of the price of the work done at each valuation is retained until the contractor has submitted a first programme.<sup>15</sup> The project manager is to certify a payment within one week of each assessment date. A certified payment is then to be made within three weeks of the assessment date or any of the applicable periods set out in the Contract Data.<sup>16</sup> Interest is payable on late payments.

One of the more controversial sections of the core clauses is those in section 6, dealing with Compensation Events. A key feature of the NEC contract has always been this category of events. Unlike other standard forms, the NEC deals with time and money in respect of each Compensation Event. If a Compensation Event occurs, then the NEC contemplates that the event will lead to an assessment of time and money (rather than a consideration of extension of time to the contract), an assessment of the value of any varied works and then a further assessment in respect of any damages and/or loss and expense. As a concept, the packaging of individual Compensation Events and the resolution of time and money in respect of each one is highly commendable. However, the use of these provisions in practice has been criticised: the NEC drafting committee responded by amending the Compensation Events provisions for NEC3, further considered below.

Core clauses 7 relate to the employer's entitlement to plant and materials, together with the removal of equipment and materials within the site.

Risks and insurances are covered by core clauses 8. The employer's risks are initially set out and the contractor's risks are 'the risks that which are not carried by the Employer'.<sup>17</sup> An insurance table sets out the types of insurance required, which cover the usual provisions. The contractor is to submit

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14 Contract Data, Part 1, 5 (Payment): 'The assessment interval is ... weeks (not more than five)'.

15 Core clause 50.3.

16 Core clause 51.2.

17 Clauses 80.1 and 81.1.

certificates demonstrating that insurance is in place, and if the contractor does not insure then the employer may insure and pass the cost of such insurance to the contractor.<sup>18</sup> Similarly, the employer is to provide the contractor with any insurances taken out by the employer, and once again the contractor may, if the employer defaults, take out those insurances and claim the cost of the insurance from the employer.<sup>19</sup>

Finally, termination is dealt with at core clauses 9, which set out the reasons and procedure for termination. In summary, either party may terminate in the event of insolvency, as defined in clause 91.1. The contractor may terminate if not paid within 13 weeks of the date of the certificate, while the employer may terminate if the contractor fails to comply with his obligations, does not provide a bond or guarantee, appoints a sub-contractor for a substantial piece of work before the project manager has accepted that sub-contractor and hindered the employer or others or substantially broken a health and safety regulation.

In the event of suspension of the works, either party may terminate if there is a default of the other, where work has not restarted within 13 weeks. Clause 91.7 is similar to some *force majeure* clauses already in use. It provides for the employer to terminate if an event which neither party could have prevented and which an experienced contractor at the contract date would have judged as having a small chance of occurring stops the contractor from completing the works.

## **Partnering and project management**

According to the proponents of the NEC, its great strength is that it adopts a partnering approach whilst also placing great emphasis upon pro-active project management. There are perhaps three ways that this is clearly demonstrated in the NEC form.

First, the early warning system is drafted to encourage the identification of problems and for the parties to work together in order to establish an early resolution. This provides that a contractor will only be compensated on the basis that an early warning had been given, based upon the date on which an experienced contractor would have or ought to have recognised the need to give a warning. Contractors are therefore encouraged to play their part in the early warning procedures, in order to avoid inadequate cost recovery for those problems which materialise later on.

Second, all those risks for which the employer is not expressly responsible under clause 80.1 are risks for which the contractor is liable.

Finally, the target cost option most clearly reflects the early warning pro-active management approach by affecting the financial bottom line of the parties, in particular the contractor.

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18 Core clause 86.1.

19 Core clause 87.3.



### ***The project manager under the NEC: Costain v Bechtel***<sup>20</sup>

In May 2005 in the Technology and Construction Court in London, Jackson J had to consider the project manager's role under an NEC-type contract to assess and certify sums due to the contractor. Costain were part of a consortium of contractors carrying out work in respect of the Channel Tunnel Rail Link. The consortium entered into contract C105 to carry out the extension and refurbishment of St Pancras Station. This provided:

'The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract.'<sup>21</sup>

The contract, though amended, was based on the NEC form: it was a target cost contract with a pay and gain mechanism, providing for the Costain consortium to be paid actual cost less disallowed cost (as defined by the contract). The project manager (RLE) was a different consortium, whose largest shareholder was Bechtel Rail Link Engineering. Many of the RLE personnel who worked on the contract were also Bechtel employees. In February 2005, RLE issued payment certificate no. 47. This valued the work carried out as approximately £264m, but disallowed costs of some £1.4m. In April 2005, payment certificate no. 48 was issued. This increased the total of Disallowed Costs to £5.8m.

The Costain consortium alleged that, at a meeting in April 2005, Mr Bassily, the executive chairman of RLE (and a Bechtel manager), instructed all Bechtel staff to take a stricter approach to disallowing costs; and to disallow legitimate costs when assessing the payment certificates. The Costain consortium were concerned that Bechtel had deliberately adopted a policy of administering the contract unfairly and adversely to them. Accordingly, the consortium issued a claim against Bechtel and Mr Bassily, alleging that they had committed the tort of unlawfully procuring breaches of contract by the employer. The claim which came to court sought interim injunctions, restraining the RLE consortium from acting in this way in relation to the assessment of the contractor's claims.

On the evidence before the court, the judge found that Mr Bassily had, in fact, been telling Bechtel staff to exercise their functions under the contract in the interests of the employer, so not impartially. Bechtel argued that they were obliged to look after the employer's best interests and that therefore owed no duty to act impartially in respect of consideration of the payment applications. Jackson J disagreed, holding that it was properly arguable that, when assessing sums payable to the contractor, RLE as project manager did owe a duty to act impartially as between employer and contractor.

20 *Costain Ltd v Bechtel Ltd* [2005] EWHC 1018 (TCC), [2005] TCLR 6, (2005) 21 Con LR T63; reported by Westlaw as 2005 WL 3027218.

21 Judge Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd (No 1)* [1999] BLR 194, TCC and the Court of Appeal in *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 both touch on the subject of partnering and on the terms 'trust' and 'cooperation'.

The judge considered the authorities, starting with *Sutcliffe v Thackrah*,<sup>22</sup> where the House of Lords had discussed the role and duties of an architect in that situation. Here Lord Reid said:

'It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.

Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the RIBA contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance) or clause 34 (antiquities), whether he should be allowed extra time (clause 23); or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect.

The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor.'<sup>23</sup>

Jackson J noted that these comments had generally been accepted by the construction industry and the legal profession as correctly stating the duties of architects, engineers and other certifiers under the conventional forms of construction contract. The issue here concerned the duty of certifiers in general, but also the specific duties of the project manager under the present contract. Four reasons were put forward as to why the contract here was different:

(i) The terms of the present contract which regulate the contractor's entitlement are very detailed and very specific. They do not confer upon the project manager a broad discretion, similar to that given to certifiers by conventional construction contracts. Therefore there is no need, and indeed no room, for an implied term of impartiality in the present contract.

(ii) The decisions made by the project manager are not determinative. If the contractor is dissatisfied with those decisions, he has recourse to the dispute resolution procedures set out in section 9 of the contract. The existence of these procedures has the effect of excluding any implied term that the project manager would act impartially.

22 *Sutcliffe v Thackrah* [1974] AC 727, HL.

