

# **STANDARD TENDERING DOCUMENTS**



## **Procurement of Works**

### **Open National Tendering (Lump Sum)**

**May 2022**



Section I. Invitation for Tenders

# Invitation for Tenders



## Invitation for Tenders (IFT)

1. The **Eswatini Water Services Corporation** has been allocated funds as part of its budgetary allocation to cover the cost of **Construction of 2x 1ML Reinforced Concrete Reservoirs at Simunye** and intends to apply part of this funds to cover eligible payments under the Contract. Tender is open to all Tenderers from eligible source countries as defined by the Eswatini Public Procurement Regulatory (ESPPRA) Agency of the Kingdom of Eswatini.
2. The **Eswatini Water Services Corporation** invites sealed Tenders from eligible Tenderers for the construction of **Construction of 2x 1ML Reinforced Concrete Reservoirs at Simunye**.
3. Tender documents (and additional copies) may be purchased at the address stated below for a non-refundable fee of E1 000.00 or its equivalent in a freely convertible currency, for each set. Interested Tenderers may obtain further information at the same address.
4. Tenders shall be valid for a period of **90 days** after Tender opening and must be accompanied by security of **E20 000.00** or its equivalent in a convertible currency, and shall be delivered to the address specified below on or before **1 July 2022 at 12h00**, at which time they will be opened in the presence of the Tenderers who wish to attend.

### **Address for inspecting and purchasing Tender Documents**

Name of Office: **Eswatini Water Services Corporation**

Street Address: **CNR MR103 and Cultural Village Dirve**

Floor/Room Number: **Auditorium**

City: **Ezulwini** Region: **Hhohho**

Country: **Eswatini**

Telephone Number: **+268 416 9000**

Email Address: **procurement@ewsc.co.sz**





# Summary Description

These Standard Tendering Documents for Procurement of Works apply either when a prequalification process has taken place before Tendering or when a prequalification process has not taken place before Tendering (provided alternative documents should be selected as applicable). A brief description of these documents is given below.

## SBD for Procurement of Works

### Summary

#### PART 1 – TENDERING PROCEDURES

##### **Section I: Instructions to Tenderers (ITT)**

This Section provides relevant information to help Tenderers prepare their Tenders. Information is also provided on the submission, opening, and evaluation of Tenders and on the award of Contracts. **Section I contains provisions that are to be used without modification.**

##### **Section II. Tender Data Sheet (TDS)**

This Section consists of provisions that are specific to each procurement and that supplement the information or requirements included in Section I, Instructions to Tenderers.

##### **Section III. Evaluation and Qualification Criteria** *(alternative Section III to be used when Prequalification has taken place before Tendering)*

This Section contains the criteria to determine the best-evaluated Tender and to ascertain the continued qualification of the Tenderer to perform the contract.

##### **Section III. Evaluation and Qualification Criteria** *(alternative Section III to be used when Prequalification has not taken place before Tendering)*

This Section contains the criteria to determine the best-evaluated Tender and the qualifications of the Tenderer to perform the contract.

##### **Section IV: Tendering Forms**

This Section contains the forms which are to be completed by the Tenderer and submitted as part of his Tender.

##### **Section V. Eligible Countries**

This Section contains information regarding eligible countries.



## **PART 2 – WORKS REQUIREMENTS**

### **Section VI. Works Requirements**

This Section contains the Specification, the Drawings, and supplementary information that describe the Works to be procured.

## **PART 3 – *CONDITIONS OF CONTRACT AND CONTRACT FORMS***

### **Section VII. General Conditions (GC)**

This Section contains the general clauses to be applied in all contracts. **The text of the clauses in this Section shall not be modified.**

### **Section VIII. Standard Conditions (SC)**

This Section consists of Part A, Contract Data, which contains data, and Part B, Specific Provisions, which contains clauses specific to each contract. The contents of this Section supplement the General Conditions and shall be prepared by the Procuring Entities.

### **Section IX: Annex to the Special Conditions - Contract Forms**

This Section contains forms which, once completed, will form part of the Contract. The forms for **Performance Security** and **Advance Payment Security**, when required, shall only be completed by the successful Tenderer after contract award.



# TENDERING DOCUMENTS

Issued on: **24 May 2022**

for

## Procurement of

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**ONT No:** *EWSC Tender No. 3 of 2022/23*

**Project/Programme:** *Construction of 2 x1ML  
Reinforced Concrete Reservoirs in Simunye*

**Procuring Entities:** *Eswatini Water Services  
Corporation*



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## Table of Contents

<b>PART 1 – Tendering Procedures</b> .....	<b>1</b>
Section I. Instructions to Tenderers .....	3
Section II. Tender Data Sheet .....	31
Section III. Evaluation and Qualification Criteria .....	37
<i>(Following Prequalification)</i> .....	37
Section III. <i>Evaluation and Qualification Criteria (Without Prequalification)</i> .....	40
Section IV. Tendering Forms.....	53
Section V. Eligible Countries .....	95
<b>PART 2 –Works Requirements</b> .....	<b>97</b>
Section VI. Works Requirements .....	99
<b>PART 3 – Conditions of Contract and Contract Forms</b> .....	<b>105</b>
Section VII. General Conditions (GC).....	107
Section VIII. Standard Conditions (SC) .....	231
Section IX. Annex to the Special Conditions - Contract Forms .....	i





# **PART 1 – TENDERING PROCEDURES**





# Section I. Instructions to Tenderers

## Table of Contents

<b>A. General.....</b>	<b>5</b>
1. Scope of Tender .....	5
2. Source of Funds .....	5
3. Fraud and Corruption .....	5
4. Eligible Tenderers .....	8
5. Eligible Materials, Equipment, and Services .....	10
<b>B. Contents of Tendering Documents .....</b>	<b>10</b>
6. Sections of Tendering Documents .....	10
7. Clarification of Tendering Documents, Site Visit, Pre-Tender Meeting .....	11
8. Amendment of Tendering Documents .....	12
<b>C. Preparation of Tenders.....</b>	<b>12</b>
9. Cost of Tendering .....	12
10. Language of Tender .....	13
11. Documents Comprising the Tender .....	13
12. Tender Submission Sheet and Schedules .....	13
13. Alternative Tenders .....	14
14. Tender Prices and Discounts .....	14
15. Currencies of Tender and Payment .....	15
16. Documents Comprising the Technical Proposal .....	15
17. Documents Establishing the Qualifications of the Tenderer .....	15
18. Period of Validity of Tenders .....	16
19. Tender Security .....	16
20. Format and Signing of Tender .....	18
<b>D. Submission and Opening of Tenders.....</b>	<b>19</b>
21. Sealing and Marking of Tenders .....	19
22. Deadline for Submission of Tenders .....	19
23. Late Tenders .....	20
24. Withdrawal, Substitution, and Modification of Tenders .....	20
25. Tender Opening .....	20
<b>E. Evaluation and Comparison of Tenders .....</b>	<b>21</b>
26. Confidentiality .....	22
27. Clarification of Tenders .....	22
28. Deviations, Reservations, and Omissions .....	22
29. Determination of Responsiveness .....	22
30. Nonmaterial Nonconformities .....	23



