

CONDITIONS OF CONTRACT

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Conditions of Contract

1 General Provisions

1.1 Definitions

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

1.1.1 The Contract

- 1.1.1.1 **“Accepted Baseline Programme”** means the Contractor's baseline programme for the Works, based on the cost loaded version of the Contractor's Tender Programme, as accepted by the Employer's Representative, and as more particularly described and updated from time to time in accordance with Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements.
- 1.1.1.2 **“Appendix to Tender”** means the completed pages entitled Appendix to Tender which are appended to and form part of the Letter of Tender.
- 1.1.1.3 **“Contract”** means the Letter of Tender, the Letter of Acceptance, the Contract Agreement, the Price Adjustment Timetable, the Conditions of Contract, the Employer's Requirements, the Contractor's Technical Proposal, the Contractor's Price Proposal, the Volume VI Documents and the Volume VII Documents and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance as forming part of the Contract.
- 1.1.1.4 **“Contract Agreement”** means the contract agreement referred to in Sub-Clause 1.6 [*Contract Agreement*].
- 1.1.1.5 **“Contractor's Price Proposal”** means the document entitled Price Proposal which the Contractor submitted with the Letter of Tender and which shows the “total base price” (which amount is the same as the Accepted Contract Amount) and a breakdown of the same together with the Provisional Sums. Such document is also referred to in places in the Contract as the Schedule of Project Elements and Prices.
- 1.1.1.6 **“Contractor's Technical Proposal”** means the document entitled Contractor's Technical Proposal, which the Contractor submitted with the Letter of Tender. Such document may include the Contractor's preliminary design and the Contractor's Tender Programme.
- 1.1.1.7 **“Contractor's Tender Programme”** means the programme submitted by the Contractor with the Contractor's Technical Proposal which includes the Milestones and Milestone Dates.

- 1.1.1.8 “**Current Programme**” means the programme that evolves from the Accepted Baseline Programme to incorporate actual progress of the Works and as more particularly described and updated in accordance with Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements.
- 1.1.1.9 “**Employer's Requirements**” means the document entitled Employer's Requirements, as included in the Contract, and any additions and modifications to such document in accordance with the Contract. Such document specifies the requirements of the Employer, the purpose, scope, and/or design and/or other technical criteria, for the Works.
- 1.1.1.10 “**Geotechnical Interpretive Report**” means the report issued by the Employer and included in the Contract at Part 1 of the Volume VII Documents.
- 1.1.1.11 “**Letter of Acceptance**” means the Employer's written legal acceptance of the Letter of Tender, issued by its posting on the Employer's webpage www.pancanal.com. The date of the issuing or receiving of the Letter of Acceptance and/or the date of the Letter of Acceptance means the first Business Day of its publication on the Employer's webpage as aforesaid.
- 1.1.1.12 “**Letter of Tender**” means the document entitled Letter of Tender, which was completed by the Contractor and includes the signed offer to the Employer for the Works and all obligations under the Contract and which includes the Appendix to Tender.
- 1.1.1.13 “**Price Adjustment Timetable**” means the document entitled Price Adjustment Timetable submitted by the Contractor with the Letter of Tender and in which document the Contractor provided the Adjustment Quantities and which shall be updated by the Employer's Representative during the course of the Contract pursuant to Sub-Clause 13.8 [*Adjustments for Changes in Prices for Specified Materials*].
- 1.1.1.14 “**RFP**” means the Employer's request for proposals (as amended by the Employer during the tender period) in respect of the Contract, number 76161.
- 1.1.1.15 “**RFQ**” means the Employer's request for qualifications and any amendments thereto in respect of the Contract, number 73902.
- 1.1.1.16 “**Tender**” means the Letter of Tender, the Contractor's Price Proposal, the Price Adjustment Timetable and the Contractor's Technical Proposal.
- 1.1.1.17 “**Volume VI Documents**” means those documents listed as Volume VI Documents within the Contract Agreement
- 1.1.1.18 “**Volume VII Documents**” means those documents listed as Volume VII Documents within the Contract Agreement.

1.1.2 Parties and Persons

- 1.1.2.1 “**Association**” means an association, consortium, joint venture or other unincorporated grouping entered into by the Members for the purposes of,

inter alia, entering into this Contract.

- 1.1.2.2 “**Contractor**” means the person(s) named as contractor in the Letter of Tender accepted by the Employer and the legal successors in title to such person(s) and any permitted and authorised assigns thereof.
- 1.1.2.3 “**Contractor's Personnel**” means the Contractor's Representative and all personnel whom the Contractor utilises on Site, who may include the staff, labor and other employees of the Contractor and of each Subcontractor; and any other personnel assisting the Contractor in the execution of the Contract.
- 1.1.2.4 “**Contractor Project Company**” means a company incorporated and operating under the laws of the Republic of Panama with the sole purpose of carrying out and completing the Contract and all obligations of the Contractor thereunder.
- 1.1.2.5 “**Contractor-Related Party**” means each Member, each Shareholder and each Guarantor.
- 1.1.2.6 “**Contractor's Representative**” means the person named by the Contractor in the Contract or appointed from time to time by the Contractor under Sub-Clause 4.3 [*Contractor's Representative*], who acts on behalf of the Contractor.
- 1.1.2.7 “**DAB**” means the three persons appointed under Sub-Clause 20.2 [*Appointment of the Dispute Adjudication Board*] or Sub-Clause 20.3 [*Failure to Agree Dispute Adjudication Board*].
- 1.1.2.8 “**Design Subcontractor**” means any Subcontractor(s) named by the Contractor as Project Designer in response to the RFQ.
- 1.1.2.9 “**Employer**” means the person named as employer in the Appendix to Tender and the legal successors in title to this person. The Employer is an entity of the Government of the Republic of Panama established under Title XIV of the National Constitution.
- 1.1.2.10 “**Employer's Representative**” means the person appointed by the Employer to act on behalf of the Employer for the purposes of the Contract and named in the Appendix to Tender, or such other person appointed from time to time by the Employer and notified to the Contractor under Sub-Clause 3.4 [*Replacement of the Employer's Representative*].
- 1.1.2.11 “**Employer's Personnel**” means the Employer's Representative, the assistants referred to in Sub-Clause 3.2 [*Delegation by the Employer's Representative*] and all other staff, labor, agents and other employees of the Employer's Representative and of the Employer; and any other personnel notified to the Contractor, by the Employer or the Employer's Representative, as Employer's Personnel.
- 1.1.2.12 “**Guarantor**” means each person named or identified as a “guarantor” under the Parent Company Guarantee and/or the Joint and Several Guarantee and/or the Parent Company Guarantee for the Joint and Several Guarantee.
- 1.1.2.13 “**Key Personnel**” are those persons employed by the Contractor and

specifically named in the Contractor's Technical Proposal as required by Sub-Clause 6.9 [*Contractor's Personnel*].

- 1.1.2.14 “**Labor Ministry**” means the Ministry of Labor and Labor Development of the Republic of Panama.
- 1.1.2.15 “**Lead Member**” means the Member designated as such in the Contractor's response to the RFQ and who shall also be designated as such in the Contract Agreement and who has the legal authority and capacity to execute and deliver on behalf of the Contractor and bind the Contractor to any agreement, document, notice, consent or other instrument as may be necessary or required under the Contract.
- 1.1.2.16 “**Lock Gates Fabricator**” means the Subcontractor (if any) named by the Contractor in relation to, inter alia, the fabrication and supply of the lock gates in the Contractor's response to the RFQ.
- 1.1.2.17 “**Maintenance Services Subcontractor**” means the Subcontractor (if any) named by the Contractor in the Contractor's Technical Proposal in relation to, inter alia, the Maintenance Services,.
- 1.1.2.18 “**Member**” means each of the individual, distinct and separate legal entities that comprise the Contractor and which have entered into the Association, and which shall include any New Member after the Base Date.
- 1.1.2.19 “**New Member**” means an individual, distinct and separate legal entity whose participation as a Member has been approved by the Employer.
- 1.1.2.20 “**Party**” means the Employer or the Contractor, as the context requires and “**Parties**” shall mean both the Employer and the Contractor.
- 1.1.2.21 “**Shareholder**” means each owner of Share Capital in the Contractor Project Company.
- 1.1.2.22 “**Subcontractor**” means any person of any tier appointed as a subcontractor, supplier, designer or consultant, for part of the Works or the Maintenance Services and the legal successors in title to each such person.

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 of Tenders.
- 1.1.3.2 “**Business Day**” means any day of the week (other than a Saturday or Sunday) when the Employer is open for business, which shall not include mandatory national holidays or memorial days established by the applicable Laws or by Cabinet Decrees in the Republic of Panama.
- 1.1.3.3 “**Commencement Date**” means the date notified under Sub-Clause 8.1 [*Commencement of Work*].
- 1.1.3.4 “**day**” means a calendar day and “**year**” means 365 days or 366 days in the case of a leap year.

- 1.1.3.5 **“Defects Notification Period”** means the period for notifying defects in the Works 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 are completed as certified under Sub-Clause 10.1 [*Taking Over of the Works*] and during which period the Contractor shall remedy defects, complete the works set out in the Schedule of Outstanding Minor Work and Defects and carry out any other obligations as required by the Contract.
- 1.1.3.6 **“Milestones”** means the milestones referred to in Sub-Clause 8.3 [*Programme*] and a “Milestone” means any of them.
- 1.1.3.7 **“Milestone Dates”** means the time for the achievement of the Milestones which times are set out in the Contractor's Tender Programme and which shall be thereafter incorporated into the Accepted Baseline Programme in accordance with Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements (with any extension under Sub-Clause 8.4A [*Extension of Milestone Dates*]), calculated from the Commencement Date and a “Milestone Date” means any of them.
- 1.1.3.8 **“Notice of Completion of the Works”** means the notice described in Sub-Clause 4.2C [*Payment Bond*].
- 1.1.3.9 **“Performance Certificate”** means the certificate issued under Sub-Clause 11.9 [*Performance Certificate*].
- 1.1.3.10 **“Schedule of Outstanding Minor Work and Defects”** means the schedule described in Sub-Clause 10.1 [*Taking Over of the Works*] and appended to the Taking-Over Certificate.
- 1.1.3.11 **“Taking-Over Certificate”** means a certificate issued under Clause 10 [*Employer's Taking Over*].
- 1.1.3.12 **“Tests after Completion”** means the tests which are specified in the Contract and which are carried out under Clause 12 [*Tests after Completion*] after the Works are taken over by the Employer.
- 1.1.3.13 **“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 are taken over by the Employer.
- 1.1.3.14 **“Time for Completion”** means the time for completing the Works 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.
- 1.1.3.15 **“UTC/GMT”** means Coordinated Universal Time/Greenwich Mean Time.

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, remedying of any

defects and all obligations under the Contract, which amount is the same as the “total base price” stated in the Contractor's Price Proposal.

- 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 Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.
- 1.1.4.4 “**Cost Plus Reasonable Profit**” means Cost and a sum of 5% of such Cost for profit.
- 1.1.4.5 “**Final Payment Certificate**” means the payment certificate issued under Sub-Clause 14.13 [*Issue of Final Payment Certificate*].
- 1.1.4.6 “**Final Statement**” means the statement defined in Sub-Clause 14.11 [*Application for Final Payment Certificate*].
- 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 “**Payment Certificate**” means a payment certificate issued under Clause 14 [*Contract Price and Payment*].
- 1.1.4.9 “**Provisional Sums**” mean the fixed price lump sums specified in the Contractor's Price Proposal as provisional sums, for the execution under Sub-Clause 13.5 [*Provisional Sums*] of certain defined elements of work as set out in the Contractor's Price Proposal and in the Employer's Requirements.
- 1.1.4.10 “**Retention Money**” means the accumulated retention moneys (if applicable) which the Employer may retain under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] and pay under Sub-Clause 14.9 [*Payment of Retention Money or Provision of Retention Security*].
- 1.1.4.11 “**Schedule of Project Elements and Prices**” is the Contractor's Price Proposal.
- 1.1.4.12 “**Statement**” means a statement submitted by the 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 “**Adjustment Amount Due This Period**” means in respect of each Adjustment Date for each of the Specified Materials, the Price Difference times the applicable Adjustment Quantity, rounded to the nearest whole dollar.
- 1.1.5.2 “**Adjustment Date**” means, in respect of each of the Specified Materials, the date determined by adding the number of “Calendar Days After Commencement Date” shown in the Price Adjustment Timetable to the

Commencement Date, and “**Adjustment Dates**” are all of them.

- 1.1.5.3 “**Adjustment Price**” means the average price, calculated in respect of each of the Specified Materials (other than Portland and Other Cements) from the price data sources stated in Sub-Clause 13.8.2 [*Adjustments for Changes in Prices for Specified Materials*], over the 90 day period prior to each Adjustment Date in respect of each of the Specified Materials (other than Portland and Other Cements), and “**Adjustment Prices**” are all of them.
- 1.1.5.4 “**Adjustment Quantity**” means the quantity stated in the Cost Adjustment Timetable in respect of each of the Specified Material in respect of each Adjustment Date, and “**Adjustment Quantities**” are all of them.
- 1.1.5.5 “**Canal**” means the Panama Canal, including the waterway, its anchorages, berths and entrances, land and sea, river, lake waters, locks, auxiliary dams, dikes and water control structures.
- 1.1.5.6 “**Cement Adjustment Date PPI Value**” means the average of the most recent three month final PPI data that is available on each Adjustment Date obtained from the non seasonally adjusted US Bureau of Labor Statistics Producer Price Index, Commodity Data, Final Data, for “Portland and Other Cements, Commodity Code 13 220 161”.
- 1.1.5.7 “**Cement Adjustment Price**” means in respect of each Adjustment Date for Portland and Other Cements, a value calculated by the following formula: (Cement Adjustment Date PPI Value / Cement Reference PPI Value) x Reference Price for Portland and Other Cements.
- 1.1.5.8 “**Cement Reference PPI Value**” means the value stated in the Cost Adjustment Timetable for Portland and Other Cements.
- 1.1.5.9 “**Contractor's Equipment**” means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works, the Maintenance Services and the remedying of any defects. However, Contractor's Equipment excludes Temporary Works, Employer's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Permanent Works.
- 1.1.5.10 “**Environmental Impact Study (EslA)**” means the Category III Environmental Impact Study of the Third Set of Locks included at Part 4 of the Volume VI Documents.
- 1.1.5.11 “**Environmental Resolution**” means resolution DIEORA IA-632-2007 dated November 9th, 2007 made by the National Environmental Authority of the Republic of Panama.
- 1.1.5.12 “**Footprint of the Lock Structures**” means with respect to the Atlantic locks to be constructed as part of the Works the area shown on Drawing 5802-39 and with respect to the Pacific locks to be constructed as part of the Works the area shown on Drawings 5803-58 and 5803-59 (see Part 2 of the Volume VII Documents).
- 1.1.5.13 “**Foundation Level**” means in respect of each Lock Structure, the top level of the foundation of each such Lock Structure.

- 1.1.5.14 **“Goods”** means Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.
- 1.1.5.15 **“Lock Structure”** means a lock chamber, lock head, gate enclosure, water saving basin, lock approach structure, culvert and water conduit, valve enclosure or any other structure in each new lock.
- 1.1.5.16 **“Maintenance Services”** means those services as set out in Section 01 93 00 [*Maintenance Services*] of the Employer's Requirements, which the Contractor shall be required to perform after the issue of the Taking-Over Certificate for the Works under Sub-Clause 10.1 [*Taking Over of Part of the Works*] in the event that Provisional Sum No.5 and/or Provisional Sum No.6 (as set out in the Contractor's Price Proposal), are instructed by the Employer's Representative in accordance with Sub-Clause 13.5 [*Provisional Sums*].
- 1.1.5.17 **“Materials”** means things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under the Contract.
- 1.1.5.18 **“Maximum Adjustment Quantity”** means in respect of each Specified Material the maximum adjustment quantity as stated in the Price Adjustment Timetable.
- 1.1.5.19 **“Operations”** means the management, operation, maintenance, preservation and protection of the Canal.
- 1.1.5.20 **“Panama Canal Expansion Program”** means the Canal expansion program (which includes the Works) as more particularly described on the Employer's webpage at: www.pancanal.com/eng/plan/documentos/propuesta/acp-expansion-proposal.pdf.
- 1.1.5.21 **“Permanent Works”** means the permanent works to be executed by the Contractor under the Contract.
- 1.1.5.22 **“Plant”** means the apparatus, machinery and vehicles intended to form or forming part of the Permanent Works.
- 1.1.5.23 **“Price Difference”** means in respect of each Adjustment Date for the Specified Materials, the applicable Adjustment Price or (in the case of Portland and Other Cements) the Cement Adjustment Price, minus the applicable Reference Price.
- 1.1.5.24 **“Prohibited Materials”** means materials or products which at the date of specification or use (given the state of knowledge generally within the construction industry at that time) are known or reasonably thought to be:
- (a) deleterious or likely to become deleterious;
 - (b) deleterious if used under certain physical or atmospheric conditions;
or
 - (c) likely to degrade prematurely or require an undue level of maintenance within the context of the life expectancy of the Works or

part thereof.

A “deleterious” material or product is a material or product which by itself or combined with other materials or products:

- (a) poses a threat to the health and safety of those involved in the construction or use of the Works or part thereof;
- (b) poses a threat to the structural integrity durability or performance of the whole or part of the Works;
- (c) will on a balance of probabilities reduce the life expectancy of the Works or any part thereof; or
- (d) will on a balance of probabilities adversely affect the ability of the Employer to insure the Works or materially increase the cost of such insurance.

1.1.5.25 “**Prudent Industry Practices**” means using the standards, practices, methods and procedures, complying with Laws and exercising the degree of prudence and foresight which would be expected from a properly skilled and experienced international market leading EPC contractor in the international civil engineering and infrastructure sector.

1.1.5.26 “**Reference Price**” means the price as so stated in the Price Adjustment Timetable for each Specified Material, and “**Reference Prices**” are all of them.

1.1.5.27 “**Specified Materials**” means each of those materials and/or products stated in the Price Adjustment Timetable in respect of which price adjustments may be made in accordance with Sub-Clause 13.8 [*Adjustments for Changes in Prices for Specified Materials*].

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

1.1.5.29 “**Works**” mean the Permanent Works and the Temporary Works, or either of them as appropriate.

1.1.6 Other Definitions

1.1.6.1 “**Acquisition Regulations of the Employer**” or “**Employer's Acquisition Regulations**” means in either case the regulations which can be accessed via the internet at: www.pancanal.com under the “Procurement Section”, “Information and Documents.” The official version of the regulations is Spanish.

1.1.6.2 “**A.M. Best**” means A.M. Best Company, Inc.

1.1.6.3 “**Acceptable Bond Issuer**” means a surety insurer:

- (a) having an Acceptable Bond Issuer Rating; and

- (b) which is:
 - (i) licensed in the State of New York, United States of America, and listed in the latest published United States Department of the Treasury Listing of Certified Surety Companies, as published in Treasury Circular 570; and/or
 - (ii) authorized to do business in the United Kingdom (UK) and which has the appropriate Financial Services Authority regulatory authorization (or is exempt from such authorization) to write surety insurance in accordance with the applicable regulatory regime; and
- (c) whose reinsurers also have an Acceptable Bond Issuer Rating and the appropriate regulatory authorization (or exemption from such authorization) in the relevant jurisdiction(s) applicable thereto.

1.1.6.4 **“Acceptable Bond Issuer Rating”** means, with respect to a surety insurer and any reinsurer thereof in respect of all or any portion of the Performance Bond or the Payment Bond, a minimum rating either from A.M. Best of “A-Category XV”, or S&P of “A-”, or Moody’s of “A3” or Fitch of “A-”.

1.1.6.5 **“Acceptable Contractor Auditor”** means an auditing firm, duly established and operating in the Republic of Panama and which is registered with the Public Company Accounting Oversight Board (PCAOB), and which is ranked as one of the top five (5) accounting firms listed in one of the following publications:

- (a) *Accountancy Magazine*, “Top 60 League table of UK accountancy firms 2008”;
- (b) *Accounting Today*, “2008 100 Top firms” in the United States; or
- (c) the 2007 Global 500 List published by the Managing Partners’ Forum.

1.1.6.6 **“Acceptable Financial Institution”** means a financial institution duly established and operating in the Republic of Panama with a valid General License issued by the Superintendence of Banks of the Republic of Panama and having an Acceptable Financial Institution Rating.

1.1.6.7 **“Acceptable Financial Institution Rating”** means, with respect to a financial institution, a minimum long-term credit rating from any of the following: from S&P of “BBB”, from Moody’s of “Baa2” or, from Fitch of “BBB”.

1.1.6.8 **“Advance Payment for Mobilisation Security”** means the security required pursuant to Sub-Clause 14.2A [*Advance Payment for Mobilisation*] in the form included at Annex D Volume 1, Part 3 of the RFP, and issued by an Acceptable Financial Institution.

1.1.6.9 **“Advance Payment for Plant Security”** means the security required pursuant to Sub-Clause 14.2B [*Advance Payment for Plant*] in the form included at Annex D-1 Volume 1 Part 3 of the RFP, and issued by an

Acceptable Financial Institution.

- 1.1.6.10 “**Contractor's Documents**” means the calculations, computer programs and other software, drawings, design information, manuals, models, design documents and other documents of a technical nature required to be supplied by the Contractor or developed in the course of or for the purposes of the work to be carried out by or on behalf of the Contractor under the Contract, including the documents described in Sub-Clause 5.2 [*Contractor's Documents*].
- 1.1.6.11 “**Contractor Security Instrument**” means each of the Performance Bond, the Payment Bond and each Contractor Security LOC.
- 1.1.6.12 “**Contractor Security Instrument Issuer**” means, at any time, the issuer of any then-outstanding Contractor Security Instrument.
- 1.1.6.13 “**Contractor Security LOC**” means each of the Defects Notification Period Security (if applicable), the Advance Payment for Mobilisation Security, the Advance Payment for Plant Security, the Fixed Retention Security (if any), the Escalating Retention Security (if any) and the Plant and Material Security.
- 1.1.6.14 “**Country**” means the country in which the Site is located, where the Permanent Works are to be executed.
- 1.1.6.15 “**Defects Notification Period Security**” means the security required pursuant to Sub-Clause 4.2B [*Defects Notification Period Security*] (if applicable), in the form included at Annex F Volume I, Part 3 of the RFP, and issued by an Acceptable Financial Institution.
- 1.1.6.16 “**DTCS**” means the Document Tracking and Control System as more particularly described in Section 01 32 00 [*Project Communication and Document Management*] of the Employer's Requirements.
- 1.1.6.17 “**Employer's Equipment**” means the apparatus, machinery and vehicles (if any) made available by the Employer for the use of the Contractor in the execution of the Works, as stated in the Employer's Requirements; but does not include Plant which has not been taken over by the Employer.
- 1.1.6.18 “**Escalating Retention Security**” means the First Escalating Retention Security and the Second Escalating Retention Security.
- 1.1.6.19 “**First Escalating Retention Security**” means the security required pursuant to Sub-Clause 14.9B [*Escalating Retention Security*] in the form included at Annex I Volume I, Part 3 of the RFP, and issued by an Acceptable Financial Institution.
- 1.1.6.20 “**First Fixed Retention Security**” means the security required pursuant to Sub-Clause 14.9A [*Fixed Retention Security*] in the form included at Annex H Volume I, Part 3 of the RFP, and issued by an Acceptable Financial Institution.
- 1.1.6.21 “**Fitch**” means Fitch Ratings, Ltd.
- 1.1.6.22 “**Fixed Retention Security**” means the First Fixed Retention Security and

the Second Fixed Retention Security.

- 1.1.6.23 **“Force Majeure”** is defined in Clause 19 [*Force Majeure*].
- 1.1.6.24 **“Joint and Several Guarantee”** means the guarantee required pursuant to sub-paragraph (e) of Sub-Clause 1.7.2 [*Assignment*] in the form at Annex E Volume 1, Part 3 of the RFP.
- 1.1.6.25 **“Laws”** means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority including the Acquisition Regulations of the Employer.
- 1.1.6.26 **“Member's Interest”** means the economic or other participating interest of each Member in the Association.
- 1.1.6.27 **“Moody's”** means Moody's Investor Services, Inc.
- 1.1.6.28 **“Parent Company Guarantee”** means the guarantee(s) required pursuant to sub-paragraph (a) of Sub-Clause 1.7A.4 [*Joint and Several Liability*] in the form included at Annex A Volume 1 Part 3 of the RFP.
- 1.1.6.29 **“Parent Company Guarantee for the Joint and Several Guarantee”** means the guarantee(s) required pursuant to sub-paragraph (f) of Sub-Clause 1.7.2 [*Assignment*] in the form included at Annex E-1 Volume 1 Part 3 of the RFP.
- 1.1.6.30 **“Partial Contractor Security LOC”** is defined in Sub-Clause 4.2E [*Multiple Contractor Security Instruments*].
- 1.1.6.31 **“Payment Bond”** means the security required pursuant to Sub-Clause 4.2C [*Payment Bond*] in the form of the American Institute of Architects (AIA) Form A312-1984, pages 7 to 11, with modifications as included in Annex C-1 Volume I, Part 3 of the RFP, and issued by an Acceptable Bond Issuer.
- 1.1.6.32 **“Performance Bond”** means the security required pursuant to Sub-Clause 4.2A.1 [*Performance Bond*] or Sub-Clause 4.2A.2 [*Performance Bond*] in the form of American Institute of Architects (AIA) Form A312-1984, pages 1 to 6, with modifications as included in Annex C Volume 1, Part 3 of the RFP, and issued by an Acceptable Bond Issuer.
- 1.1.6.33 **“Plant and Material Security”** means the security or securities required pursuant to Sub-Clause 14.5 [*Plant and Material intended for the Works*] in the form included at Annex J Volume I, Part 3 of the RFP, and issued by an Acceptable Financial Institution.
- 1.1.6.34 **“S&P”** means Standard & Poor's Ratings Group (a division of McGraw Hill Companies).
- 1.1.6.35 **“Second Escalating Retention Security”** means the security required pursuant to Sub-Clause 14.9B [*Escalating Retention Security*] in the form included at Annex I-1 Volume I, Part 3 of the RFP, and issued by an Acceptable Financial Institution.
- 1.1.6.36 **“Second Fixed Retention Security”** means the security required pursuant

to Sub-Clause 14.9A [*Fixed Retention Security*] in the form included at Annex H-1 Volume I, Part 3 of the RFP, and issued by an Acceptable Financial Institution.

- 1.1.6.37 **“Share Capital”** means, as to any person (other than a natural person) all shares of any class or other ownership interests of any kind, however called, in such person, and any and all warrants or options to purchase or otherwise acquire any of the foregoing.
- 1.1.6.38 **“Site”** means the places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, any other places as may be specified in the Contract as forming part of the Site, and shall include areas shown on drawings included at Part 4 of the Employer's Requirements and marked:
- (a) "Contractor's Areas where the Works are to be executed and to which Plant and Materials are to be delivered";
 - (b) "Contractor's Areas where the Contractor may choose to build temporary docks";
 - (c) "Camp Site in the Atlantic side available to the Contractor if he chooses to use it", and
 - (d) "Available Disposal Sites"
- 1.1.6.39 **“Subcontract”** means a contract between the Contractor and any Subcontractor.
- 1.1.6.40 **“Subcontractor Warranty”** means the collateral warranty required pursuant to Sub-Clause 4.1.8 [*Contractor's General Obligations*] in the form set out in Annex G Volume I, Part 3 of the RFP.
- 1.1.6.41 **“Topographical Data”** means the topographical data included in the Contract at Part 2 of the Volume VII Documents.
- 1.1.6.42 **“Unforeseeable”** means not reasonably foreseeable by a Contractor exercising Prudent Industry Practices by the date established for submission of Tenders.
- 1.1.6.43 **“Variation”** means any change to the Employer's Requirements or the Works, which is instructed or approved as a variation under Clause 13 [*Variations and Adjustments*].

1.2 Interpretation

In the Contract, except where the context requires otherwise:

- (a) words indicating one gender include all genders;
- (b) words indicating the singular also include the plural and words indicating the plural also include the singular;
- (c) “including” means “including without limitation” (with related words being construed

accordingly), “in particular” means “in particular but without limitation”, and other general words shall not be given a restrictive interpretation by reason of their being preceded or followed by words indicating a particular class of acts, matters or things;

- (d) provisions including the word “agree”, “agreed” or “agreement” require the agreement to be recorded in writing;
- (e) “written” or “in writing” means hand-written, type-written, printed or electronically made, and resulting in a permanent record; and
- (f) any reference to time shall be considered to be UTC/GMT minus 5 hours.

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

1.3 Communications

Wherever the Contract provides for the giving or issuing of approvals, certificates, consents, determinations, notices and requests, these communications and all other written communications during the Contract shall be transmitted via the DTCS.

Subject to the forgoing paragraph, where the Contract expressly provides for any communications to be provided in a format other than via the DTCS (including CD, DVD or hardcopy), such communications shall also be sent to the address for the recipient's communications as stated in the Appendix to Tender. However, if the recipient gives written notice of another address, communications shall thereafter be delivered accordingly.

When a certificate is issued to a Party, the certifier shall send a copy to the other Party. When a notice is issued to a Party, by the other Party or the Employer's Representative, a copy shall be sent to the Employer's Representative or the other Party, as the case may be.

Any approvals, certificates, consents, determinations, notices, requests and other written communications shall be deemed to have been given or issued by a Party as follows:

- (a) when transmitted via the DTCS, at the time of transmission to the DTCS; or
- (b) if delivered by hand, post or courier at the time of delivery;

Provided that, where in the case of delivery by hand, post, courier or transmission via the DTCS such delivery or electronic transmission occurs either after 3.30 p.m. on a Business Day or on a day other than a Business Day, delivery shall be deemed to occur at 8.00 a.m. on the next following Business Day.

For the avoidance of doubt, no approvals, certificates, consents, determinations, notices and requests may be served by email or facsimile or any other method not stated in this Sub-Clause 1.3.

1.4 Law and Language

The Contract shall be governed by the laws of the Republic of Panama.

The ruling language stated in the Appendix to Tender shall be the language of the Contract.

The language for communications under the Contract shall be that stated in the Appendix to Tender.

1.5 Priority of Documents

Other than the Volume VI Documents which are, as stated in Sub-Clause 5.1, included in the Contract for information purposes only, the documents forming the Contract are to be taken as mutually explanatory of one another. For the purposes of interpretation, the priority of the documents shall be in accordance with the following sequence:

- (a) the Contract Agreement;
- (b) the Letter of Acceptance;
- (c) the Letter of Tender;
- (d) these Conditions of Contract;
- (e) the Price Adjustment Timetable;
- (f) the Appendices to the Conditions of Contract;
- (g) the Employer's Requirements;
- (h) the Contractor's Technical Proposal;
- (i) the Contractor's Price Proposal; and
- (j) the Volume VII Documents.

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

1.6 Contract Agreement

The Parties shall be bound under the terms of the Contract from the date of the Letter of Acceptance. To further evidence the Parties agreement, the Parties shall execute the Contract Agreement within 28 days from the date of issuing of the Letter of Acceptance. The Contract Agreement shall be in the form included in Volume I, Part 2 of the RFP.

1.7 Assignment

1.7.1 The Contractor shall not assign the whole or part of the Contract nor any benefit or interest in or under the Contract.

Notwithstanding the forgoing, the Contractor may assign the whole of the Contract to a Contractor Project Company, provided that:

- (a) the Employer, in its absolute discretion, consents to such assignment;

- (b) such assignment is not and will not be or result in a violation of applicable Laws;
- (c) any such assignment is without prejudice to, and shall in no way affect the obligations of any issuer under or of, or the validity of, any Contractor Security Instrument; and
- (d) the Shareholders of such Contractor Project Company shall at the date of the assignment be the Members and each such Member shall be the legal owner of a percentage of the Share Capital of such Contractor Project Company equivalent to such Member's Interest at the Base Date.

1.7.2 In order to be considered for consent by the Employer under sub-paragraph (a) of Sub-Clause 1.7.1, and as a prior condition to the granting by the Employer of any such consent, the Contractor shall first submit to the Employer:

- (a) the organisational documents of such Contractor Project Company;
- (b) documents consisting of (i) a certificate of incorporation from the Public Registry of the Republic of Panama evidencing the establishment of such Contractor Project Company as a legal entity under the laws of the Republic of Panama and (ii) a certified copy of the share register of the Contractor Project Company identifying the Shareholders thereof;
- (c) resolutions of the Board of Directors (and, if required pursuant to the constitutive documents of such Contractor Project Company, resolutions of the Shareholders) of such Contractor Project Company, authorising the execution, delivery and performance by the Contractor Project Company of the Contract, and such other related corporate matters that may be necessary in connection therewith;
- (d) a legal opinion of Panamanian counsel to such Contractor Project Company as to the due incorporation of such company and the due authorisation by, and validity, binding nature and enforceability of the Contract, on such company following the proposed assignment, and otherwise in customary form for such opinions;
- (e) the Joint and Several Guarantee;
- (f) if required pursuant to Sub-Clause 1.7A.5 [*Joint and Several Liability*], the Parent Company Guarantee for the Joint and Several Guarantee and the related documents referred to in Sub-Clause 1.7A.5 [*Joint and Several Liability*];
- (g) a legal opinion of:
 - (i) counsel in the jurisdiction of formation of each Member, as to, in each case under the laws of such jurisdiction, (A) the due authorisation of the Joint and Several Guarantee by such Member, and (B) the valid execution and delivery of the Joint and Several Guarantee by such Member; and
 - (ii) Panamanian counsel to each Member as to the validity, binding nature and enforceability under Panamanian law of the Joint and Several Guarantee on such Member,and, in the case of each such opinion, subject to customary assumptions and qualifications and otherwise in customary form for such opinions;
- (h) written confirmation from each issuer of a Contractor Security Instrument as to the continued validity of such Contractor Security Instrument notwithstanding such assignment, which shall include without limitation receipt by the Employer from the issuer

of each of the Performance Bond and the Payment Bond of riders and/or amendments designating the original Contractor and the Contractor Project Company as co-principals thereunder; and

- (i) such other documents, certificates and opinions as may be required by the Employer;

provided that, in addition to all other provisions of this Sub-Clause 1.7.2, such documents as provided in sub-paragraphs (a) and (b) of this Sub-Clause shall provide that (i) the Share Capital of such Contractor Project Company may only be issued in the form of nominee shares; (ii) one hundred percent (100%) of the authorised, issued and outstanding Share Capital of such Contractor Project Company shall be fully subscribed and paid for by the Members, each in a percentage of the Share Capital of such Contractor Project Company equivalent to such Member's Interest at the Base Date; and (iii) other than the Share Capital to be held by the Members as provided in the preceding sub-paragraph (ii), no other Share Capital shall or may be issued by such Contractor Project Company.