23 See note 22, page 737.



(iii) The project manager under contract C105 is not analogous to an architect or other certifier under conventional contracts. The project manager is specifically employed to act in the interests of the employer. In *Royal Brompton Hospital NHS Trust v Hammond (No. 8)*<sup>24</sup> Judge Humphrey Lloyd QC at [paragraph] [23] described the project manager as 'co-ordinator and guardian of the client's interest'.

(iv) The provisions of clauses Z.10 and Z.11 prevent any implied term arising that the project manager will act impartially.<sup>25</sup>

Jackson J replied in relation to point (i):

'When the project manager comes to exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in *Sutcliffe* do not apply. It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor.'<sup>26</sup>

In respect of point (ii) he stated:

'Mr Boswood [*counsel for the defendants*] points out that under clause 92.1 the adjudicator is obliged to act impartially. Therefore, he submits, there does not need to be any similar duty upon the project manager. This submission has surprising consequences. If (a) the project manager assesses sums due partially and in a manner which favours the employer, but (b) the adjudicator assesses those sums impartially and without favouring either party, then this is likely to lead to successive, expensive and time-consuming adjudications. I do not see how that arrangement could make commercial sense.'<sup>27</sup>

On point (iii) he concluded:

'I do not see how this circumstance detracts from the normal duty which any certifier has on those occasions when the project manager is holding a balance between employer and contractor. In *Royal Brompton*<sup>28</sup> (upon which defence counsel rely in paragraph 33 of their skeleton argument) the contractual arrangement was very different from that set up in the present case. There were architects and others who would carry out the functions of certification and assessing what was due to the contractor. The role of Project Management International in the *Royal Brompton* case was far removed from that of RLE in the present case.'<sup>29</sup>

In respect of point (iv), he decided that clause Z.10 was not relevant. He then quoted clause Z.11:

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24 *Royal Brompton Hospital NHS Trust v Hammond (No 8)* [2002] EWHC 203 (TCC), 88 Con LR 1.

25 See note 20, paragraph [39].

26 See note 20, paragraph [43].

27 See note 20, paragraph [46].

28 See note 24.

29 See note 20, paragraph [47].

'This contract supersedes any previous (negotiations, statements, whether written or oral), representations, agreements, arrangements or understandings (whether written or oral) between the Employer and the Contractor in relation to the matters dealt within this Contract and constitutes the entire understanding and agreement between the Employer and the Contractor in relation to such matters and (without prejudice to the generality of the foregoing) excludes any warranty, undertaking, condition or term implied by custom.'

And commented:

'At the moment I do not see how clause Z.11 impacts upon the present issue. The implied obligation of a certifier to act fairly, if it exists, arises by operation of law not as a consequence of custom.'<sup>30</sup>

Nonetheless, the judge decided against an interim injunction:

'[The claimants] have satisfied the threshold test in *American Cyanamid*.<sup>31</sup> They have shown that there are serious issues to be tried in their claims against both defendants. Nevertheless, when it comes to the question of balance of convenience, [they] have failed to show that this is a proper case for the grant of an interim injunction. On the contrary, I am quite satisfied that this is not a proper case for the grant of such an injunction.'<sup>32</sup>

A definitive answer on the issue raised in *Costain v Bechtel* would therefore be extremely welcome. If the project manager does not owe a duty of impartiality, it is difficult to see how this can sit comfortably with the supposedly overriding objective of NEC contracts – to attempt to foster collaborative working and avoid confrontation.

### **Early warning procedure<sup>33</sup>**

Under this procedure:

- The contractor is to give the project manager a warning of relevant matters;
- A relevant matter is anything which could increase the total cost or delay the completion date or impair the performance of the finished work;
- The contractor and project manager are then required to attend an early warning meeting if one or the other party request it. Others might be invited to that meeting;
- The purpose of the early warning meeting is for those in attendance to co-operate and discuss how the problem can be avoided or reduced. Decisions focus on what action is to be taken next, and to identify who is to take that action.

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<sup>30</sup> See note 20, paragraph [50].

<sup>31</sup> *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, HL [footnote added].

<sup>32</sup> See note 20, paragraph [65].

<sup>33</sup> Core clause 16.



It could be said that this is a partnering-based approach to the resolution of issues before they form entrenched disputes. Co-operation between the parties at an early stage of any issue identified by the contractor or project manager provides an opportunity for the parties to discuss and resolve the matter in the most efficient manner.

This is a departure from the usual approach, under which the contractor serves formal notices. A contractor may receive compensation for addressing issues raised by way of the early warning system. On the other hand, if a contractor fails to give an early warning of an event which subsequently arises, and that he was aware of, then any financial compensation awarded to the contractor is assessed as if he had given an early warning at the right moment. If, therefore, a timely early warning would have provided an opportunity for the employer to identify a more efficient way of resolving the issue, then the contractor will only be paid for that method of dealing with the event.

### **The risk register**

A risk register has appeared for the first time in this most recent edition of NEC.<sup>34</sup> The risk register will initially contain risks identified by the employer and contractor, but the risk register will develop as the project proceeds. It works hand in hand with the early warning process and in conjunction with the proactive project management approach of the contract.

There are three main objectives of the risk register:

1. To identify the risks associated with the project;
2. To set out how those risks might be managed; and
3. To identify the time and cost associated with managing those risks.

It may be possible to precisely and specifically identify risks that can be added to the register, or in other instances the risk register may simply contain some generic risks. The process of identification allows the parties to consider how those risks might be managed before turning their attention to the time and cost implications. If Option A or B applies, then the employer will only bear the costs in terms of time and money if a risk is covered by a Compensation Event. Otherwise, the contractor bears all other risks. The approach is similar for Options C and D (target cost contracts) in that the employer will bear the risk if the event is one listed in clause 80.1. If not, the employer will in any event initially bear the risk, but the risk will then be shared through the risk share mechanism set out in clause 53.

There is however the further impact of clause 11.2(25), dealing with Disallowed Cost.<sup>35</sup> If an element of cost is disallowed, then the risk will be the contractor's in any event. Finally, the employer bears almost all the risk

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<sup>34</sup> Core clause 16.3.

<sup>35</sup> Under NEC3 Option C, Disallowed Costs are costs which the project manager decides are not 'justified by the Contractor's accounts and records'; should not have been paid to a subcontractor or supplier; or were incurred because the contractor did not follow acceptance or procurement procedures or give an early warning.

under Options E and F (cost reimbursable contracts). This is unless the risk is covered by the definition in clause 11.2(25) or 11.2(26), again relating to Disallowed Costs.

The important aspect of the risk register is not just the early identification, but also the ability to then appraise and re-appraise, as well as proactively manage risks *before they occur*. The overall effect of a well-run risk register is a greater assessment of the overall financial outcome of the project and a greater ability to manage time for completion of the project.

## **Time, programme and Key Dates**

### ***Completion and Key Dates***

The contractor is to start on site on the first access date and is to complete the work on or before the completion date. The project manager is to certify within one week of completion the date of completion. The contractor must also carry out the work such that any condition stated for a Key Date is met by that Key Date.