31.	Correction of Arithmetical Errors .....	24
32.	Conversion to Single Currency .....	24
33.	Margin of Preference .....	24
34.	Evaluation of Tenders .....	24
35.	Comparison of Tenders .....	26
36.	Qualification of the Tenderer .....	26
37.	Procuring Entities’s Right to Accept Any Tender, and to Reject Any or All Tenders.....	26
<b>F. Award of Contract.....</b>		<b>26</b>
38.	Award Criteria .....	26
39.	Notification of Award .....	26
40.	Standstill Period .....	27
41.	Signing of Contract .....	27
42.	Debriefing by the Procuring Entity .....	28
43.	Publication of Procurement Contract.....	28
44.	Performance Security .....	28
45.	Procurement Related Complaints and Administrative Review .....	29



## Section I. Instructions to Tenderers

### A. General

- 1. Scope of Tender**
- 1.1 In connection with the Invitation for Tenders indicated in the Tender Data Sheet (TDS), the Procuring Entities, **as indicated in the TDS**, issues these Tendering Documents for the procurement of Works as specified in Section VI, Works Requirements. The name, identification, and number of lots (contracts) of the Open International Tendering (ONT) are provided in the TDS.
- 1.2 Throughout these Tendering Documents:
- (a) the term “in writing” means communicated in written form and delivered against receipt;
  - (b) except where the context requires otherwise, words indicating the singular also include the plural and words indicating the plural also include the singular; and
  - (c) “day” means calendar day;
  - (d) the term “Engineer” refers to the officer, body or institution appointed under Section 111 of the Public Procurement Regulations 2020 as Contract Manager;
  - (e) “Government” refers to the Government of the Kingdom of Eswatini, any Procuring Entities or the relevant approvals authority as defined in the Public Procurement Act of 2011; and
  - (f) “ESPPRA” refers to the Eswatini Public Procurement Authority.
- 2. Source of Funds**
- 2.1 The Procuring Entities indicated in the TDS has applied for or received financing (hereinafter called “funds”) toward the cost of the project or programme **named in the TDS**. The Procuring Entities intends to apply a portion of the funds to eligible payments under the contract(s) for which these Tendering Documents are issued.
- 2.2 Payments by the Procuring Entities will be made only at the request of the Engineer.
- 3. Fraud and Corruption**
- 3.1 It is the Government’s policy to require that Procuring Entities (including beneficiaries of the funds), as well as Tenderers, suppliers, and contractors and their agents



(whether declared or not), personnel, subcontractors, sub-consultants, service providers and suppliers, under Government-financed contracts, observe the highest standard of ethics during the procurement and execution of such contracts. <sup>1</sup> In pursuance of this policy, the Government:

- (a) defines, for the purposes of this provision, the terms set forth below as follows:
- (i) “corrupt practice” is the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party<sup>2</sup>;
  - (ii) “fraudulent practice” is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation;<sup>3</sup>
  - (iii) “collusive practice” is an arrangement between two or more parties<sup>4</sup> designed to achieve an improper purpose, including to influence improperly the actions of another party;
  - (iv) “coercive practice” is impairing or harming, or threatening to impair or harm, directly or indirectly, any party<sup>5</sup> or the property of the party to influence improperly the actions of a party;
  - (v) “obstructive practice” is
    - (aa) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a investigation into allegations of a corrupt,

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<sup>1</sup> In this context, any action taken by a tenderder, supplier, contractor, or any of its personnel, agents, sub-consultants, sub-contractors, service providers, suppliers and/or their employees to influence the procurement process or contract execution for undue advantage is improper.

<sup>2</sup> “Another party” refers to a public official acting in relation to the procurement process or contract execution. In this context, “public official” includes Government staff and employees of other organizations taking or reviewing procurement decisions.

<sup>3</sup> “Party” refers to a public official; the terms “benefit” and “obligation” relate to the procurement process or contract execution; and the “act or omission” is intended to influence the procurement process or contract execution.

<sup>4</sup> “Parties” refers to participants in the procurement process (including public officials) attempting to establish tender prices at artificial, non competitive levels.

<sup>5</sup> “Party” refers to a participant in the procurement process or contract execution.



fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or

- (bb) acts intended to materially impede the exercise of the Eswatini Water Services Corporation's inspection and audit rights provided for under sub-clause 3.1(e) below.
- (b) will reject a proposal for award if it determines that the Tenderer recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for the contract in question;
- (c) will cancel the the funds allocated to a contract if it determines at any time that representatives of the Procuring Entities or of a beneficiary engaged in corrupt, fraudulent, collusive, or coercive practices during the procurement or the execution of that contract, without the Procuring Entities having taken timely and appropriate action satisfactory to remedy the situation; and
- (d) will sanction a firm or an individual, at any time, in accordance with prevailing sanctions procedures, including suspending or barring a Tenderer in accordance with Sections *fifty-five*, *fifty-six* and *fifty-seven* of the Public Procurement Act of 2011 and in accordance with regulations 16 to 18 of the Public Procurement Regulations of 2020: (i) to be awarded a Government-financed contract; and (ii) to be a nominated<sup>b</sup> sub-contractor, consultant, manufacturer or supplier, or service provider of an otherwise eligible firm being awarded a Government-financed contract. A Tenderer or supplier aggrieved by such a decision, may appeal in accordance with Section *fifty-seven* of the Public Procurement Act of 2011.

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<sup>b</sup> A nominated sub-contractor, consultant, manufacturer or supplier, or service provider (different names are used depending on the particular tendering document) is one which either has been: (i) included by the tenderer in its pre-qualification application or tender because it brings specific and critical experience and know-how that are accounted for in the evaluation of the tenderer's pre-qualification application or the tender; or (ii) appointed by the Procuring Entity.



3.2 In further pursuance of this policy, Tenderers shall permit the Government to inspect any accounts and records and other documents relating to the Tender submission and contract performance, and to have them audited by auditors appointed by the Government.

3.3 Furthermore, Tenderers shall be aware of the provision stated in Sub-Clause 15.6 of the General Conditions.

#### 4. Eligible Tenderers

4.1 A Tenderer may be a natural person, private entity, government-owned entity—subject to ITT 4.5—or any combination of such entities in the form of a joint venture or association (JVA) under an existing agreement or with the intent to enter into such an agreement supported by a letter of intent. In the case of a joint venture or association:

(a) **unless otherwise specified in the TDS**, all partners shall be jointly and severally liable for the execution of the Contract in accordance with the Contract terms, and

(b) the JVA shall nominate a Representative who shall have the authority to conduct all business for and on behalf of any and all the partners of the JVA during the Tendering process and, in the event the JVA is awarded the Contract, during contract execution.

4.2 A Tenderer, and all partners constituting the Tenderer, may have the nationality of any country subject to the restrictions specified in Section V, Eligible Countries. A Tenderer shall be deemed to have the nationality of a country if the Tenderer is a citizen or is constituted, incorporated, or registered and operates in conformity with the provisions of the laws of that country. This criterion shall also apply to the determination of the nationality of proposed subcontractors or suppliers for any part of the Contract including related Services.