- 1.7.3 Following an assignment of the Contract to a Contractor Project Company which is approved by the Employer under sub-paragraph (a) of Sub-Clause 1.7.1, the Shareholders may not sell or otherwise transfer all or any part of their respective interests in the Share Capital of the Contractor Project Company.

Notwithstanding the foregoing, a Shareholder may sell or otherwise transfer all or any part of its respective interests in the Share Capital of the Contractor Project Company, provided that:

- (x) the Employer, in its absolute discretion, consents to such sale or transfer; and
- (y) such sale or transfer is not and will not be or result in any violation of any applicable Laws.

In order to be considered for consent by the Employer under this Sub-Clause 1.7.3, and as a prior condition to the granting by the Employer of any such consent, the Contractor shall first submit to the Employer:

- (i) a certified statement from the Contractor specifying the nature of the proposed sale or transfer and, assuming the sale or transfer were consented to by the Employer, specifying the resulting identity of the Shareholders and the percentage of Share Capital each would be the legal owner of after giving effect to such transfer or sale;
- (ii) written confirmation from each issuer of a Contractor Security Instrument as to the continued validity of such Contractor Security Instrument notwithstanding such sale or transfer;
- (iii) a new Joint and Several Guarantee in which all Members (including the replacement Shareholder(s)) are party, and if required by the Employer in its sole discretion, a new Parent Company Guarantee and/or a new Parent Company Guarantee for the Joint and Several Guarantee from each such entity or entities as the Employer may require guaranteeing the obligations of the replacement Shareholder(s), together with all such documents as are required pursuant to sub-paragraphs (f) and (g) of Sub-Clause 1.7.2 (but applicable to the replacement Shareholder(s) and the new documents to be delivered in connection with such transfer of the Share Capital);
- (iv) all such documents referred to in sub-paragraph (a) of Sub-Clause 1.7A.2, to be provided by the replacement Shareholder in respect of its appointment of

the Lead Member; and

- (v) such other documents, certificates and opinions as may be required by the Employer;

provided, that, in the event that the Employer in its absolute discretion approves such sale or transfer, the Contractor shall provide the Employer within 5 Business Days of any such sale or transfer with a certified copy of the updated share register of the Contractor Project Company identifying the Shareholders thereof and the percentage of Share Capital each is the legal owner of after giving effect to such sale or transfer; and

provided further that in the case of any sale or transfer of interests in the Share Capital of the Contractor Project Company from a Shareholder to another Shareholder, the Contractor shall not be required to provide to the Employer the documents specified in sub-paragraph (iv) of this Sub-Clause 1.7.3.

- 1.7.4 All documents submitted under Sub-Clauses 1.7.2 and 1.7.3 shall be acceptable in form and substance to the Employer and, if granted, signed or issued in the Republic of Panama, shall be notarized by a notary public of the Republic of Panama, or, if granted, signed or issued outside the Republic of Panama, shall be legalized by a Consular Office of the Republic of Panama or certified with an Apostille in conformity with The Hague Convention of 5th October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents.
- 1.7.5 The Contractor shall not, separately from an assignment of the Contract in whole in accordance with Sub-Clause 1.7.1, assign or transfer any interest in, or grant any lien in or over, any or all of the payments to be made by the Employer under or in respect of the Contract, and neither the Contract or any of its future proceeds shall be pledged or used by the Contractor as security, collateral or guarantee for any obligations or loans, in any such case without the prior written approval of the Employer, and subject to such requirements as the Employer may impose. In no event shall any Shareholder, or the Contractor permit any Shareholder to take any action to, pledge, assign or transfer any interest in, or grant any lien or security interest in or over, any or all of the Share Capital in the Contractor Project Company (except as may be expressly permitted pursuant to Sub-Clause 1.7.3). Neither the Contractor nor any Member shall consent or permit to exist any amendment to the certificate of incorporation and/or any other organisational document of the Contractor Project Company without the express prior written consent of the Employer, in its sole discretion.
- 1.7.6 The Contractor shall ensure that any rights, titles and interests (together with the obligations connected therewith) relating to the Works and the Maintenance Services which the Contractor may directly or indirectly acquire vis-à-vis third parties (including but not limited to any Subcontractors) can, if so required by the Employer, be assigned to the Employer, at the Employer's discretion, in the event of termination of the Contract or termination of the Contractor's right to complete the Contract by notice in writing by the Employer to any such third party and the Contractor shall execute the assignment documents requested by the Employer.

1.7A Joint and Several Liability

- 1.7A.1 Each Member and the Contractor hereby expressly agrees that (i) it is and shall be jointly and severally liable to the Employer with each other Member and (in the case of all Members) with the Contractor for the due and punctual performance by the Contractor of each and all the obligations, warranties, duties and undertakings of the Contractor under and pursuant to the Contract according to the terms of the Contract and shall forthwith perform the obligations, warranties, duties and undertakings of the Contractor in the same manner that the Contractor is required to

perform such obligations, warranties, duties and undertakings according to the terms of the Contract; and (ii) such joint and several liability shall remain unaltered and in full force and effect and shall not in any way be released or discharged or otherwise absolved of liability hereunder by reason of:

- (a) the termination of, or any provision in, the constitutive documents of the Association, or the dissolution (whether by agreement or operation of law or otherwise) of the Association;
- (b) any bankruptcy, insolvency (or event of similar effect) of any other Member or, in the case of all Members, the Contractor;
- (c) any suspension of the Works or the Maintenance Services or variation to or amendment of the Works or the Contract;
- (d) any extension of time for performance by the Contractor under the Contract;
- (e) any adjustment to the amounts payable to the Contractor under the Contract;
- (f) the termination of the Contract or termination of the Contractor's right to complete the Contract;
- (g) any forbearance, variation or waiver of any right or remedy the Employer may have against the Contractor or any Member or negligence by the Employer in enforcing any right or remedy afforded under the Contract or granting of time, indulgence or concession;
- (h) any bond, security, insurance, surety or guarantee held or obtained by the Employer, including any actions taken pursuant to such instruments, in respect of the obligations of the Contractor or any Member under the Contract, or any release or waiver thereof;
- (i) any act or omission of the Contractor or any Member pursuant to any other arrangement with any thereof;
- (j) any change in status or constitution of the Contractor, any Member, or the Employer;
- (k) the issuance of any certificate under the Contract;
- (l) any breach of the Contract by or other default of the Employer;
- (m) the Contract or any provision thereof being or becoming illegal, invalid, void, voidable or unenforceable including any liquidated damages under the Contract;
- (n) the taking over of the Contract by any Guarantor, or any other surety or any other person; and/or
- (o) any other matter or thing which may otherwise create a defense, whether legal or equitable, whereby the obligations of the Contractor or any Member hereunder might be discharged or affected.

- 1.7A.2 (a) The Contract Agreement shall specify the Lead Member and, together with its execution of the Contract Agreement, the Contractor shall provide evidence that such Lead Member has authority to bind the Contractor and all other Members, which evidence shall consist of:

- (i) powers of attorney (or equivalent instruments) governed by the laws of Panama issued by the Contractor and each Member to the Lead Member for such purpose;
 - (ii) resolutions of the Board of Directors (or equivalent) (and, if required pursuant to the constitutive documents of any Member, resolutions of the Shareholders) of each Member, authorising such power of attorney and appointing the specified attorney(s)-in-fact named therein; and
 - (iii) a legal opinion of;
 - (1) counsel in the jurisdiction of formation of each Member as to, in each case under the laws of such jurisdiction, (A) the due authorisation of such power of attorney (or equivalent instrument) by such Member, and (B) the valid execution and delivery of such power of attorney (or equivalent instrument) by such Member; and
 - (2) a legal opinion of Panamanian counsel to each Member as to the validity, binding nature and enforceability under Panamanian law of such power of attorney (or equivalent instrument) on such Member,and, in the case of each such opinion, subject to customary assumptions and qualifications and otherwise in customary form for such opinions;
- (b) Each Member expressly agrees that:
- (i) it shall at all times hereunder ensure and take all actions necessary to ensure that the Lead Member is at all times hereunder duly and validly empowered to bind it hereunder and otherwise in connection with the Contract;
 - (ii) any and all agreements, documents, notices, consents or other instruments entered into or delivered under the Contract by the Lead Member shall be binding upon and enforceable against such Member and the Contractor; and
 - (iii) it shall promptly notify the Employer of any invalidity, revocation, limitation, defect or other similar event or matter affecting any power of attorney (or equivalent instruments) or other document delivered by such Member in satisfaction of its obligations under this Sub-Clause 1.7A.2, together with details of its plan to remedy such invalidity, revocation, limitation, defect or other event or matter, and shall thereafter promptly deliver all such documents to the Employer so as to rectify and remedy the same.

1.7A.3 Neither the Contractor nor any Member shall consent to or suffer to exist any material amendment to the consortium or other agreement forming the Association (except as otherwise may be permitted pursuant to this Sub-Clause 1.7A.3 with respect to changes in Member composition or Member's Interests), without the express prior written consent of the Employer, in its sole discretion or change or other alteration in the Member composition of the Association or the Member's Interests therein without the prior written consent of the Employer in its absolute discretion,

Notwithstanding the foregoing, a change or other alteration in the Member composition of the Association or the Member's Interests therein may be made, provided that:

- (x) the Employer, in its absolute discretion, consents to such sale or transfer; and

(y) such sale or transfer is not and will not be or result in any violation of any applicable Laws.

In order to be considered for approval by the Employer under this Sub-Clause 1.7A.3, and as a prior condition to the granting by the Employer of any such approval, the Contractor shall first submit to the Employer:

- (a) in the case of any proposed change in the Member composition of the Association:
- (i) the organisational documents of the proposed New Member;
 - (ii) a certificate (or equivalent evidence) as to the due establishment or incorporation of the proposed New Member;
 - (iii) resolutions of the Board of Directors (or equivalent) (and, if required pursuant to the constitutive documents of the New Member, resolutions of the Shareholders) of the proposed New Member, authorising the execution, delivery and performance by the proposed New Member of the Contract and each other document, agreement or instrument to be entered into by it under or in connection with the Contract, and such other related corporate matters as may be necessary in connection therewith;
 - (iv) a legal opinion of:
 - (1) counsel in the jurisdiction of formation of each Member as to, in each case under the laws of such jurisdiction, (A) the due authorisation of the Contract and all such other such documents, agreements or instruments referred to in sub-paragraph (a)(iii) of this Sub-Clause 1.7A.3 by such Member, and (B) the valid execution and delivery of the Contract and all such other such documents, agreements or instruments referred to in sub-paragraph (a)(iii) of this Sub-Clause 1.7A.3 by such Member; and
 - (2) a legal opinion of Panamanian counsel to each Member as to the validity, binding nature and enforceability under Panamanian law of the Contract and all such other such documents, agreements or instruments referred to in sub-paragraph (a)(iii) of this Sub-Clause 1.7A.3 on such Member,and, in the case of each such opinion, subject to customary assumptions and qualifications and otherwise in customary form for such opinions
 - (v) written confirmation from each issuer of a Contractor Security Instrument as to the continued validity of such Contractor Security Instrument notwithstanding the participation of the proposed New Member hereunder; and
 - (vi) such other documents, certificates and opinions as may be required by the Employer.

or

- (b) in the case of any proposed change in the Member's Interests in the Association which does not involve the admission of a New Member:

- (i) a certified copy of the consortium or other agreement forming the Association, as amended to reflect the Member's Interests following such change;
- (ii) written confirmation from each Member transferring the Member's Interest and the Member or Members acquiring such interests as to the continued validity of its appointment of the Lead Member notwithstanding such change;
- (iii) written confirmation from each issuer of a Contractor Security Instrument as to the continued validity of such Contractor Security Instrument notwithstanding such proposed change;
- (iv) written confirmation from the signatory to any Parent Company Guarantee and/or Parent Company Guarantee for the Joint and Several Guarantee issued by the Member which is the Member acquiring additional Member's Interests, of the continued validity of each such guarantee notwithstanding such proposed changes; and
- (v) such other documents, certificates and opinions as may be required by the Employer.

1.7A.4 Each Member that submitted a "parent company letter" under the RFQ shall submit, no later than 28 days after issuance of the Letter of Acceptance, and shall send a copy to the Employer's Representative, each of the following documents:

- (a) the Parent Company Guarantee duly executed by the parent company of such Member;
- (b) resolutions of the Board of Directors (or equivalent) (and, if required pursuant to the constitutive documents of such parent company, resolutions of the Shareholders) of such parent company, authorising the execution, delivery and performance by such parent company of the Parent Company Guarantee, and such other related corporate matters as may be necessary in connection therewith;
- (c) a legal opinion of:
 - (i) counsel in the jurisdiction of formation of each parent company as to, in each case under the laws of such jurisdiction, (A) the due authorisation of the Parent Company Guarantee by such Member, and (B) the valid execution and delivery of the Parent Company Guarantee by such Member; and
 - (ii) a legal opinion of Panamanian counsel to each such parent company as to the validity, binding nature and enforceability under Panamanian law of the Parent Company Guarantee on such Member,

and in the case of each such opinion, subject to customary assumptions and qualifications and otherwise in customary form for such opinions; and

- (d) such other documents, certificates and opinions as may be required by the Employer.

1.7A.5 If a Member is required pursuant to Sub-Clause 1.7A.4 to provide a Parent Company Guarantee, and the Contractor has requested approval of the Employer to an assignment of the Contract as provided in Sub-Clause 1.7.1 [Assignment], the Contractor shall prior to and as a condition precedent of consent to any such assignment submit to the Employer the Parent Company Guarantee for the Joint and Several Guarantee, together with all such documents as are required

pursuant to sub-paragraphs (b), (c) and (d) of Sub-Clause 1.7A.4 (but applicable to such Parent Company Guarantee for the Joint and Several Guarantee).

- 1.7A.6 All documents submitted under this Sub-Clause 1.7A shall be acceptable in form and substance to the Employer and, if granted, signed or issued in the Republic of Panama, shall be notarized by a notary public of the Republic of Panama, or, if granted, signed or issued outside the Republic of Panama, shall be legalized by a Consular Office of the Republic of Panama or certified with an Apostille in conformity with The Hague Convention of 5th October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents.
- 1.7A.7 In no event shall any Member, or the Contractor suffer to permit any Member taking any action to, pledge, assign or transfer any interest in, or grant any lien or security interest in or over, any or all of the Member's Interests in the Association (except as may be expressly permitted pursuant to this Sub-Clause 1.7A).
- 1.7A.8 The Contractor shall ensure that each of the Joint and Several Guarantee, any Parent Company Guarantee and any Parent Company Guarantee for the Joint and Several Guarantee provided hereunder shall remain valid and enforceable and in full force and effect until the Contractor has executed and completed the Works and complied with all its obligations under the Contract and until such time as all liability of the Contractor arising out of, under or in connection with the Contract (including in relation to any arbitration and/or arbitral awards) is extinguished.

1.8 Care and Supply of Documents

Each of the Contractor's Documents shall be in the custody and care of the Contractor, unless and until taken over by the Employer. In addition to transmittal via the DTCS, the Contractor shall supply to the Employer's Representative two copies of each of the Contractor's Documents (or such other number and/or in such other format as otherwise stated in the Contract).

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

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

1.9 Errors in the Employer's Requirements

- 1.9.1 The Contractor acknowledges that during the period which started on the date of publication of the RFP on December 21st 2007 and ended on the date of submission of the Tender the Contractor had ample and unrestricted opportunity to, using due care and Prudent Industry Practices, scrutinize and diligently examine the Site and the Employer's Requirements (including design criteria and calculations, if any) and the items of reference mentioned in Sub-Clause 4.7 [*Setting Out*]. Consequently, the Contractor warrants that it has not discovered any unfeasibility, error, fault or other defect whilst doing so which will form the basis of, or give rise to, or be the subject matter of, any claims of any nature against the Employer whether under this Sub-Clause 1.9 or otherwise.
- 1.9.2 Notwithstanding Sub-Clause 1.9.1, upon receiving notice under Sub-Clause 8.1 [*Commencement of Works*] the Contractor shall continue to scrutinize and diligently examine the Site and the Employer's Requirements (including design criteria and calculations, if any) and the items of

reference mentioned in Sub-Clause 4.7 [*Setting Out*] using due care and Prudent Industry Practices. Within the period stated in the Appendix to Tender, calculated from the Commencement Date, the Contractor shall give notice to the Employer's Representative of any error, fault or other defect found in the Employer's Requirements or these items of reference.

1.9.3 After receiving this notice, the Employer's Representative shall determine whether Clause 13 [*Variations and Adjustments*] shall be applied, and shall give notice to the Contractor accordingly. If and to the extent that (taking account of cost and the time available) an experienced contractor exercising due care and Prudent Industry Practices would have discovered the error, fault or other defect when scrutinizing and examining the Site and the Employer's Requirements and the items of reference mentioned in Sub-Clause 4.7 [*Setting Out*] before submitting the Tender, the Time for Completion and/or any Milestone Dates shall not be extended and the Contract Price shall not be adjusted.

1.9.4 If the Contractor suffers delay and/or incurs Cost as a result of an error in the Employer's Requirements, and an experienced contractor exercising due care and Prudent Industry Practices would not have discovered the error when scrutinizing and examining the Site and the Employer's Requirements (including design criteria and calculations, if any) and the items of reference mentioned in Sub-Clause 4.7 [*Setting Out*] under Sub-Clause 1.9.2 or before submitting the Tender (having regard to Sub-Clause 1.9.1), the Contractor shall give notice to the Employer's Representative and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

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

After receiving this notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) whether and (if so) to what extent the error could not reasonably have been so discovered and (ii) the matters described in sub-paragraphs (a) and (b) of this Sub-Clause 1.9.4 related to this extent.

1.10 Employer's Use of Contractor's Documents

As between the Parties, and until the Performance Certificate is issued, the Contractor shall retain (and not licence to others save as provided herein) the copyright and other intellectual property rights in the Contractor's Documents.

The Contractor shall be deemed by entering into the Contract to hereby grant to the Employer a worldwide, irrevocable, non-terminable transferable non-exclusive royalty-free licence to copy, use and communicate the Contractor's Documents and any data or information contained therein (together with the right to sub-license), including making and using modifications of them. This licence shall:

- (a) entitle the Employer his agents and servants and any other person authorised by the Employer to copy, use and communicate the Contractor's Documents for the purposes of completing, operating, testing, maintaining, altering, adjusting, repairing and demolishing the Works and/or for the purposes of the Panama Canal Expansion Program; and
- (b) in the case of Contractor's Documents which are in the form of computer programs and other software, permit their use on any computer on the Site and other places as

envisaged by the Contract or otherwise required by the Employer, including replacements of any computers supplied by the Contractor.

The Contractor's Documents shall not, without the Contractor's consent, be used, copied or communicated to a third party by (or on behalf of) the Employer for any purposes other than those permitted under this Sub-Clause 1.10 and those undertaken for the purposes of the Employer exercising any of its rights or performing any of its obligations under the Contract.

In the event that the Contractor's Documents include third party computer programs and/or software, or any hardware equipment supplied by the Contractor as part of the Contract which requires the use of third party computer software, the Contractor shall provide with such documents or with the Works a full site license from the relevant third party owner for the use, copying and communication of such programs or software by the Employer and his agents and servants and any other persons authorised by the Employer as permitted under this Sub-Clause 1.10. Each such license shall be valid for not less than five years after the date of the Performance Certificate (or from the date of termination of the Contract or termination of the Contractor's right to complete the Contract). All license fees shall be the sole responsibility of the Contractor.

The Contractor shall be responsible at its cost for obtaining the consents (if any) required from third parties in connection with any third party technology or intellectual property rights forming part of or to be used in relation to the Works and/or the Contractor's Documents, including without limitation any third party technology or intellectual property rights with respect to any software forming part of or to be used in relation to the Works and/or the Contractor's Documents.

The Contractor shall ensure that any licence, contract or agreement which it enters into with a third party that provides for the provision or procurement of licenses for the use of third party technology or intellectual property rights forming part of or to be used in relation to the Works and/or the Contractor's Document includes provisions whereby:

- (a) such licenses grant the Employer, its servants and agents, designee and any successor operator the right to use the subject third party technology or intellectual property rights in the operation and maintenance of and otherwise in relation to the Works and/or the Panama Canal Expansion Program;
- (b) such licenses are transferable to the Employer, its servants and agents, designee and any successor operator and permit the granting of sub-licenses. For avoidance of doubt, the obligation on the Contractor under this Sub-Clause 1.10 to transfer by assignment to the Employer rights in the Contractor's Documents shall be taken to include an obligation on the Contractor to assign all its rights and interests in any such licence, contract or agreement entered into by the Contractor or its Subcontractors with a third party;
- (c) the terms thereof, including cost, are not materially different and are no less beneficial to the relevant licensee than those of typical third party arms length licensing arrangements and enable the Contractor to comply with this Sub-Clause 1.10; and
- (d) without limiting the indemnification obligations of the Contractor under Sub-Clause 17.5 [*Intellectual and Industrial Property Rights*] each license includes an indemnification of the Employer, its servants and agents, designee and any successor operator for infringement of patents or third party intellectual property rights.

Upon the issuance of the Performance Certificate (or upon termination of the Contract or upon termination of the Contractor's right to complete the Contract), the Contractor shall assign and

transfer exclusively to the Employer all rights, title and interests in and to the Contractor's Documents, including all intellectual property rights, licenses and proprietary industrial rights in and to the Contractor's Documents. The Contractor shall execute any assignment documents requested by the Employer.

1.11 Contractor's Use of Employer's Documents

As between the Parties, the Employer shall retain the copyright and other intellectual property rights in the Employer's Requirements and other data and documents supplied or made available by (or on behalf of) the Employer under the Contract. The Contractor may, at his cost, copy, use, and obtain communication of these data and documents for the purposes of the Contract. They shall not, without the Employer's consent, be copied, used or communicated to a third party by the Contractor, except as necessary for the purposes of the Contract. Any permitted communication shall only be to third parties who are subject to appropriate confidentiality obligations specified by the Employer and the Contractor shall remain responsible for ensuring that the documents are not, without the Employer's consent, further copied, used or communicated.

1.12 Confidential Details

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

1.13 Compliance with Laws

- 1.13.1 The Contractor shall, in performing the Contract, comply with all applicable Laws and all requirements and actions specified in the Environmental Impact Study (ESIA) and the Environmental Resolution.
- 1.13.2 The Employer shall have obtained (or shall obtain) the planning, zoning, environmental or similar permissions for the Permanent Works, and any other permissions described in the Employer's Requirements as having been (or being) obtained by the Employer; and the Employer shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so.
- 1.13.3 The Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the applicable Laws in relation to the design, execution and completion of the Works or the Maintenance Services and the remedying of any defects; and the Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so. However, with respect to approvals for the delivery of Goods, the Contractor shall submit, in sufficient time in advance, details of Goods to the Employer, who shall then provide reasonable assistance to the Contractor in accordance with Sub-Clause 2.2 [*Permits, Licenses or Approvals*] to promptly obtain all import permits or licenses required for those Goods.
- 1.13.4 According to the Constitution of the Republic of Panama, the Employer is subject to Title XIV, general laws (Law 19 of 1997) which implements Title XIV of the Constitution, and the regulations that the Board of Directors of the Employer issues in order to regulate the general laws. In consequence, the Works do not require construction permits from any other public entities.

1.14 Not Used

1.15 Confidentiality

The Contractor shall treat the details of the Contract, the Contractor's Documents and the Works as private and confidential, except to the extent necessary to carry out obligations under the Contract or comply with applicable Laws. The Contractor shall not publish, permit the publication, or disclose any details of the Works and the Maintenance Services in any trade or technical paper or elsewhere without the previous consent of the Employer and any such permitted disclosure shall only be to third parties whose confidentiality obligations are either approved in writing in advance by the Employer or which are subject to at least equivalent terms as this Sub-Clause 1.15. This Sub-Clause 1.15 shall survive the transfer of the rights in the Contractor's Documents to the Employer as described in Sub-Clause 1.10 [*Employer's Use of the Contractor's Documents*].

1.16 Entire Agreement

The Contract and the documents incorporated herein by reference constitute the entire agreement between the Employer and the Contractor and supersede all prior negotiations, commitments, representations, communications and agreements relating to the Contract either oral or in writing except to the extent they have been expressly incorporated herein. The Employer and the Contractor confirm that they have not relied upon any representation inducing them to enter into the Contract and agree to waive any right which they might otherwise have to bring any action in respect of such representation.

The Parties agree and acknowledge that the Contract shall be interpreted and construed without reference to any prior negotiations or communications and without reference to any changes or amendments to the RFP during the course of the tender process which changes or amendments were not expressly incorporated into the Contract.

In furtherance of the foregoing and for the avoidance of doubt, the Parties agree and acknowledge that the Contract shall be interpreted, construed and enforced without reference to any document or other material submitted to the Employer by or on behalf of the Contractor, any Member and/or any parent company of either thereof in response to or in connection with the RFQ and/or the RFP, and in no event shall the fact that the Employer shall have received any such document or other material be construed as an approval or consent of any matter, or a waiver or modification of any term or provision of the Contract, which shall take precedence thereover.

No change in, or addition to, or waiver, relaxation, forbearance, delay or indulgence in enforcing the terms and provisions hereof shall be binding upon the Contractor or the Employer unless approved and dated in writing by their respective authorized representatives in express terms that identify this Sub-Clause 1.16.

1.17 Not Used.

2 The Employer

2.1 Right of Access to the Site

The Employer shall give the Contractor right of access to, and possession of, all parts of the Site from the time stated in the Appendix to Tender. The right and possession may not be exclusive to

the Contractor. If, under the Contract, the Employer is required to give (to the Contractor) possession of any foundation, structure, plant or means of access, the Employer shall do so in the time and manner stated in the Employer's Requirements. However, the Employer may withhold any such right or possession until the Performance Bond, the Payment Bond, the Parent Company Guarantee (if applicable) and the Joint and Several Guarantee and the Parent Company Guarantee for the Joint and Several Guarantee (if any assignment to the Contractor Project Company has been approved by the Employer pursuant to Sub-Clause 1.7.1 [*Assignment*]) have been provided.

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

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

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

However, if and to the extent that the Employer's failure was caused by any error or delay by the Contractor (including as a result of the matters contemplated by the final sentence of the first paragraph of this Sub-Clause 2.1) and, including an error in, or delay in the submission of, any of the Contractor's Documents, the Contractor shall not be entitled to such extension of time, or any Cost Plus Reasonable Profit.

Without prejudice to Sub-Clause 4.24 [*Fossils etc*], the Contractor shall be responsible for the preservation of all public property, trees, monuments and structures (including cemeteries) located on the Site (including but not limited to those identified by the Employer) and shall use best endeavours to prevent loss or damage thereto. The Contractor shall be required to provide, without limitation, reasonable public access to cemeteries especially on Sundays and religious holidays, including November 2, when the "Day of All Souls" is observed. The Contractor shall maintain safe vehicle and pedestrian access to cemeteries on such days, and shall provide signage and barriers as required to limit access to other areas of the Site.

2.2 Permits, Licences or Approvals

The Employer shall (where he is in a position to do so) provide reasonable and timely assistance to the Contractor, at the request of the Contractor, for the processing of the Contractor's applications for any permits, licences or approvals required by the applicable Laws of the Country:

- (a) which the Contractor is required to obtain under Sub-Clause 1.13 [*Compliance with Laws*];
- (b) for the delivery of Goods, including clearance through customs;
- (c) for the export of Contractor's Equipment when it is removed from the Site; and

- (d) which the Contractor, subject to the labor Laws of the Country, may require to vary the proportion of foreign personnel allowed to be hired within his labor force. For this purpose, pursuant to its obligations under the applicable Laws, the Employer will employ sufficient and dedicated staff to receive and promptly review hiring waivers submitted by the Contractor as well as to, in the substantiated cases, recommend to the Labor Ministry the issuance of the Contractor requested hiring permits. The Employer will work closely with the Labor Ministry and other pertinent government authorities to promote vigorously the expeditious processing of the aforementioned hiring permits that are substantiated by the Contractor.

Notwithstanding the foregoing, the Contractor is responsible for submitting to the Employer in a timely manner the necessary documentation that justifies any permits to be requested to the Labor Ministry or to any other government entity which pursuant to applicable Laws need to be evaluated and sponsored by the Employer. The Contractor shall remain responsible for processing directly with authorities the transactions and formalities of the process, as the case may be.

2.3 Employer's Personnel

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

- (a) co-operate with the Contractor's efforts under Sub-Clause 4.6 [*Co-operation*]; and
- (b) take actions similar to those which the Contractor is required to take under subparagraphs (a) and (c) of Sub-Clause 4.8.2 [*Safety Procedures*] and under the second and third paragraphs of Sub-Clause 4.18 [*Protection of the Environment*].

2.4 Not Used

2.5 Employer's Claims

If the Employer considers himself to be entitled to any payment under any Clause of these Conditions of Contract or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Employer's Representative shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.20 [*Employer's Equipment and Free-Issue Material*], or for other services requested by the Contractor.

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

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

This amount may be included as a deduction or set off to the Contract Price and Payment Certificates.

3 The Employer's Representative

3.1 Employer's Representative's Duties and Authority

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

The Employer's Representative shall exercise the authority delegated to him by the Employer. Unless and until the Employer notifies the Contractor otherwise, the Employer's Representative shall be deemed to have the full authority of the Employer under the Contract.

Except as otherwise stated in these Conditions of Contract:

- (a) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Employer's Representative shall be deemed to act for the Employer; and
- (b) any approval, comment, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Employer's Representative (including absence of disapproval) shall not relieve the Contractor from any responsibility he has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances.

3.2 Delegation by the Employer's Representative

The Employer or the Employer's Representative may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include 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 Employer's Representative shall not delegate the authority to determine any matter in accordance with Sub-Clause 3.5 [*Determinations*].

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

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

- (a) any failure to disapprove any work, Plant or Materials shall not constitute approval, and shall therefore not prejudice the right of the Employer's Representative to reject the work, Plant or Materials or otherwise prejudice any rights of the Employer in respect of such work, Plant or Materials; and

- (b) if the Contractor questions any determination or instruction of an assistant, the Contractor may refer the matter to the Employer's Representative, who shall promptly confirm, reverse or vary the determination or instruction.

3.3 Instructions of the Employer's Representative

Subject to the provision of Sub-Clause 3.1 [*Employer's Representative's Duties and Authority*], the Employer's Representative may issue to the Contractor (at any time) instructions which may be necessary for the execution of the Works or the Maintenance Services and the remedying of any defects, all in accordance with the Contract. The Contractor shall only take instructions from the Employer's Representative, or from an assistant to whom the appropriate authority has been delegated under this Clause. If an instruction constitutes a Variation, Clause 13 [*Variations and Adjustments*] shall apply.

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

3.4 Replacement of the Employer's Representative

If the Employer intends to replace the Employer's Representative, the Employer shall give the Contractor reasonable notice of the replacement's name, address and the intended date of the appointment.

3.5 Determinations

Whenever these Conditions of Contract provide that the Employer's Representative shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Employer's Representative shall endeavour to reach agreement with the Contractor. If agreement is not achieved, the Employer's Representative shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

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

3.6 Not Used.

4 The Contractor

4.1 Contractor's General Obligations

- 4.1.1 The Contractor warrants and undertakes that when completed, the Works shall be fit for the purposes for which the Works are intended as defined or as reasonably to be inferred from the Contract and they will fully comply with all performance specifications and requirements included in the Employer's Requirements and will comply fully with the Contract.

- 4.1.2 Entirely without prejudice to Sub-Clause 4.1.1 and without in any way limiting the Contractor's obligations as set out therein, or elsewhere in the Contract, the Contractor warrants and undertakes that it shall design, execute and complete the Works (including any rectification of defects therein) and carry out its obligations under the Contract:
- (a) in accordance with the Contract as altered or modified in accordance with these Conditions of Contract;
 - (b) ensuring that the Contractor complies with all applicable Laws, including the labor Laws and regulations of the Republic of Panama, and specifically with respect to the composition of the labor force permitted to work in the Republic of Panama;
 - (c) in relation to the design of the Works, using all the reasonable skill, care and diligence to be expected of professionally qualified and competent designers of the relevant disciplines;
 - (d) ensuring that it does not use and will not specify for use in relation to the Works any Prohibited Materials. The Contractor agrees that it will immediately give notice to the Employer's Representative if it becomes aware at any time prior to issue of the Performance Certificate that any Prohibited Materials have been or may be so used;
 - (e) using Materials and Plant which are new and of sound and satisfactory quality and all workmanship, manufacture and/or fabrication will be to the standard consistent with the intended use of the Works or as expressly stated in the Contract;
 - (f) in such a way as to ensure that the Works enable the full, efficient, economic and safe commercial operation of the Works in accordance with the applicable Laws and the requirements of the Contract after the Taking-Over Certificate has been issued with the minimum interruption for maintenance or repair; and
 - (g) with sound equipment, safely and in accordance with Prudent Industry Practices, and in accordance with the Contract's requirements and specifications.
- 4.1.3 The Contractor warrants and undertakes to the Employer that it has the requisite degree of skill, experience, capability and resources (including financial resources) available to it to perform its obligations under the Contract and execute the Works.
- 4.1.4 The Contractor shall provide the Plant and the Contractor's Documents specified in the Contract, and all the Contractor's Personnel, Goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for the design, execution, completion of the Works, and remedying of defects, as well as all things necessary for the proper use of the Works as defined or as reasonably inferred from the Contract (including, but not limited to all such information, data, source codes, licences, calculations and the like).
- 4.1.5 The Works shall include any work which is necessary to satisfy the Employer's Requirements, or is implied by the Contract, and all works which are necessary for stability or for the completion or safe and proper operation of the Works.
- 4.1.6 The Contractor shall be responsible for the adequacy, stability and safety of all Site operations, of all methods of construction and of all the Works.
- 4.1.7 The Contractor shall, whenever required by the Employer's Representative or the Contract, submit details of the arrangements and methods which the Contractor proposes to adopt for the execution of the Works and the Maintenance Services. No material alteration to these arrangements and

methods shall be made without this having previously been notified to the Employer's Representative.

- 4.1.8 The Contractor shall, within 28 days of the Commencement Date, deliver to the Employer the Subcontractor Warranty, duly executed by the Contractor's Lock Gates Fabricator.

4.2 Security for Performance

The Contractor shall, at its option, provide the Employer with either:

- (a) the Performance Bond pursuant to Sub-Clause 4.2A.1 [*Performance Bond*] and the Defects Notification Period Security pursuant to Sub-Clause 4.2B [*Defects Notification Period Security*]; or
- (b) the Performance Bond pursuant to Sub-Clause 4.2A.2 [*Performance Bond*].

4.2A Performance Bond

- 4.2A.1 Where the Contractor has elected to proceed in accordance with this Sub-Clause 4.2A.1 the Contractor shall obtain, at his own cost, and furnish to the Employer the Performance Bond. In such circumstances, the Contractor shall deliver the Performance Bond to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Employer's Representative.