Key Dates are distinct from sectional completion dates. If sectional completion is required, then secondary Option X5 must be included within the contract. Sectional completion provisions are short, and so the detail of the work to be carried out and completed in any particular section must be carefully identified in the Contract Data. By comparison a Key Date is:

‘... the date on which work is to meet the Conditions stated. The Key Date is the *Key Date* stated in the Contract Data and the Condition is the *condition* stated in the Contract Data unless later changed in accordance with this contract.’<sup>36</sup>

The distinction between a sectional completion date and a Key Date, therefore, is that the contractor must simply meet the condition stated in the contract on or before the Key Date; while a certified (sectional) completion date means that the employer must take over those works not later than two weeks after completion.<sup>37</sup>

The Guidance Notes to NEC3<sup>38</sup> state that Key Dates are applicable for projects when two or more contractors are working on the same project, albeit under separate contracts, but with a common employer and most usually the same project manager. If one contractor's work is dependent upon the actions of the other, then the use of Key Dates within a project programme allows the project manager to monitor the completion of a particular activity by a contractor for part of the works. It is said that Key Dates can be used to precisely programme timescales in order to achieve a particular condition, thus allowing other contractors – or indeed the employer – to proceed to an overall project programme.

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<sup>36</sup> Clause 11.2(9).

<sup>37</sup> Clause 35.1.

<sup>38</sup> Summary of NEC3 Engineering and Construction Contract Guidance Notes (NEC Users' Group); downloadable from [www.neccontract.com](http://www.neccontract.com).



In practice there may be some difficulty in defining precisely what it is that must be done in order for a contractor to achieve a Key Date, just as there is with adequately and properly defining each section, where a particular project is subject to sectional completion. The difficulty can only be greater in attempting to define conditions which are something less than the completion of a section, but which are readily identifiable.

An example of a Key Date may be the completion of the contractor's design in respect of a particular section of the works or a design reaching a defined stage. The purpose would be to allow others to then carry on with their design or to commence construction. No doubt with a true commitment to a proactive project management-based approach, the use of Key Dates could be invaluable.

### ***Programme***

A further important aspect of the core clauses dealing with time is the contractor's programme. The programme might be identified in the Contract Data and so attached to the contract, or alternatively the contractor may submit a programme to the project manager for acceptance. The contractor's programme must show not only the start date, access dates, Key Dates and completion dates, but also planned completion, the order and timing of operations (both the contractor's and the work of others), together with provisions for float, time risk allowances, health and safety requirements and other procedures set out in the contract.

If the contractor needs access at a particular time and in respect of a particular part of the site, then that must also be indicated in the programme, together with dates by which acceptances are needed and information from others as well as plant and materials and other 'things' that are to be provided by the employer. A statement of how the contractor is to plan and carry out the work must also be included, together with any other specific information required in the Works Information for that particular project.

The project manager has two weeks to either accept the programme or set out reasons for rejecting it. There are four default reasons set out in clause 31.3: first, if the contractor's plans are not practicable; second, if the programme does not show the information required by the contract; third, if it is not realistic; or, finally, if it does not comply with the Works Information. These are the listed reasons; but it seems that a project manager could set out further reasons for not accepting the programme. The project manager must certainly set out some reasons, rather than simply rejecting the programme.

When the contractor submits a revised programme, that programme must record the actual progress made in respect of each operation and the effect upon the remaining works. The use of programmes therefore is an active and on-going management tool. Further, a programme is to be submitted at the completion of the whole works, thus finally updating the programme to the point where it becomes almost a record of the as-built works.

The project manager may request the contractor to provide a quotation for accelerating the works in order to achieve completion before the completion date.<sup>39</sup> NEC is therefore one of the few contracts that provides express power for the employer, or rather in this instance the project manager on behalf of the employer, to request the contractor for a price for accelerating the works. Nonetheless, any acceleration is of course subject to the contractor submitting a quotation that is acceptable, and indeed being in a position to accelerate the works.

### ***Taking over the works***

Clause 35.1 provides that the employer will take over the works not later than two weeks after completion. If the contractor completes the work early, then the employer might not be obliged to take over the works before the completion date, but only if he has set out in the Contract Data that he is not willing to do so.

Partial possession is possible if the employer begins to use a part of the works, unless it is simply to suit the contractor's method of working or for a reason stated in the Works Information. If the employer does take over part of the works then the project manager is to certify the partial taking over within one week.

## **Compensation Events**

### ***Definition***

Core clause 60 deals with Compensation Events. If a Compensation Event occurs, which is one entitling the contractor to more time and/or money, then these will be dealt with on an individual basis. If the Compensation Event arises from a request of the project manager or supervisor, then the contractor is asked to provide a quotation, which should also include any revisions to the programme. The project manager can request the contractor to revise the price or programme, but only after he has explained his reasons for the request.

The general scheme of clause 60 is to define those events which are Compensation Events. Notice provisions are contained in clause 61 (dealt with in further detail below); a quotation in respect of a Compensation Event may then be requested by the project manager. The contractor can be asked to submit alternative quotations.<sup>40</sup> The contractor should submit its quotation within three weeks of a request by the project manager. The project manager then replies within two weeks, either accepting the quote, instructing a further revised quote, notifying the contractor that the proposed instruction will not be given or notifying the contractor that the project manager will make his own assessment.<sup>41</sup>

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39 Core clause 36.1.

40 Clause 62.1.

41 Clause 61.3.



## ***Impact of Compensation Events***

Compensation Events are assessed under clause 63. A Compensation Event is assessed by reference to the 'actual Defined Cost of the work already done, the forecast Defined Cost of the work not yet done and the resulting Fee'.<sup>42</sup> Clause 52 deals with defined cost, which provides that the 'All the *Contractor's* costs which are not included in the Defined Cost are treated as included in the Fee.' The Defined Cost comprises the rate and percentages that are set out in the Contract Data less any discounts, but subject to an additional Fee.

A delay to the completion date is assessed by reference to the planned completion shown on the accepted programme. The adjustment to the time for completion is, therefore, based upon assumptions, which may include for risks associated with the forecasting of any particular event. There is, however, no change to any adjustment to the time for completion if the assessment turns out to be wrong.<sup>43</sup>

### ***Notice by contractors: Core clause 61.3***

NEC3 has adopted a more strict regime for contractors in respect of Compensation Events, in Core clause 61.3:

'The *Contractor* notifies the *Project Manager* of an event which has happened or which he expects to happen as a compensation event if

- the *Contractor* believes that the event is a compensation event and
- the *Project Manager* has not notified the event to the *Contractor*.

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Price, the Completion Date or a Key Date unless the *Project Manager* should have notified the event to the *Contractor* but did not.'

Clause 61.3 is apparently a bar to any claim, should the contractor fail to notify the project manager within eight weeks of becoming aware of the event in question. The old NEC2 formulation of a two-week period for notification has been replaced with an eight-week period, but with potentially highly onerous consequences for a contractor. This clause must also be read in conjunction with clause 60.1(18), which states that a Compensation Event includes:

'A breach of contract by the *Employer* which is not one of the other Compensation Events in this contract.'

Clause 61.3, therefore, effectively appears to operate as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

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<sup>42</sup> Clause 63.1.

<sup>43</sup> Clause 65.2: 'The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong.'

### *Impact of the time-bar*<sup>44</sup>

The courts have for many years been hostile to such clauses. In more modern times, there has been an acceptance by the courts that such provisions might well be negotiated in commercial contracts between businessmen.<sup>45</sup> The House of Lords case of *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA*<sup>46</sup> provides authority for the proposition that for a notice to amount to a condition precedent it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract. This seems relatively straightforward. However, it may not be possible for an employer to rely upon *Bremer* in circumstances where the employer has itself caused some delay. So *Bremer* is a case where the party seeking to rely upon the condition precedent was not itself in breach in any respect. An employer may, therefore, be in some difficulty when attempting to rely upon *Bremer* in circumstances where the employer has caused the loss, or a proportion of the loss.