4.3 A Tenderer shall not have a conflict of interest. All Tenderers found to have a conflict of interest shall be disqualified. A Tenderer may be considered to have a conflict of interest with one or more parties in this Tendering process, if :

(a) they have at least one controlling partner in common; or

(b) they receive or have received any direct or indirect subsidy from any of them; or

(c) they have the same legal representative for purposes of this Tender; or





- (d) they have a relationship with each other directly that puts them in a position to have access to information about or influence on the Tender of another Tenderer, or influence the decisions of the Procuring Entities regarding this Tendering process; or
  - (e) a Tenderer participates in more than one Tender in this Tendering process. Participation by a Tenderer in more than one Tender will result in the disqualification of all Tenders in which such Tenderer is involved. However, this does not limit the inclusion of the same subcontractor in more than one Tender; or
  - (f) a Tenderer participated as a consultant in the preparation of the design or technical specifications of the works that are the subject of the Tender;
  - (g) a Tenderer or any of its affiliates has been hired (or is proposed to be hired) by the Procuring Entities or Procuring Entities as Engineer for the Contract implementation.
- 4.4 A Tenderer that has been sanctioned by ESPPRA in accordance with the above ITT 3.1 (d), , shall be ineligible to be awarded a Government-financed contract, or benefit from a Government-financed contract, financially or otherwise, during such period of time as ESPPRA shall determine.
- 4.5 A statutory corporation or body or company in which Government has a majority or controlling interest shall be eligible only if they meet the provisions of Section 92 of the Public Procurement Regulations 2020. To establish eligibility, the government-owned enterprise or institution should provide all relevant documents (including its documents establishing the entity) sufficient to demonstrate that it meets the provisions of Section 92 of the Public Procurement Regulations 2020.
- 4.6 Tenderers shall provide such evidence of their continued eligibility satisfactory to the Procuring Entities, as the Procuring Entities shall reasonably request.
- 4.7 Tenderers shall be excluded if:
- (a) as a matter of law or official regulation, the Government prohibits commercial relations with that country, provided that Cooperating Partners involved are satisfied



that such exclusion does not preclude effective competition for the supply of Works required; or

- (b) by an act of compliance with a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Government prohibits any import of goods or contracting of Works or services from that country or any payments to persons or entities in that country.

4.8 This Tendering is open to Tenderers unless an exception has been granted by ESPPRA, **as indicated in the TDS.**

**5. Eligible Materials, Equipment, and Services**

5.1 The materials, equipment and services to be supplied under the Contract may have their origin in any country subject to the restrictions specified in Section V, Eligible Countries, and all expenditures under the Contract will not contravene such restrictions. At the Procuring Entities's request, Tenderers may be required to provide evidence of the origin of materials, equipment and services.

**B. Contents of Tendering Documents**

**6. Sections of Tendering Documents**

6.1 The Tendering Documents consist of Parts 1, 2, and 3, which include all the Sections indicated below, and should be read in conjunction with any Addenda issued in accordance with ITT 8.

**PART 1 Tendering Procedures**

- Section I. Instructions to Tenderers (ITT)
- Section II. Tender Data Sheet (TDS)
- Section III. Evaluation Criteria and Qualification Criteria
- Section IV. Tendering Forms
- Section V. Eligible Countries

**PART 2 Works Requirements**

- Section VI. Works Requirements

**PART 3 Conditions of Contract and Contract Forms**

- Section VII. General Conditions (GC)
- Section VIII. Standard Conditions (SC)
- Section IX. Annex to the Special Conditions - Contract Forms



- 6.2 The Invitation for Tenders issued by the Procuring Entities is not part of the Tendering Documents.
- 6.3 The Procuring Entities is not responsible for the completeness of the Tendering Documents and their addenda, if they were not obtained directly from the source stated by the Procuring Entities in the Invitation for Tenders.
- 6.4 The Tenderer is expected to examine all instructions, forms, terms, and specifications in the Tendering Documents. Failure to furnish all information or documentation required by the Tendering Documents may result in the rejection of the Tender.
- 7. Clarification of Tendering Documents, Site Visit, Pre-Tender Meeting**
- 7.1 A prospective Tenderer requiring any clarification of the Tendering Documents shall contact the Procuring Entities in writing at the Procuring Entities's address **indicated in the TDS** or raise his enquiries during the pre-Tender meeting if provided for in accordance with ITT 7.4. The Procuring Entities will respond in writing to any request for clarification, provided that such request is received no later than seven (7) days prior to the deadline for submission of Tenders. The Procuring Entities shall forward copies of its response to all Tenderers who have acquired the Tendering Document in accordance with ITT 6.3, including a description of the inquiry but without identifying its source. Should the clarification result in changes to the essential elements of the Tendering Documents, the Procuring Entities shall amend the Tendering Documents following the procedure under ITT 8 and ITT 22.2.
- 7.2 The Tenderer is advised to visit and examine the Site of Works and its surroundings and obtain for itself on its own responsibility all information that may be necessary for preparing the Tender and entering into a contract for construction of the Works. The costs of visiting the Site shall be at the Tenderer's own expense.
- 7.3 The Tenderer and any of its personnel or agents will be granted permission by the Procuring Entities to enter upon its premises and lands for the purpose of such visit, but only upon the express condition that the Tenderer, its personnel, and agents will release and indemnify the Procuring Entities and its personnel and agents from and against all liability in respect thereof, and will be responsible for death or personal injury, loss of or damage to property, and any other loss,



damage, costs, and expenses incurred as a result of the inspection.

- 7.4 The Tenderer's designated representative is invited to attend a pre-Tender meeting, **if provided for in the TDS**. The purpose of the meeting will be to clarify issues and to answer questions on any matter that may be raised at that stage.
- 7.5 The Tenderer is requested, as far as possible, to submit any questions in writing, to reach the Procuring Entities not later than one week before the meeting.
- 7.6 Minutes of the pre-Tender meeting, including the text of the questions raised, without identifying the source, and the responses given, together with any responses prepared after the meeting, will be transmitted promptly to all Tenderers who have acquired the Tendering Documents in accordance with ITT 6.3. Any modification to the Tendering Documents that may become necessary as a result of the pre-Tender meeting shall be made by the Procuring Entities exclusively through the issue of an Addendum pursuant to ITT 8 and not through the minutes of the pre-Tender meeting.
- 7.7 Nonattendance at the pre-Tender meeting will ~~not~~ be a cause for disqualification of a Tenderer.

## **8. Amendment of Tendering Documents**

- 8.1 At any time prior to the deadline for submission of Tenders, the Procuring Entities may amend the Tendering Documents by issuing addenda.
- 8.2 Any addendum issued shall be part of the Tendering Documents and shall be communicated in writing to all who have obtained the Tendering Document from the Procuring Entities in accordance with ITT 6.3.
- 8.3 To give prospective Tenderers reasonable time in which to take an addendum into account in preparing their Tenders, the Procuring Entities should extend the deadline for the submission of Tenders, pursuant to ITT 22.2

## **C. Preparation of Tenders**

### **9. Cost of Tendering**

- 9.1 The Tenderer shall bear all costs associated with the preparation and submission of its Tender, and the Procuring Entities shall not be responsible or liable for those costs, regardless of the conduct or outcome of the Tendering process.