The Contractor shall ensure that the Performance Bond (for the amount stated in the Appendix to Tender) shall remain valid and enforceable and in full force and effect until the Contractor has executed and completed the Works and complied with all its obligations under the Contract and remedied any defects during and in respect of the period stated in the Appendix to Tender.

- 4.2A.2 Where the Contractor has elected to proceed in accordance with this Sub-Clause 4.2A.2 the Contractor shall obtain, at his own cost, and furnish to the Employer the Performance Bond. In such circumstances, the Contractor shall deliver the Performance Bond to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Employer's Representative.

The Contractor shall ensure that the Performance Bond (for the amount stated in the Appendix to Tender) shall remain valid and enforceable and in full force and effect until the Contractor has executed and completed the Works and complied with all its obligations under the Contract and remedied any defects during and in respect of the period stated in the Appendix to Tender.

4.2B Defects Notification Period Security

Where the Contractor has elected to provide the Performance Bond pursuant to Sub-Clause 4.2A.1 [*Performance Bond*], the Contractor shall obtain, at his own cost, and furnish to the Employer the Defects Notification Period Security. In such circumstances, the Contractor shall deliver the Defects Notification Period Security to the Employer by the date that the Employer's Representative issues, and as a prior condition to the issuance of, the Taking-Over Certificate, and shall send a copy to the Employer's Representative.

The Contractor shall ensure that the Defects Notification Period Security (for the amount stated in

the Appendix to Tender) shall remain valid and enforceable and in full force and effect until the Contractor has complied with all its obligations under the Contract during and in respect of the period stated in the Appendix to Tender, provided that the Defects Notification Period Security may be issued for recurring periods of not less than one year during such period.

If the Contractor has not become entitled to receive the Performance Certificate by the date 45 days prior to the specified expiry date of the Defects Notification Period Security the Contractor shall, not later than 30 days prior to the expiry date of the Defects Notification Period Security, extend the validity of Defects Notification Period Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing in advance with the Employer's Representative, will maintain the Defects Notification Period Security in effect until the Performance Certificate has been issued by the Employer's Representative) and provide the Employer's Representative with reasonable evidence of each such extension.

The Employer shall be entitled to make a claim under the Defects Notification Period Security, if:

- (a) the Contractor has not become entitled to receive the Performance Certificate by the date 45 days prior to the expiry date of the Defects Notification Period Security and the Contractor fails to extend the validity of the Defects Notification Period Security in accordance with this Sub-Clause 4.2B;
- (b) the Contractor fails to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [*Employer's Claims*] or Clause 20 [*Claims, Disputes and Arbitration*], within 42 days after this agreement or determination;
- (c) the Contractor fails to remedy a default within the time stated in the Employer's notice requiring the default to be remedied, and/or
- (d) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

4.2C Payment Bond

The Contractor shall obtain, at its own cost, and furnish to the Employer the Payment Bond. The Contractor shall deliver the Payment Bond to the Employer within 28 days after receiving the Letter of Acceptance, and shall send a copy to the Employer's Representative.

The Contractor shall publish a Notice of Completion of the Works in a Panamanian national newspaper within 30 days of the issue of the Performance Certificate and in the form provided by the Employer's Representative along with the Performance Certificate. The Notice of Completion of the Works shall be published in the same form on the next 2 consecutive days after the date of publication of the first Notice of Completion of the Works in a Panamanian national newspaper as aforesaid so that it is published 3 times in total announcing that the Contractor's obligations have been completed and that those who may have any pending claims against the Contractor for services rendered for labor or the supply of materials, must file such claims within the next 180 days after the date of the last publication of the Notice of Completion of the Works. The Contractor shall not be entitled to any further sums which may be due under the Contract unless this Sub-Clause 4.2C is complied with.

The Contractor shall ensure that the Payment Bond (for the amount stated in the Appendix to Tender) shall remain valid and enforceable and in full force and effect in respect of all claims filed under the Payment Bond up to 180 days after the date of the third and final publication in a

Panamanian national newspaper of the Notice of Completion of the Works as provided above.

4.2D Contractor Security Instrument Rating Downgrade

In the event that, at any time, any Contractor Security Instrument Issuer ceases to have an Acceptable Bond Issuer Rating or an Acceptable Financial Institution Rating, as the case may be, the following shall apply:

- (a) the Contractor shall, without the need for any notice from the Employer or the Employer's Representative, cause, within 90 days of such occurrence, the Contractor Security Instrument issued by such Contractor Security Instrument Issuer to be replaced with a Contractor Security Instrument (or, in the case of the Performance Bond or the Payment Bond, to be supplemented with a supplement to the existing Contractor Security Instrument) issued by an Acceptable Bond Issuer or an Acceptable Financial Institution, as the case may be, and which replacement Contractor Security Instrument (or supplement thereto) is satisfactory to the Employer and which otherwise complies in all respects with all applicable terms and provisions of these Conditions of Contract;
- (b) in the event that the Contractor shall fail to replace (or supplement) any Contractor Security Instrument required to be replaced (or supplemented) pursuant to subparagraph (a) of this Sub-Clause 4.2D within the time period specified therein, then, subject to the terms of this sub-paragraphs (b) to (f) of Sub-Clause 4.2D, the Contractor (so long as it acts within the time period specified in subparagraph (a) of this Sub-Clause 4.2D regarding the same) may request that the Employer grant an extension of such time period, provided that, as a prior condition to such extension, the Contractor submits to the Employer:
 - (i) all documents and any other evidence necessary to establish to the satisfaction of the Employer that the Contractor has used and is continuing to use its best efforts to obtain such replacement (or supplement); and
 - (ii) a written request for such an extension stating a reasonable period of time for such extension (which may not be longer than an additional 90 days beyond the time period specified in subparagraph (a) of this Sub-Clause 4.2D), together with a statement that the Contractor reasonably believes that, if such extension is granted by the Employer, the Contractor will within such period be able to obtain such replacement (or supplement), together with reasonable supporting evidence of the same;

provided that such request and all such evidence is to the satisfaction of the Employer, then the Employer shall not unreasonably withhold its approval of such request and shall by written notice provide its approval thereof to the Contractor.

- (c) in the case of any Contractor Security LOC in respect of which the Contractor Security Instrument Issuer ceases to have an Acceptable Financial Institution Rating (an LOC Rating Event):
 - (i) the Employer undertakes and agrees not to draw on such Contractor Security LOC solely because of such LOC Rating Event;
 - (ii) from the first date following the expiration of the extension period specified in subparagraph (a) of this Sub-Clause 4.2D (as the same may be extended pursuant to subparagraph (b) of this Sub-Clause 4.2D) until such date as the

Contractor Security Instrument Issuer of such Contractor Security LOC has an Acceptable Financial Institution Rating or such Contractor Security LOC is replaced either with a Contractor Security LOC or Partial Contractor Security LOCs issued in each such case by an Acceptable Financial Institution in accordance with this Sub-Clause 4.2D (the “**LOC Rating Restoration Date**”), then:

- (A) where the Contractor shall have previously made the election specified in sub-paragraph (a) or sub-paragraph (b) of Sub-Clause 14.9.1 [*Payment of Retention Money or Provision of Retention Security*], the Employer may also deduct retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*] as if such election had not been made by the Contractor (and, for the avoidance of doubt, the Employer shall also be entitled to retain and, as permitted under the Contract, draw upon, the Fixed Retention Security or Escalating Retention Security (as applicable) and the Contractor's ongoing obligations in respect of such election shall remain in full force and effect);
- (B) the Employer shall not be obligated to accept delivery from the Contractor of any other Contractor Security LOC required or permitted to be delivered under the terms of any provision of the Contract and nor shall the Employer be required to perform any obligation on its part under the terms of any provision of the Contract a condition of which is the delivery by the Contractor of any other Contractor Security LOC; provided that the Employer, in its sole and absolute discretion and without any obligation on its part to do so may accept such delivery of any other Contractor Security LOC as it deems fit and provided further that:
 - (1) if pursuant to sub-paragraph (c)(ii)(B) of this Sub-Clause 4.2D the Employer has refused to accept the Plant and Material Security, then notwithstanding the provisions of Sub-Clause 14.5 [*Plant and Material intended for the Works*] or any other provisions to the contrary contained herein, Interim Payment Certificates shall not include any amount for Plant and Materials pursuant to subparagraph (a) of Sub-Clause 14.5.1 [*Plant and Material intended for the Works*] until the earlier of the LOC Rating Restoration Date and the subsequent compliance by the Contractor with Sub-Clause 14.5.3 [*Plant and Material intended for the Works*] or the circumstances set out in Sub-Clause 14.5.4 [*Plant and Material intended for the Works*] have been satisfied; and
 - (2) nothing in sub-paragraph (c)(ii)(B) of this Sub-Clause 4.2D may affect the Taking Over of the Works or the issue of a Taking Over Certificate pursuant to Clause 10.1.
- (d) the Employer's Representative shall certify for payment to the Contractor, in the next Interim Payment Certificate following the LOC Rating Restoration Date any amounts deducted pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim*

Payment Certificates] in the circumstances permitted by sub-paragraph (c)(ii)(A) of this Sub-Clause 4.2D, provided that no other LOC Rating Event shall have occurred (in which case this Sub-Clause 4.2D shall continue to apply until the LOC Rating Restoration Date in respect of any or all other so affected Contractor Security LOCs shall have occurred); any amounts so deducted and not certified for payment hereunder shall be certified for payment under Sub-Clause 14.9.2 [*Payment of Retention Money or Provision of Retention Security*];

- (e) following the expiration of any extension period specified in sub-paragraph (a) of this Sub-Clause 4.2D (as the same may be extended pursuant to sub-paragraph (b) of this Sub-Clause 4.2D), and notwithstanding the forgoing, the Contractor shall continue to use its best efforts to replace any Contractor Security LOC in respect of which the Contractor Security Instrument Issuer has ceased to have an Acceptable Financial Institution Rating with a Contractor Security LOC issued by an Acceptable Financial Institution; and
- (f) upon a Contractor Security LOC in respect of which the Contractor Security Instrument Issuer has ceased to have an Acceptable Financial Institution Rating being replaced either with a Contractor Security LOC or Partial Contractor Security LOCs issued in each such case by an Acceptable Financial Institution Rating in accordance with this Sub-Clause 4.2D, the Employer's Representative shall release to the Contractor the Contractor Security LOC and/or Partial LOC that was or were so replaced.

4.2E Multiple Contractor Security Instruments

- (a) The terms of this Sub-Clause 4.2E shall apply solely to each Contractor Security LOC.
- (b) Whenever under the Contract the Contractor is required to provide, or has the option to elect to provide and does so provide, a Contractor Security LOC, the Contractor may, at its option, either:
 - (i) provide the Employer with a single Contractor Security LOC in the amount of such Contractor Security LOC required under the Contract; or
 - (ii) if, and only if, the amount of such Contractor Security LOC required under the Contract shall be for an amount not less than \$50 million (Fifty Million Dollars), provide the Employer with multiple instruments (each, a "Partial Contractor Security LOC"), each of which shall comply with all applicable terms specified for such Contractor Security LOC under the Contract (other than as to the amount thereof which may be modified in compliance with the terms of this Sub-Clause 4.2E), all of which in the aggregate shall provide to the Employer the total amount of such Contractor Security LOC required under the Contract and which shall be in the minimum amount of \$50 million (Fifty Million Dollars) each, and, if necessary, a single Partial Contractor Security LOC in such lesser amount as may be necessary to provide, in the aggregate, the total amount of such Contractor Security LOC required under the Contract; provided that, in such case, the Contractor shall comply with the following terms of this Sub-Clause 4.2E; and

in either such case, the Contractor shall comply with all other terms and conditions of the Contract with respect to such Contractor Security LOC.

- (c) In the event that the Contractor provides the Employer with a single Contractor Security LOC and subsequent thereto the Contractor Security Instrument Issuer in respect of such Contractor Security LOC ceases to have an Acceptable Financial Institution Rating, the Contractor, in complying with its obligations under Sub-Clause 4.2D [*Contractor Security Instrument Rating Downgrade*], may, at its option, either:
- (i) provide the Employer, in replacement of the Contractor Security LOC so affected, with a single Contractor Security LOC in the amount of such Contractor Security LOC required under the Contract; or
 - (ii) if, and only if, the amount of such Contractor Security LOC so affected shall be for an amount of not less than \$50 million (Fifty Million Dollars), provide the Employer, in replacement of such Contractor Security LOC with multiple Partial Contractor Security LOCs each of which shall comply with the terms of sub-paragraph (b)(ii) of this Sub-Clause 4.2E; provided that, in such case, the Contractor shall comply with the following terms of this Sub-Clause 4.2E; and
- in either such case, the Contractor shall comply with all other terms and conditions of Sub-Clause 4.2D and otherwise in the Contract with respect to such replacement Contractor Security LOC or Partial Contractor Security LOCs..
- (d) In the event that the Contractor, acting in compliance with the terms of sub-paragraph (b)(ii) or (c)(ii) of this Sub-Clause 4.2E, shall provide the Employer with multiple Partial Contractor Security LOCs, then in the event that, at any time, subsequent to the delivery by the Contractor of such Partial Contractor Security LOCs, either (A) the amount which is required to be supported by such relevant Contractor Security LOC, or (B) the total aggregate amount which is then outstanding under all such Partial Contractor Security LOCs, in either such case shall be less than \$50 million (Fifty Million Dollars), then the Contractor shall promptly (and in any event within 28 days) replace all such Partial Contractor Security LOCs provided in respect of such obligation with a single Contractor Security LOC in the total aggregate amount required under the Contract and which complies with all other terms and conditions of the Contract with respect to such Contractor Security LOC.
- (e) In the event that the Contractor, acting in compliance with the terms of sub-paragraph (b)(ii) or (c)(ii) of this Sub-Clause 4.2E, shall provide the Employer with multiple Partial Contractor Security LOCs and subsequent thereto the Contractor Security Instrument Issuer in respect of any such Partial Contractor Security LOC ceases to have an Acceptable Financial Institution Rating, the Contractor, in addition to complying with the terms of Sub-Clause 4.2D [*Contractor Security Instrument Rating Downgrade*], shall, at its option, either:
- (i) provide the Employer, in replacement of any such Partial Contractor Security LOC, with a replacement Partial Contractor Security LOC in the same amount of the Partial Contractor Security LOC being so replaced; or
 - (ii) provide the Employer, in replacement of any such Partial Contractor Security LOC and all other Partial Security LOCs provided by the Contractor in respect of the same obligation of the Contractor to which such affected Partial Contractor LOC relates, with a single replacement Contractor Security LOC in the total aggregate amount of such Contractor Security LOC required under the Contract; and

in either such case, the Contractor shall comply with all other terms and conditions of Sub-Clause 4.2D and otherwise in the Contract with respect to such replacement Contractor Security LOC or Partial Contractor Security LOCs.

(f) Any drawing on, or increase or reduction in the available amount by the Employer in respect of any Partial Contractor Security LOC shall be made *pro rata* under such Partial Contractor Security LOC and each other Partial Contractor Security LOC provided by the Contractor in respect of the same obligation of the Contractor under the Contract; provided that:

(i) if, at the time any such drawing on, or reduction in, the available amount is to be made, and the Contractor Security Instrument Issuer in respect of any one such Partial Contractor Security LOC has ceased to have an Acceptable Financial Institution Rating and has not yet been replaced as required under the Contract, then any such drawing or reduction shall be made, *first*, under the Partial Contractor Security LOC so affected, until such time as the full amount thereof shall have been drawn or reduced and, *second*, thereafter, *pro rata* under each other Partial Contractor Security LOC provided by the Contractor in respect of the same obligation of the Contractor under the Contract;

(ii) if, at the time any such drawing on, or reduction in, the available amount is to be made, the Contractor Security Instrument Issuer in respect of more than one such Partial Contractor Security LOCs has ceased to have an Acceptable Financial Institution Rating and has not yet been replaced as required under the Contract, then any such drawing or reduction, shall be made, *first, pro rata*, under each of the Partial Contractor Security LOCs so affected, until such time as the full amount thereof shall have been drawn or reduced and, *second*, thereafter, *pro rata* under each other Partial Contractor Security LOC provided by the Contractor in respect of the same obligation of the Contractor under the Contract; and

(iii) if at any time any such increase is to be made:

(A) the Contractor Security Instrument Issuer in respect of one such Partial Contractor Security LOCs has ceased to have an Acceptable Financial Institution Rating and has not yet been replaced as required under the Contract; or

(B) the Contractor Security Instrument Issuer in respect of more than one such Partial Contractor Security LOCs has ceased to have an Acceptable Financial Institution Rating and has not yet been replaced as required under the Contract;

then any such increase shall be made *pro rata*, under each other Partial Contractor Security LOC which is not so affected, up to the maximum available amount of each thereof, and, *second*, thereafter, *pro rata* under the Partial Contractor Security LOC which is so affected.

4.3 Contractor's Representative

The Contractor shall appoint the Contractor's Representative and shall give him all authority necessary to act on the Contractor's behalf under the Contract. The person appointed shall be the person so named in the Contractor's Technical Proposal.

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

The Contractor's Representative shall be dedicated on a full-time basis to directing the Contractor's performance of the Contract. If the Contractor's Representative is to be temporarily absent from the Site during the execution of the Works or the Maintenance Services, a suitable replacement person shall be appointed, subject to the Employer's Representative's prior consent, and the Employer's Representative shall be notified accordingly.

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

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

The Contractor's Representative and any such delegee shall be fluent in the language for communications specified in Sub-Clause 1.4 [*Law and Language*].

If the Contractor's Representative or any such delegee is not also fluent in Spanish, the Contractor shall at its own cost make a competent interpreter available during all working hours.

4.4 Subcontractors

4.4.1.1A The Contractor shall not subcontract the whole of the Works or (save as stated in Sub-Clause 4.4.1.2) subcontract separately or jointly the whole of the Pacific or of the Atlantic lock complexes.

Subject to the foregoing paragraph, with the prior written consent of the Employer's Representative, the Contractor shall be entitled to subcontract parts of the Works, but such prior consent shall not be required for:

- (a) suppliers of Materials;
- (b) the fabrication and supply of the lock gates by the Lock Gates Fabricator;
- (c) the design of any part of the Works by the Design Subcontractor;
- (d) the performance of the Maintenance Services by the Maintenance Services Subcontractor; and
- (e) subject to Sub-Clause 5.1 [*General Design Obligations*], Subcontracts with a total contract value of less than 1 million US Dollars. The Contractor shall not split-up, phase, sequence, break or sub-divide subcontracts to avoid or circumvent this threshold.

- 4.4.1.1B (a) For the avoidance of doubt, if the fabrication and supply of the lock gates is to be subcontracted by the Contractor it shall only be subcontracted to the Lock Gates Fabricator.
- (b) For the avoidance of doubt, if the Maintenance Services are to be subcontracted by the Contractor it may only be subcontracted to the Maintenance Services Subcontractor, but subject to Sub-Clause 4.4.1.1C, prior to the commencement of the Maintenance Services:
- (i) the Contractor may replace the Maintenance Services Subcontractor; or
- (ii) in circumstances where there is no Maintenance Services Subcontractor, the Contractor may subcontract the Maintenance Services to a single subcontractor;
- with the prior written consent of the Employer's Representative.
- 4.4.1.1C In order to be considered for the consent of the Employer's Representative under sub-paragraph (b) of Sub-Clause 4.4.1.1B, and as a prior condition to the granting of any such consent, the Contractor shall submit:
- (a) in the case of a replacement of the Maintenance Services Subcontractor, evidence that the proposed replacement possess at least equivalent qualifications and experience as the Maintenance Services Subcontractor; or
- (b) in the case where there is no Maintenance Services Subcontractor, evidence that the proposed subcontractor possess at least equivalent qualifications and experience as the Contractor;
- as well as the documentation and information required by paragraphs A and B of Volume IV, Part 7 of the RFP.
- 4.4.1.2 The Contractor shall not be required to seek the consent of the Employer's Representative to subcontract to a Member (including the whole of the Pacific or Atlantic lock complexes), save that the Contractor may not subcontract the whole of the Works to a Member. However, for the avoidance of doubt, consent shall be required to subcontract to:
- (a) entities wholly or partially owned by the Contractor or by any Member; and
- (b) any joint venture, consortium, association or similar entity or any special purpose company in which the Contractor or any Member participates, or any co-owner or partner of the Contractor or of any Member or a subsidiary of any Member.
- 4.4.1.3 Notwithstanding that the Contractor may (in the circumstances set out above) subcontract without the prior consent of the Employer's Representative, the Contractor shall under no circumstances subcontract to any individuals or business associations that are at the date of the proposed Subcontract prohibited to contract with the Government of the Republic of Panama or the Employer. The Contractor shall be fully responsible for verifying the standing of any intended Subcontractor with the Employer and other relevant authorities.
- 4.4.1.4 The Employer's Representative shall be entitled to give, at its sole discretion, its consent in respect of the proposed appointment of any Subcontractor for which consent is required. In seeking such consent, the Contractor shall give the Employer's Representative not less than 28 days' notice of:

- (a) the intended appointment of the Subcontractor, with detailed particulars which shall include his relevant experience;
- (b) the intended date of commencement of the Subcontractor's work; and
- (c) the intended date of commencement of the Subcontractor's work on the Site (if applicable).

4.4.2 The Contractor shall be responsible for the acts, defaults or omissions of any Subcontractor, his agents or employees, as if they were the acts, defaults or omissions of the Contractor. Any Subcontract entered into by the Contractor (including any consent given by the Employer's Representative therefore) shall not relieve the Contractor from any liability or obligation under the Contract.

4.4.3 The Contractor shall ensure that any Subcontract entered into by the Contractor with a Subcontractor provides for the provision or procurement of licenses for the use of third party technology or intellectual property rights forming part of or to be used in relation to the Works or the Contractor's Documents and includes provisions whereby:

- (a) such licenses grant the Employer, its servants and agents, designees and any successor operator the right to use the third party technology or intellectual property rights in the operation and maintenance of the Works and/or the Panama Canal Expansion Program;
- (b) such licenses are transferable to the Employer, its servants and agents, designees and any successor operator and permit the granting of sub-licenses;
- (c) the terms thereof, including cost, are not materially different and no less beneficial to the relevant licensee than those of typical third party arms length licensing arrangements; and
- (d) without limiting the indemnification obligations of the Contractor under Sub-Clause 17.5 [*Intellectual and Industrial Property Rights*], each license includes an indemnification of the Employer, its servants and agents, designees and any successor operator for infringement of patents or third party intellectual property rights.

4.4.4 The Contractor shall forward to the Employer's Representative a copy of each Subcontract upon its execution.

4.4.5 No Subcontract shall bind or purport to bind the Employer and each Subcontract shall provide:

- (a) that the Contractor's rights under the Subcontract are capable of being freely assigned in full, without consent or limitation to the Employer or any other person nominated by the Employer in the event of termination of the Contract or termination of the Contractor's right to complete the Contract at the sole discretion of the Employer;
- (b) subject to sub-paragraph (a), for its termination in the event of termination of the Contract or termination by the Employer of the Contractor's right to complete the Contract;
- (c) for its suspension in the event of suspension under the Contract of all or part of the Works or the Maintenance Services;
- (d) for a change in the scope of the works under the Subcontract if there is a Variation under the Contract; and

- (e) for title in any goods, equipment or materials to pass to the Employer on terms consistent with Sub-Clause 7.7 [*Ownership of Plant and Materials*].

- 4.4.6 In all material respects, the Contractor shall ensure that it enters into Subcontracts (and that Subcontractors enter into contracts) on terms and conditions that are consistent with the terms and conditions of the Contract. The terms of the Subcontract (if any) with the Lock Gates Fabricator shall include an obligation, on the Lock Gates Fabricator, to duly execute the Subcontractor Warranty, in favour of the Employer within 28 days of the Commencement Date, pursuant to Sub-Clause 4.1.8 [*Contractor's General Obligations*].
- 4.4.7 The Contractor shall ensure that any Subcontract entered into by the Contractor with a Subcontractor that includes the provision of guarantees or warranties also includes provisions whereby such guarantees and warranties are freely assignable to the Employer upon request by the Employer or the Employer's Representative.
- 4.4.8 The Contractor shall be fully and solely responsible for the payment of all salaries, wages, commissions, allowances and other remuneration to any Subcontractor's employees, agents or representatives and for the deduction and payment of the applicable taxes, social premiums and the like therefrom and for the remittance of such sums to tax or other authorities under any Subcontract, and the Contract Price shall be deemed to include all of the foregoing.
- 4.4.9 The Contractor shall ensure that the requirements imposed on the Contractor by Sub-Clause 1.12 [*Confidential Details*] apply equally to each Subcontractor.

4.5 Nominated Subcontractors

In this Sub-Clause 4.5, "nominated Subcontractor" means a Subcontractor whom the Employer's Representative, under Clause 13 [*Variations and Adjustments*], instructs the Contractor to employ as a Subcontractor. The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Employer's Representative as soon as practicable, with supporting particulars.

4.6 Co-operation

The Contractor acknowledges that work will be undertaken by others on behalf of the Employer in respect of the Panama Canal Expansion Program and that it is of paramount importance that the performance of the Works is properly co-ordinated with such other related works. The Contractor shall at all times and otherwise in accordance with the requirements and directions of the Employer's Representative and without adjustment to the Contract Price or extension of the Time for Completion or extension of any Milestone Date:

- (a) take all reasonable steps to plan, co-operate and programme and to the extent physically possible to integrate the performance of the Works, including the work of the Subcontractors, with the activities of the other contractors who may be engaged on or near the Site and in particular liaise, consult and co-operate with all authorized parties responsible for such other related works including the preparation of joint programs, method statements, co-ordination drawings and specifications;
- (b) attend such co-ordination meetings called by the Employer or Employer's Representative to plan, review, clarify and determine co-ordinated activities for the management of interfaces between the Works and any other related works; and

- (c) at all times refrain from carrying out any operation on the Site in a manner which is likely to cause damage or inconvenience to the execution of any other related works and advise the Employer's Representative if the Contractor becomes aware of any conflict or potential conflict between the Works and any other related works, whether related to program, design, execution or otherwise.

4.7 Setting Out

The Contractor shall set out the Works in relation to original points, lines and levels of reference as may be required in the Employer's Requirements. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works. Where and to the extent that there are errors in such items of reference in the Employer's Requirements Clause 1.9 [*Errors in the Employer's Requirements*] shall apply.

4.8 Safety Procedures

- 4.8.1 All safety procedures adopted by the Contractor in the execution of the Works shall be in accordance with Sections 01 35 23 [*Health and Safety Requirements*] and 01 35 29 [*Health and Safety Management/Emergency Response Procedures*] of the Employer's Requirements.
- 4.8.2 The Contractor shall:
 - (a) comply with all applicable safety regulations, including without limitation the Employer's safety documents referenced in Sub-Part 2 of Part 3 of Volume II of the Employer's Requirements,
 - (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 and maintain (at his own cost) all lights, guards, fencing, warning signs and watch when and where necessary, or as required by the Employer's Representative or by any competent statutory or other authority for the protection of the Works or the safety and convenience of the public or others; and
 - (e) provide any Temporary Works (including roadways, footways, guards and fences) which may be necessary, because of the execution of the Works, for the use and protection of the public and of owners and occupiers of adjacent land.
- 4.8.3 If the Employer shall carry out work on the Site with his own workmen or other contractors, he shall in respect of such work:
 - (a) have full regard to the safety of all persons entitled to be upon the Site; and
 - (b) keep the Site where his own workmen or other contractors are undertaking work in an orderly state appropriate to the avoidance of danger to such persons.
- 4.8.4 Without prejudice to Sub-Clauses 1.13 [*Compliance with Laws*] and 6.7 [*Health and Safety*], the Contractor shall comply with, and shall procure that his employees, agents and Subcontractors and others on the Site shall comply with, all their respective duties and obligations under

applicable Laws and other requirements having the force of law relating to the health, safety and conduct of construction operations.

4.8.5 The Contractor shall, and shall procure that every Subcontractor shall, provide and employ in connection with the execution of the Works and the Maintenance Services:

- (a) only such technical assistants as are skilled and experienced in their respective occupations and sub sub-agents, foremen and leading hands as are competent to give proper supervision to the work they are required to supervise; and
- (b) such skilled, semi-skilled and unskilled labor as is necessary for the proper and timely execution of the Works and the Maintenance Services.

4.8.6 Without prejudice to Sub-Clauses 4.14 [*Avoidance of Interference*], 4.15 [*Access Route*] and 4.18 [*Protection of the Environment*], the Contractor shall:

- (a) prevent any nuisance or inconvenience to the owners, tenants or occupiers of other premises upon or in the locality of the Site and to the public generally, including taking measures to reduce the nuisance from noise, dust, smell, fumes and vibration during the carrying out of the Works and the Maintenance Services;
- (b) ensure that the access to the Site is unobstructed at all times and that there is no interference with or obstruction of any vehicles using the Site in order to gain access to other premises; and
- (c) at all times co-operate with and not interfere with or obstruct any other contractor engaged by the Employer to perform other works on or in the vicinity of the Site.

4.8.7 The Contractor shall indemnify the Employer in respect of any liability, loss, claim or proceedings of whatsoever nature arising out of or in connection with any breach of the duties and obligations referred to in this Sub-Clause 4.8.

4.9 Quality Assurance

In addition to the requirements of this Sub-Clause 4.9 the Contractor shall carry out quality assurance in accordance with Section 01 40 00 [*Quality Requirements*] of the Employer's Requirements.

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

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

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

4.10 Site Data

- 4.10.1 Prior to the Base Date, the Employer shall have made available to the Contractor the Geotechnical Interpretive Report and certain other data (including geotechnical boring cores) in the Employer's possession on physical conditions including sub-surface, hydro-geologic and topographic conditions at the Site, including environmental aspects.
- 4.10.2 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 the Works. To the same extent, the Contractor shall be deemed to have inspected and examined the Site, its surroundings, the data referred to in Sub-Clause 4.10.1 and other available information, and to have been satisfied before submitting the Tender as to all relevant matters, including:
- (a) the form and nature of the Site, which shall include physical conditions, sub-surface, hydro-geologic and topographical conditions at the Site and environmental aspects;
 - (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 applicable Laws, procedures and labor practices of the Country;
 - (e) the Contractor's requirements for access, accommodation, facilities, personnel, power, transport, water and other services; and
 - (f) availability of labor.
- 4.10.3 The Employer gives no warranty as to and shall have no responsibility for the sufficiency, suitability or completeness of any data or information (including geotechnical boring cores) it has provided or does provide regarding physical conditions including sub-surface, hydro-geologic and topographic conditions at the Site and environmental aspects, except for:
- (a) the Employer's geotechnical characterization and interpretation, to the extent set out (but not further or otherwise) in the Geotechnical Interpretive Report, of the physical conditions (as defined in sub-paragraph (a) of Sub-Clause 4.12.1.1) to be encountered at and below the Foundation Level of each Lock Structure but only to the extent it relates to the area inside the footprint of each Lock Structure;
 - (b) the Employer's geotechnical characterization and interpretation, to the extent set out (but not further or otherwise) in the Geotechnical Interpretive Report, of the physical conditions (as defined in sub-paragraph (a) of Sub-Clause 4.12.1.1) to be encountered, in respect of each Lock Structure for the purposes only of designing and building the slopes of the excavations for each Lock Structure; and
 - (c) information concerning topographic conditions (as defined in Sub-Clause 4.12.1.2) contained in the Topographical Data in so far as it relates to the area defined by the Footprint of the Lock Structures.

4.11 Sufficiency of the Accepted Contract Amount

The Contractor shall be deemed to have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount.

Unless otherwise stated in the Contract, the Accepted Contract Amount covers all the Contractor's obligations under the Contract and all things mentioned to be or reasonably inferred to be necessary for the proper design, execution and completion of the Works and the remedying of any defects.

4.12 Unforeseeable Physical Conditions

4.12.1.1 In this Sub-Clause 4.12, "physical conditions" means:

- (a) natural physical conditions, including sub-surface and hydro-geologic conditions but excluding climatic conditions; and
- (b) man-made and other physical obstructions and pollutants.

4.12.1.2 In this Sub-Clause 4.12, "topographic conditions" means the geometric conditions of the ground at the surface.

4.12.2 If the Contractor encounters:

- (a) in respect of a Lock Structure, physical conditions (as defined in sub-paragraph (a) of Sub-Clause 4.12.1.1) at and/or below the Foundation Level of the Lock Structure within the area inside the footprint of such Lock Structure, which are more adverse to the Contractor than the Employer's geotechnical characterization and interpretation of such conditions to the extent set out (but not further or otherwise) as included in the Geotechnical Interpretive Report as it relates to such Lock Structure;
- (b) in respect of a Lock Structure, adverse, physical conditions (as defined in sub-paragraph (b) of Sub-Clause 4.12.1.1), at, or above or below the Foundation Level of the Lock Structure within the area inside the footprint of such Lock Structure;
- (c) in respect of a Lock Structure, physical conditions (as defined in sub-paragraph (a) of Sub-Clause 4.12.1.1), which are more adverse to the Contractor than the Employer's geotechnical characterization and interpretation of such conditions to the extent set out (but not further or otherwise) in the Geotechnical Interpretive Report, as it relates to such Lock Structure and which as a consequence prevent it from designing and building the slopes of the excavations for the Lock Structure as contemplated by sub-paragraph (b) of Sub-Clause 4.10.3;
- (d) in respect of a Lock Structure, adverse, physical conditions (as defined in sub-paragraph (b) of Sub-Clause 4.12.1.1), above or below the slopes of the excavations for the Lock Structure; and/or
- (e) adverse, topographic conditions (as defined in Sub-Clause 4.12.1.2) within the area defined by the Footprint of the Lock Structures, materially different from those reflected in the Topographical Data and/or falling outside the tolerances stated in the Topographical Data;

which the Contractor considers to be Unforeseeable, the Contractor shall give notice to the Employer's Representative as soon as practicable.

- 4.12.3 Any notice given by the Contractor as required by Sub-Clause 4.12.2 shall describe the physical or topographical conditions encountered (as the case may be) which the Contractor considers to have been Unforeseeable, so that they can be inspected by the Employer's Representative, and shall set out the reasons why the Contractor considers such conditions to be Unforeseeable.

The Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions or topographic conditions, and shall comply with any instructions which the Employer's Representative may give. If an instruction constitutes a Variation, Clause 13 [*Variations and Adjustments*] shall apply.

- 4.12.4 If and to the extent that the Contractor encounters the physical or topographical conditions referred to in Sub-Clause 4.12.2 which are Unforeseeable, gives the required notice(s), and suffers delay and/or incurs Cost due to these conditions, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

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

- 4.12.5 After receiving such notice and inspecting and/or investigating the subject matter of the notice, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) whether and (if so) to what extent these conditions were Unforeseeable, and (ii) the matters described in sub-paragraphs (a) and (b) of Sub-Clause 4.12.4 related to this extent.