The courts also interpret strictly any clause that appears to be a condition precedent. Not only will the court construe the term against the person seeking to rely upon it, but it will require extremely clear words in order for the court to find that any right or remedy has been excluded. However, an alternative way of approaching such provisions was highlighted in the Scottish case of *City Inn Ltd v Shepherd Construction Ltd*.<sup>47</sup>

Here the Court of Session considered the requirement on the contractor to comply with a time-bar clause (in this case a heavily amended JCT80 Private with Quantities).<sup>48</sup> The contractor had been awarded (by the architect and an adjudicator) a total nine-week extension of time. The employer argued that no extension should have been granted and that liquidated damages should be payable, since the contractor had failed to comply with the time-bar provisions. Clause 13.8.1 provided:

‘Where, in the opinion of the Contractor, any instruction, or other item, which, in the opinion of the Contractor, constitutes an instruction issued by the Architect will require an adjustment to the Contract Sum and/or delay the Completion Date the Contractor shall not execute such instruction (subject to clause 13.8.4) unless he shall have first submitted to the Architect, in writing, within 10 working days (or within such other

44 See also Hamish Lal, *The Rise And Rise of Time-Bar Clauses for Contractors' Claims: Issues for Construction Arbitrators*, Society of Construction Law Paper 142, September 2007.

45 See for example *Photo Production Ltd v Securicor Ltd* [1980] AC 827, HL.

46 *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL.

47 *City Inn Ltd v Shepherd Construction Ltd* 2002 SLT 781, [2001] SCLR 961, Outer Hse, Ct of Sess; then appealed to the Inner Hse (successful on the point that failure to use the procedures of clause 13.8 was not itself a breach of contract, so the clause could not be treated as imposing a penalty), [2003] BLR 468.

48 The relevant clause was 13.8.5: ‘If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3’.



period as may be agreed between the Contractor and the Architect) of receipt of the instruction details of [its initial estimate, requirements in respect of additional resources and the length of any extension of time].”

Clause 13.8.5 further provided:

“If the Contractor fails to comply with any one or more of the provisions of clause 13.8.1, where the Architect has not dispensed with such compliance under clause 13.8.4, the Contractor shall not be entitled to any extension of time under clause 25.3.”

In the Inner House, the Lord Justice Clerk applied the time bar as it stood:

“... if he [the contractor] wishes an extension of time, he must comply with the condition precedent that clause 13.8 provides for these specific circumstances ... But if the contractor fails to take the specified steps in clause 13.8.1, then, unless the architect waives the requirements of the clause under 13.8.4, the contractor will not be entitled to an extension of time on account of that particular instruction.”<sup>19</sup>

The Inner House interpreted the time-bar clause as giving an option, so not imposing any obligation on the contractor; which also disposed of the contractor’s argument (successful in the Outer House) that the time bar was a penalty, thus unenforceable.

One important distinction between the drafting of the provision in *City Inn* and the NEC3 is that the contractor in *City Inn* did not have to carry out an instruction unless he had submitted certain details to the architect. The NEC3 by contrast provides a bar to the bringing of a claim simply for failure to notify the project manager in time about a Compensation Event. A specific instruction might not have been given; and the contractor might not be prompted to respond in the absence of this.

### ***Operation of the time bar***

Under NEC3, the contractor must of course be ‘aware of the event’ in order to notify the project manager under clause 61.3. There will no doubt be arguments about when a contractor became aware – or should have become aware – of a particular event, and also the extent of the knowledge in respect of any particular event. Ground conditions offer a good example. Initially, when a contractor encounters ground conditions that are problematic, he may continue to work in the hope that he will overcome the difficulties without any delay or additional costs. As the work progresses, the contractor’s experience of dealing with the actual ground conditions may change, such that the contractor reaches a point where he should notify the project manager. The question arises: should the contractor have notified the project manager at the date of the initial discovery, rather than at the date when the contractor believed that the ground conditions were unsuitable?

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<sup>19</sup> See note 17, [2003] BLR 468, paragraph [23].

The answer must be, in line with the words of NEC3, that the contractor should give notice when he encounters ground conditions which an experienced contractor would have considered at the Contract Date to have had only a minimal chance of occurring and so it would have been unreasonable to have allowed for them in the contract price, having regard to all of the information that the contractor is to have taken into account under clause 60.2.<sup>50</sup>

### ***Who needs to be 'aware'?***

A further question arises in respect of clause 61.3: who precisely needs to be 'aware'? Is it the person on site working for the contractor, the contractor's agents or employees, or is it the senior management within the limited company organisation of the contractor? Case law suggests that it is the senior management of the company, not merely servants and agents.<sup>51</sup>

The starting point is the general argument that all corporation and authorities have a legal identity and act through the individuals that run, are employed by or are agents of that organisation. A corporation or authority is a legal person, and is therefore regarded by law as a legal entity quite distinct from the person or persons who may, from time to time, be the members of that corporation.

The position is simplified for a person dealing with a company registered under the Companies Act 1985. A party to a transaction with a company is not generally bound to enquire as to whether it is permitted by the company's memorandum or as to a limitation on the powers of the board of directors to bind the company. However, if the contract is to be completed as a deed, then the contract must be signed by either two directors or a director and the company secretary.

Generally, directors and the company secretary have, therefore, authority to bind the company. If a person represents that he has authority, which he does not possess, but in any event induces another to enter into a contract that is void for want of authority, then that person will be able to sue for breach of want of authority. However, these propositions relate to the formation of contracts, rather than the conduct of the contract and in particular the identification of who within the company needs to have the knowledge required in order to make a decision whether a notice should be served. While then an agent of a company can bind a company, that agent must still act within the scope of their authority when taking actions under a contract.

So who then within the company must be 'aware' for the purposes of clause 61.3? Identifying the 'directing mind' within a company is the key to ascertaining who within a company has the necessary quality to be 'aware', as explained by Denning LJ (as he then was) in *HL Bolton (Engineering) Co Ltd v TG Graham & Sons Ltd*:

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<sup>50</sup> Clause 60.2 deals with physical conditions.

<sup>51</sup> Eg *HL Bolton (Engineering) Co Ltd v TG Graham & Sons Ltd* (see note 52 and linked main text).



'Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Other are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.'<sup>52</sup>

The intention of the company is therefore to be derived from the directors and the managers, rather than those that might be carrying out the work. The company's intention will, therefore, depend upon: the nature of the matter that is being considered; the position of the director or manager; and other relevant facts of the particular case. This principle has been affirmed in subsequent cases, in particular by Lord Reid in *Tesco Supermarkets Ltd v Natrass* in the House of Lords:

'Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation, he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.'<sup>53</sup>

Lord Reid confirms the approach of Denning LJ, but notes that it may be possible for the directors or senior managers to delegate, in this instance, fundamental decision-making processes required during the course of the running of a construction contract. In the absence of such delegation, it is arguable that those whom must be 'aware' are the directors and managers who constitute the 'directing mind' of the company.

### ***The prevention principle***

The prevention principle may also apply in respect of any employer's claim for liquidated damages. Under NEC3, if the contractor does not make a claim, then the project manager cannot extend the Completion Date, and so an employer will be entitled to liquidated damages.

However, those liquidated damages could be in respect of a period where the employer had caused delay; and the employer can only recover losses for delay in completion for which the employer is not itself liable. Some will therefore argue that employer-caused delay sets time 'at large': the contractor

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52 *HL Bolton (Engineering) Co Ltd v TG Graham & Sons Ltd* [1957] 1 QB 159, CA, at page 172.