- 10. Language of Tender**
- 10.1 The Tender, as well as all correspondence and documents relating to the Tender exchanged by the Tenderer and the Procuring Entities, shall be written in English. Supporting documents and printed literature that are part of the Tender may be in another language provided they are accompanied by an accurate translation of the relevant passages in English, in which case, for purposes of interpretation of the Tender, such translation shall govern.
- 11. Documents Comprising the Tender**
- 11.1 The Tender shall comprise the following:
- (a) Tender Submission Sheet and Appendix to Tender
  - (b) completed schedules as required, including priced Bill of Quantities, in accordance with ITT 12 and 14;
  - (c) Tender Security, in accordance with ITT 19;
  - (d) alternative Tenders, if permissible, in accordance with ITT 13;
  - (e) written confirmation authorizing the signatory of the Tender to commit the Tenderer, in accordance with ITT 20.2;
  - (f) documentary evidence in accordance with ITT 17 establishing the Tenderer's continued qualified status or, if post-qualification applies, as indicated in accordance with ITT 4.8, the Tenderer's qualifications to perform the contract if its Tender is accepted;
  - (g) Technical Proposal in accordance with ITT 16; and
  - (h) any other document required in the TDS.
- 11.2 In addition to the requirements under ITT 11.1, Tenders submitted by a JVA shall include a copy of the Joint Venture Agreement entered into by all partners. Alternatively, a Letter of Intent to execute a Joint Venture Agreement in the event of a successful Tender shall be signed by all partners and submitted with the Tender, together with a copy of the proposed agreement.
- 12. Tender Submission Sheet and Schedules**
- 12.1 The Tender Submission Sheet and Schedules, including the Bill of Quantities, shall be prepared using the relevant forms furnished in Section IV, Tendering Forms. The forms must be completed without any alterations to the text, and no substitutes shall be accepted except as provided under ITT 20.2. All blank spaces shall be filled in with the information requested.



**13. Alternative Tenders**

- 13.1 **Unless otherwise indicated in the TDS**, alternative Tenders shall not be considered.
- 13.2 When alternative times for completion are explicitly invited, a statement to that effect **will be included in the TDS**, as will the method of evaluating different times for completion.
- 13.3 Except as provided under ITT 13.4 below, Tenderers wishing to offer technical alternatives to the requirements of the Tendering Documents must first price the Procuring Entities's design as described in the Tendering Documents and shall further provide all information necessary for a complete evaluation of the alternative by the Procuring Entities, including drawings, design calculations, technical specifications, breakdown of prices, and proposed construction methodology and other relevant details. Only the technical alternatives, if any, of the best-evaluated Tenderer conforming to the basic technical requirements shall be considered by the Procuring Entities.
- 13.4 **When specified in the TDS**, Tenderers are permitted to submit alternative technical solutions for specified parts of the Works, and such parts **will be identified in the TDS**, as will the method for their evaluating, and described in Section VI, Work's Requirements.

**14. Tender Prices and Discounts**

- 14.1 The prices and discounts quoted by the Tenderer in the Tender Submission Sheet and in the Bill of Quantities shall conform to the requirements specified below.
- 14.2 The price to be quoted in the Tender Submission Sheet, in accordance with ITT 12.1, shall be the total price of the Tender, excluding any discounts offered.
- 14.3 The Tenderer shall quote any unconditional discounts and the methodology for their application in the Tender Submission Sheet, in accordance with ITT 12.1.
- 14.4 **Unless otherwise provided in the TDS** and the Contract, the rates and prices quoted by the Tenderer are subject to adjustment during the performance of the Contract in accordance with the provisions of the Conditions of Contract. In such a case, the Tenderer shall furnish the indices and weightings for the price adjustment formulae in the Schedule of Adjustment Data and the Procuring Entities may require the Tenderer to justify its proposed indices and weightings.



- 14.4 If so indicated in ITT 1.1, Tenders are being invited for individual lots (contracts) or for any combination of lots (packages). Tenderers wishing to offer any price reduction for the award of more than one Contract shall specify in their Tender the price reductions applicable to each package, or alternatively, to individual Contracts within the package. Price reductions or discounts shall be submitted in accordance with ITT 14.3, provided the Tenders for all lots (contracts) are submitted and opened at the same time.
- 14.6 All duties, taxes, and other levies payable by the Contractor under the Contract, or for any other cause, as of the date 28 days prior to the deadline for submission of Tenders, shall be included in the rates and prices and the total Tender Price submitted by the Tenderer.
- 15. Currencies of Tender and Payment**
- 15.1 The currency(ies) of the Tender and the currency(ies) of payments shall be **as specified in the TDS**.
- 15.2 Tenderers may be required by the Procuring Entities to justify, to the Procuring Entities's satisfaction, their local and foreign currency requirements, and to substantiate that the amounts included in the unit rates and prices and shown in the the Schedule of Adjustment Data in the Appendix to Tender are reasonable, in which case a detailed breakdown of the foreign currency requirements shall be provided by Tenderers.
- 16. Documents Comprising the Technical Proposal**
- 16.1 The Tenderer shall furnish a Technical Proposal including a statement of work methods, equipment, personnel, schedule and any other information as stipulated in Section IV, in sufficient detail to demonstrate the adequacy of the Tenderers' proposal to meet the work requirements and the completion time.
- 17. Documents Establishing the Qualifications of the Tenderer**
- 17.1 In accordance with Section III, Evaluation and Qualification Criteria, to establish that the Tenderer continues to meet the criteria used at the time of prequalification, the Tenderer shall provide in the corresponding information sheets included in Section IV, Tendering Forms, updated information on any assessed aspect that changed from that time, or if post-qualification applies as indicated in accordance with ITT 4.8, the Tenderer shall provide the information requested in the corresponding information sheets included in Section IV, Tendering Forms.
- 17.2 If a margin of preference applies as indicated in accordance with ITT 33.1, domestic Tenderers, individually or in joint



ventures, applying for eligibility for domestic preference shall supply all information required to satisfy the criteria for eligibility indicated in accordance with ITT 33.1.

### 18. Period of Validity of Tenders

18.1 Tenders shall remain valid for the period **specified in the TDS** after the Tender submission deadline date prescribed by the Procuring Entities in accordance with ITT 22.1. A Tender valid for a shorter period shall be rejected by the Procuring Entities as non responsive.

18.2 In exceptional circumstances, prior to the expiration of the Tender validity period, the Procuring Entities may request Tenderers to extend the period of validity of their Tenders. The request and the responses shall be made in writing. If a Tender security is requested in accordance with ITT 19, it shall also be extended for twenty-eight (28) days beyond the deadline of the extended validity period. A Tenderer may refuse the request without forfeiting its Tender security. A Tenderer granting the request shall not be required or permitted to modify its Tender, except as provided in ITT 18.3.

18.3 If the award is delayed by a period exceeding fifty-six (56) days beyond the expiry of the initial Tender validity, the Contract price shall be determined as follows:

- (a) In the case of fixed price contracts, the Contract price shall be the Tender price adjusted by the factor **specified in the TDS**.
- (b) In the case of adjustable price contracts, to determine the Contract price, the fixed portion of the Tender price shall be adjusted by the factor **specified in the TDS**.
- (c) In any case, Tender evaluation shall be based on the Tender price without taking into consideration the applicable correction from those indicated above.