- 4.12.6 Save as expressly provided in this Sub-Clause 4.12, the Contractor shall not be entitled to and shall not make any claims, or requests for Variations or for adjustment(s) to the Contract Price or for any Cost or for extension(s) to the Time for Completion or to any Milestone Date(s), arising from, out of or in connection with topographic conditions (as defined in Sub-Clause 4.12.1.2) or physical conditions (as defined in Sub-Clause 4.12.1.1) expected to be encountered or actually encountered during the course of the Works.

4.13 Rights of Way and Facilities

The Contractor shall bear all costs and charges for special and/or temporary rights-of-way which he may require for the carrying out of the Works, including any use of the Canal.

The Employer will (except where expressly stated in the Contract), grant at no cost to the Contractor rights-of-way for access to the Site through the lands under the Employer's possession where it is reasonably able to do so.

The Contractor shall also obtain, at his risk and cost, any additional facilities outside the Site which he may require for the purposes of the Works.

4.14 Avoidance of Interference

The Contractor shall not interfere unnecessarily or improperly with:

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

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

4.15 Access Route

The Contractor shall maintain existing roads or construct new roads and bridges as required to provide continued access to the Employer's areas and facilities and to third-party facilities, both within the Site and in areas near the Site where access will be interrupted as a direct result of the Works (including for example the ferry installations (to be used primarily by the general public) and the Gatun Yacht Club). In addition to maintaining or rerouting all current access routes, the Contractor shall ensure the availability of access roads between the existing and the new lock complexes on the Atlantic side and between the existing Miraflores Locks and the new Pacific-side lock complex. All access routes shall be in accordance with Sections 01 50 00 [*Temporary Facilities, Accesses and Controls*] and 01 57 19 [*Temporary Environmental Controls*] of the Employer's Requirements.

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

Except as otherwise stated in these Conditions of Contract:

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

4.16 Transport of Goods

The Contractor shall:

- (a) give the Employer's Representative 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) be responsible for packing, loading, transporting, receiving, unloading, storing and protecting all Goods and other things required for the Works; and
- (c) indemnify and hold the Employer harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from the transport of Goods, and shall negotiate and pay all claims arising from their transport.

4.17 Contractor's Equipment

The Contractor shall be responsible for all Contractors' Equipment. When brought on to the Site, Contractor's Equipment shall be deemed to be exclusively intended for the execution of the Works and/or the Maintenance Services. The Contractor shall not remove from the Site any major items of Contractor's Equipment without the consent of the Employer's Representative. However, consent shall not be required for vehicles transporting Goods (other than major items of Contractor's Equipment) or Contractor's Personnel off Site.

Contractor's Equipment that is brought on to the Site shall comply with the "Simplified Declaration Proceeding" established in Cabinet Decree No. 20 of 12 July 2000 and shall be exempt from tax while it is on the Site. Once the Contractor's Equipment is no longer required for the execution of the Works the Contractor shall, subject to the first paragraph of this Sub-Clause 4.17, export such equipment or pay the applicable taxes according to the value determined at that time by Autoridad Nacional de Aduanas (ANA). The Contractor shall indemnify and hold harmless the Employer for all claims, loss and expenses the Employer may suffer as a result of the Contractor's failure to pay such taxes as aforesaid.

4.18 Protection of the Environment

In addition to the requirements of this Sub-Clause 4.18, the Contractor shall undertake the Works in accordance with Sections 01 57 19 [*Temporary Environmental Controls*], 01 57 19.13 [*Environmental Management Systems*] and 01 74 19 [*Construction Waste Management and Disposal*] of the Employer's Requirements and shall be fully responsible for implementing and carrying out all actions specified or required in the Environmental Impact Study (EslA) and the Environmental Resolution insofar as they relate to the Works.

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

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

The Contractor shall indemnify and hold the Employer harmless from all claims, losses and expenses that the Employer may suffer as a result of the Contractor's breach of any environmental obligations as set out in this Sub-Clause 4.18 or elsewhere in the Contract.

4.19 Electricity, Water and Gas

The Contractor shall be responsible for the provision of all electric power, water, gas and other services he may require.

4.20 Employer's Equipment and Free-Issue Material

The Employer shall make the Employer's Equipment (if any) available for the use of the Contractor in the execution of the Works in accordance with the details, arrangements and prices stated in the Employer's Requirements. Unless otherwise stated in the Employer's Requirements the Employer shall be responsible for the Employer's Equipment, except that the Contractor shall be responsible for each item of Employer's Equipment whilst any of the Contractor's Personnel is operating it, driving it, directing it or in possession or control of it.

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

The Contractor may use in relation to the Works, free of charge, any "accumulated materials" and/or "borrow material" within areas under the Employer's responsibility in accordance with the details stated in Section 01 50 00 (*Temporary Facilities, Accesses And Controls*) of the Employer's Requirements. The Employer shall not have any responsibility for any shortage, defect or default in these materials.

4.21 Progress Reports

In addition to the requirements of this Sub-Clause 4.21, all progress reports relating to the Works shall be in accordance with Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements.

Monthly progress reports shall be prepared by the Contractor and submitted to the Employer's Representative 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 Contractor has completed all work which is known to be outstanding at the completion date stated in the Taking-Over Certificate for the Works. Following the issue of the Taking-Over Certificate for the Works the Contractor shall provide such further regular reports as the Employer's Representative may require.

Each report shall include:

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

dates of:

- (i) commencement of manufacture;
 - (ii) the Contractor's inspections;
 - (iii) tests; and
 - (iv) shipment and arrival at the Site;
- (d) the details described in Sub-Clause 6.10 [*Records of Contractor's Personnel and Equipment*];
 - (e) copies of quality assurance documents, test results and certificates of Materials;
 - (f) list of Variations, notices given under Sub-Clause 2.5 [*Employer's Claims*] and notices given under Sub-Clause 20.1 [*Contractor's Claims*];
 - (g) safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations; and
 - (h) comparisons of actual and planned progress, with details of any events or circumstances which may jeopardise the completion in accordance with the Contract, and the measures being (or to be) adopted to overcome delays.

4.22 Security of the Site

In addition to the requirements of this Sub-Clause 4.22, security matters relating to the Works shall be in accordance with Section 01 50 00 [*Temporary Facilities, Accesses and Controls*] of the Employer's Requirements.

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

4.23 Contractor's Operations on Site

In addition to the requirements of this Sub-Clause 4.23, all Contractor operations relating to the Works shall be in accordance with Sections 01 14 00 [*Work Restrictions*], 01 50 00 [*Temporary Facilities, Accesses and Controls*] and 01 57 19 [*Temporary Environmental Controls*] of the Employer's Requirements.

The Contractor shall confine his operations to the Site. The Contractor shall take all necessary precautions to keep Contractor's Equipment and Contractor's Personnel within the Site and to keep them off adjacent land.

Notwithstanding the forgoing, the Contractor may extend its operations to additional working areas outside of the Site, but within the Employer's property, provided that the Employer's Representative, in its absolute discretion, consents to such extension of the Contractor's operations. Where such consent is granted such additional working areas shall thereafter become and form part of the Site.

In order to be considered for consent by the Employer's Representative under the forgoing paragraph (and as a precondition to the granting by the Employer's Representative of any such approval), the Contractor shall first submit to the Employer's Representative evidence that it is necessary for the Contractor:

- (a) to extend its operations to additional working areas outside of the Site in order to properly carry out and perform the Work; and
- (b) has complied with applicable Laws and the provisions of the Contract.

Further, the Contractor shall not be entitled to argue or contend that any such extension of the Contractor's operations outside of the Site in accordance with this Sub-Clause 4.23 shall give rise to any extension of time to the Time for Completion, and/or to a Milestone Date and/or an entitlement to additional Cost or constitute a Variation or otherwise be the basis of any claim against the Employer.

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

Upon the issue of a Taking-Over Certificate, the Contractor shall clear away and remove, from that part of the Site and Works to which the Taking-Over Certificate refers, all Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works. The Contractor shall leave that part of the Site and the Works in a clean and safe condition. However, the Contractor may retain on Site, during the Defects Notification Period, such Goods as are required for the Contractor to fulfil its obligations under the Contract.

If the Contractor wishes any Temporary Works to remain on the Site as property of the Employer after the issue of the Taking-Over Certificate, then the Contractor shall submit his proposal in respect of such matters to the Employer's Representative for consideration. In response to such proposal, the Employer's Representative shall provide to the Contractor his consent (or otherwise) along with the proposed costs of allowing any Temporary Works to remain on Site (if applicable). If such costs are not acceptable to the Contractor then the Contractor shall comply with its obligations under the Contract as regards the removal of such Temporary Works at its own cost.

The Employer's Representative may require the Contractor not to remove any Temporary Works. Under such circumstances, this shall be treated as a Variation under Sub-Clause 13.3 [*Variation Procedure*].

4.24 Fossils, etc

All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological or archaeological interest found on the Site and any cemeteries or burial sites located within the Site, as identified by the Employer or as otherwise discovered at or in the vicinity of the Site, shall be placed under the care and authority of the Employer. The Contractor shall take reasonable precautions to prevent Contractor's Personnel or other persons from removing or

damaging any of these findings.

Without prejudice to the generality of the forgoing, the Contractor shall not disturb or damage any cemeteries or burial sites, as identified by the Employer or as otherwise discovered at or in the vicinity of the Site.

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

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

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

4.25 Corrupt Practices

The Contractor warrants and undertakes that it has not and will not, and no Contractor-Related Party has or will, directly or indirectly, pay, give, deliver, receive, agree, or undertake to pay, give, deliver, receive, agree, any bribe, pay-off, kick-back, gifts, gratuity or unlawful commissions or other things of value, in any way or form, or have paid or will pay directly or indirectly unlawful amounts, as an inducement or reward, in local or foreign currency, in the Republic of Panama or any other place where such conduct relates to the Contract, or any other place in violation of applicable Laws, including without limitation any applicable anti-corruption legislation under the Laws of the Republic of Panama, or any similar law of the Republic of Panama, to:

- (a) any person while knowing that all or a portion of such payment, bribe, pay-off, kick-back, gift, gratuity, unlawful commissions, unlawful gratuity or unlawful amount will be offered, given, delivered or promised to government officials or employees, political parties, political party officials or political candidates or third persons with influence over government officials or employees; and/or
- (b) any government official or employee, political party official or political candidate or third person that due to his/her influence over any government official or employee, could be influential over the execution or supervision of the Contract, or over any actions in relation to the appointment of the Contractor, before or during the execution of all and/or any of the activities included in the Contract.

The Employer shall be entitled to terminate the Contractor's right to complete the Contract in accordance with sub-paragraph (g) of Sub-Clause 15.2 [*Termination by Employer*] for failure of the Contractor and/or any Contractor-Related Party to comply with its obligations under this Sub-Clause 4.25, without prejudice to any civil, criminal and/or administrative actions against the Contractor and/or against any Contractor-Related Party.

4.26 Standards of Conduct

As part of the Contractor's contractual obligations and in order to avoid real or apparent conflict of interest related to former officials or employees of the Employer, the Contractor without prejudice to its other obligations under the Contract acknowledges, warrants and undertakes that it shall not participate in, or induce or seek to induce, any breach or violation of the following standards of conduct:

(a) pursuant to Article 32 of the Agreement No. 11 of May 6, 1999 and amendments thereto, by which agreement the Employer's Code of Ethics and Conduct is issued, the following standards of conduct shall apply to former officials or employees of the Employer:

(i) for a period of 2 years after separating from the Employer, former officials or employees of the Employer shall not represent any other person, organization or group before the Employer with regard to any contract or particular matter in which they may have participated directly, personally and substantially while working for the Employer. This prohibition prevents the former employee from communicating, appearing, or participating in meetings, or action or in any manner whatsoever representing before the Employer any other natural or legal person, company, or organization, or any sort or group, that may be related to any contract or affair that the former employee may have participated in a direct, personal and substantial manner by reason of the duties performed as a former employee of the Employer.

For the purposes of this Sub-Clause 4.26, "direct, personal and substantial" participation shall be construed as such participation by the former employee that may have taken place while working for the organization, and in which a decision may have been made, or an approval or disapproval, recommendation, or advice regarding the contract or affair may have been issued, or contracts may have been signed with companies, proponents, or suppliers, or any documentation, proposals, or programs may have been evaluated by the former employee, in such case or circumstance by which the former employee may have been involved in interactions leading to his/her knowing of the affair prior to or after the contract or particular matter.

(ii) for a period of 2 years after separating from the Employer, the former official or employee may not represent any other person before the Employer, with regards to any issue that may have been pending under the former official or employee's responsibility during their last year of service.

For the purposes of this Sub-Clause 4.26, "issue that may have been pending under the former official or employee's responsibility" shall be construed as any and all matters assigned to the former official or employee or to any person supervised thereby, including projects or contracts that may have been underway under their responsibility during their last year of service to the Employer.

(iii) for a period of 2 years after separating from the Employer, the Employer's Administrator, Deputy Administrator, Inspector General, as well as the chiefs of the Employer's main offices, shall not represent any person with the intention of influencing in the Employer over any pending matter or any matter of

substantial interest for the Employer.

- (b) pursuant to Article 18 of the Agreement 24 of October 4, 1999, and the amendments thereto, by which agreement the Acquisition Regulations of the Employer are established, the following standards of conduct shall apply:
- (i) no former official or employee of the Employer, whose main responsibility was to participate in any contracting processes conducted thereby, may act in any contractor selection action for a period of 2 years as from the date when the former official or employee separated from the Employer. This restriction shall apply to all former official or employees whose main responsibility was to make recommendations, evaluations or selections during contracting processes or whom may have in any way performed the duties of a purchasing agent, contracts specialist or contracting officers, without any exceptions; and
 - (ii) no former official or employee of the Employer who may have participated in a specific contracting process shall be authorized to represent the Contractor before the Employer in any matter whatsoever related to such contracting process, for a period of 3 years as from the date when said former official or employee separated from the Employer. Former officials or employees shall not be authorized to participate for, conduct business for, or represent the contractor before the Employer with regard to any action related to such contracts in which he/she may have participated, until the above-mentioned 3 year period has ended.

Any breach of this Sub-Clause 4.26 by the Contractor shall be construed as an intentional and deliberate breach of its contractual obligations, which breach, without prejudice to the relevant penal or civil actions, may constitute justified cause for initiating the Debarment process established in Chapter XVI of the Acquisition Regulations of the Employer against both the former official or employee and the company that such former official or employee may represent as well as entitling the Employer to terminate the Contractor's right to complete the Contract pursuant to sub-paragraph (g) of Sub-Clause 15.2 [*Termination by Employer*].

5 Design

5.1 General Design Obligations

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

The Contractor warrants and undertakes that he and all Subcontractors which carry out any design of the Works have the experience and capability necessary for the design of the Works. The Contractor undertakes that all designers shall be available to attend discussions with the Employer's Representative at all reasonable times, until the expiry date of the relevant Defects Notification Period.

Notwithstanding any other provisions of the Contract, the Parties agree that the Employer shall not be responsible in any way whatsoever for the Volume VI Documents, including but not limited to the drawings, designs, geotechnical data, reports, documents, design data and other information included therein and shall not be deemed to have given any warranty, representation of accuracy

or completeness in relation to the same. Nothing contained therein shall relieve the Contractor from his responsibility for the design and execution of the Works in accordance with the Employer's Requirements. The parties agree that the Volume VI Documents are included in the Contract for information purposes only, may not be relied upon by the Contractor in any way or for any reason, and shall not give rise to, form the basis of, or be the subject matter of, any claims of any nature against the Employer.

5.2 Contractor's Documents

In addition to the requirements of this Sub-Clause 5.2, any Contractor's Documents to be submitted to the Employer's Representative under the Contract, shall be submitted in accordance with Section 01 33 00 [*Submittal Procedures*] of the Employer's Requirements.

The Contractor's Documents shall include the technical documents specified in the Employer's Requirements or elsewhere in the Contract, documents required to satisfy all regulatory approvals, and the documents described in Sub-Clause 5.6 [*As-Built Documents*] and Sub-Clause 5.7 [*Operation and Maintenance Manuals*]. Unless otherwise stated in the Employer's Requirements, the Contractor's Documents shall be written in the language for communications defined in Sub-Clause 1.4 [*Law and Language*] and shall be in the format specified by the Employer.

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

If the Contract describes or if the Employer's Representative instructs the Contractor's Documents which are to be submitted to the Employer's Representative for review and/or for approval, they shall be submitted accordingly, together with a notice as described below. In the following provisions of this Sub-Clause 5.2, (i) "review period" means the period required by the Employer's Representative for review and (if so specified) for approval, and (ii) "Contractor's Documents" exclude any documents which are not specified as being required to be submitted for review and/or for approval.

Unless otherwise stated in the Contract, each review period shall not exceed 28 days, calculated from the date on which the Employer's Representative receives a Contractor's Document and the Contractor's notice. This notice shall state that the Contractor's Document is considered ready, both for review (and approval, if so specified) in accordance with this Sub-Clause 5.2 and for use. The notice shall also state that the Contractor's Document complies with the Contract, or the extent to which it does not comply.

The Employer's Representative may, within the review period, give notice to the Contractor that a Contractor's Document fails (to the extent stated) to comply with the Contract. If a Contractor's Document so fails to comply, it shall be rectified, resubmitted and reviewed (and, if specified, approved) in accordance with this Sub-Clause 5.2, at the Contractor's cost.

If requested by the Employer, the Contractor shall provide as requested, free of charge, details and information that the Employer considers necessary or desirable to enable it to understand and use any of the Contractor's Documents and otherwise for the purposes of completing, testing, operating, maintaining, altering, adjusting, repairing and demolishing the Works and/or for the purposes of the Panama Canal Expansion Program.

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

- (a) in the case of a Contractor's Document which has (as specified) been submitted for the Employer's Representative's approval:
- (i) the Employer's Representative shall give notice to the Contractor that it may (A) "proceed", (B) "proceed as noted", (C) "proceed as noted and resubmit", or (D) "revise and resubmit";
 - (ii) execution of such part of the Works or the Maintenance Services shall not commence until the Employer's Representative has given notice to the Contractor that he may (A) "proceed", (B) "proceed as noted", or (C) "proceed as noted and resubmit" in respect of the relevant Contractor's Documents; and
 - (iii) the Employer's Representative shall be deemed to have given notice to the Contractor to "proceed" in respect of a Contractor's Document upon the expiry of the review periods for any such Contractor's Document which are relevant to the design and execution of such part, unless the Employer's Representative has previously notified otherwise in accordance with sub-paragraph (a)(i) of this Sub-Clause 5.2;
- (b) execution of such part of the Works or the Maintenance Services shall not commence prior to the expiry of the review periods for all Contractor's Documents, save where the Employer's Representative has given notice to (A) "proceed", (B) "proceed as noted", or (C) "proceed as noted and resubmit";
- (c) execution of such part of the Works and the Maintenance Services shall be in accordance with these reviewed Contractor's Documents; and
- (d) if the Contractor wishes to modify any design or document which has previously been submitted for review (and, if specified, approval), the Contractor shall immediately give notice to the Employer's Representative giving full reasons why such modification is necessary. Thereafter, the Contractor shall submit revised documents to the Employer's Representative in accordance with the above procedure.

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

Any approval or consent, or any review or comment or failure to do the same (under this Sub-Clause 5.2 or otherwise), by the Employer's Representative (or any of the Employer's Personnel), shall not relieve the Contractor from any of its obligations or responsibilities under the Contract.

Further, the Contractor shall not be entitled to argue or contend that any approval, consent or review or comment or failure to do the same on a Contractor's Document (under this Sub-Clause 5.2 or otherwise) by the Employer's Representative (or any of the Employer's Personnel), shall of itself give rise to any extension of time to the Time for Completion, and/or to a Milestone Date and/or an entitlement to additional Cost or constitute a Variation. To the extent that a Contractor's Document shows a deviation from or a change to the Employer's Requirements which is approved consented to or not objected to by the Employer's Representative (or any of the Employer's Personnel) that approval consent or non objection (including any comment) shall not of itself constitute an instruction by the Employer's Representative or a Variation of any nature to the Contract or the Employer's Requirements. Clause 13 [*Variations and Adjustments*] shall be construed accordingly.

5.3 Not Used.

5.4 Technical Standards and Regulations

In addition to the requirements of this Sub-Clause 5.4, the Contractor shall undertake the Works in accordance with the standards and regulations set out in Section 01 42 19 [*Reference Standards*] of the Employer's Requirements.

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

All these Laws shall, in respect of the Works, be those prevailing when the Works are taken over by the Employer under Clause 10 [*Employer's Taking Over*]. References in the Contract to published standards shall be understood to be references to the edition applicable on the Base Date, unless stated otherwise.

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

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

then the Employer's Representative shall initiate a Variation in accordance with Clause 13 [*Variations and Adjustments*] save to the extent that a Contractor using Prudent Industry Practices would have reasonably foreseen such change or new applicable standard at the Base Date.

5.5 Training

In addition to the requirements of this Sub-Clause 5.5, all training to be provided under the Contract shall be in accordance with Section 01 79 00 [*Demonstration and Training*] of the Employer's Requirements.

The Contractor shall carry out the training of Employer's Personnel in the operation and maintenance of the Works to the extent specified in the Contract. If the Contract specifies training which is to be carried out before taking-over, the Works shall not be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [*Taking-Over of the Works*] until this training has been completed.

5.6 As-Built Documents

In addition to the requirements of this Sub-Clause 5.6, all as-built documents prepared by or on behalf of the Contractor shall be in accordance with Section 01 77 00 [*Taking-Over Procedures*] of the Employer's Requirements.

The Contractor shall prepare, and keep up-to-date, a complete set of "as-built" records of the execution of the Works, showing the exact as-built locations, sizes and details of the work as

executed. These records shall be kept on the Site and shall be used exclusively for the purposes of this Sub-Clause 5.6. Unless stated otherwise in the Contract, two copies shall be supplied to the Employer's Representative prior to the commencement of the Tests on Completion.

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

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

5.7 Operation and Maintenance Manuals

In addition to the requirements of this Sub-Clause 5.7, all operational and maintenance manuals required to be provided under the Contract shall be in accordance with Section 01 78 23 [*Operation Data*] and Section 01 93 00 [*Maintenance Services*] of the Employer's Requirements.

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

The Works shall not be considered to be completed for the purposes of taking over under Sub-Clause 10.1 [*Taking-Over of the Works*] until the Employer's Representative has received final operations manuals in accordance with Section 01 78 23 [*Operation Data*] of the Employer's Requirements and final maintenance manuals in accordance with the requirements of Section 01 93 00 [*Maintenance Services*] of the Employer's Requirements, in such detail, and any other manuals specified in the Employer's Requirements for these purposes.

5.8 Design Error

Without prejudice to any other provisions of the Contract, the Contractor shall at all times be responsible for the accuracy, correctness and integrity of the Contractor's Documents and any specifications, designs, drawings and documentation produced by or on its behalf as part of the Works or for which it is responsible under the Contract. The Contractor shall promptly correct, at its own expense, any error, inconsistency or omission, any ambiguities, inadequacies or other defects found in any document prepared by it on its behalf or for which it is responsible under the Contract and notify the Employer's Representative promptly upon discovering any such error, inconsistency, omission, ambiguity, inadequacy or defect.

6 Staff and Labor

6.1 Engagement of Labor

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

The Contractor shall comply and shall ensure that its Subcontractors shall comply with all applicable Laws relating to labor and immigration and shall allow the Employer's Representative at any time upon reasonable notice to audit payroll and social security information and filings to verify that all Contractor's and Subcontractor's staff and labor are enrolled in the Caja de Seguro Social ("CSS") and that such staff and labor, including that hired under contract and not on the regular payroll, are being paid at least the minimum wage set out in Sub-Clause 6.2 [*Rates of Wages and Conditions of Labor*] below. The Contractor and Subcontractors shall submit to the Employer's Representative via the DTCS certified copies of the CSS payroll payment forms on a monthly basis, and where requested by the Employer's Representative the original hard copies.

The Contractor shall allow the Employer's Representative at any time on reasonable notice to audit the migratory status of the Contractor's Personnel and, once a month, the Contractor and its Subcontractors shall submit to the Employer's Representative a certified report listing the names of all foreign workers in the Contractor's and Subcontractors' payrolls or hired under contract or otherwise. The report shall include, as a minimum: (i) the name, the nationality, the passport number, the migratory status and expiration date of migratory status, (ii) the responsibility assigned to the worker, and (iii) the percentage of the entire staff and labor force that the foreign workers represent as of the date of the report.

Engineers, architects and related professionals that under the applicable Laws require specific license or authorization to practice such professions in the Country, shall be registered and shall have obtained the respective licenses or authorizations issued by the Technical Board of Engineering and Architecture of the Republic of Panama (*Junta Técnica de Ingeniería y Arquitectura de la República de Panamá (the "JTIA")*) according to Law No. 15 of 1959, its modifications and any other related regulations as the case may be. The Contractor and Subcontractors shall submit to the Employer's Representative the respective licenses or authorizations, duly issued by the JTIA, of each of the professionals referred herein this paragraph, before any such professionals commence work in the Republic of Panama.

6.2 Rates of Wages and Conditions of Labor

The Contractor shall pay rates of wages, and observe conditions of labor, which are not lower than those established for the trade or industry where the work is carried out. If no established rates or conditions are applicable, the Contractor shall pay rates of wages and observe conditions which are not lower than the general level of wages and conditions observed locally by employers whose trade or industry is similar to that of the Contractor.

Minimum Wage

The wages of the Contractor's Personnel engaged under this Contract shall be subject to the minimum wage of US\$2.90 per hour or such other sum as is set from time to time by the competent authority for the Contractor's Personnel including Subcontractor's staff and labor personnel engaged in respect of the Works in the Republic of Panama.

The Contractor's compliance with the minimum wage shall be subject to auditing of payrolls, stubs, social security information and filings of the Contractor's Personnel and other documents that prove social security payment statements of the Contractor's Personnel and other documents that prove the payment of the above-mentioned wage, by the Employer's Representative and/or a competent authority.

6.3 Persons in the Service of Employer

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

6.4 Labor Laws

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

The Contractor shall require his employees to obey all applicable Laws, including those concerning safety at work.

6.5 Working Hours

Subject to applicable Laws and any express restrictions in the Contract, work may be carried out on the Site at all times save that where the Contractor intends to carry out works on Site on a day which is not a Business Day or outside of 8.00am to 3.30pm on a Business Day, at least 3 days prior notice of such intention shall be given to the Employer's Representative unless the work is necessary for the protection of life or property or for the safety of the Works, in which case the Contractor shall as soon as practicable advise the Employer's Representative.

6.6 Facilities for Staff and Labor

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

The Contractor shall not permit any of the Contractor's Personnel to maintain any temporary or permanent living quarters or facilities to spend the night within the Site or in any areas that are the property of or are administered by the Employer, save that the Contractor may establish temporary or permanent living quarters (campsites) in the specific area described in Section 01 50 00 [*Temporary Facilities, Accesses and Controls*] of the Employer's Requirements and shall comply with all the requirements established in such Section. The establishment of any such temporary or permanent living quarters (campsites) as aforesaid by the Contractor shall be entirely at the Contractor's own risk and cost and the Employer makes no warranty as to, and shall have no responsibility for, the suitability of such area for such temporary or permanent living quarters (campsites).

If the Contractor or any of the Contractor's Personnel establish or build any type of facilities or living quarters outside the Site or outside the areas that are the property of or are administered by the Employer, or in the specific area described in Section 01 50 00 [*Temporary Facilities, Accesses and Controls*] of the Employer's Requirements as permitted in the preceding paragraph, the Contractor and/or the Contractor's Personnel shall, in doing so, comply with all applicable Laws and obtain all the required permits thereunder.

6.7 Health and Safety

In addition to the requirements of this Sub-Clause 6.7, health and safety matters shall be in accordance with Sections 01 14 00 [*Work Restrictions*], 01 35 23 [*Health and Safety Requirements*] and 01 35 29 [*Health and Safety Management/Emergency Response Procedures*] of the Employer's Requirements.

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

The Contractor shall:

- (a) implement a Health and Safety Management System (HSMS) all as described in Paragraph 1.04 of Section 01 35 29 [*Health and Safety Management / Emergency Response Procedures*] of the Employer's Requirements;
- (b) appoint a Health and Safety Manager with specific responsibility to administer the Health and Safety Management System all as in Paragraph 1.04 of Section 01 35 29 [*Health and Safety Management and Emergency Response Procedures*] of the Employer's Requirements; and
- (c) appoint safety supervisors and safety representatives all as in Paragraph 1.04 of Section 01 35 29 [*Health and Safety Management and Emergency Response Procedures*] of the Employer's Requirements.

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

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

6.8 Contractor's Superintendence

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

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

A reasonable proportion of the Contractor's superintending staff shall (at its own cost) also have a working knowledge of Spanish, or the Contractor shall at its own cost have a sufficient number of competent interpreters available at the Site during all working hours.

6.9 Contractor's Personnel

In addition to the requirements of this Sub-Clause 6.9, matters in relation to Contractor's Personnel shall be in accordance with Section 01 14 00 [*Work Restrictions*] of the Employer's Requirements.

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

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

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

Notwithstanding the provisions of this Sub-Clause 6.9, the Key Personnel shall be employed by the Contractor in the roles stated in the Contractor's Technical Proposal solely in relation to the Works from the Commencement Date until the issuance of the Taking-Over Certificate (provided that the Contractor shall use its best endeavours where requested by the Employer's Representative to make such Key Personnel available upon reasonable notice after issuance of the Taking-Over Certificate for the purposes of carrying out the Contractor's obligations in the Defects Notification Period). In addition, the Contractor shall make available all other qualified Personnel who may be required until the end of the Defects Notification Period and for the Maintenance Services.

The Contractor shall only employ the Key Personnel named in the Contractor's Technical Proposal for those posts, except for the following reasons:

- (a) in the event of death, illness or accident;
- (b) whenever it becomes necessary to replace such a person for reasons beyond the Contractor's reasonable control; or
- (c) whenever such a person is removed under this Sub-Clause 6.9.

Wherever Key Personnel must be replaced in the foregoing circumstances, the replacement shall possess at least equivalent qualifications and experience as the person to be replaced. Whenever the Contractor is unable to provide a replacement with equivalent qualifications and/or experience, the Employer's Representative may, under Sub-Clause 8.8 [*Suspension of Work*], either, suspend the part of the Works affected by the lack of an acceptable replacement until such time as an approved replacement is appointed and commences his/her duties or, in exceptional circumstances, permit the replacement proposed. If a part of the Works is suspended for such reasons, then the Employer will not be liable for any costs or delays incurred by the Contractor and

the suspension shall be the responsibility of the Contractor.

6.10 Records of Contractor's Personnel and Equipment

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

6.11 Disorderly Conduct

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

7 Plant, Materials and Workmanship

7.1 Manner of Execution

In addition to the requirements of this Sub-Clause 7.1, Plant and Materials shall be in accordance with Section 01 25 00 [*Product Substitution Requirements*] of the Employer's Requirements.

Subject always to Sub-Clause 4.1 [*Contractor's General Obligations*], the 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; and
- (b) with properly equipped facilities and non-hazardous Materials, except as otherwise specified in the Contract.

7.2 Samples

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

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

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

7.3 Inspection

The Employer's Personnel shall at all 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 performance of any or all of the Plant to be supplied and to check the progress of manufacture of Plant and production and manufacture of Materials.

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

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

7.4 Testing

This Sub-Clause 7.4 shall apply to all tests specified in the Contract, other than the Tests after Completion (if any).

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

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

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

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

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*] and/or if completion of a Milestone is or will be delayed, under Sub-Clause 8.4A [*Extension of Milestone Dates*]; and

- (b) payment of any such Cost Plus Reasonable Profit, which shall be included in the Contract Price.

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

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

7.5 Rejection

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

If the Employer's Representative requires this Plant, Materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If the rejection and retesting cause the Employer to incur additional costs, the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay these costs to the Employer.

7.6 Remedial Work

Notwithstanding any previous test or certification, the Employer's Representative may instruct the Contractor to:

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

Further, if the Contractor fails to perform the Maintenance Services in accordance with the Contract, the Employer's Representative may instruct the Contractor to re-perform or carry out such Maintenance Services in accordance with the Contract.

The Contractor shall comply with the instruction within a reasonable time, which shall be the time (if any) specified in the instruction, or immediately if urgency is specified under sub-paragraph (c) of this Sub-Clause 7.6.

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

Claims] pay to the Employer all costs arising from this failure.

7.7 Ownership of Plant and Materials

Each item of Plant and Materials shall, to the extent consistent with the applicable 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; or
- (b) when the Contractor is entitled to payment of the value of the Plant and Materials under Sub-Clause 8.10 [*Payment for Plant and Materials in Event of Suspension*].

Where, prior to delivery to the Site, the title to the Plant and Materials passes to the Employer, the Contractor shall set that Plant and Materials aside and mark it as the Employer's property in a manner reasonably required by the Employer.

Without prejudice to the generality of the foregoing, the Contractor warrants and undertakes that it will have good title, free from liens and encumbrances, to each item of Plant and Materials supplied by it under the Contract and that each item of Plant and Materials will remain free from any liens and encumbrances created by, in favour of or in any way attributable to the Contractor or any of its Subcontractors until title in the Plant and Materials is passed to the Employer in accordance with this Sub-Clause 7.7. The Contractor shall defend, indemnify and hold the Employer harmless from and against any and all actions, claims, demands, costs, charges and expenses arising from any breach of the warranty contained in this Sub-Clause 7.7.

7.8 Not Used.

8 Commencement, Delays and Suspension

8.1 Commencement of Work

The Employer's Representative shall give the Contractor not less than 7 days' notice of the Commencement Date. The Commencement Date shall be within 42 days after the date of the issue of the Letter of Acceptance.

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

8.2 Time for Completion

The Contractor shall complete the whole of the Works, within the Time for Completion for the Works, including:

- (a) achieving the passing of the Tests on Completion;
- (b) completing all work which is stated in the Contract as being required for the Works to be considered to be completed for the purposes of taking-over under Sub-Clause 10.1

[*Taking Over of the Works*];

- (c) if applicable, providing the Defects Notification Period Security;
- (d) if applicable, providing the Second Fixed Retention Security; and
- (e) if applicable, providing the Second Escalating Retention Security.

8.3 Programme

The Contractor shall comply with the programming and other requirements in Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements.