53 *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, HL, page 171; applied in *KR and others v Royal & Sun Alliance plc* [2006] EWCA Civ 1454, [2007] Bus LR 139.

may suggest that it is relieved of the obligation to complete the works by the specified date. Arguably, where a delaying event has been caused by the employer and there is ordinarily an obligation on the employer to give an extension of time so as to alleviate the contractor from liquidated damages, but the employer is unable to do so, then time will become at large.<sup>54</sup> It must be remembered that the purpose of the extension of time provisions is quite simply to allow the employer the benefit of the liquidated damages provisions where the contractor is in delay, but only where the employer has not caused any of that delay.

The English legal principle of prevention means that an employer cannot benefit from its breach. If, therefore, there is concurrency of delay and the employer refuses to award an extension of time (thus alleviating the contractual liquidated damages), then the contractor may be freed from those liquidated damages in any event.

It might also be said that the true cause of a loss to the contractor was not the employer, but the contractor's failure to issue a notice complying with clause 61.3. Until recently, judgments – such as they were – had been divided. The Australian case of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd*<sup>55</sup> follows the English case of *Peak v McKinney*,<sup>56</sup> but goes further, holding that liquidated damages were irrecoverable when the contractor had failed to serve a notice in time: the completion date could not be identified, since time had become 'at large'. The alternative approach of *City Inn* suggests a different conclusion: the straightforward application of the time bar.

The key issue in a case like this is: whose acts or omissions under the contract, or breaches of contract, are the events that lead to the loss? Regardless of any acts, omission or breaches of the employer, can the loss be treated as caused by the contractor not having received an extension of time, having failed to issue a clause 61.3 notice in time?

This issue was recently considered in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)*.<sup>57</sup> Multiplex was the main contractor building the new national stadium at Wembley and Honeywell was one of the sub-contractors. The claimant in the action was Multiplex, and Honeywell the defendant. The key question in this case was whether time was set 'at large' under Honeywell's sub-contract. In other words, had Honeywell's contractual obligation to complete within 60 weeks (subject to any extensions of time) fallen away and been replaced with an obligation to complete within a reasonable time and/or reasonably in accordance with the progress of the main contract works?

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54 See *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114, CA.

55 *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (2000) 16 BCL 449, Supreme Ct NT.

56 See note 54.

57 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), [2007] BLR 195.



Clause 11 required the sub-contractor to carry out and complete works in accordance with the sub-contract. In particular, the sub-contractor acknowledged, at clause 11.1.2, that 'the Contractor could suffer loss and/or expense and/or damage if such time related matters [were] not complied with ...'.

The key notice ('time-bar') provisions were clauses 11.1.3 and 11.2.1:

11.1.3 It shall be a condition precedent to the Sub Contractor's entitlement to any extension of time under clause 11, that he shall have served all necessary notices on the Contractor by the dates specified and provided all necessary supporting information including but not limited to causation and effect programmes, labour, plant and materials resource schedules and critical path analysis programmes and the like. In the event the Sub Contractor fails to notify the Contractor by the dates specified and/or fails to provide any necessary supporting information then he shall waive his right, both under the Contract and at common law, in equity and/or to pursuant to statute to any entitlement to an extension of time under this clause 11.

11.2.1 If and whenever it becomes apparent or should have become apparent to an experienced and competent Sub Contractor that the commencement, progress or completion of the Sub Contract Works or any part thereof is being or is likely to be delayed, the Sub Contractor shall forthwith give written notice to the Contractor of the material circumstances including, in so far as the Sub Contractor is able, the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event.'

Multiplex sought a declaration from the English Technology and Construction Court that, on the true construction of the sub-contract, clause 11 provided a mechanism for extending the period for completion of the sub-contract works in respect of any delay caused by an instruction under the contract. In particular, that such an instruction would not put time at large. In other words, the contract provided a mechanism for extensions of time in order to fix a new completion date, such that any damages could not be said to be a penalty.

Several authorities, some well known, were cited and discussed, in particular *Holme v Guppy*,<sup>58</sup> *Dodd v Churton*,<sup>59</sup> *Peak v McKinney*,<sup>60</sup> and *Trollope & Colls Limited v North West Metropolitan Regional Hospital Board*.<sup>61</sup> Jackson J derived three propositions from these:

- (i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.
- (ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

<sup>58</sup> *Holme v Guppy* (1831) 3 M & LJ 387.

<sup>59</sup> *Dodd v Churton* [1897] 1 QB 562, CA.

<sup>60</sup> See note 54.

<sup>61</sup> *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, HL.

(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.<sup>62</sup>

Honeywell argued that there was no power to award an extension of time in respect of a direction given under the variations provisions of the contract. This, they argued, meant that a direction would lead to time being rendered at large. The judge did not accept that proposition. He concluded that directions issued under the variation clause 4.2 may have no effect at all upon the duration of the works. On the other hand, those that did have an effect would be variations under clause 4.2 and then would be recognised under the extension of time provisions.

Honeywell also argued that Multiplex failed to review the overall programme or consider and properly award extensions of time. Once again, these did not render the extension of time provisions inoperative.

Relying on the Australian decision of *Gaymark*,<sup>63</sup> Honeywell argued that a failure to comply with the clause was sufficient to put time at large. In that case, the contract provided that the contractor would only obtain an extension of time if notices had been submitted under clause 19.2 of the contract. That in turn relied upon *Peak Construction v McKinney*,<sup>64</sup> in which the House of Lords said that if an employer wished to recover liquidated damages because a contractor had failed to complete on time, then the employer could not do so where any of the delay was due to the employer's own fault or breach of contract. The extension of time provisions in a contract should therefore provide for an extension of time in respect of any fault or breach on the part of the employer. *Gaymark*<sup>65</sup> held that the inability to give an extension of time because of a contractor's failure to provide a notice meant that time was set at large; by contrast, in *City Inn*<sup>66</sup> the court concluded that the breach was not the employer's inability to grant an extension of time, the loss having instead been caused by the contractor's failure to serve an appropriate notice – or indeed to apply its mind to whether a notice was required.<sup>67</sup>

Jackson J also considered the use of 'the prevention principle' in *Gaymark*,<sup>68</sup> concluding that it was not clearly English law and that the approach of *City*

62 See note 57, paragraph [56].

63 See note 55 and linked main text.

64 See note 54.

65 See note 55.

66 See note 47.

67 On appeal, the Inner House held that Shepherd was not in breach of contract in failing to issue notices under clause 13. However, if Shepherd had issued notices, then it might have been relieved of liability under the liquidated damages clause 23 (see last sentence of paragraph [25] of the judgment – note 47). As a result Shepherd was not 'in breach of' clause 13, but had incurred liability under clause 23.