### 19. Tender Security

19.1 The Tenderer shall furnish as part of its Tender, either a Tender-Securing Declaration or a Tender security **as specified in the TDS**, in original form and, in the case of a Tender security, in the amount and currency **specified in the TDS**.

19.2 A Tender-Securing Declaration shall use the form included in Section IV, Tendering Forms.





19.3 If a Tender security is specified pursuant to ITT 19.1, the Tender security shall be a demand guarantee in any of the following forms at the Tenderer's option:

- (a) an unconditional bank guarantee issued by a bank or surety;
- (b) an irrevocable letter of credit;
- (c) a cashier's or certified check; or
- (d) another security **indicated in the TDS**,

from a reputable source from an eligible country. If the unconditional guarantee is issued by an insurance company or a bonding company located outside the Procuring Entities's Country, the issuer shall have a correspondent financial institution located in the Procuring Entities's Country to make it enforceable. In the case of a bank guarantee, the Tender security shall be submitted either using the Tender Security Form included in Section IV, Tendering Forms, or in another substantially similar format approved by the Procuring Entities prior to Tender submission. In either case, the form must include the complete name of the Tenderer. The Tender security shall be valid for twenty-eight (28) days beyond the original validity period of the Tender, or beyond any period of extension if requested under ITT 18.2.

19.4 If a Tender security is specified pursuant to ITT 19.1, any Tender not accompanied by a substantially responsive Tender security or Tender-Securing Declaration shall be rejected by the Procuring Entities as non responsive.

19.5 If a Tender security is specified pursuant to ITT 19.1, the Tender security of unsuccessful Tenderers shall be returned as promptly as possible upon the successful Tenderer's furnishing of the performance security pursuant to ITT 41.

19.6 The Tender security of the successful Tenderer shall be returned as promptly as possible once the successful Tenderer has signed the Contract and furnished the required performance security.

19.7 The Tender security may be forfeited or the Tender-Securing Declaration executed:

- (a) if a Tenderer withdraws its Tender during the period of Tender validity specified by the Tenderer on the Tender Submission Sheet or



- (b) if the successful Tenderer fails to:
  - (i) sign the Contract in accordance with ITT 40; or
  - (ii) furnish a performance security in accordance with ITT 41.

19.8 The Tender security or the Tender-Securing Declaration of a JVA shall be in the name of the JVA that submits the Tender. If the JVA has not been legally constituted into a legally enforceable JVA at the time of Tendering, the Tender security or the Tender-Securing Declaration shall be in the names of all future partners as named in the letter of intent referred to in ITT 4.1.

19.9 If a Tender security is **not required in the TDS** pursuant to ITT 19.1, and

- (a) if a Tenderer withdraws its Tender during the period of Tender validity specified by the Tenderer on the Tender Submission sheet, except as provided in ITT 18.2, or
- (b) if the successful Tenderer fails to sign the Contract in accordance with ITT 40; or furnish a performance security in accordance with ITT 41;

the Procuring Entities may, **if provided for in the TDS**, declare the Tenderer disqualified to be awarded a contract by the Procuring Entities for a period of time **as stated in the TDS**.

## 20. Format and Signing of Tender

20.1 The Tenderer shall prepare one original of the documents comprising the Tender as described in ITT 11 and clearly mark it "ORIGINAL." Alternative Tenders, if permitted in accordance with ITT 13, shall be clearly marked "ALTERNATIVE." In addition, the Tenderer shall submit copies of the Tender, in the number **specified in the TDS** and clearly mark them "COPY." In the event of any discrepancy between the original and the copies, the original shall prevail.

20.2 The original and all copies of the Tender shall be typed or written in indelible ink and shall be signed by a person duly authorized to sign on behalf of the Tenderer. This authorization shall consist of a written confirmation **as specified in the TDS** and shall be attached to the Tender. The name and position held by each person signing the authorization must be typed or printed below the signature. All pages of the Tender where entries or amendments have been made shall be signed or initialed by the person signing the Tender.



- 20.3 A Tender submitted by a JVA shall comply with the following requirements:
- (a) Unless not required in accordance with ITT 4.1 (a), be signed so as to be legally binding on all partners and
  - (b) Include the Representatives's authorization referred to in ITT 14.1 (b), consisting of a power or attorney signed by those legally authorized to sign on behalf of the JVA.
- 20.4 Any inter-lineation, erasures, or overwriting shall be valid only if they are signed or initialed by the person signing the Tender.

#### **D. Submission and Opening of Tenders**

##### **21. Sealing and Marking of Tenders**

- 21.1 The Tenderer shall enclose the original and all copies of the Tender, including alternative Tenders, if permitted in accordance with ITT 13, in separate sealed envelopes, duly marking the envelopes as "ORIGINAL", "ALTERNATIVE" and "COPY." These envelopes containing the original and the copies shall then be enclosed in one single envelope.
- 21.2 The inner and outer envelopes shall:
- (a) bear the name and address of the Tenderer;
  - (b) be addressed to the Procuring Entities in accordance with ITT 22.1;
  - (c) bear the specific identification of this Tendering process indicated in the TDS 1.1; and
  - (d) bear a warning not to open before the time and date for Tender opening.
- 21.3 If all envelopes are not sealed and marked as required, the Procuring Entities will assume no responsibility for the misplacement or premature opening of the Tender.

##### **22. Deadline for Submission of Tenders**

- 22.1 Tenders must be received by the Procuring Entities at the address and no later than the date and time **indicated in the TDS. When so specified in the TDS**, Tenderers shall have the option of submitting their Tenders electronically. Tenderers submitting Tenders electronically shall follow the electronic Tender submission procedures **specified in the TDS**.
- 22.2 The Procuring Entities may, at its discretion, extend the deadline for the submission of Tenders by amending the



Tendering Documents in accordance with ITT 8, in which case all rights and obligations of the Procuring Entities and Tenderers previously subject to the deadline shall thereafter be subject to the deadline as extended.

- 23. Late Tenders** 23.1 The Procuring Entities shall not consider any Tender that arrives after the deadline for submission of Tenders, in accordance with ITT 22. Any Tender received by the Procuring Entities after the deadline for submission of Tenders shall be declared late, rejected, and returned unopened to the Tenderer.
- 24. Withdrawal, Substitution, and Modification of Tenders** 24.1 A Tenderer may withdraw, substitute, or modify its Tender after it has been submitted by sending a written notice, duly signed by an authorized representative, and shall include a copy of the authorization in accordance with ITT 20.2, (except that withdrawal notices do not require copies). The corresponding substitution or modification of the Tender must accompany the respective written notice. All notices must be:
- (a) prepared and submitted in accordance with ITT 20 and ITT 21 (except that withdrawals notices do not require copies), and in addition, the respective envelopes shall be clearly marked “WITHDRAWAL,” “SUBSTITUTION,” “MODIFICATION;” and
  - (b) received by the Procuring Entities prior to the deadline prescribed for submission of Tenders, in accordance with ITT 22.
- 24.2 Tenders requested to be withdrawn in accordance with ITT 24.1 shall be returned unopened to the Tenderers.
- 24.3 No Tender may be withdrawn, substituted, or modified in the interval between the deadline for submission of Tenders and the expiration of the period of Tender validity specified by the Tenderer on the Tender Submission Sheet or any extension thereof.
- 25. Tender Opening** 25.1 The Procuring Entities shall open the Tenders in public, in the presence of Tenderers` designated representatives and anyone who choose to attend, and at the address, date and time **specified in the TDS**. Any specific electronic Tender opening procedures required if electronic Tendering is permitted in accordance with ITT 22.1, shall be **as specified in the TDS**.
- 25.2 First, envelopes marked “WITHDRAWAL” shall be opened and read out and the envelope with the corresponding Tender shall