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

Milestones

In the Contractor's Tender Programme and the Accepted Baseline Programme the following Milestones shall be clearly identified:

- (a) Milestones for design – the number of days after the Commencement Date when:
 - (i) all design requirements for the Filling and Emptying System will be satisfied according to Sections 01 81 13 [*Filling and Emptying System*] and 01 81 13.13 [*Physical Model for Filling and Emptying System*] of the Employer's Requirements; and
 - (ii) all Lock and Gate and Valve design requirements will be completed and released for fabrication, according to Sections 01 81 19 [*Lock Gates*] and 01 81 23 [*Culvert and Conduit Valves*] of the Employer's Requirements.
- (b) Milestones for construction – the number of days after the Commencement Date when:
 - (i) the Atlantic Locks Aggregate and Concrete Production and Delivery Facilities will have been fully deployed, all functional testing will have been completed, and the first 5,000 cubic meters of concrete will have been placed according to the requirements of Section 03 30 00 [*Concrete*] of the Employer's Requirements;
 - (ii) the Pacific Locks Aggregate and Concrete Production and Delivery Facilities will have been fully deployed, all functional testing will have been completed, and the first 5,000 cubic meters of concrete will have been placed according to the requirements of Section 03 30 00 [*Concrete*] of the Employer's Requirements;
 - (iii) the structural excavation for the Atlantic Locks and Water Saving Basins will have been completed according to Sections 31 23 00 [*Excavation and Fill*] and 31 23 16.26 [*Drilling and Blasting*] of the Employer's Requirements and

- any other applicable sections;
- (iv) the structural excavation for the Pacific Locks and Water Saving Basins will have been completed according to Sections 31 23 00 [*Excavation and Fill*] and 31 23 16.26 [*Drilling and Blasting*] of the Employer's Requirements and any other applicable sections;
 - (v) all concrete for the Atlantic Locks and Water Saving Basins will have been placed in accordance with Section 03 30 00 [*Concrete*] of the Employer's Requirements and any other applicable sections;
 - (vi) all concrete for the Pacific Locks and Water Saving Basins will have been placed in accordance with Section 03 30 00 [*Concrete*] of the Employer's Requirements and any other applicable sections;
 - (vii) all Locks, Rolling Gates and their appurtenances for the Atlantic Locks Complex will have been completed and installed;
 - (viii) all Locks Rolling Gates and their appurtenances for the Pacific Locks Complex will have been completed and installed;
 - (ix) the Contractor will have fulfilled all the requirements needed to be met before requesting the Taking-Over Certificate for the Atlantic Locks Complex in accordance with the Contract; and
 - (x) the Contractor will have fulfilled all the requirements needed to be met before requesting the Taking-Over Certificate for the Pacific Locks Complex in accordance with the Contract.

8.4 Extension of Time for Completion

The Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [*Taking Over of the Works*] is or will be delayed by any of the following causes:

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

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Employer's Representative in accordance with Sub-Clause 20.1 [*Contractor's Claims*]. When determining each extension of time under Sub-Clause 20.1 [*Contractor's Claims*], the Employer's Representative shall review previous determinations and

may increase, but shall not decrease, the total extension of time.

8.4A Extension of Milestone Dates

The Contractor shall be entitled, subject to Sub-Clause 20.1 [*Contractor's Claims*] to an extension of a Milestone Date if and to the extent that completion of the relevant Milestone is or will be delayed by any of the causes set out in Sub-Clause 8.4 [*Extension of Time for Completion*].

If the Contractor considers himself to be entitled to an extension of a Milestone Date, the Contractor shall give notice to the Employer's Representative in accordance with Sub-Clause 20.1 [*Contractor's Claims*].

It shall not necessarily follow that where the Contractor is entitled to an extension of a Milestone Date, under this Sub-Clause 8.4.A it will also be entitled to an extension to the Time for Completion under Sub-Clause 8.4 [*Extension of Time for Completion*] on the same grounds or for the same or any period.

Similarly, it shall not follow that if the Contractor is entitled to an extension of the Time for Completion under Sub-Clause 8.4 [*Extension of Time for Completion*] a Milestone Date will necessarily be extended on the same grounds or for the same or any period.

The Employer's Representative, in determining any contractual entitlement under Sub-Clause 8.4 [*Extension of Time for Completion*] and this Sub-Clause 8.4A shall do so separately.

8.5 Delays Caused by Authorities

If the following conditions apply, namely:

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

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

8.6 Rate of Progress

In the circumstances set out in paragraph 1.10F of Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements, the Employer's Representative may instruct the Contractor to produce a recovery programme (as required therein), and to undertake the other actions required therein.

Unless the Employer's Representative notifies otherwise, the Contractor shall adopt such actions, at the risk and cost of the Contractor. If these actions cause the Employer to incur additional costs, the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay these costs to the

Employer, in addition to delay damages (if any) under Sub-Clause 8.7 [*Withholdings, Delay Damages and Bonus for Early Completion*] below.

At all times the Contractor shall use its best endeavours to mitigate the effects of any delay to the progress of the Works howsoever caused and comply with the requirements of the Contract as regards delay including but not limited to the matters set out in Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements.

8.7 Deductions, Delay Damages and Bonus for Early Completion

Deduction

- 8.7.1 If the Contractor fails to achieve any Milestone by the relevant Milestone Date then the Employer's Representative shall be entitled to deduct in any Interim Payment Certificate in accordance with Sub-Clause 8.7.2 the amount specified in the Appendix to Tender in respect of such Milestone.
- 8.7.2 Any amounts to be deducted by the Employer's Representative as stated in Sub-Clause 8.7.1 shall be deducted in the next Interim Payment Certificate pursuant to Sub-Clause 14.6 [*Issue of Interim Payment Certificate*] immediately following the failure to achieve any such Milestone by the relevant Milestone Date.

Recovery of a Milestone Deduction

- 8.7.3 The Contractor shall be entitled to recover any amounts deducted pursuant to Sub-Clause 8.7.1, should the Contractor:
- (a) achieve any subsequent Milestone by the applicable Milestone Date; and/or
 - (b) achieve the Milestone the subject of the deduction under Sub-Clause 8.7.1 within 56 days after the applicable Milestone Date.
- 8.7.4 Any amounts to be recovered by the Contractor as stated in Sub-Clause 8.7.3 shall be included by the Employer's Representative in the next Interim Payment Certificate under Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] immediately following the issue of the relevant Milestone Certificate and the application for the said sum in the Contractor's next application for payment pursuant to Sub-Clause 14.3 [*Application for Interim Payment Certificates*].
- 8.7.5 Any amounts deducted pursuant to Sub-Clause 8.7.1 which the Contractor does not subsequently become entitled to recover pursuant to Sub-Clause 8.7.3 may be retained by the Employer's Representative for the application of delay damages (if any) which become due under Sub-Clause 8.7.7 below. For the avoidance of doubt should the Contractor complete the whole of the Works by the Time for Completion then any monies still being deducted pursuant to Sub-Clause 8.7.1 shall be included in the next Interim Payment Certificate under Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] immediately following the issue of the Taking Over Certificate and the application for the said sum in the Contractor's next application for payment pursuant to Sub-Clause 14.3 [*Application for Interim Payment Certificates*].
- 8.7.6.1 In the event that the Employer's Representative deducts any amounts pursuant to Sub-Clause 8.7.1 which do not become recoverable by the Contractor pursuant to Sub-Clause 8.7.3, and which are greater than any amount of delay damages applicable pursuant to Sub-Clauses 8.7.7 below, then the Contractor shall be entitled to recover the balance which shall be included by the Employer's Representative in the next Interim Payment Certificate under Sub-Clause 14.6 [*Issue of Interim Payment Certificates*] immediately following the issuing of the Taking-Over Certificate and

the application for the said sum in the Contractor's next application for payment pursuant to Sub-Clause 14.3 [*Application for Interim Payment Certificates*].

- 8.7.6.2 The Contractor may apply by notice to the Employer's Representative for a certificate that a Milestone has been achieved ("Milestone Certificate") not earlier than 14 days before the Milestone will, in the Contractor's opinion, be achieved. The Employer's Representative shall, within 28 days after receiving the Contractor's application:
- (a) issue the Milestone Certificate to the Contractor, stating the date on which the Milestone was achieved; or
 - (b) reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Milestone Certificate to be issued. The Contractor shall then complete this work before issuing a further application under this Sub-Clause 8.7.6.2.
- 8.7.6.3 If the Employer's Representative fails either to issue the Milestone Certificate or to reject the Contractor's application within the period of 28 days, and if the Milestone has been substantially reached in accordance with the Contract, the Milestone Certificate shall be deemed to have been issued on the last day of that period.

Delay Damages

- 8.7.7 Subject to Sub-Clause 8.7.11, if the Contractor fails to comply with Sub-Clause 8.2 [*Time for Completion*], the Contractor shall, subject to Sub-Clause 2.5 [*Employer's Claims*], pay or allow to the Employer delay damages to the Employer for his default.
- 8.7.8 Subject to Sub-Clause 8.7.11, the delay damages payable by the Contractor or allowable to the Employer under this Sub-Clause 8.7 shall be the sum stated in the Appendix to Tender which shall be paid for every day which shall elapse between the Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount of delay damages due under this Sub-Clause 8.7 shall not exceed the maximum amount of delay damages stated in the Appendix to Tender.
- 8.7.9 Subject to Sub-Clause 8.7.11 and to Sub-Clause 8.6 [*Rate of Progress*], these delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination of the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract.
- 8.7.10 It is agreed that the delay damages payable by the Contractor or allowable to the Employer pursuant to this Sub-Clause 8.7 have been agreed in good faith by the Parties and do not exceed the likely loss to the Employer as a result of the Contractor's failure to meet its obligations under Sub-Clause 8.2 [*Time for Completion*].
- 8.7.11 Notwithstanding the other provisions of this Sub-Clause 8.7;
- (a) in circumstances where the delay damages in this Sub-Clause 8.7 are successfully challenged by the Contractor (or are otherwise deemed in any judicial, dispute adjudication board or arbitral proceedings) as being unenforceable against the Contractor; and/or

- (b) where and to the extent that any failure by the Contractor to comply with Sub-Clause 8.2 [*Time for Completion*] is as a result of fraud, deliberate default, reckless misconduct or gross negligence of the Contractor;

the Parties agree that the Contractor's liability to the Employer for breach of its obligations in Sub-Clause 8.2 [*Time for Completion*] will instead be determined by general damages which shall not be capped at the daily rates and the maximum amount stated in the Appendix to Tender and such general damages shall not in the case of sub-paragraph (a) of this Sub-Clause 8.7.11 be subject to Sub-Clause 17.6.1 [*Limitation of Liability*] and shall not in the case of sub-paragraph (b) of this Sub-Clause 8.7.11 be subject to Sub-Clauses 17.6.1 [*Limitation of Liability*] and 17.6.2 [*Limitation of Liability*], save that, for the avoidance of doubt, sub-paragraph (a) of this Sub-Clause 8.7.11 does not apply in circumstances where delay damages are not due because the Contractor is entitled to an extension of time pursuant to Sub-Clause 8.4 [*Extension of Time for Completion*].

Bonus for Early Completion

- 8.7.12 If a Taking-Over Certificate for the whole of the Works is issued before the Time for Completion, the Contractor shall be entitled to payment of a bonus. The bonus shall be the sum stated in the Appendix to Tender, which sum shall be paid for each day between the date stated in the Taking-Over Certificate on which the Works were completed in accordance with the Contract and the Time for Completion up to the maximum amount stated in the Appendix to Tender. However and notwithstanding the foregoing, in no event shall the Contractor be entitled to a bonus for early completion if the Taking-Over Certificate for the whole of the Works is issued on or later than 1,981 days after the Commencement Date, notwithstanding any extension to the Time for Completion under Sub-Clause 8.4 [*Extension of Time for Completion*] that would extend the Time for Completion beyond such date.

8.8 Suspension of Work

- 8.8.1 The Employer's Representative may at any time (save in relation to sub-paragraph (d) of this Sub-Clause 8.8.1, which shall apply at any time after the issue of the Taking Over Certificate) instruct the Contractor to:

- (a) suspend progress of part or all of the Works;
- (b) suspend delivery of Plant, Material or Contractor's Equipment which is ready for delivery to the Site;
- (c) suspend the erection of the Plant or Material that has been delivered to the Site; or
- (d) suspend all or any part of the Maintenance Services;

for such time and in such manner as the Employer's Representative sets out in its written notice of suspension.

- 8.8.2 During such suspension the Contractor shall except to the extent expressly requested in writing by the Employer's Representative:

- (a) protect, store and secure all the Works, Plant, Materials and Contractor's Equipment and any free-issue material against any deterioration, loss or damage,
- (b) place no further agreements with the Subcontractors or purchase any materials, services, work or facilities with respect to those parts of the Works or the Maintenance Services

suspended; and

- (c) use all reasonable endeavours to suspend on the most favourable terms available to the Contractor all Subcontracts, purchase orders and rental agreements to the extent affected by such suspension and otherwise minimize the additional costs associated with such suspension.

8.8.3 The Employer's Representative may also notify the cause for the suspension. If and to the extent that the cause is notified and is the responsibility of the Contractor, the following Sub-Clauses 8.9 [*Consequences of Suspension*], 8.10 [*Payment for Plant and Materials in Event of Suspension*] and 8.11 [*Prolonged Suspension*] shall not apply.

8.9 Consequences of Suspension

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

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

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

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

8.10 Payment for Plant and Materials in Event of Suspension

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

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

8.11 Prolonged Suspension

If the suspension under Sub-Clause 8.8 [*Suspension of Work*] has continued for more than 140 days, the Contractor may request the Employer Representative's permission to proceed. If the Employer's Representative does not give permission within 28 days after being requested to do so, the Contractor may, by giving notice to the Employer's Representative, treat the suspension as an omission under Clause 13 [*Variations and Adjustments*] of the affected part of the Works or

Maintenance Services. If the suspension affects the whole of the Works, the Contractor may give notice of termination under Sub-Clause 16.2 [*Termination by Contractor*] but may not treat the suspension as an omission under Clause 13 [*Variations and Adjustments*].

8.12 Resumption of Work

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

9 Tests on Completion

9.1 Contractor's Obligations

The Contractor shall carry out the Tests on Completion in accordance with the Employer's Requirements (in particular Section 01 91 00 [*Tests on Completion and Tests after Completion*] of the Employer's Requirements) and with this Clause 9 and Sub-Clause 7.4 [*Testing*], after providing the documents in accordance with Sub-Clause 5.6 [*As-Built Documents*] and Sub-Clause 5.7 [*Operation and Maintenance Manuals*].

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

The Tests on Completion shall be carried out generally in the following sequence:

- (a) pre-commissioning tests, which shall include the appropriate inspections and ("dry" or "cold") functional tests to demonstrate that each item of Plant and all components can safely undertake the next stage;
- (b) commissioning tests, which shall include the specified operational tests to demonstrate that the Works (or any part thereof) can be operated safely and as specified, under all available operating conditions;
- (c) performance tests to demonstrate whether the Works (or any part thereof) conform with the criteria specified in the Employer's Requirements; and
- (d) trial operation, which shall demonstrate that the Works (or any part thereof) perform reliably and in accordance with the Contract.

During trial operation, when the Works (or any part thereof) are operating under stable conditions, the Contractor shall give notice to the Employer's Representative that the Works (or any part thereof) are ready for any other Tests on Completion, including performance tests to demonstrate whether the Works (or any part thereof) conform with the criteria specified in the Employer's Requirements.

Trial operation and testing shall not constitute a taking-over under Clause 10 [*Employer's Taking Over*]. Any revenues generated by the Works (or any part thereof) during trial operation and testing shall be the property of the Employer.

In considering the results of the Tests on Completion, the Employer's Representatives shall make allowances for the effect of any use of the Works (or any part thereof) by the Employer on the performance or other characteristics of the Works (or any part thereof). As soon as the Works (or any part thereof) have passed each of the Tests on Completion described in sub-paragraph (a), (b), (c) or (d) of this Sub-Clause 9.1, the Contractor shall submit a certified report of the results of these tests to the Employer's Representative.

9.2 Delayed Tests

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

If the Tests on Completion (including any retesting thereof) are being unduly delayed by the Contractor, the Employer's Representative may by notice require the Contractor to carry out the Tests within 21 days after receiving the notice. The Contractor shall carry out the Tests on such day or days within that period as the Contractor may fix and of which he shall give notice to the Employer's Representative.

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

9.3 Retesting

If the Works (or any part thereof) fail to pass any of the Tests on Completion, Sub-Clause 7.5 [*Rejection*] and Sub-Clause 7.6 [*Remedial Work*] shall apply, and the Employer's Representative or the Contractor may require each failed Test, and Tests on Completion on any related work, to be repeated under the same terms and conditions, up to a maximum of five times for each test.

9.4 Failure to Pass Tests on Completion

If the Works (or any part thereof) fail to pass any of the Tests on Completion (repeated in accordance with Sub-Clause 9.3 [*Retesting*]) or (where applicable) fail to pass any of the Tests on Completion repeated pursuant to sub-paragraph (a) of this Sub-Clause 9.4, the Employer's Representative shall in its absolute discretion be entitled to:

- (a) order further repetition of Tests on Completion under Sub-Clause 9.3 [*Retesting*];
- (b) in respect of the tests stated in paragraph 1.06 of Section 01 91 00 [*Tests on Completion and Tests after Completion*] of the Employer's Requirements determine that the Employer shall be entitled to recover performance damages at the rates specified in Section 01 91 00 [*Tests on Completion and Tests after Completion*] of the Employer's Requirements in which case the Employer may then, in addition to being entitled to recover such performance damages and without prejudice to any other rights of the Employer set out herein, either:
 - (i) request the Employer's Representative to issue a Taking-Over Certificate, in which event the Contractor shall then proceed in accordance with all other obligations

under the Contract; or

- (ii) request the Employer's Representative to proceed in accordance with sub-paragraph (c) of this Sub-Clause 9.4, save that any agreement or determination thereunder shall not take account of the matters that were the subject of performance damages pursuant to sub-paragraph (b) of this Sub-Clause 9.4,
- (c) issue a Taking-Over Certificate, if the Employer so requests in which event the Contractor shall then 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 Employer as:
 - (i) agreed by both Parties (in full satisfaction of this failure only) and shall be paid before this Taking-Over Certificate is issued; or
 - (ii) determined and paid under Sub-Clause 2.5 [*Employer's Claims*] and Sub-Clause 3.5 [*Determinations*].

Further, it is agreed that the performance damages payable by the Contractor or allowable to the Employer pursuant to sub-paragraph (b) of this Sub-Clause 9.4 have been agreed in good faith by the Parties and do not exceed the likely loss to the Employer as a result of the Contractor's failure to pass the Tests on Completion referred to therein.

Notwithstanding the other provisions of this Sub-Clause 9.4, in circumstances where the performance damages payable by the Contractor or allowable to the Employer pursuant to sub-paragraph (b) of this Sub-Clause 9.4 are successfully challenged by the Contractor (or are otherwise deemed in any judicial, dispute adjudication board or arbitral proceedings) as being unenforceable against the Contractor, the Parties agree that the Contractor's liability to the Employer for its failure to pass the Tests on Completion referred to in sub-paragraph (b) of this Sub-Clause 9.4 will instead be determined by general damages which shall not be subject to Sub-Clause 17.6.1 [*Limitation of Liability*].

For the avoidance of doubt, the Parties agree that sub-paragraphs (b) and (c) of this Sub-Clause 9.4 shall be subject to Sub-Clauses 17.6.2 [*Limitation of Liability*] and 17.6.3 [*Limitation of Liability*], and that Sub-Clause 17.6.1 [*Limitation of Liability*] is neither relevant nor applicable to this Sub-Clause 9.4.

10 Employer's Taking Over

10.1 Taking Over of the Works

Except as stated in Sub-Clause 9.4 [*Failure to Pass Tests on Completion*], the Works shall be taken over by the Employer when (i) the Works have been completed in accordance with the Contract, including but not limited to complying with all the requirements of Section 01 77 00 [*Taking-Over Procedures*] of the Employer's Requirement and the matters described in Sub-Clause 8.2 [*Time for Completion*] and except as allowed in sub-paragraph (a) of this Sub-Clause 10.1, and (ii) a Taking-Over Certificate for the Works has been issued, or is deemed to have been issued in accordance with this Sub-Clause 10.1.

The Contractor may apply by notice to the Employer's Representative for a Taking-Over Certificate not earlier than 14 days before the Works will, in the Contractor's opinion, be complete and ready for taking over.

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

- (a) issue the Taking-Over Certificate to the Contractor, stating the date on which the Works were completed in accordance with the Contract, except for any minor outstanding work and defects recorded in the Schedule of Outstanding Minor Work and Defects which will not affect the use of the Works for their intended purpose (either until or whilst this work is completed and these defects are remedied); or
- (b) reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work before issuing a further notice under this Sub-Clause 10.1.

If the Employer's Representative fails either to issue the Taking-Over Certificate or to reject the Contractor's application with the period of 28 days, and if the Works are substantially in accordance with the Contract as aforesaid, the Taking-Over Certificate shall be deemed to have been issued on the last day of that period.

10.2 Taking Over of Parts of the Works

The Employer's Representative may, at the sole discretion of the Employer, issue a Taking-Over Certificate for any part of the Permanent Works.

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

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

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

If the Contractor incurs Cost as a result of the Employer taking over and/or using a part of the Works, other than such use as is specified in the Contract or agreed by the Contractor, the Contractor shall (i) give notice to the Employer's Representative and (ii) be entitled subject to Sub-Clause 20.1 [*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 Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine this Cost Plus Reasonable Profit.

If a Taking-Over Certificate has been issued for a part of the Works, the delay damages thereafter for completion of the remainder of the Works shall be reduced. For any period of delay after the

date stated in this Taking-Over Certificate, the proportional reduction in these delay damages shall be calculated as the proportion which the value of the part so certified bears to the value of the Works as a whole. The Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these proportions. The provisions of this paragraph shall only apply to the daily rate of delay damages under Sub-Clause 8.7 [*Withholdings, Delay Damages and Bonus for Early Completion*], and shall not affect the maximum amount of these damages.

10.3 Interference with Tests on Completion

If the Contractor suffers delay and/or incurs Cost as a result of delay caused by the Employer in carrying out the Tests on Completion, the Contractor shall give notice to the Employer's Representative and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

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

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

10.4 Surfaces Requiring Reinstatement

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

11 Defects Liability

11.1 Completion of Outstanding Work and Remedying Defects

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

- (a) complete any work which is outstanding as set out in the Schedule of Outstanding Minor Work and Defects, within such reasonable time as is instructed by the Employer's Representative; and
- (b) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period for the Works.

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

11.2 Cost of Remedying Defects and Completing work

All work referred to in sub-paragraph (a) of Sub Clause 11.1 [*Completion of Outstanding Work and Remedying Defects*] shall be executed at the risk and cost of the Contractor.

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 of the Contractor, if and to the extent that the work is attributable to:

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

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

11.3 Extension of Defects Notification Period

The Employer shall be entitled subject to Sub-Clause 2.5 [*Employer's Claims*] to an extension of the Defects Notification Period for the Works if and to the extent that the Works 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, the 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 [*Contractor's Entitlement to Suspend Work*], the Contractor's obligations under this Clause shall not apply to any defects or damage occurring more than two years after the Defects Notification Period for the Plant and/or Materials would otherwise have expired.

11.4 Failure to Remedy Defects

If the Contractor fails to commence and diligently and continuously pursue remediation of any defects or damage and/or completion of the work in the Schedule of Outstanding Minor Work and Defects within the shortest time reasonably practicable, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied and/or the work in the Schedule of Outstanding Minor Works and Defects is to be completed. The Contractor shall be given reasonable notice of this date.

If the Contractor fails to remedy the defect or damage and/or complete the work in the Schedule of Outstanding Minor Work and Defects by this notified date and such work was to be executed at the cost of the Contractor under Sub-Clause 11.2 [*Cost of Remedying Defects and Completing Work*],

the Employer may (at his option):

- (a) carry out the work himself or by others, in a reasonable manner and at the Contractor's cost, but the Contractor shall have no responsibility for this work; and the Contractor shall subject to Sub-Clause 2.5 [*Employer's Claims*] pay to the Employer the costs reasonably incurred by the Employer in carrying out such work;
- (b) require the Employer's Representative 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 Employer of substantially the whole benefit of the Works or any major part of the Works, terminate the Contractor's right to complete 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 Employer shall then be entitled to recover all sums paid for the Works or for such part (as the case may be), plus financing costs.

For the avoidance of doubt, the Parties agree that sub-paragraphs (b) and (c) of this Sub-Clause 11.4 shall be subject to Sub-Clauses 17.6.2 [*Limitation of Liability*] and 17.6.3 [*Limitation of Liability*] but Sub-Clause 17.6.1 [*Limitation of Liability*] is neither relevant nor applicable to either sub-paragraphs (b) or (c) of this Sub-Clause 11.4.

11.5 Removal of Defective or Damaged Plant

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

11.6 Further Tests

If the work of remedying any defect or damage may affect the performance of the Works, the Employer's Representative may require the repetition of any of the tests described in the Contract, including Tests on Completion and/or Tests after Completion. 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 and Completing Work*], for the cost of the remedial work.

11.7 Right of Access

Until the Performance Certificate has been issued, the Contractor shall have the right of access to all parts of the Works as is required to fulfill its obligations under the Contract and to records of the operation and performance of the Works, except as may be inconsistent with the Employer's reasonable security restrictions and commercial operation of the Works and the Employer's Operations.

11.8 Contractor to Search

The Contractor shall, if required by the Employer's Representative, search for the cause of any defect, under the direction of the Employer's Representative. Unless the defect is to be remedied at the cost of the Contractor under Sub-Clause 11.2 [*Cost of Remedying Defects and Completing work*], the Cost Plus Reasonable Profit of the search shall be agreed or determined by the Employer's Representative in accordance with Sub-Clause 3.5 [*Determinations*] and shall be included in the Contract Price.

11.9 Performance Certificate

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

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

11.10 Unfulfilled Obligations

After the Performance Certificate has been issued, each Party shall remain liable for the fulfilment of any obligation which remains unperformed at that time, including but not limited to the Contractor's liability for any latent defects in the Works. 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 Contractor shall remove any remaining 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 Employer receives a copy of the Performance Certificate, the Employer may sell or otherwise dispose of any remaining items. The Employer shall be entitled to be paid the costs incurred in connection with, or attributable to, such sale or disposal and restoring the Site.

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

11.12 Article 1343 of the Panamanian Civil Code

For the avoidance of doubt, nothing in this Contract shall relieve or in any way reduce or alter the Contractor's obligations under Article 1343 of the Panamanian Civil Code, which are in addition to the obligations set out in Clause 11 [*Defects Liability*] and the Contract.

12 Tests after Completion

12.1 Procedure for Tests after Completion

This Clause shall apply to any Tests after Completion instructed by the Employer pursuant to Section 01 91 00 [*Tests on Completion and Tests after Completion*] of the Employer's Requirements. The Employer shall:

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

The Tests after Completion shall be carried out as required by the Contract. The Employer shall give to the Contractor 21 days' notice of the date or dates after which the Tests after Completion will be carried out. Unless otherwise agreed, these Tests shall be carried out within 14 days after this date or dates, on the day or days determined by the Employer.

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

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

12.2 Delayed Tests

If the Contractor incurs Cost as a result of any unreasonable delay by the Employer to the Tests after Completion, the Contractor shall (i) give notice to the Employer's Representative and (ii) be entitled subject to Sub-Clause 20.1 [*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 Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine this Cost Plus Reasonable Profit.

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

12.3 Retesting

If the Works (or any part thereof) fail to pass the Tests after Completion:

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

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

12.4 Failure to Pass Tests after Completion

If the Works (or any part thereof) fail to pass a Test after Completion repeated under Sub-Clause 12.3 [*Retesting*], the Contractor may be instructed to make adjustments or modifications to the Works (or any part thereof), at a time that is convenient to the Employer. The Contractor shall then remain liable to carry out the adjustments or modifications and to satisfy this Test, within a reasonable period of receiving notice by (or on behalf of) the Employer of the time that is convenient to the Employer. However, if the Contractor does not receive this notice during the Defects Notification Period, the Contractor shall be relieved of this obligation and the Works (or any part thereof) shall be deemed to have passed this Test after Completion.

If the Contractor incurs additional Cost as a result of any unreasonable delay by the Employer in permitting access to the Works (or any part thereof) or Plant by the Contractor, either to investigate the causes of a failure to pass a Test after Completion or to carry out any adjustments or modifications, the Contractor shall (i) give notice to the Employer's Representative and (ii) be entitled subject to Sub-Clause 20.1 [*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 Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine this Cost Plus Reasonable Profit.

13 Variations and Adjustments

13.1 Right to Vary

Variations may be initiated by the Employer's Representative at any time prior to issuing the Taking-Over Certificate for the Works (or in relation to the Maintenance Services, after the issue of the Taking-Over Certificate for the Works), either by an instruction or by a request for the Contractor to submit a proposal. A Variation shall not comprise the omission of any work which is to be carried out by others. Variations shall not vitiate or invalidate the Contract. No Variations shall be made by the Contractor without the Employer's Representative's prior written approval of the same which approval shall not be given by the process stated in Sub-Clause 5.2 [*Contractor's Documents*], but shall be governed solely by the process stated in Sub-Clause 13.3 [*Variation*]

Procedure].

The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Employer's Representative stating (with supporting particulars) that: (i) the Contractor cannot readily obtain the Goods required for the Variation, (ii) it will reduce the safety or suitability of the Works, or (iii) it will have an adverse impact on the achievement of the Employer's Requirements. Upon receiving this notice, the Employer's Representative shall cancel, confirm or vary the instruction.

13.2 Value Engineering

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

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

The Employer's Representative may in its absolute discretion choose to accept or reject the proposal from the Contractor.

Any reduction to the Contract Price resulting from the implementation of an agreed value engineering initiative approved by the Employer's Representative shall be agreed as part of the approval process under Sub-Clause 13.3 [*Variation Procedure*] and shared 50/50 between the Contractor and the Employer as shall be set out and recorded in the said agreement.

13.3 Variation Procedure

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

- (a) a description of the proposed design and/or work to be performed and a programme for its execution;
- (b) the Contractor's proposal for any necessary modifications to the Accepted Baseline Programme according to Sub-Clause 8.3 [*Programme*] and Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements and to the Time for Completion and/or to any Milestone Date(s) including such detailed information as the Employer's Representative may reasonably require to allow the Employer's Representative to consider any proposed modification to the Accepted Baseline Programme and to the Time for Completion and/or to any Milestone Date(s); and
- (c) the Contractor's proposal for adjustment to the Contract Price, including such details or information as the Employer's Representative may reasonably require to allow the Employer's Representative to consider the amount of any proposed adjustment to the Contract Price.

The Employer's Representative shall, as soon as practicable after receiving such proposal (under Sub-Clause 13.2 [*Value Engineering*] or otherwise), respond with approval, disapproval or comments. The Contractor shall not delay any other work (i.e. work not the subject of the proposal)

whilst awaiting a response.

Each instruction to execute a Variation, with any requirements for the recording of Costs, shall be issued by the Employer's Representative to the Contractor, who shall acknowledge receipt and shall implement the Variation without delay, with each instruction numbered consecutively and indexed in the reports prepared by the Contractor under Sub-Clause 4.21 [*Progress Reports*].

Upon instructing or approving a Variation, the Employer's Representative shall, where an agreement has been reached between the Employer's Representative and the Contractor as to the effect of a Variation (including in respect of an approved value engineering initiative under Sub-Clause 13.2 [*Value Engineering*]) on the Contract Price and/or Time for Completion and/or any Milestone Dates, give effect to such agreement, or where an agreement has not been reached, shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine adjustments to the Contract Price. These adjustments shall include reasonable profit.

Without prejudice to the requirements of these Conditions of Contract, all matters related to Variations and adjustments shall be reported in accordance with Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements.

13.4 Not Used

13.5 Provisional Sums

The parties have agreed Provisional Sums for certain elements of the works as described in the Employer's Requirements.

Each Provisional Sum shall only be used in accordance with the Employer's Representative's instructions and the Contract Price shall be adjusted accordingly if so instructed.

The Contractor shall be deemed to have made all necessary allowances within the Contractor's Tender Programme and the Accepted Baseline Programme for the works the subject of each Provisional Sum and shall not be entitled to any extension of time to the Time for Completion and/or to a Milestone Date in respect of the works the subject of any Provisional Sum which the Employer's Representative may instruct, provided that the Employer's Representative issues such instruction(s) within 2 months from the date of issuing of the Letter of Acceptance. Thereafter, if instructed, the works the subject of each Provisional Sum shall be valued and assessed in accordance with Sub-Clause 13.3 [*Variation Procedure*], and Sub-Clauses 8.4 [*Extension of Time for Completion*] and 8.4A [*Extension of Milestone Dates*].

Save that, for the avoidance of doubt, and notwithstanding the preceding paragraph, where such Provisional Sums relate to the Maintenance Services (i.e. Provisional Sum No.5 and Provisional Sum No.6), then since the Maintenance Services shall only be carried out after the issuance of the Taking Over Certificate pursuant to Sub-Clause 10.1 [*Taking Over of the Works*] the instruction of such Provisional Sums (and the carrying out of the Maintenance Services) shall not, in any circumstances, affect the Time for Completion or entitle the Contractor to an extension of the Time for Completion under Sub-Clause 8.4 [*Extension of Time for Completion*] or an extension of any Milestone Date under Sub-Clause 8.4A [*Extension of Milestone Dates*] irrespective of when such instruction is issued.

13.6 Daywork

13.6.1 For additional work of a minor or incidental nature, the Employer's Representative may instruct that a Variation shall be executed on a daywork basis. No work shall be undertaken or be reimbursed on a daywork basis without a specific instruction from the Employer's Representative requesting the Contractor expressly to do so.

Before ordering Materials for the work to be carried out on a daywork basis, the Contractor shall submit quotations, supported by actual invoices, to the Employer's Representative for his prior written approval.

Work carried out on a daywork basis as aforesaid shall be valued as provided in Sub-Clause 13.6.2 below provided that the Contractor shall deliver to the Employer's Representative, accurate statements in duplicate containing the following information concerning the resources used in executing the previous day's work:

- (a) the names, occupations, basic salaries and the number of hours worked of the Contractor's Personnel;
- (b) the cost and quantities of Materials; and
- (c) the cost, quantity and utilization time (if applicable) of the Contractor's Equipment.

One copy of each statement will, if correct, or when agreed, be signed by the Employer's Representative and returned to the Contractor.

13.6.2 The Contractor shall submit priced statements of these resources (including all substantiation such as invoices, vouchers, accounts and receipts and other information required by the Employer's Representative) on the basis of the statements signed by the Employer's Representative as specified in Sub-Clause 13.6.1 prior to their inclusion in the next application for Interim Payment under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] which priced statements shall incorporate the following:

- (a) the basic salaries of the Contractor's Personnel multiplied by a factor of 1.71 to account for, inter alia, social costs associated to these salaries;
- (b) the cost of Materials shall be multiplied by a factor of 1.075 to account for, inter alia, costs associated with the handling of Materials;
- (c) the cost of the Contractor's Equipment; and
- (d) profit of 5 % shall be applied to the summation of items described in sub-paragraph (a), (b) and (c) of this Sub-Clause 13.6.2.

13.7 Adjustments for Changes in Legislation

The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract save that there shall be no increase in the Contract Price or adjustment to the Time for Completion or to any Milestone Date where the Contractor exercising Prudent Industry Practices

ought reasonably to have foreseen such increases in cost or time at the Base Date and provided further that the Contract Price shall not be adjusted pursuant to this Sub-clause 13.7 as a result of any increase in Labor Costs (as defined in Sub-Clause 13.9.8 [*Adjustments for Changes in Local Labor Rates*]).