68 Hamish Lal (see note 44) refers on this point to Ellis Baker, James Bremen & Anthony Lavers, 'The Development of the Prevention Principle in English and Australian Jurisdictions', [2005] ICLR 197, page 211; also to I N Duncan Wallace, 'Liquidated Damages Down Under: Prevention by Whom?' (2002) 7:2 Construction and Engineering Law 23, where Duncan Wallace holds that *Gaymark* represents 'a misunderstanding of the basis of the prevention theory' and 'a mistaken understanding of the inherently consensual and interpretative basis of the prevention principle'. In particular he says of *Gaymark*: 'Neither Bailey J nor the arbitrator ... discussed or noted the practical need



*Inn*<sup>69</sup> was to be preferred. He thought that there was considerable force in Professor Wallace's criticisms of *Gaymark*, noting that contractual terms requiring a contractor to give prompt notice of delay serve a useful purpose:

'... such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If *Gaymark* is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.'<sup>70</sup>

He concluded:

'If the facts are that it was possible to comply with clause 11.1.3 that Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large.'<sup>71</sup>

Honeywell had a further argument in respect of the effect of an earlier settlement agreement between Multiplex and the employer Wembley National Stadium Ltd, but Jackson J concluded that this did not entitle Honeywell to any relief. In the absence of arguments drawn from equity, it seems therefore that there is a high chance that the time-bar in NEC3 clause 61.3 will be enforced as a condition precedent.

### *Equity*

The contractor wishing to make a claim for a Compensation Event, like under a more traditional standard form, may be able to rely upon the equitable principles of waiver and/or estoppel.<sup>72</sup> It may be that the contractor does not serve a formal notice because, by words or conduct, the employer (or indeed project manager) represents that they will not rely upon the strict eight-week notice period.

The contractor would also need to show that he relied upon that representation and that it would now be inequitable to allow the employer to act inconsistently with it. This approach could be further supported by core clause 10.1, which requires the parties to act 'in a spirit of mutual trust and co-operation'. It would be somewhat ironic if a contractor did not submit contractual notices, in the spirit of 'mutual trust and co-operation' but the employer at some much later date relied on the strict terms of clause 61.3.

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which justifies a strict notice requirement in all EOT matters (due to the Contractor's more intimate knowledge of its own construction intentions and so the critical path significance of an EOT event and also to give the owner an opportunity as, for example, by withdrawing an instruction or varying the work – to avoid or reduce delay to completion of which he has been notified). Nor was there any recognition that, precisely for these reasons, strict notice would be even more justifiable where random acts or instructions of the owner or his Superintendent ... could later be said to be acts of prevention'

69 See note 47.

70 See note 57, paragraph [103].

71 See note 57, paragraph [105].

72 See *Hughes v Metropolitan Railway* (1877) 2 App Cas 439, HL.

## Secondary option clauses

The secondary option clauses are [*original formatting preserved*]:

- X1 Price adjustment for inflation
- X2 Changes in the law
- X3 Multiple currencies
- X4 Parent company guarantee
- X5 Sectional completion
- X6 Bonus for early completion
- X7 Delay damages
- X12 Partnering
- X13 Performance bond
- X14 Advanced payment to the *Contractor*
- X15 Limitation of the *Contractor's* liability for his design to reasonable skill and care
- X16 Retention
- X17 Low performance damages
- X18 Limitation of liability
- X20 Key Performance Indicators.<sup>73</sup>

These clauses are relatively short. They simply provide for some instances which are commonly encountered and therefore may be required in the contract. X1, dealing with price adjustment for inflation, is only to be used with Options A-D, but in any event in the UK is currently unlikely to be necessary, given the persistent low inflation for more than 15 years.<sup>74</sup> However, the clause may prove to be widely used in many other parts of the world. X2, for changes in the law, provides a further Compensation Event if there was a change in the law, and X3 provides for multiple currencies. Once again, these two secondary options are more likely to be used internationally.

If a parent company guarantee is required, then X4 can be used. If sectional completion is required, then X5 is appropriate. An incentive for early completion is dealt with at X6, and (the most frequently encountered) liquidated damages are covered by Option X7.

The more lengthy Option X12 deals with partnering. Unsurprisingly, it requires the parties to work together in a 'spirit of mutual trust and co-operation'.<sup>75</sup> The partners are to give an early warning to the others when a

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<sup>73</sup> Note that Options X8-X11 and X19 are not used.

<sup>74</sup> That statement had more force when this paper was first written in mid-2006. At the time of final editing, the base interest rate has increased several times.

<sup>75</sup> Option X12.3(1). In any event, Core clause 10.1 requires that the parties 'shall act ... in a spirit of mutual trust and co-operation'. So the subjective partnering terminology



partner becomes aware of a matter that could affect the achievement of any other partner's objectives. It would be interesting to test the ramifications of an allegation of failing to follow this procedure, as clause X12.2(6) states that the option does not create a legal partnership between the partners, but does not go as far as stating that the partnering option is to have no legal effect, as a non-binding partnering charter might. Option X12 also provides for incentives based upon key performance indicators (KPIs) – but see also X20 below. A partner can therefore achieve a financial incentive by reaching its target or improving upon it.

Where a contractor is designing and constructing the works, X15 provides that the contractor's liability for design is reduced to one of reasonable skill and care. The extent to which clauses of this nature work in practice remain to be seen, given that the focus of the drafting is on a reduction of the design liability to one of skill and care, without considering that a contractor's overall liability for design-and-build is under English law on a fitness for purpose basis.<sup>76</sup> Further provisions limiting the contractor's liability are covered at Option X18.

KPIs may be introduced by the use of Option X20. Option X12, relating to partnering, does not need to be used in conjunction with X20. Indeed the contract does not anticipate that X20 and X12 will be used together. The KPIs introduced at Option X20 are therefore simply in order to add an incentive schedule into an NEC3 contract where the partnering option has not been selected.

## **Z clauses**

Additional conditions can be inserted into the NEC through the use of Option Z. These are often referred to as 'Z clauses': clauses inserted by the parties either to address matters that are not expressly addressed within the contract, or to amend the standard clauses of contract. In traditional forms of contract, like the JCT, ICE and so on, the equivalent would be those clauses inserted as 'special conditions' or those inserted through a 'schedule of amendments'.

When considering Z clauses, it is important not to lose sight of the defining characteristics of the NEC. The NEC is inherently flexible: the combined use of Core and Optional clauses provides for a variety of approaches to risk allocation and consequently the NEC can be adapted for any number of circumstances. Further, the NEC is intended as a stimulus to good management: rather than prescribing an outcome for every eventuality, it advocates early collaboration between the parties using an early warning system, so that there is a proactive approach to problems as the works progress.

---

pervades all of the NEC3 forms, and the commanding future tense auxiliary verb 'shall' requires the parties to comply. This is the only clause in NEC3 where 'shall' is used.

76 *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1, HL.

Despite this, some would suggest that the lack of detail contained in the NEC can lead to ambiguity and that clarity in respect of certain matters should be set out at the outset, rather than as particular events occur. Accordingly, Z clauses may typically address the following:

1. *The provision of collateral warranties:* notwithstanding the Contracts (Rights of Third Parties) Act 1999, the construction industry still relies heavily on collateral warranties. Funders, tenants and the like will often insist on an employer procuring collateral warranties from its contractor. An employer will therefore be forced to include such provision within the contract.
2. *Copyright:* where a contractor has design responsibility, it is important to include a provision addressing matters relating to copyright. Without such clarity, the employer's rights, if any, to use the design would be uncertain.
3. *Prohibited materials:* again, where a contractor has design responsibility, a provision requiring the contractor to refrain from using prohibited materials in design and construction may be necessary; and
4. *Assignment:* a provision prohibiting the contractor from assigning the contract may be necessary, so that the employer has certainty in respect of who is actually carrying out the works.

The above are only a few examples of the types of issues that are commonly addressed in Z clauses. Such clauses are not intended to substantially re-write the standard clauses of contract; indeed, improper use of Z clauses can be problematic. No doubt it is quite easy for parties to simply 'cut and paste' provisions contained in some 'special conditions' or a 'schedule of amendments' into Z clauses, falling back into old habits and thereby defeating the benefits of using the NEC. Put simply, wholesale amendments to the standard form through the use of Z clauses should normally be resisted.