not be opened, but returned to the Tenderer. No Tender withdrawal shall be permitted unless the corresponding withdrawal notice contains a valid authorization to request the withdrawal and is read out at Tender opening. Next, envelopes marked “SUBSTITUTION” shall be opened and read out and exchanged with the corresponding Tender being substituted, and the substituted Tender shall not be opened, but returned to the Tenderer. No Tender substitution shall be permitted unless the corresponding substitution notice contains a valid authorization to request the substitution and is read out at Tender opening. Envelopes marked “MODIFICATION” shall be opened and read out with the corresponding Tender. No Tender modification shall be permitted unless the corresponding modification notice contains a valid authorization to request the modification and is read out at Tender opening. Only Tenders that are opened and read out at Tender opening shall be considered further.

- 25.3 All other envelopes shall be opened one at a time, reading out: the name of the Tenderer and whether there is a modification; the Tender Price(s), including any discounts and alternative offers; the presence or absence of a Tender security, if required; and any other details as the Procuring Entities may consider appropriate. Only discounts and alternative offers read out at Tender opening shall be considered for evaluation. **If so requested by the Procuring Entities in the TDS**, the Tender Submission Sheet and the Bill of Quantities are to be initialed by representatives of the Procuring Entities attending Tender opening in the manner indicated in the TDS. No Tender shall be rejected at Tender opening except for late Tenders, in accordance with ITT 23.1.
- 25.4 The Procuring Entities shall prepare a record of the Tender opening that shall include, as a minimum: the name of the Tenderer and whether there is a withdrawal, substitution, or modification; the Tender Price, per lot if applicable, including any discounts and alternative offers; and the presence or absence of a Tender security, if one was required. The Tenderers’ representatives who are present shall be requested to sign the record. The omission of a Tenderer’s signature on the record shall not invalidate the contents and effect of the record. A copy of the record shall be distributed to all Tenderers.

## E. Evaluation and Comparison of Tenders



- 26. Confidentiality**
- 26.1 Information relating to the evaluation of Tenders and recommendation of contract award shall not be disclosed to Tenderers or any other persons not officially concerned with such process until information on Contract award is communicated to all Tenderers.
- 26.2 Any attempt by a Tenderer to influence the Procuring Entities in the evaluation of the Tenders or Contract award decisions may result in the rejection of its Tender.
- 26.3 Notwithstanding ITT 26.2, from the time of Tender opening to the time of Contract award, if any Tenderer wishes to contact the Procuring Entities on any matter related to the Tendering process, it may do so in writing.
- 27. Clarification of Tenders**
- 27.1 To assist in the examination, evaluation, and comparison of the Tenders, and qualification of the Tenderers, the Procuring Entities may, at its discretion, ask any Tenderer for a clarification of its Tender. Any clarification submitted by a Tenderer that is not in response to a request by the Procuring Entities shall not be considered. The Procuring Entities's request for clarification and the response shall be in writing. No change in the prices or substance of the Tender shall be sought, offered, or permitted, except to confirm the correction of arithmetic errors discovered by the Procuring Entities in the evaluation of the Tenders, in accordance with ITT 31.
- 27.2 If a Tenderer does not provide clarifications of its Tender by the date and time set in the Procuring Entities's request for clarification, its Tender may be rejected.
- 28. Deviations, Reservations, and Omissions**
- 28.1 During the evaluation of Tenders, the following definitions apply:
- (a) "Deviation" is a departure from the requirements specified in the Tendering Document;
  - (b) "Reservation" is the setting of limiting conditions or withholding from complete acceptance of the requirements specified in the Tendering Document; and
  - (c) "Omission" is the failure to submit part or all of the information or documentation required in the Tendering Document.
- 29. Determination of Responsiveness**
- 29.1 The Procuring Entities's determination of a Tender's responsiveness is to be based on the contents of the Tender itself, as defined in ITT 11.



29.2 A substantially responsive Tender is one that meets the requirements of the Tendering Document without material deviation, reservation, or omission. A material deviation, reservation, or omission is one that,

(a) if accepted, would

(i) affect in any substantial way the scope, quality, or performance of the Works specified in the Contract; or

(ii) limit in any substantial way, inconsistent with the Tendering Document, the Procuring Entities's rights or the Tenderer's obligations under the proposed Contract; or

(b) if rectified, would unfairly affect the competitive position of other Tenderers presenting substantially responsive Tenders.

29.3 The Procuring Entities shall examine the technical aspects of the Tender submitted in accordance with ITT 16, Technical Proposal, in particular, to confirm that all requirements of Section VI, Works Requirements have been met without any material deviation, reservation or omission.

29.4 If a Tender is not substantially responsive to the requirements of the Tendering Document, it shall be rejected by the Procuring Entities and may not subsequently be made responsive by correction of the material deviation, reservation, or omission.

**30. Nonmaterial  
Nonconformities**

30.1 Provided that a Tender is substantially responsive, the Procuring Entities may waive any nonconformities in the Tender that do not constitute a material deviation, reservation or omission.

30.2 Provided that a Tender is substantially responsive, the Procuring Entities may request that the Tenderer submit the necessary information or documentation, within a reasonable period of time, to rectify nonmaterial nonconformities in the Tender related to documentation requirements. Requesting information or documentation on such nonconformities shall not be related to any aspect of the price of the Tender. Failure of the Tenderer to comply with the request may result in the rejection of its Tender.

30.3 Provided that a Tender is substantially responsive, the Procuring Entities shall rectify quantifiable nonmaterial



nonconformities related to the Tender Price. To this effect, the Tender Price shall be adjusted, for comparison purposes only, to reflect the price of a missing or non-conforming item or component. The adjustment shall be made using the method indicated in Section III, Evaluation and Qualification Criteria.