Subject to the first paragraph of this Sub-Clause 13.7, if the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in the Laws or in such interpretations, made after the Base Date, the Contractor shall give notice to the Employer's Representative and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

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

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

13.8 Adjustments for Changes in Prices for Specified Materials

13.8.1 Subject to Sub-Clause 13.8.5, the Contract Price shall be adjusted (up or down as the case may be), during the course of the Contract and in accordance with this Sub-Clause 13.8 to account for increases or decreases in the prices of the Specified Materials.

13.8.2 The following indices shall be used to determine the Adjustment Prices:

- (a) Reinforcing Steel: "Platts Steel Markets Daily", "Reinforcing Bar", "Ex-Works, US SE", "Close/Midpoint" Price, in US \$ per short ton;
- (b) Lock Gate, Valve, and Bulkhead Structural Steel Plate and Shapes: "Platts Steel Markets Daily", "Plate", "Ex-Works, US SE", "Close/Midpoint" Price, in US \$ per short ton; and
- (c) Diesel Fuel: "Platts Latin American Wire", "Gulf Diesel (No. 2 Oil)", Closing Price, in US \$ per US gallon.

13.8.3 Subject to Sub-Clause 13.8.5, within 30 days after each Adjustment Date, the Employer's Representative shall determine the applicable Adjustment Prices, Cement Adjustment Date PPI Value and Cement Adjustment Price and shall issue to the Contractor an updated Price Adjustment Timetable which states the same and states the consequent Price Difference and Adjustment Amount Due This Period in respect of each Specified Material.

13.8.4 The Adjustment Amount Due This Period in respect of each Specified Material as stated in the Price Adjustment Timetable produced pursuant to Sub-Clause 13.8.3 shall be added to or subtracted from the Contract Price and shall be included in the Contractor's next Statement and the next Interim Payment Certificate thereafter.

13.8.5 The Adjustment Dates and, subject to paragraph 1.03(C)(10) of Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements, the Adjustment Quantities are for the purpose of this Sub-Clause 13.8 only and are fixed. No claims shall be made by the Contractor (whether under this Sub-Clause 13.8 or otherwise) arising from different quantities from those shown in the Price Adjustment Timetable or actual dates of purchase, use or delivery of the Specified Materials. No adjustments shall be made in respect of any increase or decrease in the

price of a Specified Material after the last Adjustment Date in respect of that Specified Material. Further, and for the avoidance of any doubt, wherever the Adjustment Quantity is 0 this shall mean that the corresponding Adjustment Amount Due this Period shall be 0

- 13.8.6 For the further avoidance of any doubt, there shall be no price adjustments in excess of the Maximum Adjustment Quantity for a Specified Material under this Sub-Clause 13.8 or otherwise. In the event that the Contractor submitted the Price Adjustment Timetable showing Adjustment Quantities in respect of any Specified Material in excess of the Maximum Adjustment Quantity for that Specified Material, the Employer's Representative will apply price adjustments under this Sub-Clause up to the Maximum Adjustment Quantity in chronological order of Adjustment Dates until the Adjustment Quantities for the Specified Material reach the Maximum Adjustment Quantity and there above and thereafter there shall be no further price adjustment.

13.9 Adjustment for Changes in Local Labor Rates

- 13.9.1 The Contract Price shall be adjusted in accordance with the provisions of this Sub-Clause 13.9, to account for any increases in local labor rates as described herein. No adjustments shall be made pursuant to this Sub-Clause 13.9 in respect of any increases after the 1694th day after the Commencement Date.

- 13.9.2 The Employer's Representative shall determine the initial base labor rate ("IBLR") and the current base labor rate ("CBLR") in the manner described in Sub-Clauses 13.9.3 and 13.9.4 respectively, on the basis of the following information which (save in relation to sub-paragraph (e) of this Sub-Clause 13.9.2) shall be submitted by the Contractor to the Employer's Representative for review no later than 14 days after the end of the applicable adjustment period, or 14 days after the period for which the IBLR is determined:

- (a) a combined labor utilization and cost report which shows in respect of each Relevant Employee in the relevant period as follows:
 - (i) the identification number (cédula);
 - (ii) the name and the position and/or function;
 - (iii) the number of hours worked in respect of the Works within the Country in the relevant period; and
 - (iv) the Labor Costs paid in the relevant period;
- (b) a certificate from the Acceptable Contractor Auditor that the combined labor utilization and cost report provided pursuant to sub-paragraph (a) of this Sub-Clause 13.9.2 is correct and accurate in all respects and certifying that the individuals set out in the report are all Relevant Employees and the hours stated were in respect of Relevant Employees for the hours claimed and that the Labor Cost reported is correct and accurate in all respects;
- (c) certified local payrolls that the Contractor and his first tier Subcontractors submit to the Panamanian Tax Authorities plus any other documentation that the Contractor and his first tier Subcontractors develop or possess to support the certified local payrolls in respect of such Relevant Employees;
- (d) such other information and records that the Employer's Representative may in his

discretion require in order to verify the information provided in sub-paragraph (a), (b) and (c) of this Sub-Clause 13.9.2 above and/or in order to determine the CBLR or the IBLR; and

- (e) audits which the Employer may procure at any time of the information provided by the Contractor pursuant to sub-paragraphs (a), (b), (c) and (d) of this Sub-Clause 13.9.2.

13.9.3 On the basis of the information described in Sub-Clause 13.9.2, the IBLR will be determined by the Employer's Representative by dividing the Labor Costs, in respect of the following two months:

- (a) the month in which the Payment Certificate is issued in which the total of all certified interim payments (excluding the Advance Payment for Mobilisation) exceeds 25 % of the Accepted Contract Amount; and
- (b) the month immediately preceding the month in sub-paragraph (a) of this Sub-Clause 13.9.3,

by the total number of hours worked by all Relevant Employees in the aforesaid two months, and multiplying the result by 1.10.

13.9.4 Subject to Sub-Clause 13.9.5, the CBLR will be determined by the Employer's Representative for each successive six month period after the month in which the Payment Certificate is issued in which the total of all certified interim payments (excluding the Advance Payment for Mobilisation) exceeds 25 % of the Accepted Contract Amount. Based upon the information described in Sub-Clause 13.9.2, the Labor Costs for each such six month period shall be determined by the Employer's Representative and divided by the total number of hours worked by all Relevant Employees in such six month period (the current period labor hours ("CPLH")) so as to determine the CBLR. However, the resulting rate shall not be multiplied by 1.10.

13.9.5 The CBLR in respect of the final adjustment under this Sub-Clause 13.9 shall be determined as stated in Sub-Clause 13.9.4 but pro rata in respect of the period (if it is less than 6 months) immediately preceding the 1694th day after the Commencement Date.

13.9.6 The local labor cost adjustment ("LLCA") for each period, shall be determined by multiplying the CPLH for the relevant six month period (or lesser period pursuant to Sub-Clause 13.9.5) by the difference between the CBLR for that period and the IBLR. The Contractor shall only be entitled to 70% of any resulting increase for each six month period (or lesser period pursuant to Sub-Clause 13.9.5). Therefore, the LLCA will be calculated as follows:

$$\text{LLCA} = 0.7 \times [(\text{CBLR} - \text{IBLR}) \times \text{CPLH}]$$

and any such adjustment shall be given effect to in the next Interim Payment Certificate after such determination.

13.9.7 The Contractor shall not be entitled to any adjustments pursuant to this Sub-Clause 13.9 in respect of Labor Costs which were included within Variations (including Dayworks) and/or any Labor Costs incurred in respect of the correction of defective work and/or work carried out pursuant to Sub-Clauses 7.5 [*Rejection*] and 7.6 [*Remedial Work*] and/or the repetition of any tests failed by the Contractor. The Labor Costs and labor hours utilized in respect of such work shall not be included within the information submitted by the Contractor pursuant to Sub-Clause 13.9.2 or, where it is impractical to separate out such costs and time from such information, it shall be separately identified by the Contractor to the satisfaction of the Employer's Representative.

13.9.8 For the purposes of this Sub-Clause 13.9:

- (a) "Labor Costs" shall mean, in respect of a relevant period the basic salary and any overtime payments to or in respect of all Relevant Employees, paid by the Contractor or a first tier Subcontractor of the Contractor in that relevant period, but excluding all other costs including but not limited to vacation, social security, education tax, other taxes, bonuses or the like;
- (b) "first tier Subcontractor" shall mean any Subcontractor in a direct contractual relationship with the Contractor; and
- (c) "Relevant Employee" shall mean any Panamanian (according to the laws of the Republic of Panama) employee of the Contractor or of the first tier Subcontractor fully engaged during the relevant period within the Country in respect of the Works.

14 Contract Price and Payment

14.1 The Contract Price

- (a) The Contract Price shall be the lump sum Accepted Contract Amount and be subject to adjustments in accordance with the Contract.
- (b) The Contractor shall pay all taxes, duties and fees required to be paid by him under the Contract, and the Contract Price shall not be adjusted for any of these costs, except as stated in Sub-Clause 13.7 [*Adjustments for Changes in Legislation*].
- (c) Any quantities which may be set out in a schedule or elsewhere in the Contract are estimated quantities and are not to be taken as the actual and correct quantities of the Works which the Contractor is required to execute.
- (d) Any quantities or price data which may be set out in a schedule or elsewhere in the Contract shall be used for the purposes stated in the schedule or elsewhere in the Contract (as applicable) and shall be inapplicable for other purposes.
- (e) The Contract Price shall include import duties and any other taxes, fees, charges, or contributions required by applicable Laws, for all goods, products, and materials that are imported to be incorporated into the Works. However, the following goods, materials and products will be exempt from import duties and related taxes (including but not limited to ITBMS [*Impuesto a las transferencias de bienes corporales muebles y la prestación de servicios*]), fees, charges, and contributions, if they are manufactured outside the Republic of Panama and shipped/consigned to the Employer and if the Employer's prior written approval is obtained for such import:
 - (i) gates and gate operating machinery and components;
 - (ii) valves and valve operating machinery and components;
 - (iii) bulkheads;
 - (iv) electrical components;

- (v) electronic components;
- (vi) steel;
- (vii) cement;
- (viii) petrol;
- (ix) diesel oil;
- (x) bunker fuel; and
- (xi) explosives.

The Contractor shall submit to the Employer's Representative the original invoice of origin, copy of the order or contract and the original shipping documents (bill of lading or other evidence of shipment) and any other documents required by the competent authorities to process the tax exemption. The Employer's Representative will prepare the corresponding customs clearance documents and shall endorse the necessary exemption documents prepared by the Contractor or its Subcontractors for presentation to customs officials and other relevant authorities. The Contractor shall be responsible for processing and filing the simplified customs document.

However, if any part of the Works is to be paid according to quantity supplied or work done, the provisions for measurement and evaluation shall be as stated in the Conditions of Contract. The Contract Price shall be determined accordingly, subject to adjustments in accordance with the Contract.

The Employer declares that stamp tax shall not be due or chargeable in respect of the Contract and/or any assignment of the Contract permitted by the Contract, since the Employer is the issuer of this document and according to Title XIV of the Political Constitution of the Republic of Panama, the Employer shall not be subject to the payment of any taxes, duties, tariffs, charges, rates or tribute of a national or municipal nature. Notwithstanding the foregoing and notwithstanding Sub-Clause 1.13.3 [*Compliance with Laws*] and this Sub-Clause 14.1 [*The Contract Price*], in the event that for any reason stamp tax does become due or chargeable in respect of the Contract and/or any assignment of the Contract permitted by the Contract, the Employer shall be responsible for such tax.

14.2 A Advance Payment for Mobilisation

Subject to sub-paragraph (a) of Sub-Clause 14.7 [*Payment*], the Employer shall make an advance payment, as an interest-free loan for mobilisation ("Advance Payment for Mobilisation"), after the Contractor submits the Advance Payment for Mobilisation Security.

Subject to the first paragraph of this Sub-Clause 14.2A, the total amount of the Advance Payment for Mobilisation and the applicable currency shall be as stated in the Appendix to Tender.

The Contractor shall ensure that the Advance Payment for Mobilisation Security (for the amount stated in the Appendix to Tender) shall remain valid and enforceable and in full force and effect until the Advance Payment for Mobilisation has been repaid, provided that the Advance Payment for Mobilisation Security may be issued for recurring periods of not less than one year during such period and provided further, that its amount may be progressively reduced by the amount repaid by the Contractor in respect of the Advance Payment for Mobilisation as indicated in the Payment

Certificates. If the Advance Payment for Mobilisation has not been repaid by the date 45 days prior to the specified expiry date of the Advance Payment for Mobilisation Security, the Contractor shall, not later than 30 days prior to the specified expiry date of the Advance Payment for Mobilisation Security, extend the validity of the Advance Payment for Mobilisation Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing with the Employer's Representative, will maintain the Advance Payment for Mobilisation Security in effect until the Advance Payment for Mobilisation has been repaid) and provide the Employer's Representative with reasonable evidence thereof.

The Advance Payment for Mobilisation shall be repaid by the Contractor through percentage deductions in Payment Certificates, as follows:

- (a) deductions shall commence in the Payment Certificate in which the total of all certified interim payments (excluding the Advance Payment for Mobilisation) exceeds ten percent (10%) of the Accepted Contract Amount;
- (b) deductions shall be made at the rate of ten percent (10%) of the amount of each Payment Certificate in the currency of the Advance Payment for Mobilisation, until such time as the Advance Payment for Mobilisation has been repaid by fifty percent (50%); and
- (c) deductions shall be made at the rate of fifteen percent (15%) of the amount of each Payment Certificate in the currency of the Advance Payment for Mobilisation, from the time that the Advance Payment for Mobilisation has been repaid by fifty percent (50%) until such time as the Advance Payment for Mobilisation has been repaid in full (or in the case of the final such deduction such lesser percentage of the applicable Payment Certificate as is necessary to make such repayment in full).

The whole of the balance of the Advance Payment for Mobilisation outstanding shall immediately become due and payable by the Contractor to the Employer and the Employer shall be entitled to make a claim for the entire outstanding amount under the Advance Payment for Mobilisation Security, if:

- (a) the Advance Payment for Mobilisation has not been repaid in full prior to the issue of the Taking-Over Certificate for the Works or prior to a termination under Clause 15 [*Termination by Employer*], Clause 16 [*Suspension and Termination by Contractor*] or Clause 19 [*Force Majeure*] (as the case may be);
- (b) the Advance Payment for Mobilisation has not been repaid 45 days prior to the specified expiry date of the Advance Payment for Mobilisation Security and the Contractor fails to extend the validity of the Advance Payment for Mobilisation Security in accordance with this Sub-Clause 14.2A; and/or
- (c) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

14.2 B Advance Payment for Plant

Subject to sub-paragraph (b) of Sub-Clause 14.7 [*Payment*], the Employer shall make two advance payments, as interest-free loans for start up and development of all activities related to the design, manufacture, handling and shipping of Plant (collectively, the "Advance Payment for Plant"). The first Advance Payment for Plant (the "First Advance Payment for Plant") shall be made not earlier than the date which is 182 days after the Commencement Date. The second Advance Payment

for Plant (the "Second Advance Payment for Plant") shall be made not earlier than the date which is 364 days after the Commencement Date provided that, on such date, the Contractor's progress is in conformance with the Accepted Baseline Programme. If the Contractor's progress is not in accordance with the Accepted Baseline Programme on the date which is 364 days after the Commencement Date the Second Advance Payment for Plant shall only be made on a date as determined by the Employer's Representative after the date on which the Contractor's progress is either subsequently in conformance with the Accepted Baseline Programme or after the Contractor submits an acceptable recovery program in accordance with paragraph 1.10F of Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements.

The Contractor shall:

- (a) as a pre-condition to the payment of the First Advance Payment for Plant, deliver to the Employer the Advance Payment for Plant Security for the initial amount stated in the Appendix to Tender; and
- (b) as a pre-condition to the payment of the Second Advance Payment for Plant, increase the value of the Advance Payment for Plant Security to the final amount stated in the Appendix to Tender.

Subject to the preceding paragraphs of this Sub-Clause 14.2B, the total amount of the First Advance Payment for Plant and the Second Advance Payment for Plant and the applicable currency shall be as stated in the Appendix to Tender.

The Contractor shall ensure that the Advance Payment for Plant Security shall remain valid and enforceable and in full force and effect until the Advance Payment for Plant has been repaid, provided that the Advance Payment for Plant Security may be issued for recurring periods of not less than one year during such period and provided further, that its amount may be progressively reduced by the amount repaid by the Contractor in respect of the Advance Payment for Plant as indicated in the Payment Certificates. If the Advance Payment for Plant has not been repaid by the date 45 days prior to the specified expiry date, the Contractor shall, not later than 30 days prior to the specified expiry date of the Advance Payment for Plant Security, extend the validity of the Advance Payment for Plant Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing with the Employer's Representative, will maintain the Advance Payment for Plant Security in effect until the Advance Payment for Plant has been repaid) and provide the Employer's Representative with reasonable evidence thereof.

The Advance Payment for Plant shall be repaid by the Contractor through percentage deductions in Payment Certificates as follows:

- (a) deductions shall commence in the Payment Certificate in which the total of all certified interim payments (excluding the Advance Payment for Mobilisation and the Advance Payment for Plant) exceeds fifty percent (50%) of the Accepted Contract Amount;
- (b) deductions shall be made at the rate of nineteen percent (19%) of the amount of each Payment Certificate) in the currency of the Advance Payment for Plant, until such time as the Advance Payment for Plant has been repaid in full (or in the case of the final such deduction such lesser percentage of the applicable Payment Certificate as is necessary to make such repayment in full).

The whole of the balance of the Advance Payment for Plant outstanding shall immediately become due and payable by the Contractor to the Employer and the Employer shall be entitled to make a claim for the entire outstanding amount under the Advance Payment for Plant Security, if:

- (a) the Advance Payment for Plant has not been repaid in full prior to the issue of the Taking-

Over Certificate for the Works or prior to a termination under Clause 15 [*Termination by Employer*], Clause 16 [*Suspension and Termination by Contractor*] or Clause 19 [*Force Majeure*] (as the case may be);

- (b) the Advance Payment for Plant has not been repaid 45 days prior to the expiry date of the Advance Payment for Plant Security and the Contractor fails to extend the validity of the Advance Payment for Plant Security in accordance with this Sub-Clause 14.2B; and/or
- (c) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

14.3 Application for Interim Payment Certificates

- 14.3.1 In addition to the provisions of this Sub-Clause 14.3, matters related to the determination of the amounts of Interim Payment Certificates related to progress and work accomplished, shall be in accordance with the provisions stated in the Employer's Requirements, Section 01 31 00 [*Project Management and Coordination*].
- 14.3.2 The Contractor shall submit a Statement in six copies to the Employer's Representative after the end of the period of payment stated in the Contract (if not stated, after the end of each month), in a form approved by the Employer's Representative, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the relevant report on progress in accordance with Sub-Clause 4.21 [*Progress Reports*].
- 14.3.3 The Statement shall include the following items, as applicable, on the form provided by the Employer, which shall be expressed in the currency in which the Contract Price is payable:
 - (a) the estimated contract value of the Works executed and amounts for the Plant and Materials in accordance with Sub-Clause 14.5 [*Plant and Materials intended for the Works*] 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) of this Sub-Clause 14.3.3) calculated in accordance with Section 01 31 00 [*Project Management and Coordination*] of the Employer's Requirements;
 - (b) any amounts to be added and deducted for changes in legislation and changes in prices of Specified Materials and local labor rates, in accordance with Sub-Clause 13.7 [*Adjustments for Changes in Legislation*] and Sub-Clause 13.8 [*Adjustments for Changes in Prices for Specified Materials*] and Sub-Clause 13.9 [*Adjustments for Changes in Local Labor Rates*];
 - (c) if applicable, 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 amount in sub-paragraph (a) of this Sub-Clause 14.3.3, until the amount so retained by the Employer reaches the limit of Retention Money stated in the Appendix to Tender;
 - (d) any amounts to be added and deducted for the payment or repayment of the Advance Payment for Mobilisation in accordance with Sub-Clause 14.2A [*Advance Payment for Mobilisation*];
 - (e) any amounts to be added and deducted for the payment or repayment of the Advance Payment for Plant in accordance with Sub-Clause 14.2B [*Advance Payment for Plant*];

- (f) any other additions or deductions or other sums which may have become due under the Contract or otherwise, including those under Clause 20 [*Claims, Disputes and Arbitration*]; and
- (g) the deduction of amounts certified in all previous Payment Certificates.

14.4 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

- 14.5.1 Interim Payment Certificates shall include, under sub-paragraph (a) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*], in respect of the Plant and Materials listed in the Appendix to Tender:
- (a) an amount equal to fifty percent (50%) of the contract value of such Plant and Materials which have been manufactured and are ready for shipping to the Site;
 - (b) an amount equal to fifty percent (50%) of the contract value for such Plant and Materials which have been delivered to the Site for incorporation in the Permanent Works.
- 14.5.2 The contract value of the Plant and Materials listed in the Appendix to Tender shall be the relevant lump sum price for such Plant and Materials contained within the Contractor's Price Proposal.
- 14.5.3 Subject to sub-paragraph (c)(ii)(B)(1) of Sub-Clause 4.2D [*Contractor Security Instrument Rating Downgrade*], The Employer's Representative shall determine and certify each amount under sub-paragraph (a) of Sub-Clause 14.5.1, if the Contractor:
- (a) has kept satisfactory records verifying compliance with the Contract and the Contractor's Documents, which are available for inspection; and
 - (b) delivers a Plant and Material Security to the Employer 7 days prior to the Contractor's Statement under Sub-Clause 14.3 [*Application for Interim Payment Certificate*] in respect of each such amount, to the value of the amount claimed.
- 14.5.4 The Employer's Representative shall determine and certify each amount under sub-paragraph (b) of Sub-Clause 14.5.1, if the Contractor:
- (a) has kept satisfactory records verifying compliance with the Contract and the Contractor's Documents, which are available for inspection; and
 - (b) ensures that the relevant Plant and Materials have been delivered to and are properly stored on the Site, are protected against loss, damage or deterioration, and appear to be in accordance with the Contract.
- 14.5.5 The Contractor shall ensure that each Plant and Material Security provided in accordance with Sub-Clause 14.5.3 shall remain valid and enforceable and in full force and effect until the relevant Plant and Materials to which the Plant and Material Security relates 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, provided that each Plant and Material Security may be issued for recurring periods of not less than one year during such period. If the relevant Plant and Materials have not been delivered to and/or are not properly stored on the Site, and/or are not protected against loss, damage or deterioration, and/or do not appear to be in accordance with the Contract by the date 45 days prior to the specified expiry date of the relevant Plant and Material Security, the Contractor shall, not later than 30 days prior to the specified expiry date of the relevant Plant and Material Security, extend the validity of the relevant Plant and Material Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing with the Employer's Representative, will maintain the relevant Plant and Material Security in effect until the relevant Plant and Materials have been delivered to and are properly stored on the Site, are protected against loss, damage or deterioration, and appear to be in accordance with the Contract) and provide the Employer's Representative with reasonable evidence thereof.

14.5.6 The Employer shall be entitled to make a claim under any Plant and Material Security, if:

- (a) the relevant Plant and Materials have not been delivered to and/or are not properly stored on the Site, and/or are not protected against loss, damage or deterioration, and/or do not appear to be in accordance with the Contract by the date 45 days prior to the expiry date of the relevant Plant and Material Security and the Contractor fails to extend the validity of the relevant Plant and Material Security in accordance with Sub-Clause 14.5.5;
- (b) the Contractor fails to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [*Employer's Claims*] or Clause 20 [*Claims, Disputes and Arbitration*], within 42 days after this agreement or determination;
- (c) the Contractor fails to remedy a default within the time stated in the Employer's notice requiring the default to be remedied, and/or
- (d) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

14.6 Issue of Interim Payment Certificates

No amount will be certified or paid until the Employer has received and approved the Performance Bond in accordance with Sub-Clause 4.2A [*Performance Bond*], the Payment Bond in accordance with Sub-Clause 4.2C [*Payment Bond*] and the Parent Company Guarantee in accordance with Sub-Clause 1.7A.4 [*Joint and Several Liability*] (if applicable) and the Joint and Several Guarantee and the Parent Company Guarantee for the Joint and Several Guarantee (if any assignment to the Contractor Project Company has been approved by the Employer pursuant to Sub-Clause 1.7.1 [*Assignment*]). Thereafter, the Employer's Representative shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Employer's Representative fairly determines to be due, with supporting particulars.

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

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

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

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

14.7 Payment

Subject to the first sentence of Sub-Clause 14.6 [*Issue of Interim Payment Certificates*], the Employer shall pay to the Contractor:

- (a) the amount certified in any Interim Payment Certificate relating to the Advance Payment for Mobilisation, within 42 days after the Employer's Representative receives the Statement and supporting documents, provided that the Employer shall have received the Advance Payment for Mobilisation Security in accordance with Sub-Clause 14.2A [*Advance Payment for Mobilisation*];
- (b) the amount certified in any Interim Payment Certificate relating to the Advance Payment for Plant, within 56 days after the Employer's Representative receives the Statement and supporting documents, provided that the Employer shall have received the Advance Payment for Plant Security in accordance with Sub-Clause 14.2B [*Advance Payment for Plant*];
- (c) the amount certified in each other Interim Payment Certificate within 56 days after the Employer's Representative receives the Statement and supporting documents; and
- (d) the amount certified in the Final Payment Certificate within 56 days after the Employer receives this Payment Certificate.

For each Interim or Final Payment Certificate, the Contractor may submit an early payment offer based on both percentage and day reductions, applicable to the corresponding Payment Certificate. This early payment offer may be either rejected or accepted by the Employer's Representative in its absolute discretion.

Payment of the amount due shall be made by electronic transfer of funds to the bank account nominated by the Contractor. In order to receive payment the Contractor shall provide the Employer's Representative with all such information as is required to permit payment to be made by way of electronic transfer of funds.

14.8 Delayed Payment

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [*Payment*], save in respect of any Advance Payment for Mobilisation made in accordance with Sub-Clause 14.2A

[*Advance Payment for Mobilisation*] and/or any Advance Payment for Plant made in accordance with Sub-Clause 14.2B [*Advance Payment for Plant*], the Contractor shall be entitled to receive financing charges 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 sub-paragraph (c) of Sub-Clause 14.7 [*Payment*]) of the date on which any Interim Payment Certificate is issued and shall end on the day on which payment is made by the Employer.

The financing charges shall be calculated as simple interest applied to the delayed period at the rate of 200 basis points over the US Federal Funds Target Rate (FDTR) (as determined by the Employer's Representative, which determination shall be conclusive and binding absent manifest error) prevailing during such period of delay and shall be paid in US dollars.

The 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 or Provision of Retention Security

14.9.1 The Contractor shall, at its option, either:

- (a) provide the Employer with the Fixed Retention Security pursuant to Sub-Clause 14.9A [*Fixed Retention Security*];
- (b) provide the Employer with the Escalating Retention Security pursuant to Sub-Clause 14.9B [*Escalating Retention Security*]; or
- (c) be subject to the deduction of retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*].

14.9.2 If the Contractor does not provide the Fixed Retention Security pursuant to Sub-Clause 14.9A [*Fixed Retention Security*] or the Escalating Retention Security pursuant to Sub-Clause 14.9B [*Escalating Retention Security*] or in the circumstances permitted by sub-paragraph (c)(ii)(A) of Sub-Clause 4.2D [*Contractor Security Instrument Downgrade*], then the Employer shall be entitled to deduct retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*], in which case (and save where the deduction was in the circumstances permitted by sub-paragraph (c)(ii)(A) of Sub-Clause 4.2D [*Contractor Security Instrument Downgrade*] and such deduction has already been certified for payment pursuant to Sub-Clause 4.2D (d):

- (a) the first half of the Retention Money shall be certified by the Employer's Representative for payment to the Contractor, in the next Interim Payment Certificate following the issuance of the Taking-Over Certificate; and
- (b) the second half of the Retention Money shall be certified by the Employer's Representative for payment to the Contractor within 84 days after the Contractor completes, to the satisfaction of the Employer's Representative, all outstanding work listed in the Schedule of Outstanding Minor Work and Defects appended to the Taking-Over Certificate.

14.9.3 Further, whilst any work remains to be executed under Clause 11 [*Defects Liability*] or Clause 12 [*Tests after Completion*], or otherwise under the Contract the Employer's Representative shall be entitled to withhold payment of the estimated cost of this work until it has been executed.

14.9A Fixed Retention Security

- 14.9A.1 The Contractor shall obtain, at his own cost, and furnish to the Employer the Fixed Retention Security as an alternative to the deduction of retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*] and as an alternative to the provision of the Escalating Retention Security pursuant to Sub-Clause 14.9B [*Escalating Retention Security*], where it elects to proceed in accordance with this Sub-Clause 14.9A.
- 14.9A.2 The Contractor shall deliver the First Fixed Retention Security to the Employer by 7 days prior to the Contractor's first Statement under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] in which the deduction of retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*] would otherwise have become applicable, and shall send a copy to the Employer's Representative.
- 14.9A.3 The Contractor shall ensure that the First Fixed Retention Security (for the amount stated in the Appendix to Tender) shall remain valid and enforceable and in full force and effect for the period stated in the Appendix to Tender, provided that the First Fixed Retention Security may be issued for recurring periods of not less than one year during such period.
- 14.9A.4 If the Contractor has not become entitled to receive the Taking-Over Certificate by the date 45 days prior to the specified date of expiry of the First Fixed Retention Security the Contractor shall, not later than 30 days prior to the expiry date of the First Fixed Retention Security, extend the validity of the First Fixed Retention Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing in advance with the Employer's Representative, will maintain the First Fixed Retention Security in effect until the Taking-Over Certificate has been issued by the Employer's Representative) and provide the Employer's Representative with reasonable evidence of each such extension.
- 14.9A.5 Where the Contractor has opted to provide the Fixed Retention Security pursuant to Sub-Clause 14.9A, the Contractor shall deliver the Second Fixed Retention Security to the Employer by the date that the Employer's Representative issues, and as a prior condition to the issuance of, the Taking-Over Certificate, and shall send a copy to the Employer's Representative.
- 14.9A.6 The Contractor shall ensure that the Second Fixed Retention Security (for the amount stated in the Appendix to Tender) shall remain valid and enforceable and in full force and effect for the period stated in the Appendix to Tender, provided that the Second Fixed Retention Security may be issued for recurring periods of not less than one year during such period.
- 14.9A.7 If the Contractor has not completed, to the satisfaction of the Employer's Representative, all outstanding work listed in the Schedule of Outstanding Minor Work and Defects appended to the Taking-Over Certificate by 45 days prior to the specified date of expiry of the Second Fixed Retention Security the Contractor shall, not later than 30 days prior to the expiry date of the Second Fixed Retention Security, extend the validity of Second Fixed Retention Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing in advance with the Employer's Representative, will maintain the Second Fixed Retention Security in effect until all outstanding work listed in the Schedule of Outstanding Minor Work and Defects appended to the Taking-Over Certificate is completed to the satisfaction of the Employer's Representative) and provide the Employer's Representative with reasonable evidence of each such extension.
- 14.9A.8 The Employer shall be entitled to make a claim under the First Fixed Retention Security, if:

- (a) the Contractor has not become entitled to receive the Taking-Over Certificate by the date 45 days prior to the specified expiry of the First Fixed Retention Security and the Contractor fails to extend the validity of the First Fixed Retention Security in accordance with Sub-Clause 14.9A.4;
- (b) the Contractor fails to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [*Employer's Claims*] or Clause 20 [*Claims, Disputes and Arbitration*], within 42 days after this agreement or determination;
- (c) the Contractor fails to remedy a default within the time stated in the Employer's notice requiring the default to be remedied, and/or
- (d) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

14.9A.9 The Employer shall be entitled to make a claim under the Second Fixed Retention Security, if:

- (a) the Contractor has not completed, to the satisfaction of the Employer's Representative, all outstanding work listed in the Schedule of Outstanding Minor Work and Defects appended to the Taking-Over Certificate by 45 days prior to the specified date of expiry of the Second Fixed Retention Security and the Contractor fails to extend the validity of the Second Fixed Retention Security in accordance with Sub-Clause 14.9A.7;
- (b) the Contractor fails to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [*Employer's Claims*] or Clause 20 [*Claims, Disputes and Arbitration*], within 42 days after this agreement or determination;
- (c) the Contractor fails to remedy a default within the time stated in the Employer's notice requiring the default to be remedied, and/or
- (d) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

14.9B Escalating Retention Security

14.9B.1 The Contractor shall obtain, at his own cost, and furnish to the Employer the Escalating Retention Security as an alternative to the deduction of retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*] and as an alternative to the provision of the Fixed Retention Security pursuant to Sub-Clause 14.9A [*Fixed Retention Security*], where it elects to proceed in accordance with this Sub-Clause 14.9B.

14.9B.2 The Contractor shall deliver the First Escalating Retention Security to the Employer by 7 days prior to the Contractor's first Statement under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] in which the deduction of retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*] would otherwise have become applicable and shall send a copy to the Employer's Representative.

14.9B.3 The Contractor shall ensure that the initial amount of the First Escalating Retention Security shall be equal to the value that would have been deducted as retention under the Contractor's first Statement pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*], had the Contractor been subject to the deduction of retention thereunder and shall ensure that the First Escalating Retention Security remains valid and enforceable and in full force

and effect for the period stated in the Appendix to Tender, provided that the First Escalating Retention Security may be issued for recurring periods of not less than one year during such period.