## **Dispute resolution**

The principal dispute resolution procedure in NEC3 is adjudication. The parties have a choice: Option W1 applies unless the United Kingdom Housing Grants, Construction & Regeneration Act 1996 (HGCRA) applies. If the HGCRA applies, then Option W2 is appropriate.

This is a significant departure from NEC2. The adjudication procedure in NEC2 imposed minimum time periods that a referring party had to comply with, before they could issue a referral to adjudication. But section 108(3) of the HGCRA requires a construction contract to provide that either party can 'at any time' refer a dispute to adjudication. Since NEC2 fettered this ability, it did not comply with the HGCRA. As a result either party could ignore the adjudication provisions in NEC2 and refer any dispute at any time under the HGCRA, in accordance with the adjudication procedure set out in the statutory



Scheme for Construction Contracts.<sup>77</sup> NEC3 has dealt with this problem by providing an HGCRA-compliant procedure as Option W2, retaining the original NEC2 adjudication procedure as Option W1.

Option W1 identifies which party may refer a dispute to an adjudicator and when. In brief:

1. A dispute about an action of the project manager or supervisor may be referred by the contractor between two and four weeks after the contractor's notification of the dispute to the employer and project manager. The notification must be made not more than four weeks after the contractor became aware of the action. In similar circumstances the contractor may also refer a dispute about the project manager or supervisor not having taken a particular course of action.
2. The employer may refer a dispute about a quotation for a Compensation Event which has been treated as having been accepted. Once again the employer may refer the dispute to an adjudicator between two and four weeks after the project manager's notification of the dispute to the employer and the contractor. That notification must be made not more than four weeks after the quotation was treated as accepted.
3. Further, either party may refer a dispute about any other matter between two and four weeks after the notification of the dispute to the other party and the project manager.

This is the default procedure, which can be used by either party where the HGCRA does not apply. It is not necessary to identify it by selecting an option in the Contract Data.

However, if the contract is used in another country where legislation provides for adjudication or adjudication-backed payment, then there is a high chance that Option W1 will not comply with the local legislation. If so, the dispute resolution procedures may be entirely replaced by that local legislation. A truly international form would have provided for a third option, when Options W1 and W2 are inappropriate, thus placing the onus on the employer to insert a dispute resolution procedure that complies with the law of the place where the contract is being carried out. Local branches of the NEC Users' Group around the world might then be able to develop short W option clauses for particular jurisdictions, in order to assist in the wider international use of NEC3.

The party referring the dispute to the adjudicator must include 'information' with the referral. This is presumably the supporting documentation and explanation of the matter or matters in dispute. Any further information is to be provided within four weeks of the referral.<sup>78</sup> The adjudicator is to decide the dispute, with reasons, within four weeks of the end of the period from

<sup>77</sup> The Scheme for Construction Contracts (England and Wales) Regulations 1998, SI 1998/649.

<sup>78</sup> Option W1.3(3).

receipt of the information. The period may be extended by agreement between the parties. The minimum period for an adjudication is therefore eight weeks.

The decision is binding unless or until revised by 'the tribunal' (defined in Part 1 of the Contract Data). More importantly, the decision becomes final and binding unless one of the parties notifies the other that he is dissatisfied with the dispute and intends to refer it to the tribunal.<sup>79</sup> If the tribunal referred to in W1 is to be an arbitral tribunal, then Part 1 of the Contract Data also encourages the employer to specify the applicable arbitration procedure and the place where the arbitration is to be held, as well as the procedure for the appointment of the arbitrator.

## Conclusions

NEC3 is clearly a departure from the traditional approach to construction contract drafting. The use of simple short direct core clauses provides the basis for a range of construction contracts covering different procurement pathways. Secondary option clauses allow an employer to select particular terms which suit a particular employer's requirements, or indeed a particular project.

Its proactive project management focus must be welcomed. Construction projects, regardless of their size, are complex and require careful planning. NEC3 builds upon that concept, attempting to engage the contractor in the process by the use of a simple early warning system with adverse valuation principles should the contractor fail to warn, as well as the optional partnering procedures.

Nonetheless, in practice the success of a project depends on the forward thinking, planning and reasonableness of the individuals that manage, co-ordinate and carry out the work. The NEC3 attempts to do what only a contract can do – to capture a framework for the parties to follow – but at the same time identify who bears which risk in the event that a particular problem materialises.

Mechanisms for resolving disputes during the course of the project or very soon after a project's conclusion are becoming more frequent. NEC3 goes further than simply addressing disputes by way of adjudication, but attempts to introduce a time-bar for any Compensation Events that are not notified by the contractor to the project manager within eight weeks of becoming aware of the event. This approach, whose effect in law is not yet clear,<sup>80</sup> attempts to give the employer some certainty in respect of the outturn cost of the project by requiring the contractor to give an early notice and thus alert the employer's team to additional costs. This is similar to the international FIDIC contracts,<sup>81</sup> also to contracts amended by more sophisticated employers.

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79 Clause W14(3).

80 See *Multiplex* (note 57 and linked main text).

81 E.g. FIDIC 1999 forms, clause 20.1, discussed by Hamish Lal (see note 14).



Contractors are having difficulty adjusting to this new regime. Many feel that a warning notice relating to claims leads to a breakdown in the relationship between the individuals working on the project, thus making the project more difficult to complete. However, an absence of an appropriate notice might well mean that a contractor is unable to bring a claim at some later date. It will be interesting to see how this mechanism is used by the industry in practice – and how the courts interpret such a clause. Given that many disputes will be resolved in adjudication and then finally most likely arbitration, it may be some time before the courts comment definitively on these provisions.

Overall, NEC3 is a contract that is now being adopted by some sectors of the construction industry within the UK, and internationally. It adopts a drafting philosophy that many argue supports modern good practice. If the use of NEC3 continues to develop across further sectors of the industry and internationally, then there is no doubt that it will be the construction contract of the future.

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*'The object of the Society  
is to promote the study and understanding of  
construction law amongst all those involved  
in the construction industry'*

**MEMBERSHIP/ADMINISTRATION ENQUIRIES**

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BAP publications

12 Aug 09.

Minutes

9.75.1 Why ET not acted as hoped. ?  
2 " " " " " " ?

9.76.1 " " " " " " ?

9.10.1 [will do within "a month"]

Nominated subcom has been sent to Council: has not met or considered, so not passed. ETM to give deadline to members after which approved.

Consultants doc: Rakhman notes.

Fix cross-ref typo on A2 conditions raised by Edward.

CV raised issue of parties to dispute 'arbitrator on his behalf' might suggest bias? consider. CV will give note to ET. [within 2 weeks]

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No response from Council re electronic forms: cert for payment get working on web.

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Next week @ wimpys game. 11 Aug 09

Check that ET has issued final versions of last 6 months revised documents to all committee members: also to council members (if not already done).



## BOTSWANA INSTITUTE OF DEVELOPMENT PROFESSIONS

### ARCHITECT'S APPOINTMENT

1980 Edition, revised May 2008

#### CONTENTS

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	15	Part 5 : Time charges
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	17	Part 7 : Abandoned works and interpretation
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12	Table 3 : Apportionment of fees between stages of services

#### The numbering of clauses

*Each part is divided into sections, clauses and sub-clauses which are numbered as follows:*

Sections have 2 digits, thus	1.2
Clauses have 3 digits	3.20
Sub-clauses have 4 digits	3.401

It is advisable to read clauses in the context of the Section as a whole in which they appear, and essential to read sub-clauses in conjunction with the main clause to which they are related.