- 31. Correction of Arithmetical Errors**
- 31.1 Provided that the Tender is substantially responsive, the Procuring Entities shall correct arithmetical errors on the following basis:
- (a) if there is a discrepancy between the unit price and the total price that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected, unless in the opinion of the Procuring Entities there is an obvious misplacement of the decimal point in the unit price, in which case the total price as quoted shall govern and the unit price shall be corrected;
  - (b) if there is an error in a total corresponding to the addition or subtraction of subtotals, the subtotals shall prevail and the total shall be corrected; and
  - (c) if there is a discrepancy between words and figures, the amount in words shall prevail, unless the amount expressed in words is related to an arithmetic error, in which case the amount in figures shall prevail subject to (a) and (b) above.
- 31.2 If the Tenderer that submitted the best-evaluated Tender does not accept the correction of errors, its Tender shall be rejected.
- 32. Conversion to Single Currency**
- 32.1 For evaluation and comparison purposes, the currency(ies) of the Tender shall be converted into a single currency as specified in the TDS.
- 33. Margin of Preference**
- 33.1 **Unless otherwise specified in the TDS**, a margin of preference shall not apply.
- 34. Evaluation of Tenders**
- 34.1 The Procuring Entities shall use the criteria and methodologies listed in this Clause. No other evaluation criteria or methodologies shall be permitted.
- 34.2 To evaluate a Tender, the Procuring Entities shall consider the following:
- (a) the Tender price, excluding Provisional Sums and the provision, if any, for contingencies in the Summary Bill





- of Quantities, but including Daywork items, where priced competitively;
- (b) price adjustment for correction of arithmetic errors in accordance with ITT 31.1;
  - (c) price adjustment due to discounts offered in accordance with ITT 14.3;
  - (d) converting the amount resulting from applying (a) to (c) above, if relevant, to a single currency in accordance with ITT 32;
  - (e) price adjustment due to quantifiable nonmaterial nonconformities in accordance with ITT 30.3;
  - (f) the evaluation factors indicated in Section III, Evaluation and Qualification Criteria;
- 34.3 The estimated effect of the price adjustment provisions of the Conditions of Contract, applied over the period of execution of the Contract, shall not be taken into account in Tender evaluation.
- 34.4 If these Tendering Documents allows Tenderers to quote separate prices for different lots (contracts), and the award to a single Tenderer of multiple lots (contracts), the methodology to determine the best-evaluated price of the lot (contract) combinations, including any discounts offered in the Tender Submission Sheet, is specified in Section III, Evaluation and Qualification Criteria.
- 34.5 If the Tender, which results in the best-evaluated Tender Price, is seriously unbalanced or front loaded in the opinion of the Procuring Entities, the Procuring Entities may require the Tenderer to produce detailed price analyses for any or all items of the Bill of Quantities, to demonstrate the internal consistency of those prices with the construction methods and schedule proposed. After evaluation of the price analyses, taking into consideration the schedule of estimated Contract payments, the Procuring Entities may require that the amount of the performance security be increased at the expense of the Tenderer to a level sufficient to protect the Procuring Entities against financial loss in the event of default of the successful Tenderer under the Contract.



- 35. Comparison of Tenders** 35.1 The Procuring Entities shall compare all substantially responsive Tenders in accordance with ITT 34.2 to determine the best-evaluated Tender.
- 36. Qualification of the Tenderer** 36.1 The Procuring Entities shall determine to its satisfaction whether the Tenderer that is selected as having submitted the best-evaluated and substantially responsive Tender either continues to meet (if prequalification applies) or meets (if postqualification applies) the qualifying criteria specified in Section III, Evaluation and Qualification Criteria.
- 36.2 The determination shall be based upon an examination of the documentary evidence of the Tenderer's qualifications submitted by the Tenderer, pursuant to ITT 17.1.
- 36.3 An affirmative determination shall be a prerequisite for award of the Contract to the Tenderer. A negative determination shall result in disqualification of the Tender, in which event the Procuring Entities shall proceed to the next best-evaluated Tender to make a similar determination of that Tenderer's qualifications to perform satisfactorily.
- 37. Procuring Entities's Right to Accept Any Tender, and to Reject Any or All Tenders** 37.1 The Procuring Entities reserves the right to accept or reject any Tender, and to annul the Tendering process and reject all Tenders at any time prior to contract award, without thereby incurring any liability to Tenderers. In case of annulment, all Tenders submitted and specifically, Tender securities, shall be promptly returned to the Tenderers.

## F. Award of Contract

- 38. Award Criteria** 38.1 Subject to ITT 37.1, the Procuring Entities shall award the Contract to the Tenderer whose offer has been determined to be the best-evaluated Tender and is substantially responsive to the Tendering Document, provided further that the Tenderer is determined to be qualified to perform the Contract satisfactorily.
- 39. Notification of Award** 39.1 Prior to the expiration of the period of Tender validity, the Procuring Entities shall notify the successful Tenderer, in writing, that its Tender has been accepted. The notification letter (hereinafter and in the Conditions of Contract and Contract Forms called the "Letter of Acceptance") shall specify the sum that the Procuring Entities will pay the Contractor in consideration of the execution and completion of the Works (hereinafter and in the Conditions of Contract and Contract Forms called "the Contract Price") and the



requirement for the Contractor to remedy any defects therein as prescribed by the Contract. At the same time, the Procuring Entities shall also notify all other Tenderers of the results of the Tendering and shall publish in the *ESPPRA Website* the results identifying the Tender and lot numbers and the following information:

- (i) name of each Tenderer who submitted a Tender;
- (ii) Tender prices as read out at Tender Opening;
- (iii) name and evaluated prices of each Tender that was evaluated;
- (iv) name of Tenderers whose Tenders were rejected and the reasons for their rejection; and
- (v) name of the successful Tenderer, and the Price it offered, as well as the duration and summary scope of the contract awarded.

39.2 Until a formal contract is prepared and executed, the notification of award shall not constitute a binding Contract.

39.3 The Procuring Entities shall promptly respond in writing to any unsuccessful Tenderer who, after notification of award in accordance with ITT 39.1, requests in writing the grounds on which its Tender was not selected.

#### **40. Standstill Period**

40.1 The Contract shall not be signed earlier than the expiry of a Standstill Period of 10 days to allow any dissatisfied tender to launch a complaint. Where only one Tender is submitted, the Standstill Period shall not apply.

40.2 Where a Standstill Period applies, it shall commence when the Procuring Entity has transmitted to each Tenderer the Notification of Intention to Enter in to a Contract with the successful Tenderer.

#### **41. Signing of Contract**

41.1 Promptly upon notification, the Procuring Entities shall send the successful Tenderer the Contract Agreement.

41.2 Within twenty-eight (28) days of receipt of the Contract Agreement, the successful Tenderer shall sign, date, and return it to the Procuring Entities.



- 42. Debriefing by the Procuring Entity**
- 42.1 On receipt of the Procuring Entity's Notification of Intention to Enter into a Contract referred to in ITT 39, an unsuccessful tenderer may make a written request to the Procuring Entity for a debriefing on specific issues or concerns regarding their tender. The Procuring Entity shall provide the debriefing within five days of receipt of the request.
- 42.2 Debriefings of unsuccessful Tenderers may be done in writing or verbally. The Tenderer shall bear its own costs of attending such a debriefing meeting.
- 43. Publication of Procurement Contract**
- Within fourteen days after signing the contract, the Procuring Entity shall publish the awarded on the Website of the Agency. At the minimum, the notice shall contain the following information:
- a) Name and address of the Procuring Entity;
  - b) Name and reference number of the contract being awarded, a summary of its scope and the selection method used;
  - c) The name of the successful Tenderer, the final total contract price, the contract duration.
  - d) Dates of signature, commencement and completion of contract;
  - e) Names of all Tenderers that submitted Tenders, and their Tender prices as read out at Tender opening.
- 44. Performance Security**
- 44.1 Within twenty-eight (28) days of the receipt of notification of award from the Procuring Entities, the successful Tenderer shall furnish the performance security in accordance with the General Conditions of Contract, subject to ITT 34.5, using for that purpose the Performance Security Form included in Section IX, Annex to the Special Conditions - Contract Forms, or another form acceptable to the Procuring Entities. If the performance security furnished by the successful Tenderer is in the form of a bond, it shall be issued by a bonding or insurance company that has been determined by the successful Tenderer to be acceptable to the Procuring Entities. A foreign institution providing a bond shall have a correspondent financial institution located in the Procuring Entities's Country.
- 44.2 Failure of the successful Tenderer to submit the above-mentioned Performance Security or sign the Contract shall constitute sufficient grounds for the annulment of the award and forfeiture of the Tender security. In that event the Procuring Entities may award the Contract to the next best-



evaluated Tenderer whose offer is substantially responsive and is determined by the Procuring Entities to be qualified to perform the Contract satisfactorily.