- 14.9B.4 Where the Contractor has opted to provide the Escalating Retention Security pursuant to Sub-Clause 14.9B, the Contractor shall increase the amount of the First Escalating Retention Security by 7 days prior to each of the Contractor's Statements under Sub-Clause 14.3 [*Application for Interim Payment Certificates*], by such amount as would have been deducted as retention under each such Statements pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*], had the Contractor been subject to the deduction of retention thereunder and shall provide the Employer's Representative with reasonable evidence of each such increase.
- 14.9B.5 Where the Contractor fails to increase the amount of the First Escalating Retention Security in accordance with Sub-Clause 14.9B.4, then the Employer shall be entitled to, without prejudice to any other rights and remedies, deduct retention, pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 [*Application for Interim Payment Certificates*] from the next Interim Payment Certificate pursuant to Sub-Clause 14.6 [*Issue of Interim Payment Certificate*] immediately following such failure.
- 14.9B.6 If the Contractor has not become entitled to receive the Taking-Over Certificate by the date 45 days prior to the specified date of expiry of the First Escalating Retention Security the Contractor shall, not later than 30 days prior to the expiry date of the First Escalating Retention Security, extend the validity of the First Escalating Retention Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing in advance with the Employer's Representative, will maintain the First Escalating Retention Security in effect until the Taking-Over Certificate has been issued by the Employer's Representative) and provide the Employer's Representative with reasonable evidence of each such extension.
- 14.9B.7 Where the Contractor has opted to provide the Escalating Retention Security pursuant to Sub-Clause 14.9B, the Contractor shall deliver the Second Escalating Retention Security to the Employer by the date that the Employer's Representative issues, and as a prior condition to the issuance of, the Taking-Over Certificate, and shall send a copy to the Employer's Representative.
- 14.9B.8 The Contractor shall ensure that the Second Escalating Retention Security (for the amount stated in the Appendix to Tender) shall remain valid and enforceable and in full force and effect for the period stated in the Appendix to Tender, provided that the Second Escalating Retention Security may be issued for recurring periods of not less than one year during such period.
- 14.9B.9 If the Contractor has not completed, to the satisfaction of the Employer's Representative, all outstanding work listed in the Schedule of Outstanding Minor Work and Defects appended to the Taking-Over Certificate by 45 days prior to the specified date of expiry of the Second Escalating Retention Security the Contractor shall, not later than 30 days prior to the expiry date of the Second Escalating Retention Security, extend the validity of the Second Escalating Retention Security for a period of not less than one year (or such lesser period as the Contractor in good faith believes, as agreed in writing in advance with the Employer's Representative, will maintain the Second Escalating Retention Security in effect until all outstanding work listed in the Schedule of Outstanding Minor Work and Defects appended to the Taking-Over Certificate is completed to the satisfaction of the Employer's Representative) and provide the Employer's Representative with reasonable evidence of each such extension.
- 14.9B.10 The Employer shall be entitled to make a claim under the First Escalating Retention Security, if:
- (a) the Contractor has not become entitled to receive the Taking-Over Certificate by the date 45 days prior to the specified expiry of the First Escalating Retention Security and the

Contractor fails to extend the validity of the First Escalating Retention Security in accordance with Sub-Clause 14.9B.6;

- (b) the Contractor fails to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [*Employer's Claims*] or Clause 20 [*Claims, Disputes and Arbitration*], within 42 days after this agreement or determination;
- (c) the Contractor fails to remedy a default within the time stated in the Employer's notice requiring the default to be remedied, and/or
- (d) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

14.9B.11 The Employer shall be entitled to make a claim under the Second Escalating Retention Security, if

- (a) the Contractor has not completed, to the satisfaction of the Employer's Representative, all outstanding work listed in the Schedule of Outstanding Minor Work and Defects appended to the Taking-Over Certificate by 45 days prior to the specified date of expiry of the Second Escalating Retention Security and the Contractor fails to extend the validity of the Second Escalating Retention Security in accordance with Sub-Clause 14.9B.9;
- (b) the Contractor fails to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [*Employer's Claims*] or Clause 20 [*Claims, Disputes and Arbitration*], within 42 days after this agreement or determination;
- (c) the Contractor fails to remedy a default within the time stated in the Employer's notice requiring the default to be remedied, and/or
- (d) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [*Termination by Employer*], irrespective of whether notice of termination has been given.

14.10 Statement at Completion

Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Employer's Representative 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 Contractor considers to be due for work carried out up to the date stated in the Taking Over Certificate; and
- (c) an estimate of the other amounts which the Contractor considers will become due to him under the Contract during the Defects Notification Period including in relation to the Maintenance Services. Estimated amounts shall be shown separately in this Statement at completion.

The Employer's Representative shall then certify in accordance with Sub-Clause 14.6 [*Issue of*

Interim Payment Certificates].

The Contractor may continue to issue Statements during the Defects Notification Period pursuant to Sub-Clause 14.3.3 [*Application for Payment Certificates*], in such form as required by the Employer's Representative in respect of such sums which may become due under the Contract.

14.11 Application for Final Payment Certificate

Within 56 days after receiving the Performance Certificate, the Contractor shall submit, to the Employer's Representative, six copies of a draft final statement with supporting documents showing in detail in a form approved by the Employer's Representative:

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

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

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

14.12 Discharge

When submitting the Final Statement, the 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 Contractor under or in connection with the Contract. This discharge may state that it becomes effective when the Contractor has received the outstanding balance of this total in which event the discharge will be effective on such date.

14.13 Issue of Final Payment Certificate

Within 28 days after receiving the Final Statement and written discharge in accordance with Sub-Clause 14.11 [*Application for Final Payment Certificate*] and Sub-Clause 14.12 [*Discharge*], the Employer's Representative shall issue, to the Employer, the Final Payment Certificate which shall state:

- (a) the amount which is finally due; and
- (b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled, the balance (if any) due from the

Employer to the Contractor or from the Contractor to the Employer, as the case may be.

If the Contractor has not applied for a Final Payment Certificate in accordance with Sub-Clause 14.11 [*Application for Final Payment Certificate*] and Sub-Clause 14.12 [*Discharge*], the Employer's Representative shall request the Contractor to do so. If the Contractor fails to submit an application within a period of 28 days, the Employer's Representative shall issue the Final Payment Certificate for such amount as he fairly determines to be due.

14.14 Cessation of Employer's Liability

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

- (a) in the Final Statement; and
- (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 14.14 shall not limit the Employer's liability under his indemnification obligations, or the Employer's liability in any case of fraud, deliberate default, reckless misconduct or gross negligence by the Employer.

14.15 Currencies of Payment

The Contract Price shall be paid in the currency named in the Appendix to Tender.

15 Termination by Employer

15.1 Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Employer's Representative may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

15.2 Termination by Employer

The Employer shall be entitled to terminate the Contractor's right to complete the Contract:

- (a) if the Contractor fails to comply with Sub-Clause 4.2A [*Performance Bond*], or Sub-Clause 4.2B [*Defects Notification Period Security*] (if applicable), or Sub-Clause 4.2C [*Payment Bond*] or Sub-Clause 1.7A.4 [*Joint and Several Liability*] or with a notice under Sub-Clause 15.1 [*Notice to Correct*];
- (b) if the Contractor abandons all or a substantial part of the Works or the Maintenance Services or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract;

- (c) if the Contractor 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) if the Contractor enters into any Subcontracts for the whole or part of the Works contravening the provisions of Sub-Clauses 4.4 [*Subcontractors*] and 5.1 [*General Design Obligations*];
- (e) if the Contractor and/or any Member breaches, violates or otherwise acts or fails to act in contravention or contrary to any of the terms of any of Sub-Clause 1.7 [*Assignment*] or Sub-Clause 1.7A [*Joint and Several Liability*];
- (f) if the Contractor or any Member or any Guarantor becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events;
- (g) if the Contractor or any Contractor-Related Party is in breach of any of its obligations under Sub-Clauses 4.25 [*Corrupt Practices*] and/or 4.26 [*Standards of Conduct*];
- (h) if the Contractor is guilty of any act of fraud, deliberate default or reckless misconduct or gross negligence;
- (i) if the Contractor has paid or allowed to the Employer delay damages pursuant to Sub-Clause 8.7 [*Withholdings, Delay Damages and Bonus for Early Completion*] in an amount equal to the cap on the Contractor's liability for delay damages stated in the Appendix to Tender or is liable and has failed to pay delay damages in that amount; provided always that a period of not less than 272 days has elapsed from the Time for Completion and a Taking-Over Certificate has not been issued pursuant to Sub-Clause 10.1 [*Taking Over of the Works*];
- (j) as a result of any other causes as set out in Article 221 of the Acquisition Regulations of the Employer; or
- (k) in the circumstances stated in sub-paragraph (c) of Sub-Clause 11.4 [*Failure to Remedy Defects*].

In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, declare the Contractor to be in default of its obligations under the Contract and terminate the Contractor's right to complete the Contract and expel the Contractor from the Site. However, in the case of sub-paragraph (f) or (g) of this Sub-Clause 15.2, the Employer may by notice terminate the Contractor's right to complete the Contract immediately.

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

The Contractor shall then leave the Site and deliver any required Goods, all Contractor Documents, and other design documents made by or for him to the Employer's Representative.

However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment (as the Employer may elect) of any Subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination of the Contractor's right to complete the Contract, the Employer may complete the Contract and/or arrange for the Surety or its nominee under the Performance Bond or any other entities to do so. The Employer and these entities (including the Surety or its nominee) may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.

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

15.3 Valuation at Date of Termination

Subject to Sub-Clause 15.4 [*Payment after Termination*], as soon as practicable after a notice of termination under Sub-Clause 15.2 [*Termination by Employer*] has taken effect, the Employer's Representative shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums that may be due to the Contractor for work and the Maintenance Services executed in accordance with the Contract.

15.4 Payment after Termination

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

- (a) proceed in accordance with Sub-Clause 2.5 [*Employer's Claims*];
- (b) withhold further payments to the Contractor until the costs of design, execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established;
- (c) recover from the Contractor any losses and damages incurred by the Employer or likely to be incurred and any extra costs of completing the Works, the Maintenance Services and remedying any defects, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [*Valuation at Date of Termination*]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor; and/or
- (d) where sub-paragraph (c) of Sub-Clause 11.4 [*Failure to Remedy Defects*] applies, recover from the Contractor all sums due to the Employer thereunder.

15.5 Employer's Entitlement to Termination

The Employer shall be entitled to terminate the Contractor's right to complete the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the date on which the Contractor receives this notice.

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

16 Suspension and Termination by Contractor

16.1 Contractor's Entitlement to Suspend Work

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

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

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

If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause 16.1, the Contractor shall give notice to the Employer's Representative and shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

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

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

16.2 Termination by Contractor

The Contractor shall be entitled to terminate the Contract if:

- (a) the Employer's Representative fails, within 104 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate;
- (b) the Contractor does not receive the amount due under an Interim Payment Certificate, for undisputed items, within 90 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 [*Employer's Claims*]);
- (c) the Employer substantially fails to perform his obligations under the Contract;

- (d) the Employer fails to comply with Sub-Clause 1.6 [*Contract Agreement*];
- (e) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [*Prolonged Suspension*]; or
- (f) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract. However, in the case of sub-paragraph (e) or (f) of this Sub-Clause 16.2, the Contractor may by notice terminate the Contract immediately.

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

16.3 Cessation of Work and Removal of Contractor's Equipment

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

- (a) cease all further work, except for such work as may have been instructed by the Employer's Representative for the protection of life or property or for the safety of the Works;
- (b) hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment;
- (c) remove all other Goods from the Site, except as necessary for safety, and leave the Site; and
- (d) assign to the Employer or any other person nominated by the Employer all rights, title and benefit of the Contractor to the Works, Contractor's Documents and the Plant as at the date of termination, and, any Subcontracts.

16.4 Payment on Termination

After a notice of termination under Sub-Clause 16.2 [*Termination by Contractor*] has taken effect, the Employer shall promptly pay the Contractor in accordance with Sub-Clause 19.6 [*Optional Termination, Payment and Release*] and pay to the Contractor the amount of loss or damage sustained by the Contractor as a result of this termination.

17 Risk and Responsibility

17.1 Indemnities

17.1A The Contractor shall indemnify, defend and hold harmless the Employer, the Employer's Personnel, and their respective agents, advisors, and consultants (collectively, "Indemnified Parties"), against and from all claims, proceedings, suits, penalties, fines, debts, costs, damages, losses, expenses (including legal fees and expenses), awards and judgments, in respect of:

- (a) bodily injury, sickness, disease or death of any person or persons who are the Contractor's Personnel from any cause whatsoever arising out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, save to the extent attributable to any negligence, breach of the Contract, act or omission by the Indemnified Parties;
- (b) bodily injury, sickness, disease or death of any person or persons (except as set forth in sub-paragraph (a) of this Sub-Clause 17.1A) whatsoever arising out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, attributable to any negligence, breach of the Contract, act or omission by the Contractor, the Contractor's Personnel and Subcontractors or any of their respective agents or anyone directly or indirectly employed by any of them; and
- (c) damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss:
 - (i) arises out of or in the course or by reason of the design, execution and completion of the Works and the remedying of any defects; and
 - (ii) is attributable to any negligence, breach of the Contract, act or omission by the Contractor, the Contractor's Personnel and Subcontractors or any of their respective agents or anyone directly or indirectly employed by any of them.

17.1B The Employer shall indemnify, defend and hold harmless the Contractor, the Contractor's Personnel and their respective agents, advisors and consultants against and from all claims, proceedings, suits, penalties, fines, debts, costs, damages, losses and expenses (including legal fees and expenses), awards and judgments in respect of:

- (a) bodily injury, sickness, disease or death of any person or persons who are the Contractor's Personnel; and/or
- (b) damage to or loss of any property, real or personal (other than the Works);

to the extent attributable to any negligence, breach of the Contract, act or omission by the Indemnified Parties.

17.2 Contractor's Care of the Works

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

issued) for any part of the Works, responsibility for the care of the part shall then pass to the Employer.

After responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed and for the performance of the Maintenance Services.

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

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

17.3 Employer's Risks

The risks referred to in Sub-Clause 17.4 [*Consequence of Employer's Risk*] are:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country;
- (c) riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (d) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity;
- (e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- (f) use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract; and
- (g) any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.

17.4 Consequences of Employer's Risks

If and to the extent that any of the risks listed in Sub-Clause 17.3 [*Employer's Risk*] above results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Employer's Representative and shall rectify this loss or damage to the extent required by the Employer's Representative.

If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Employer's Representative and shall be entitled subject

to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*] and/or if completion of a Milestone is or will be delayed, under Sub-Clause 8.4A [*Extension of Milestone Dates*]; and
- (b) payment of any such Cost, which shall be included in the Contract Price. In the case of sub-paragraph (f) of Sub-Clause 17.3 [*Employer's Risks*], reasonable profit on the Cost shall also be included.

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

17.5 Intellectual and Industrial Property Rights

In this Sub-Clause 17.5, "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 and "claim" means a suit, action, claim (or proceedings pursuing a claim) fees, losses, demands, costs, charges and expenses of whatsoever nature including attorney's fees and expenses alleging an infringement.

The Contractor shall defend, indemnify and hold harmless the Employer and its officers, directors, agents, representatives and employees from and against any and all claims arising from any infringement resulting from or arising in connection with the use or possession of the Works and/or the Contractor's Documents by or on behalf of the Employer and/or out of or in connection with the execution of the Works by the Contractor, including without limitation any such claims resulting from or arising in connection with:

- (a) the Contractor's design, manufacture, construction or execution of the Works;
- (b) the use of the Contractor's Equipment; or
- (c) the proper use of the Works.

The Contractor will promptly notify the Employer if it is, or becomes, aware of any such infringement or any matter which may give rise to a claim for infringement. In such event the Employer shall have the right to require the Contractor, at no extra cost to the Employer, and at the Employer's discretion, to obtain forthwith for the Employer the right to use or continue to use the Works or any part thereof for its intended purposes or any of the Contractor's Documents, including without limitation for the purposes of completing, testing, operating, maintaining, altering adjusting, repairing and demolishing the Works and/or to amend or alter the Works, the Plant or its performance thereof or any Contractor's Documents in such manner as shall avoid infringement.

Without limiting any of the Employer's rights under this Sub-Clause 17.5, the Contractor may (at its own cost) conduct negotiations for the settlement of any and all claims arising from any infringement and shall keep the Employer fully informed of the progress of and developments of any settlement discussions. The conduct by the Contractor of such negotiations shall be conditional upon the Contractor having first given the Employer such reasonable security as shall from time to time be requested by the Employer to cover the amount ascertained or agreed or estimated, as the case may be, of any compensation, damages, expenses and costs for which the Employer may become liable and the Contractor shall not make any comment or admission to any third party in respect of any act or omission on the part of the Employer without the prior written consent of the Employer and shall procure that its agents, Subcontractors and employees do not

do so. The Employer may, at the request and cost of the Contractor, assist in contesting a claim for any infringement, subject to the Employer being repaid all reasonable expenses incurred in providing such assistance. Without limiting the indemnity given under this Sub-Clause 17.5, if the Contractor does not defend a claim within a reasonable period of either party becoming aware of the infringement or does not continue to defend any such claim, the Employer shall be free to conduct and control at the Contractor's cost and expense the defence and/or settlement of the claim.

17.6 Limitation of Liability

17.6.1 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*] or save where expressly stated otherwise in the Contract.

17.6.2 The total liability of the Contractor to the Employer, under or in connection with the Contract other than

- (a) under Sub-Clause 4.20 [*Employer's Equipment and Free-Issue Material*];
- (b) under Sub-Clause 17.1 [*Indemnities*]; and
- (c) under Sub-Clause 17.5 [*Intellectual and Industrial Property Rights*];

shall not exceed the sum stated in the Appendix to Tender.

17.6.3 Sub-Clauses 17.6.1 and 17.6.2 shall not apply in any case of fraud, deliberate default, reckless misconduct or gross negligence by the defaulting Party.

18 Insurance

18.1 General Requirements

This Sub-Clause 18.1 shall apply to the insurances required to be taken out and maintained under Sub-Clause 18.2 [*Employer Insurances*], Sub-Clause 18.3 [*Contractor Insurances*], Sub-Clause 18.4 [*Subcontractor Insurances*], Sub-Clause 18.5 [*Social Security Scheme*] and Sub-Clause 18.6 [*Maintenance Services Insurance*].

18.1.1 Nothing in this Clause 18 shall limit the obligations, liabilities or responsibilities of the Parties under and/or in connection with the Contract. Without prejudice to the aforesaid:

- (a) If either Party (for the purpose of this sub-paragraphs (a) and (b) of Sub-Clause 18.1.1 hereafter referred to as the "Defaulting Party"):
 - (i) fails for whatever reason to take out and/or maintain any insurance it is obliged to take out and maintain under this Clause 18; and/or
 - (ii) takes out and/or maintains any insurance it is obliged to take out and maintain under this Clause 18 but the insurer or underwriter becomes insolvent or is otherwise unable to pay its proportion of any claim,

and as a consequence thereof loss, damage and/or liability is suffered or incurred by the Party that is not the Defaulting Party which would have otherwise been insured pursuant to this Clause 18, the Defaulting Party shall be liable for such loss, damage and/or liability save to the extent that the failure to take out and/or maintain any insurance under sub-paragraph (a)(i) of Sub-Clause 18.1.1 or the insolvency or inability to pay under sub-paragraph (a)(ii) of Sub-Clause 18.1.1 is caused by or contributed to by the default of the Party that is not the Defaulting Party.

- (b) Without prejudice to the foregoing, the Defaulting Party shall immediately:
- (i) in the event of sub-paragraph (a)(i) of Sub-Clause 18.1.1, take-out and maintain such insurance in accordance with this Clause 18; and/or
 - (ii) in the event of sub-paragraph (a)(ii) of Sub-Clause 18.1.1, take-out and maintain the insurance that is subject to such insolvency or inability to pay with another insurer or underwriter in accordance with this Clause 18,

failing which, the Party that is not the Defaulting Party shall be entitled (but not obliged) after having given the Defaulting Party 7 day's prior written notice thereof, to obtain such insurance on the Defaulting Party's behalf and at the Defaulting Party's expense and the Defaulting Party shall reimburse the other Party for all premiums payable thereunder on written request by the other Party.

- (c) The Contractor shall be responsible for all deductibles payable under the policies of insurance required under this Clause 18.
- (d) The "Sum Insured" and "Limit of Liability" sums set out in Appendix 2 to the Conditions of Contract and the "Sum Insured" and "Limit of Liability" sums required in respect of the interim insurances at Sub-Clause 18.2 [*Employer Insurances*] (for the purpose of this sub-paragraph (d) of Sub-Clause 18.1.1 all such sums are hereafter referred to as the "Insured Amounts") shall in no way affect nor are they intended as a limitation of the Contractor's liability under the Contract. In the event that any loss, damage and/or liability is suffered or incurred by a Party (for the purpose of this sub-paragraph (d) of Sub-Clause 18.1.1 hereafter referred to as the "Injured Party") which is loss, damage and/or liability that is in excess of any such Insured Amounts (but which otherwise would have been insured if such Insured Amount was higher), any such excess may be recoverable by the Injured Party from the other Party if and to the extent the same is properly recoverable from the other Party pursuant to and subject to the provisions of the Contract.
- (e) In the event that any loss, damage and/or liability is suffered or incurred by a Party (for the purpose of this sub-paragraph (e) of Sub-Clause 18.1.1 hereafter referred to as the "Injured Party") and such loss damage and/or liability is not insured pursuant to this Clause 18, any such loss, damage and/or liability may be recoverable by the Injured Party from the other Party if and to the extent the same is properly recoverable from the other Party pursuant to and subject to the provisions of the Contract.
- (f) If either Party (for the purpose of this sub-paragraph (f) of Sub-Clause 18.1.1 hereafter referred to as the "Defaulting Party") fails to comply with Sub-Clause 18.1.5 and/or Sub-Clause 18.1.8 and as a consequence thereof, loss, damage and/or liability is suffered or incurred by the other Party which would otherwise have been insured pursuant to this Clause 18, the Defaulting Party shall be liable for such loss, damage or liability.

18.1.2 The following words and expressions shall have the meanings set out below when used in this Clause 18 (but not further or otherwise):

“Co-insured” means:

- (a) the Employer;
- (b) the Contractor;
- (c) every Subcontractor;
- (d) manufacturers, suppliers, and vendors but only in respect of their manual activities at the Site; and
- (e) any designer, consultant or subconsultant of any person under sub-paragraphs (a), (b) and (c) of this Sub-Clause 18.1.2 above but only in respect of their manual activities at the Site.

“Insured party” means any person identified as such under the heading “Insured parties” for each of the insurances set out in Appendix 2 to the Conditions of Contract and the interim insurances at Sub-Clause 18.2 [*Employer Insurances*].

“Subcontractor” means any person appointed as a subcontractor of any tier, for part of the Works and/or the Maintenance Services and the legal successors in title to each such person.

18.1.3 The Employer and the Contractor shall, and the Contractor shall procure that every Subcontractor shall, take out and maintain a policy or policies of insurance in accordance with this Clause 18 with a well-established insurance company, companies and/or underwriters that (except for the Social Security Scheme pursuant to Sub-Clause 18.5 [*Social Security Scheme*]) has at the time such policy is or policies are taken out a minimum rating of AM Best “A-”, S & P “A-”, Moody’s “A3” or Fitch “A-” or such lesser minimum rating as the Employer at its sole and absolute discretion may elect.

18.1.4 The Contractor may, at its sole and absolute discretion, take out and maintain insurance for any risk associated with the Works and any risk associated with the Maintenance Services that is not insured under the policies required to be taken out and maintained pursuant to this Clause 18. The Contractor shall notify the Employer in writing prior to any such insurance required being taken out. The cost of any such insurances shall be borne solely by the Contractor and shall not be payable by the Employer.

18.1.5 In order to comply with the obligations of the Parties under this Clause 18, the Contractor and the Employer shall disclose to the Employer and the Contractor (as the case may be) and/or to the Employer’s and the Contractor’s (as the case may be) relevant insurer(s), underwriter(s) and/or broker(s), all information material as to the risks covered by the insurances to be taken out and maintained by the Employer and the Contractor (as the case may be) pursuant to this Clause 18 which:

- (a) is required by the Employer’s and the Contractor’s (as the case may be) relevant insurer(s), underwriter(s) and/or broker(s);
- (b) is required pursuant to the terms and conditions of the relevant insurance policies; and/or
- (c) would or would be likely to influence the judgment of a prudent insurer in determining

whether it would insure such risk and/or the premium and/or terms and conditions in respect thereof.

If at any time during the course of the Works or at any time during the course of the Maintenance Services, any change shall occur materially varying any of the facts relating to the Works, the Maintenance Services and/or any of the information or the subject matter relating to any such information previously provided under this Sub-Clause 18.1.5, the Employer or the Contractor (as the case may be) shall immediately give notice in writing of such change to the other, supplying as soon as possible thereafter any further particulars as the other may reasonably require.

18.1.6A In respect of the insurances required to be taken out and maintained in respect of the Works pursuant to this Clause 18, the Employer and the Contractor shall provide to each other prior to the Commencement Date:

- (a) a copy or copies of the signed and stamped policy or policies for the insurances required to be taken out and maintained pursuant to this Clause 18; and
- (b) written confirmation from the relevant insurer(s), underwriter(s) and/or broker(s) that all premiums due have been paid.

18.1.6B In respect of the insurances required to be taken out and maintained in respect of the Maintenance Services pursuant to this Clause 18, the Employer and the Contractor shall provide to each other:

- (a) a copy or copies of the signed and stamped policy or policies for the insurances required to be taken out and maintained pursuant to this Clause 18; and
- (b) written confirmation from the relevant insurer(s), underwriter(s) and/or broker(s) that all premiums due have been paid,

prior to the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the Works (or in the case of any Taking-Over Certificate for any part of the Works issued under Sub-Clause 10.2 [*Taking-Over Parts of the Works*] prior to the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking-Over of the Works*]) of the Taking-Over Certificate for the first part of the Works).

18.1.7A Without prejudice to Sub-Clause 18.1.6A, at any time during the course of the Works the Employer and the Contractor shall provide to each other:

- (a) a copy or copies of the signed and stamped policy or policies referred to in sub-paragraph (a) of Sub-Clause 18.1.6A;
- (b) the written confirmation referred to in sub-paragraph (b) of Sub-Clause 18.1.6A; and
- (c) written confirmation that the policy or policies remain in full force,

within 7 days of any written request by a Party so to do.

18.1.7B Without prejudice to Sub-Clause 18.1.6B, at any time during the course of the Maintenance Services the Employer and the Contractor shall provide to each other:

- (a) a copy or copies of the signed and stamped policy or policies referred to in sub-paragraph (a) of Sub-Clause 18.1.6B;
- (b) the written confirmation referred to in sub-paragraph (b) of Sub-Clause 18.1.6B; and

(c) written confirmation that the policy or policies remain in full force,
within 7 days of any written request by a Party so to do.

18.1.8 In respect of the insurance policies required to be taken out and maintained pursuant to this Clause 18:

- (a) the Employer and the Contractor shall; and
- (b) the Employer and the Contractor shall procure that each Subcontractor, manufacturer, supplier, vendor, designer, consultant and subconsultant for which it is respectively responsible shall
 - (i) comply with the terms and conditions of such insurance policies and any claims procedures under or other requirements of such insurance policies;
 - (ii) assist and cooperate in every manner possible in connection with the investigation and conduct of all claims made under such insurance policies; and
 - (iii) not do or permit to be done anything that would invalidate, prejudice or compromise any such insurance policies.

18.1.9 In respect of the insurance policies required to be taken out and maintained pursuant to this Clause 18:

- (a) the Employer and the Contractor hereby waive; and
- (b) the Employer and the Contractor shall procure that each Subcontractor, manufacturer, supplier, vendor, designer, consultant and subconsultant for which it is respectively responsible shall waive,

all rights of subrogation which they or their insurers on their behalf have or may have against each other where they are an Insured party under the insurance policies to be taken out and maintained pursuant to this Clause 18 save to the extent that the Employer or the Contractor is in breach of Sub-Clauses 18.1.5 and/or 18.1.8.

18.1.10 If there is an occurrence of any loss, damage and/or liability in respect of any insurance taken out and maintained under this Clause 18:

- (a) upon such occurrence or the later discovery of such occurrence:
 - (i) where the Employer is obliged to take out and maintain such insurance, the Contractor shall forthwith give notice to the Employer's Representative; or
 - (ii) where the Contractor is obliged to take out and maintain such insurance, the Employer shall forthwith give notice to the Contractor;

of its extent, nature and location; and

- (b) save in respect of the insurances that the Employer is obliged to take out and maintain pursuant to Sub-Clause 18.2 [*Employer Insurances*] that meet the requirements stated in Part 1, B [*Third Party Liability Insurance (Excess Loss)*] of the Appendix 2 to the Conditions of Contract, the Contractor hereby authorises and shall procure that each Subcontractor,

manufacturer, supplier, vendor, designer, consultant and subconsultant for which it is responsible authorises the insurers under the insurance policies which the Employer is obliged to take out and maintain pursuant to Sub-Clause 18.2 [*Employer Insurances*] to pay all monies in respect of any loss, damage and/or liability to the Employer (save to the extent that any terms and conditions of the relevant insurance policy provides for such monies (or a proportion thereof) to be paid direct to the Contractor or to any such Subcontractor, manufacturer, supplier, vendor, designer, consultant or subconsultant).

- 18.1.11 The terms and expressions stated in Appendix 2 to the Conditions of Contract to the extent not defined in the Contract shall have the meaning commonly assigned to those terms and expressions consistent with the law governing the relevant policy and related commonly accepted insurance industry practice.
- 18.1.12 Save where otherwise expressly stated in Appendix 2 to the Conditions of Contract, the insurances set out in Appendix 2 to the Conditions of Contract shall be subject to such extensions, exclusions and conditions (including sub-limits) as may be available in the commercial insurance market at reasonable terms and conditions.

18.2 Employer Insurances

- 18.2.1 The Employer shall, at its own expense, take out and maintain insurances that meet the requirements stated in Part 1, A [*Construction "All Risks" Insurance*] and Part 1, B [*Third Party Liability Insurance (Excess Loss)*] of Appendix 2 to the Conditions of Contract provided always that the Employer may elect at its sole and absolute discretion to take out and maintain at its own expense insurances on an interim basis that comply with Sub-Clause 18.2.2 in lieu of the insurances stated in Part 1, A [*Construction "All Risks" Insurance*] and Part 1, B [*Third Party Liability Insurance (Excess Loss)*] of Appendix 2 to the Conditions of Contract.
- 18.2.2 The interim insurances referred to at Sub-Clause 18.2.1 shall meet the requirements stated in Part 1, A [*Construction "All Risks" Insurance*] and Part 1, B [*Third Party Liability Insurance (Excess Loss)*] of Appendix 2 to the Conditions of Contract save that such interim insurances shall provide that:
- (a) the Period of Cover shall be from the Commencement Date until the date when the insurances stated at Part 1, A [*Construction "All Risks" Insurance*] and Part 1, B [*Third Party Liability Insurance (Excess Loss)*] of Appendix 2 to the Conditions of Contract are taken out and maintained for the full Period of Cover stated at item (iv) of Part 1, A [*Construction "All Risks" Insurance*], and item (iii) of Part 1, B [*Third Party Liability Insurance (Excess Loss)*], of Appendix 2 to the Conditions of Contract; and
 - (b)
 - (i) the Sum Insured in respect of Part 1, A [*Construction "All Risks" Insurance*] of Appendix 2 to the Conditions of Contract shall be a reasonable sum for the new replacement value of the Works taking into account the parts of the Works that are to be executed during the Period of Cover for such interim insurances; and
 - (ii) the Deductible in respect of Part 1, A [*Construction "All Risks" Insurance*] of Appendix 2 to the Conditions of Contract shall not exceed a sum that is reasonable taking into account the parts of the Works that are to be executed during the Period of Cover for such interim insurances and as may be available in the commercial insurance market at reasonable terms and conditions.

18.3 Contractor Insurances

The Contractor shall, at its own expense, take out and maintain insurances that meet the

requirements stated in Part 2, A [*Third Party Liability Insurance*], B [*Construction Plant and Equipment*], C [*Automobile Liability*], D [*Marine Cargo/Transportation*], E [*Hull and Machinery*] and F [*Protection and Indemnity*] of Appendix 2 to the Conditions of Contract.

18.4 Subcontractor Insurances

The Contractor shall, at its own expense, procure that every Subcontractor shall take out and maintain insurances for their rights and interests that meet the requirements stated in Part 2 of Appendix 2 to the Conditions of Contract, B [*Construction Plant and Equipment*], C [*Automobile Liability*], D [*Marine Cargo/Transportation*] and E [*Hull and Machinery*] save that the “Sum Insured”, “Limit of Liability”, “Deductible” and “Period of Cover” in respect of each such insurance shall be as is reasonable considering the work and/or services to be undertaken by each such Subcontractor.

18.5 Social Security Scheme

The Employer and the Contractor shall at their own expense, and the Contractor shall at its own expense procure that every Subcontractor shall, take out and maintain insurances for worker's compensation protection in accordance with the applicable Laws and with a well-established insurance company, companies and/or underwriters for each of their respective interests.

18.6 Maintenance Services Insurances

18.6.1 Regardless as to whether or not the Employer's Representative issues an instruction pursuant to Sub-Clause 13.5 [*Provisional Sums*] in respect of Provisional Sums No. 5 and No. 6 for Maintenance Services as set out in the Contractor's Price Proposal, the Contractor shall have allowed for:

- (a) taking out and maintaining the insurances at Sub-Clause 18.6 2 (b);
- (b) procuring that any Subcontractor carrying out the Maintenance Services takes out maintains insurances pursuant to Sub-Clause 18.6 2 (c); and
- (c) taking out and maintaining any further insurances pursuant to Sub-Clause 18.1.4 in respect of the Maintenance Services

in the fixed price lump sums specified in the Contractor's Price Proposal in respect of Provisional Sums No. 5 and No. 6.

18.6.2 If the Employer's Representative issues an instruction pursuant to Sub-Clause 13.5 [*Provisional Sums*] in respect of Provisional Sums No. 5 and No. 6 as set out in the Contractor's Price Proposal, the following shall apply:

- (a) the Employer shall, at its own expense, take out and maintain insurances that meet the requirements stated in Part 1, C [*Maintenance Services Insurance*] of Appendix 2 to the Conditions of Contract;
- (b) the Contractor shall, at its own expense, take out and maintain insurances that meet the requirements stated in Part 2, G [*Maintenance Services Insurance*] of Appendix 2 to the Conditions of Contract; and
- (c) the Contractor shall, at its own expense, procure that any Subcontractor carrying out the Maintenance Services shall take out and maintain insurances for their rights and interests that meet the requirements stated in Part 2, G [*Maintenance Services Insurance*] of

Appendix 2 to the Conditions of Contract but only in so far as it relates to the insurances under item (ii) [*Other Insurance*] for Construction Plant and Equipment, Automobile Liability, Marine Cargo/Transportation and Hull and Machinery) save that the “Sum Insured”, “Limit of Liability”, “Deductible” and “Period of Cover” in respect of each such insurance shall be as is reasonable considering the work and/or services to be undertaken by each such Subcontractor.

19 Force Majeure

19.1 Definition of Force Majeure

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

- (a) which is beyond a Party's control;
- (b) which such Party could not reasonably have provided against before entering into the Contract;
- (c) which, having arisen, such Party could not reasonably have avoided or overcome; and
- (d) which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as the conditions described in sub-paragraphs (a), (b), (c) and (d) of this Sub-Clause are satisfied:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; and
- (v) 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 circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

The Party shall, 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 19, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.

19.3 Duty to Minimise Delay

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

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

19.4 Consequences of Force Majeure

If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [*Notice of Force Majeure*], and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and/or if completion of a Milestone is or will be delayed, under Sub-Clause 8.4A [*Extension of Milestone Dates*]; and
- (b) 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) of Sub-Clause 19.1 [*Definition of Force Majeure*], occurs in the Country, payment of any such Cost.