Taq07

CBC meeting

produce a summary of progress for information

6.6.3 LH: careful consideration: ET has not circulated.  
↳ ① Stage

Similar to our agreement 7.40.

look at LH submission against 7.40 and transfer to consultants.

Submission via M. Mozambique.

6.6.4: Cutoff date for comment:  
corrections & revisions

5 ✓

6 In place: refer back to Council  
CC from MM on SFA contract staged  
approach

8 Back to Council: some before meeting.

Other matters

• Consultant agreement.

look @ harmonising app C with our app.

create clear defaults

MM will draft.

• Domestic subson: circulate + give 3 weeks for comments.

• Certificate for payment + demo e-forms:  
check copied to all members. ET.

• Software by weekend.

• Consultant agreement pt: sufficient as agreed between the two parties. add in app C.

• Send meeting schedule to new members

Next at Game Wimp

(A0kp)20

**BIDP**

**PUBLIC RELATION COMMITTEE**

**STAGES**

- 1 Motivation
- 2 Public relation committee assess whether to take further
- 3 Develop a draft (existing text)
- 4 Public relation committee ok with drafts
- 5 Draft to council
- 6 Implement if approved.

Cc: D Young  
G Vlug 533 7249  
C Burton 309 8563  
B Alemarumo 395 3698  
L Hutchings 318 2016  
T Allen tony.allen@botsnet.bw  
A Hakim 5773530  
M Yates 3913628  
M Mogomela 3164580  
U Soderstrom 3974465  
President, BIDP  
File



# **BIDP AD-HOC CONTRACTS REVIEW COMMITTEE**

**PROGRAMME:** updated 10mr08

Reference	Details	Response Deadline
Consultant Appointment 2007-08-22-1	Add new clause 2.5 to section 2 Interpretation. (Approved by council only to be implemented when clause 8 'Disputes' is created)	
Consultant Appointment 2007-08-22-3	Add a termination clause to consultants appointment: original revised text was approved by council. Further issues were subsequently noted to PRC.	15de07
Consultant Appointment 2007-08-22-4	Clause 8.3 add word 'The appointed arbitrator's cost will be ...' (Approved await implementation).	
Consultant Appointment 2007-08-22-2	M Mogomela email 8ag07: Defaults to Appendix c will follow: ET to chase MM: ET checked MM on 16no07: MM stated will see when to send.	15de07
Consultant Appointment 2007-08-22-5	Clause 9 'Copyright' (approved by council will follow after inserting clause 8 'Disputes')	
Architect Appointment 24my07	Clause 7.50 add word 'The appointed arbitrator's cost will be ....' (Approved await implementation)	
Architect Appointment 2007-08-02-1	Clause 4.81 amend as "Time charges shall be in accordance with Part 5 except that the time rate for arbitrators shall be as agreed with the arbitrator, with a minimum fee equating to three-hour charge".	Adopted 12fe08
Architect Appointment 2007-08-01-1	L Hutchings email 10jy07: Settlement of disputes - mediation clause  D Young comment: 23ag07: 'This motivation represents a change of principle in our dealing with differences, which presumably would apply to all agreements. We need to carefully assess whether it is practical and necessary in all the documents including the present one' U Soderstrom comment 5mr08 sent to all:	13mr08
Domestic Subcontract 2007-08-12-1	Proposal received by all:  M Yates: stated draft is fine. DY/GV: eliminate capitals at start of sentences: ET to do search and replace – done 23no07 Input on roles needed	15de07

*Min last Meet: sat by 13mr08*

ALL

23ap08

Consultants have been appointed (Nantes Africa) who are doing the job.

- Don't be afraid of being in the world. Large developments are ok.
- Roof height calculation
- Urban densities
- Building regulations interface
- EIA vs development plan.
- Norms or other relevant acts.
- Change of use/intensification:   
 report on changes to traffic & services  
 & specific informed agreement of  
 other parties.

### aesthetics & safety

- hoardings across streets
- air conditioners
- free enterprise, no massive building material deposits of distinctive type.
- safety: connections of pavements, avoid zoning <sup>development</sup> shelter.
- responsibility for maintaining public places.



## **BIDP**

### **CONTRACTS REVIEW COMMITTEE**

#### Schedule of meetings

Next Contract Review Committee meeting will be held on Tuesday, 5<sup>th</sup> August, 2008: proposed to be at Wimpy, Riverwalk at 7:30am.

#### Proposed extended schedule for 2008:

Tuesday, 12<sup>th</sup> February, 2008

Tuesday, 6<sup>th</sup> May, 2008


Tuesday, 5<sup>th</sup> August, 2008

Tuesday, 11<sup>th</sup> November, 2008



*Also see comments from D Young: 13ag07*

## SUGGESTED CHANGES TO THE NOMINATED SUBCONTRACT TO BECOME A DOMESTIC SUBCONTRACT

- Cover page - change "nominated" to "domestic"  
Delete at the bottom "and endorsed by..... Botswana"  
Change "1999 edition" to "2007 edition"
- Page 3 Delete item 8 as it also appears on page 5.  
Renum. the items.  
In (existing) paragraph 12, line 1, insert the words "by recorded delivery or" between the words "agreement" and "by prepaid registered post....."  
Change (existing) clause 15 to "The original hereof is kept by the Contractor, but the Subcontractor shall be entitled to a real copy thereof."
- Page 5 After the description of "architect" put in a new clause:  
CERTIFICATE OF INTERIM COMPLETION" means a certificate issued by the contractor to the subcontractor accepting that interim completion of the subcontract works has been achieved but shall not take preference over the certificates of practical completion and final completion.  
  
INTERIM COMPLETION LIST means a list issued by the contractor to the subcontractor defining the outstanding and defective work required to be done by the subcontractor to achieve interim completion.  
  
Omit paragraph 1.23  
 *D Young comment: Omit paragraph 1.31*
- Page 10 Clause 13.8 Omit the words "and less a settlement discount as recorded in the schedule"  
  
Omit clause 13.9.
- Page 11 Omit clause 13.14  
Omit clause 14.2 (clause 14.1 becomes clause 14)
- Page 12 Clause 23.1.3 replace the second paragraph by "then the contractor shall give written and registered notice to the subcontractor specifying the same and if such default shall continue for 14 days after such notice the contractor shall determine the employment of the subcontractor."  
  
Clause 23.2. delete the words "upon instruction from the agent.....from the employer"  
  
Clause 23.3 delete the whole clause.



- Page 13 In clauses 24.1 to 24.4 delete "less a settlement discount as recorded in the schedule"
- Page 14 Clause 30.4 first line Before the word "Arbitration" insert "Botswana"  
Third line change to Botswana Institute of Arbitrators
- Page 15 Delete "settlement discount" on last line.  
Insert at appropriate places:  
Name of Insurance Company  
Name of Surety  
Amount of liquidated damages per calendar day as per main contract...  
.....

*D Young comments:*

✓ *Clauses 23.3.1, 23.3.2 'regarding settlement discount'*

*Clause 25.2 'settlement discount'*

*Clause 11.1 'settlement discount'*

*D Young removed clause 1.22 'SETTLEMENT DISCOUNT' on page 5.*