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

19.5 Force Majeure Affecting Subcontractor

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

19.6 Optional Termination, Payment and Release

If the execution of substantially all the Works in progress or substantially all of the Maintenance Services are prevented for a continuous period of 120 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 200 days due to the same notified Force Majeure, then either Party may give to the other Party notice of termination of the Contract or termination of the Contractor's right to complete the Contract (as the case may be). In this event, the termination shall take effect 21 days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [*Cessation of Work and Removal of Contractor's Equipment*].

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

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;
- (b) to the extent not included under sub-paragraph (a) of this Sub-Clause 19.6, the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works or the Maintenance Services;
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and
- (e) the Cost of repatriation of the Contractor's staff and labor employed wholly in connection with the Works or the Maintenance Services at the date of termination.

19.7 Not Used.

20 Claims, Disputes and Arbitration

20.1 Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or to any Milestone Date, and/or any additional payment, under any Clause of these Conditions of Contract or otherwise in connection with the Contract, the Contractor shall give notice to the Employer's Representative, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

Notwithstanding any other provisions in the Contract, if the Contractor fails to give notice of a claim within such period of 28 days, neither the Time for Completion nor any Milestone Date shall be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause 20.1 shall apply.

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

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Employer's Representative. Without admitting the Employer's liability, the Employer's Representative may, after receiving any notice under this Sub-Clause 20.1, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Employer's Representative to inspect all these records, and shall (if instructed) submit copies to the Employer's Representative.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Employer's Representative, the Contractor shall send to the Employer's Representative a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

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

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 Employer's Representative and approved by the Contractor, the Employer's Representative shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

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

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

The requirements of this Sub-Clause 20.1 are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause 20.1.

20.2 Appointment of the Dispute Adjudication Board

Disputes 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, three suitably qualified persons ("the members").

Each Party shall nominate one member. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.

The agreement between the Parties and each of the three members (in the form attached at Appendix 1 to these Conditions of Contract) shall incorporate by reference the General Conditions of Dispute Adjudication Agreement also contained in the Appendix 1 to these Conditions of Contract, with such amendments as are agreed between them.

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

If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. The replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause 20.2.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DAB (including each member) shall expire 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:

- (a) either Party fails to nominate a member of the DAB by the date stated in the Appendix to Tender;
- (b) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DAB by such date;
- (c) the Parties fail to agree upon the appointment of a replacement third member (to act as chairman) within 42 days after the date on which the third member chairman declines to act or is unable to act as a result of death, disability, resignation or termination of appointment; or
- (d) either Party fails to nominate a replacement member within 42 days after the date on which the member (nominated by the relevant Party pursuant to Sub-Clause 20.2 [*Appointment of the Dispute Adjudication Board*]) 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 and after due consultation with both Parties, appoint this member of the DAB. This appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

20.4 Obtaining Dispute Adjudication Board's Decision

If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Employer's Representative, then after a DAB has been appointed pursuant to Sub-Clauses 20.2 [*Appointment of the Dispute Adjudication*

Board] and 20.3 [*Failure to Agree Dispute Adjudication Board*] either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Employer's Representative. Such reference shall state that it is given under this Sub-Clause 20.4.

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 information, access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrators.

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 20.4. However, if neither of the Parties has paid in full the invoices submitted by each member pursuant to Clause 6 of the Appendix 1 to the Conditions of Contract, the DAB shall not be obliged to give its decision until such invoices have been paid in full. 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. At all times unless the Contract has already been abandoned, repudiated or the Contract has been terminated or the Contractor's right to complete the Contract has been terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period 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 20.4, 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 20.4.

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

20.5 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] above, 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 fifty-sixth 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 in law (within the meaning of Panamanian law). Unless otherwise agreed by both Parties:

- (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the “**Rules**”);
- (b) in addition to the Rules, the arbitration shall be conducted according to the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration;
- (c) the dispute shall be settled by three arbitrators who shall all be licensed lawyers appointed in accordance with the Rules;
- (d) the arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*];
- (e) the venue of the arbitration shall be Miami, Florida - United States of America; and
- (f) the arbitration agreement and the arbitration shall be governed by the United States Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

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

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

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

20.7 Failure to Comply with Dispute Adjudication Board's 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 Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply to this reference.

20.8 Expiry of Dispute Adjudication Board's Appointment

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 and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

- (a) Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply; and
- (b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [*Arbitration*].

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APPENDIX 1

DISPUTE ADJUDICATION BOARD AGREEMENT

[for each member of a three-person DAB]

Name and details of Contract

Name and address of Employer

Name and address of Contractor

Name and address of Member

Whereas the Employer and the Contractor have entered into the Contract and desire jointly to appoint the Member to act as one of the three persons who are jointly called the 'DAB' [*and desire the Member to act as chairman of the DAB*].

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the 'General Conditions of Dispute Adjudication Agreement', which is appended to the Conditions of Contract and the following provisions. In these conditions, words and expressions shall have the same meanings as are assigned to them in the General Conditions of Dispute Adjudication Agreement.
2. In accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member shall be paid:
 - (a) a retainer fee of _____ per calendar month.
 - (b) a daily fee of _____.
3. In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member undertakes to serve, as described in this Dispute Adjudication Agreement, as one of the three persons who are jointly to act as the DAB.
4. The Employer and the Contractor jointly and severally undertake to pay the Member, in consideration of the carrying out of these services, in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement.
5. This Dispute Adjudication Agreement shall be governed by the law of the Republic of Panama.

SIGNED by:
For and on behalf of the
Employer in the presence of:
Witness:
Name:
Address:
Date:

SIGNED by:
For and on behalf of the
Contractor in the presence of:
Witness:
Name:
Address:
Date:

SIGNED by:
The Member in the presence of:
Witness:
Name:
Address:
Date:

[*A brief description or name of dispute to be added.]

General Conditions of Dispute Adjudication Agreement

1 Definitions

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

- ^{A4}(a) the “Employer”^{A4}
- (b) the “Contractor”; and
- (c) the “Member” who is defined in the Dispute Adjudication Agreement as being 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 Employer and the Contractor have entered 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.

2 General Provisions

Unless otherwise stated in the Dispute Adjudication Agreement, it shall come into force when the Employer, the Contractor and each of the Other Members have respectively each signed a Dispute Adjudication Agreement.

When the Dispute Adjudication Agreement has come into effect, the Employer and the Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective.

This employment of the Member shall be made as a personal appointment. At any time the Member may give no less than 70 days notice of his resignation to the Employer and to the Contractor, and the Dispute Adjudication Agreement shall terminate upon the expiry of this period.

No assignment or subcontracting of the Dispute Adjudication Agreement shall be permitted without the prior written agreement of all the parties and of the Other Members.

3 Warranties

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

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is: (a) experienced in the work which the Contractor is to carry out under the Contract, (b) experienced in the interpretation of contract documentation, and (c) fluent in the language for communications defined in the Contract.

4 General Obligations of the Member

The Member shall:

- (a) have no interest financial or otherwise in the Employer or the Contractor, nor any financial interest in the Contract except for payment under the Dispute Adjudication Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Employer or the Contractor, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Adjudication Agreement;
- (c) have disclosed in writing to the Employer, the Contractor and the Other Members, before entering into the Dispute Adjudication Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer or the Contractor, and any previous involvement in the overall project of which the Contract forms part;
- (d) not, for the duration of the Dispute Adjudication Agreement, be employed as a consultant or otherwise by the Employer or the Contractor, except as may be agreed in writing by the Employer, the Contractor and the Other Members;
- (e) comply with the annexed procedural rules and with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] of the Conditions of Contract;
- (f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract;
- (g) not while a Member enter into discussions or make any agreement with the Employer or the Contractor regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Adjudication Agreement;
- (h) ensure his/her availability for all site visits and hearings as necessary;
- (i) become conversant with the Contract and with the progress of the Works (and of any other parts of the project of which the Contract forms part) by studying all documents received, which shall be maintained in a current working file; and

- (j) treat the details of the Contract and all the DAB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members.

5 **General Obligations of the Employer and the Contractor**

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DAB's activities under the Contract and the Dispute Adjudication Agreement, and except to the extent that prior agreement is given by the Employer, the Contractor and the Other Members. The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

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

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

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

Whenever the Employer or the Contractor refers a dispute to the DAB under Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] of the Conditions of Contract, which requires the Member to make a site visit and/or attend a hearing, the referring party shall provide appropriate security to the Member equivalent to such reasonably anticipated expenses to be incurred by the Member as determined by the Member in its sole discretion.

6 **Payment**

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

- (a) a monthly retainer fee, which shall be considered as payment in full for:
 - (i) being available on 28 days' notice for all site visits and hearings;
 - (ii) becoming and remaining conversant with the Contract, all project developments and maintaining relevant files;
 - (iii) all overhead and expenses, including secretarial services, photocopying and office supplies incurred in connection with the Member's duties; and

- (iv) all services performed hereunder, save for those services referred to in sub-paragraphs (b) and (c) of this Clause 6,
- (b) a daily fee which shall be considered as payment in full for:
 - (i) each day or part of a day up to a maximum of one day's travel time in each direction for the journey between the Member's home and the Site, or location of a meeting with the Other Members (if not the Site);
 - (ii) each working day on Site visits, hearings or preparing decisions; and
 - (iii) each day spent reading submissions in preparation for a hearing.
- (c) all reasonable expenses incurred in connection with Site visits, preparing for hearings, hearings or preparing decisions, including the cost of telephone calls, courier charges, faxes and telexes, travel expenses, hotel and subsistence costs: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (b) of this Clause 6; and
- (d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The retainer fee and daily fee shall be as specified in the Dispute Adjudication Agreement. Unless otherwise specified, the retainer fee and daily fee shall remain fixed for the first 36 calendar months, and shall thereafter be adjusted by agreement between the Employer, the Contractor and the Member, at each anniversary of the date in which the Dispute Adjudication Agreement became effective.

The Member shall be entitled to payment of the retainer fee from for the first full calendar month following the Dispute Adjudication Agreement taking effect.

The retainer fee shall be reduced by 50% with effect from the first full calendar month following the issuance of the Taking-Over Certificate. The retainer fee shall be payable for the period up to the time the Member resigns or the Dispute Adjudication Agreement is otherwise terminated (inclusive of any part month thereof).

The Member shall submit quarterly in advance, invoices for payment of the retainer fee and any air fares forming part of travel expenses under Sub-paragraph (c) of this Clause 6. Invoices for the daily fee and the balance of all other expenses shall be submitted following the conclusion of any Site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

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

If the Contractor fails to pay the Member the amount to which he/she is entitled under the Dispute Adjudication Agreement, the Employer may pay the amount due to the Member and any other amount which may be required to maintain the operation of the DAB; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in Sub-Clause 14.8 [*Delayed Payment*] of the Conditions of Contract.

If the Member does not receive payment for the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under Clause 7 [*Termination*].

7 Termination

The Dispute Adjudication Agreement may be terminated in circumstances where:

- (a) the Employer and the Contractor so agree, upon 42 day's notice from the Employer and the Contractor to the Member;
- (b) the Employer and the Contractor agree that the Member has failed to comply with the terms of the Dispute Adjudication Agreement, upon immediate notice from the Employer and the Contractor to the Member;
- (c) the Member resigns, upon 70 days notice from the Member to both the Employer and the Contractor; or
- (d) In the opinion of the Member, the Employer or the Contractor has failed to comply with the terms of the Dispute Adjudication Agreement, upon immediate notice by the Member to both the Employer and the Contractor.

Any notice of termination of the Dispute Adjudication Agreement shall be final and binding on the Employer, the Contractor and the Member. However, any notice under Sub-paragraph (a) and (b) of this Clause 7 shall only be effective if signed by both the Employer and the Contractor.

8 Default of the Member

If the Member fails to comply with any obligation under Clause 4 [*General Obligations of the Member*], he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members, for proceedings or decisions (if any) of the DAB which are rendered void or ineffective.

9 Disputes

Any dispute or claim arising out of or in connection with this Dispute Adjudication Agreement, or the breach, termination or invalidity thereof, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with these Rules of Arbitration.

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ANNEX

Procedural Rules

- 1 Unless otherwise agreed by the Employer and the Contractor, the DAB shall visit the site once in the first year following the Commencement Date and twice per year thereafter. Unless otherwise agreed by the Employer, the Contractor and the DAB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.
- 2 The timing of and agenda for each site visit shall be as agreed jointly by the DAB, the Employer and the Contractor, or in the absence of agreement, shall be decided by the DAB. The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims.
- 3 Site visits shall be attended by the Employer, the Contractor and the Employer's Representative and shall be co-coordinated by the Employer in co-operation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services. At the conclusion of each site visit and before leaving the site, the DAB shall prepare a report on its activities during the visit and shall send copies to the Employer and the Contractor.
- 4 The Employer and the Contractor shall furnish to the DAB one copy of all documents which the DAB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DAB and the Employer or the Contractor shall be copied to the other Party. If the DAB comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.
- 5 If any dispute is referred to the DAB in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] of the Conditions of Contract, the DAB shall proceed in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DAB shall:
 - (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case; and
 - (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.
- 6 The DAB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.
- 7 Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Employer's Representative, and to proceed in the absence of any party who the DAB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.
- 8 The Employer and the Contractor empower the DAB, among other things, to:

- (a) establish the procedure to be applied in deciding a dispute;
- (b) decide upon the DAB's own jurisdiction, and as to the scope of any dispute referred to it;
- (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules and rules of natural justice;
- (d) take the initiative in ascertaining the facts and matters required for a decision;
- (e) make use of its own specialist knowledge, if any;
- (f) decide upon the payment of financing charges in accordance with the Contract;
- (g) decide upon any provisional relief such as interim or conservatory measures; and
- (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Employer's Representative, relevant to the dispute.

The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DAB shall make and give its decision in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*], or as otherwise agreed by the Employer and the Contractor in writing. If the DAB comprises three persons:

- (a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;
- (b) it shall endeavour to reach a unanimous decision: if this proves impossible the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
- (c) if a Member fails to attend a meeting or hearing, or to fulfill any required function, the other two Members may nevertheless proceed to make a decision, unless:
 - (i) either the Employer or the Contractor does not agree that they do so; or
 - (ii) the absent Member is the chairman and he/she instructs the other Members to not make a decision.

Appendix 2 to the Conditions of Contract Part 1 - Employer Insurances

A. Construction “All Risks” Insurance

(i) Insured parties:

Each and every Co-insured for each of their respective rights and interests.

(ii) Territorial Limits:

Anywhere within the Republic of Panama in connection with the Works.

(iii) Cover/Subject Matter:

“All risks” of physical damage to all permanent and/or temporary works, preliminary works (including associated works and mobilisation) executed or in the course of execution, including materials, goods, parts, excavations, spare parts, inventory, consumables and all other things, equipment of whatsoever nature used for or intended to be used in the Works, and including electricity, gas and water connections, all designs, drawings, specifications and plans to be provided, together with computer and building services equipment, all other parts or units or equipment, plant and machinery of whatsoever nature the property of the Insured parties or for which they are responsible (other than the Contractor's or each Subcontractor's constructional plant, equipment, temporary buildings or their contents not forming part of or intended to form part of the Works) whilst on or adjacent to the Site or elsewhere within the Territorial Limits, and all associated and ancillary works connected therewith built, constructed, erected, supplied, installed, repaired, replaced, revised or otherwise or in the course of being built, constructed, erected, supplied, installed, repaired, replaced, revised, or otherwise, tested, commissioned and brought into full operation, and including project management and other similar costs.

(iv) Period of Cover:

From the Commencement Date until the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the Works (or in the case of any Taking-Over Certificate for any part of the Works issued under Sub-Clause 10.2 [*Taking Over of Parts of the Works*]), until the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the last part of the Works) and in all cases plus the Defects Notification Period.

(v) Sum Insured:

A sum representing the new replacement value of the Works.

(vi) Deductibles:

(a) USD 1,000,000 each and every loss in respect of earthquake.

(b) USD 1,000,000 each and every loss in respect of subsidence, collapse, landslip and flood;

(c) USD 500,000 each and every loss:

- arising out of testing and commissioning;
- arising out of defects in workmanship, material, design, plan or specification (LEG2/96);
- arising out of and/or during maintenance or defects liability obligations.

(d) USD 100,000 each and every loss in respect of all other losses.

(vii) Main Extensions to include but not limited to:

- (a) Existing property owned, operated or the responsibility of the Employer subject to a sub-limit of USD 20,000,000 per occurrence and a deductible of USD 100,000 each and every loss;
- (b) Debris removal;
- (c) Professional fees;
- (d) Expediting expenses;
- (e) Airfreight;
- (f) Plans and documents;
- (g) Additional import/customs duties;
- (h) Inland transit within the Republic of Panama;
- (i) Offsite storage within the Republic of Panama;
- (j) Offsite fabrication within the Republic of Panama;
- (k) Public and local authorities; and
- (l) Temporary repairs.

(viii) Memoranda to include but not limited to:

- (a) Maintenance or defects liability clause (“Extended” basis);
- (b) Other interests clause;
- (c) Automatic reinstatement of sum insured clause;
- (d) Automatic increase clause;
- (e) 72 hours clause;
- (f) Marine cargo 50/50 clause;
- (g) Free issue materials clause;
- (h) Repeat tests clause; and

(i) Continuation of cover clause.

(ix) General Exclusions:

(a) War, sabotage and terrorism;

(b) Political risks, nuclear and radioactive contamination; and

(c) Electronic data.

(x) Specific Exclusions to include but not limited to:

(a) Defects in workmanship, materials, design, plan or specification (LEG 2/96);

(b) Cash and bank notes;

(c) Loss of or damage to:

○ Aircraft or hovercraft;

○ Waterborne vessels or craft;

○ Construction plant, equipment, tools or machinery not belonging to or the responsibility of the Employer;

○ Temporary building and contents;

(d) Loss of use or consequential loss;

(e) Inventory losses or unexplained shortages or disappearance;

(f) Wear and tear, gradual deterioration, oxidisation, erosion or corrosion; and

(g) The deductibles.

(xi) General Conditions to include but not limited to:

(a) Multiple insured clause (London Engineering Group wording);

(b) Claims notification clause;

(c) Arbitration clause;

(d) Primary insurance clause;

(e) Payments on account clause;

(f) Premium adjustment clause;

(g) Nominated loss adjuster clause;

(h) Loss payee clause;

(i) Work stoppages clause;

- (j) Non-cancellation clause;
- (k) Law and jurisdiction clause;
- (l) Change in risk clause;
- (m) Access and inspection clause;
- (n) Subrogation clause;
- (o) Fraudulent claims clause; and
- (p) Policy voidable clause.

Appendix 2 to the Conditions of Contract

Part 1 - Employer Insurances

B. Third Party Liability Insurance (Excess of Loss)

(i) Insured parties:

Each and every Co-insured for each of their respective rights and interests.

(ii) Cover:

Legal liability for accidental third-party death and/or bodily and/or personal injury and/or disease and/or illness and/or property damage arising directly in connection with the performance of the Works.

(iii) Period of Cover:

From the Commencement Date until the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the Works (or in the case of any Taking-Over Certificate for any part of the Works issued under Sub-S 10.2 [*Taking Over of Parts of the Works*], until the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the last part of the Works) and in all cases plus the Defects Notification Period.

(iv) Limit of Liability:

USD 99,000,000 any one occurrence or series of occurrences arising out of any one event but unlimited in the aggregate during the period of cover in excess of the policy taken out and maintained by the Contractor in accordance with Sub-Clause 18.3 [*Contractor's Insurance*] and as detailed in Appendix 2 to the Conditions of Contract, Part 2 – Contractor Insurances, A. [*Third Party Liability Insurance*].

(v) Territorial Limits:

Republic of Panama.

(vi) Policy Jurisdiction:

Worldwide including USA and Canada (North American conditions to apply).

(vii) Main Extensions to include but not limited to:

- (a) Maintenance or defects liability;
- (b) Authorised visitors;
- (c) Contingent motor liability;
- (d) Additional insureds;
- (e) Loss mitigation;
- (f) Legal costs in addition to limit of liability;
- (g) Cross liability; and

(h) Consequential loss (as a result of third party damage or injury only).

(viii) General Exclusions:

(a) War, sabotage and terrorism;

(b) Political risks, nuclear and radioactive contamination;

(c) Fines, penalties, punitive or exemplary damages, performance guarantees; and

(d) Electronic data.

(ix) Specific Exclusions but not limited to:

(a) Employers liability;

(b) Liability for loss or damage to the Works;

(c) Liability for loss or damage to existing property owned, operated or the responsibility of the Employer;

(d) Liability arising out of the use of:

○ Aircraft or hovercraft;

○ Waterborne vessels or craft;

(e) Professional indemnity (but not legal liability for death or injury or property damage arising therefrom);

(f) Liability for which compulsory insurance is required in respect of mechanically propelled vehicles;

(g) Industries, Seepage, Pollution and Contamination Exclusion (NMA 1685);

(h) Toxic mould;

(i) Asbestos;

(j) Directors and Officers liability;

(k) Pure financial loss;

(l) Medical malpractice; and

(m) Liability for interruption, consequential or financial loss to the Operations arising directly in connection with the performance of the Works.

(x) General Conditions to include but not limited to:

(a) Multiple insured clause (London Engineering Group wording);

(b) Claims notification clause;

(c) Arbitration clause;

- (d) Primary insurance clause (except for first USD 1,000,000 to be arranged by Contractor);
- (e) Non-cancellation clause;
- (f) Law and jurisdiction clause;
- (g) Change in risk clause;
- (h) Access and inspection clause;
- (i) Subrogation clause;
- (j) Fraudulent claims clause; and
- (k) Policy voidable clause.

Appendix 2 to the Conditions of Contract

Part 1 - Employer Insurances

C. Maintenance Services Insurance

(i) Insured parties:

The Employer and the Contractor for their respective rights and interests.

(ii) Cover:

(a) All Risks of physical loss or damage to the completed Works.

(b) Legal liability for accidental third-party death and/or bodily and/or personal injury and/or disease and/or illness and/or property damage,

arising out of the Maintenance Services.

(iii) Period of Cover:

12 months commencing on the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the Works (or in the case of any Taking-Over Certificate for any part of the Works issued under Sub-Clause 10.2 [*Taking Over of Parts of the Works*], commencing on the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the first part of the Works) and annually renewable for a total Period of Cover of 3 years from the date of the Taking-Over Certificate for the Works (or in the case of any Taking-Over Certificate for any part of the Works issued under Sub-Clause 10.2 [*Taking Over of Parts of the Works*], commencing on the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the first part of the Works).

(iv) Sum Insured/Limit of Liability:

(a) In respect of the insurances at item (ii) (a) above, USD 50,000,000 each and every loss.

(b) In respect of the insurances at item (ii) (b) above, USD 99,000,000 any one occurrence or series of occurrences arising out of any one event in excess of the policy taken out and maintained by the Contractor in accordance with Sub-Clause 18.3 [*Contractor's Insurance*] and as detailed in Appendix 2 to the Conditions of Contract, Part 2 – Contractor Insurances, G [*Maintenance Services Insurance*].

(v) Deductible:

(a) In respect of the insurances in item (ii) (a) above, USD 1,000,000 per occurrence.

(vi) Territorial Limits:

The Republic of Panama

(vii) Jurisdiction (Third Party Liability):

Worldwide including USA and Canada (North American conditions to apply).

(viii) Extensions, Exclusions and Conditions:

As may be available in the commercial insurance market at reasonable terms and conditions.

Appendix 2 to the Conditions of Contract

Part 2 – Contractor Insurance

A. Third Party Liability Insurance

(i) Insured parties:

Each and every Co-insured for each of their respective rights and interests.

(ii) Cover/Subject Matter:

Legal liability for accidental third-party death and/or bodily and/or personal injury and/or disease and/or illness and/or property damage arising directly in connection with the performance of the Works.

(iii) Period of Cover:

From the Commencement Date until the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the Works (or in the case of any Taking-Over Certificate for any part of the Works issued under Sub-Clause 10.2 [*Taking Over of Parts of the Works*], until the date of issue (or deemed issue under Sub-Clause 10.1 [*Taking Over of the Works*]) of the Taking-Over Certificate for the last part of the Works) and in all cases plus the Defects Notification Period.

(iv) Limit of Liability:

Not less than USD 1,000,000 any one occurrence or series of occurrences arising out of any one event but unlimited in the aggregate during the period of cover.

(v) Deductible:

Not to exceed USD 50,000 each and every occurrence in respect of third party property damage only and nil in respect of bodily injury.

(vi) Territorial Limits:

Republic of Panama.

(vii) Policy Jurisdiction:

Worldwide including USA and Canada (North American conditions to apply).

(viii) Main Extensions to include but not limited to:

- (a) Maintenance or defects liability;
- (b) Authorised visitors;
- (c) Contingent motor liability;
- (d) Additional insureds;
- (e) Loss mitigation;

- (f) Legal costs in addition to limit of liability;
- (g) Cross liability; and
- (h) Consequential loss (as a result of third party damage or injury only).

(ix) General Exclusions:

- (a) War, sabotage and terrorism;
- (b) Political risks, nuclear and radioactive contamination;
- (c) Fines, penalties, punitive or exemplary damages, performance guarantees; and
- (d) Electronic data.

(x) Accepted Exclusions in relation to Third Party Insurance:

- (a) Employers liability;
- (b) Liability for loss or damage to the Works;
- (c) Liability for loss or damage to existing property owned, operated or the responsibility of the Employer;
- (d) Liability arising out of the use of:
 - o Aircraft or hovercraft;
 - o Waterborne vessels or craft;
- (e) Professional indemnity (but not legal liability for death or injury or property damage arising therefrom);
- (f) Liability for which compulsory insurance is required in respect of mechanically propelled vehicles;
- (g) Industries, Seepage, Pollution and Contamination Exclusion (NMA 1685);
- (h) Toxic mould;
- (i) Asbestos;
- (j) Directors and Officers liability;
- (k) Pure financial loss;
- (l) Medical malpractice;
- (m) Liability for interruption, consequential or financial loss to the Operations arising directly in connection with the performance of the Works; and
- (n) The deductible.

(xi) Accepted Conditions:

- (a) Multiple insured clause (London Engineering Group wording);
- (b) Claims notification clause;
- (c) Arbitration clause;
- (d) Primary insurance clause;
- (e) Non-cancellation clause;
- (f) Law and jurisdiction clause;
- (g) Change in risk clause;
- (h) Access and inspection clause;
- (i) Subrogation clause;
- (j) Fraudulent claims clause;
- (k) Policy voidable clause.

Appendix 2 to the Conditions of Contract

Part 2 – Contractor Insurances

B. Construction Plant and Equipment

(i) Insured parties:

The Contractor and the Employer for their respective rights and interests.

(ii) Cover/Subject Matter:

Physical loss or damage to all Key Items of the Contractor's plant and equipment (including but not limited to temporary buildings and their contents not forming part of the Works) while working within the Territorial Limits or in transit thereto by any means. "Key Items" shall comprise:

(a) any items of the Contractor's plant and equipment (including but not limited to temporary buildings and their contents not forming part of the Works) for which the absence of, or loss or damage to, may have an impact on the Contractor's ability to meet the Time for Completion and/or the programme for carrying out and completing the Works; and/or

(b) any items of the Contractor's plant and equipment (including but not limited to temporary buildings and their contents not forming part of the Works) as otherwise may be designated as such by the Employer (acting reasonably) and notified to the Contractor.

(iii) Period of Cover:

From the Commencement Date until the date of issue of the Performance Certificate (or in the case of any Performance Certificate for any part of the Works, until the date of issue of the Performance Certificate for the last part of the Works).

(iv) Sum Insured:

A sum representing not less than the new replacement value of the insured property.

(v) Deductible:

In accordance with market conditions but not to exceed USD 250,000 for any one loss.

(vi) Territorial Limits:

Republic of Panama.

Appendix 2 to the Conditions of Contract

Part 2 – Contractor Insurances

C. Automobile Liability

(i) Insured parties:

The Contractor and the Employer.

(ii) Cover/Subject Matter:

Liability for damage to third party property or injury to third party persons arising out of the ownership, use and maintenance of motor vehicles which are owned, leased, hired or used by the Contractor in respect of the carrying out and completion of the Works in accordance with the provisions of the applicable Laws and for conditions and amounts in accordance with such applicable Laws or in line with local practice.

(iii) Period of Cover:

In accordance with applicable Laws or in line with local practice.

(iv) Sum Insured:

A sum or sums in accordance with applicable Laws or in line with local practice.

(v) Deductible:

In accordance with applicable laws or in line with local practice.

(vi) Territorial Limits:

Republic of Panama.

Appendix 2 to the Conditions of Contract

Part 2 – Contractor Insurances

D. Marine Cargo/Transportation

(i) Insured parties:

The Contractor and the Employer for each of their respective rights and interests.

(ii) Cover/Subject Matter:

All goods and/or merchandise and/or cargo of every description, including materials, plant, machinery, equipment, accessories, supplies, ancillary and associated facilities and all items being imported in connection with or for incorporation into the Works whilst in transit to the Site by any means of transport at and from ports and/or places anywhere in the world, to the Site or vice versa including loading, unloading, intermediate transshipments and whilst at the premises of the insured. Coverage to be extended for return shipments on a warehouse-to-warehouse basis.

(iii) Period of Cover:

From the earliest date of the transportation of any goods and/or merchandise and/or cargo of every description required to be insured under this Part 2 - Contractor Insurances, D [*Marine Cargo/Transportation*] until the date of delivery of all such goods and/or merchandise and/or cargo to the Site.

(iv) Sum Insured:

A sum equivalent to the maximum value transported in any one conveyance or at any one location. The basis of loss settlement shall be Delivery Duty Unpaid (DDU) to the Site.

(v) Deductible:

Not to exceed USD 50,000 any one loss.

(vi) Territorial Limits:

Worldwide.

(vii) Main Extensions to include but not limited to:

- (a) Institute Cargo Clauses;
- (b) Institute War Clauses;
- (c) Institute Strikes Clauses; and
- (d) Marine cargo 50/50 sharing clause.

Appendix 2 to the Conditions of Contract

Part 2 – Contractor Insurances

E. Hull and Machinery

(i) Insured parties:

The Contractor, the Employer and any owner of any third party hull, materials, machinery, and any other things which are part of any vessel/craft that the Contractor may consider it necessary to charter in order to fulfill its obligations in respect of the Works for each of their respective rights and interests.

(ii) Cover/Subject Matter:

Hull, materials, machinery, and all other things which are part of any vessel/craft owned and/or operated by and/or the responsibility of the Contractor.

(iii) Period of Cover:

From the Commencement Date until the date of issue of the Performance Certificate (or in the case of any Performance Certificate for any part of the Works, until the date of issue of the Performance Certificate for the last part of the Works).

(iv) Sum Insured:

A sum equivalent to the value required to cover the individual market values of any vessel/craft that may be required.

(v) Deductible:

In accordance with market conditions but not to exceed USD 250,000 for any one loss.

(vi) Territorial Limits:

Worldwide.

Appendix 2 to the Conditions of Contract

Part 2 – Contractor Insurances

F. Protection and Indemnity

(i) Insured parties:

The Contractor and Employer as an additional insured with a waiver of subrogation in favour of the Employer.

(ii) Cover/Subject Matter:

The insured's legal and/or contractual liability in respect of but not limited to death or bodily injury to or sickness of any person; loss or damage to property; removal of wreck; and pollution arising out of the ownership or operation of vessels and/or craft used for or in connection with the Works.

(iii) Period of Cover:

From the Commencement Date until the date of issue of the Performance Certificate (or in the case of any Performance Certificate for any part of the Works, until the date of issue of the Performance Certificate for the last part of the Works).

(iv) Sum Insured:

Not less than USD 50,000,000 in respect of any one occurrence and unlimited in the number of occurrences.

(v) Deductible:

Not to exceed USD 25,000 any one occurrence.

(vi) Territorial Limits:

Worldwide.

(vii) Extensions, Exclusions and Conditions

As may be available in the commercial insurance market at reasonable terms and conditions.

Appendix 2 to the Conditions of Contract

Part 2 - Contractor Insurances

G. Maintenance Services Insurance

(i) Third Party Liability Insurance

In respect of the insurances referred to at Part 2, A [*Third Party Liability Insurance*] of Appendix 2 to the Conditions of Contract, such insurances shall be in accordance with Part 2, A [*Third Party Liability Insurance*] of Appendix 2 to the Conditions of Contract, save that:

- (a) the Period of Cover shall be in accordance with Part 1, C [*Maintenance Services Insurance*] of Appendix 2 to the Conditions of Contract; and
- (b) in respect of the Cover/Subject Matter the words “the performance of the Works” shall be changed to “performance of the Maintenance Services”.

(ii) Other Insurance

In respect of the insurances referred to at Part 2 B [*Construction Plant and Equipment*], C [*Automobile Liability*], D [*Marine Cargo/Transportation*], E [*Hull and Machinery*] and F [*Protection and Indemnity*] of Appendix 2 to the Conditions of Contract, these insurances shall be taken out and maintained by the Contractor to the extent such insurances are applicable to the Maintenance Services. Such insurances shall be in accordance with B [*Construction Plant and Equipment*], C [*Automobile Liability*], D [*Marine Cargo/Transportation*], E [*Hull and Machinery*] and F [*Protection and Indemnity*] respectively of Appendix 2 to the Conditions of Contract, save that:

- (a) the Period of Cover for each of these insurances shall be in accordance with the Period of Cover at Part 1, C [*Maintenance Services Insurance*] of Appendix 2 to the Conditions of Contract;
- (b) the Deductible for each of these insurances shall not exceed a sum that is reasonable taking into account the Maintenance Services;
- (c) the “Key Items” in respect of B [*Construction Plant and Equipment*] shall comprise:
 - any items of the Contractor's plant and equipment (including but not limited to temporary buildings and their contents not forming part of the Works) for which the absence of, or loss or damage to, may have an impact on the Contractor's ability to meet its obligations in respect of the Maintenance Services; and/or
 - any items of the Contractor's plant and equipment (including but not limited to temporary buildings and their contents not forming part of the Works) as otherwise may be designated as such by the Employer (acting reasonably) and notified to the Contractor,
- (d) in respect of D [*Marine Cargo/Transportation*], the Cover/Subject Matter at item (ii) thereto shall be amended so that it states: All goods and/or merchandise and/or cargo of every description, including materials, plant, machinery, equipment, accessories, supplies, ancillary and associated facilities and all items being imported in connection with the Maintenance Services whilst in transit to the Site by any means of transport at and from ports and/or places anywhere in the world, to the Site or vice versa including loading, unloading, intermediate transshipments and whilst at the premises of the insured. Coverage to be extended for return shipments on a warehouse-to-warehouse basis;

- (e) in respect of E [*Hull and Machinery*], the Insured parties at item (i) thereto shall be amended so that “Works” is changed to “Maintenance Services “; and
- (f) in respect of F [*Protection and Indemnity*], the Cover/Subject Matter at item (ii) thereto shall be amended so that “Works” is changed to, “Maintenance Services”.

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