**45. Procurement  
Related  
Complaints  
and  
Administrative  
Review**

45.1 The procedures for making a Procurement-related Complaint are as **specified in the TDS.**

45.1 An application for administrative review shall be made in accordance with section 48 and 49 of the Act, 2011 using the form provided on the Agency's website <https://www.esppra.co.sz>.





## Section II. Tender Data Sheet

<b>A. Introduction</b>	
<b>ITT 1.1</b>	The number of the Invitation for Tenders is : <b>One (1)</b>
<b>ITT 1.1 &amp; 2.1</b>	The Procuring Entities is: <b>Eswatini Water Service Coropation</b>
<b>ITT 1.1</b>	The name of the ONT is: <b>Construction of 2x 1ML Reinforced Concrete Reservoirs at Simunye</b> The identification number of the ONT is: <b>EWSC Tender No. 3 of 2022/23</b> The number and identification of lots (contracts) comprising this ONT is: <b>One (1)</b>
<b>ITT 2.1</b>	The name of the Project is: <b>Construction of 2x 1ML Reinforced Concrete Reservoirs at Simunye</b>
<b>ITT 4.1 (a)</b>	The individuals or firms in a joint venture or association <b>shall be</b> jointly and severally liable.
<b>B. Tendering Documents</b>	
<b>ITT 7.1</b>	For <b>clarification purposes</b> only, the Procuring Entities's address is: Attention: <b>Procurement Manager</b> Street Address: <b>CNR MR103 and Cultural Village Drive</b> _____ City: <b>Ezulwini</b> <b>Eswatini</b>  Telephone: <b>+268 2416 9000</b> Facsimile number: _____ Electronic mail address: <a href="mailto:procurement@ewsc.co.sz">procurement@ewsc.co.sz</a> <b>EWSC shall respond to written requests for clarification which it receives not later than 14 days prior to the deadline for the submission of tenders.</b>
<b>ITT 7.4</b>	A Pre-Tender compulsory meeting <b>shall</b> take place at the following date, time and place: Date: <b>Wednesday 8 June 2022</b> Time: <b>10h00</b> Place: <b>Simunye Treatment Plant</b>
<b>C. Preparation of Tenders</b>	
<b>ITB 10.1</b>	The language of the tender is: English
<b>ITT 11.1 (h)</b>	The Tenderer shall submit with its Tender the following additional documents:



	<p>(a) <u>Construction Programme,</u></p> <p>(b) <u>Mobilisation Schedule, Key Personnel,</u></p> <p>(c) <u>Safety Health and Environment Plan,</u></p> <p>(d) <u>Proof of Payment for document,</u></p> <p>(e) <u>Submission of a certified copy of a Company Current Form C</u></p> <p>(f) <u>Submission of a certified copy of a Company Current Form C</u></p> <p>(g) <u>Original and Valid Tax Compliance Certificate</u></p> <p>(h) <u>Certified copy of a valid Trading Licence,</u></p> <p>(i) <u>Certified copy of a valid registration certificate issued by Construction Industry Council</u></p> <p>(j) <u>Certified copy of a valid Trading Licence,</u></p> <p>(k) <u>Certified copy of a valid Labour Compliance Certificate,</u></p> <p>(l) <u>Police Clearance or Affidavit for all Company Directors</u></p> <hr/> <p>Failure to meet these requirements shall render the tender <b>NON - RESPONSIVE</b></p>
ITT 13.1	Alternative Tenders <b>are not</b> permitted.
ITT 13.2	Alternative times for completion <b>are not</b> permitted. If alternative times for completion are permitted, the evaluation method will be as specified in Section III, Evaluation and Qualification Criteria.
ITT 13.4	Alternative technical solutions shall be permitted for the following parts of the Works: <b>None</b> . If alternative technical solutions are permitted, the evaluation method will be as specified in Section III, Evaluation and Qualification Criteria.
ITT 14.4	The prices quoted by the Tenderer <b>shall not be subject to adjustment</b>
ITT 15.1	The prices shall be quoted by the tenderer in: Emalangeni
ITT 18.1	The Tender validity period shall be <b>90</b> days.
ITT 18.3 (a)	The Tender price shall be adjusted by the following factor: <b>None</b>





<b>ITT 18.3 (b)</b>	The fixed portion of the Tender price shall be adjusted by the following factor: <b>None</b>
<b>ITT 19.1</b>	A Tender security <b>is</b> required. A Tender-Securing Declaration <b>is</b> required. If a Tender security shall be required, the amount and currency of the Tender security shall be <b>E20 000.00</b>
<b>ITT 19.2 (d)</b>	Other types of acceptable securities: <b>None</b>
<b>ITT 19.9</b>	If the Tenderer incurs any of the actions prescribed in subparagraphs (a) or (b) of this provision, the Procuring Entities will declare the Tenderer ineligible to be awarded contracts by the Procuring Entities for a period of <b>3</b> years.
<b>ITT 20.1</b>	In addition to the original of the Tender, the number of copies is: <b>Five (5)</b>
<b>ITT 20.2</b>	<p>The written confirmation of authorization to sign on behalf of the Tenderer shall consist of: <b>Authority of Signatory</b></p> <p>(a) Tenderer should submit Written Power of Attorney authorizing an officer to sign the tender and any other relevant documents on behalf of the company. Written Power of Attorney could be signed by the company's Attorney or any other authorized person (s) such as Managing Director. The full name and specimen signature of the appointed person committing the tender must be provided.</p> <p>(b) In the case of Tenders submitted by an existing or intended JV an undertaking signed by all parties (i) stating that all parties shall be jointly and severally liable, if so required in accordance with ITT 4.1(a), and (ii) nominating a Representative who shall have the authority to conduct all business for and on behalf of any and all the parties of the JV during the tendering process and, in the event the JV is awarded the Contract, during contract execution.”</p>
<b>D. Submission and Opening of Tenders</b>	
<b>ITT 22.1</b>	<p>The Tender submission shall take place at:</p> <p>Street Address: <b>CNR MR103 and Cultural Village Drive</b>  Floor/Room number: <b>Auditorium</b>  City: <b>Ezulwini</b>  Country: <b>Eswatini</b></p> <p>The Deadline for the submission of tenders is:  Date: <b>1 July 2022</b>  Time: <b>12h00</b></p>



	Late tenders shall not be accepted.
<b>ITT 25.1</b>	<p>The Tender opening shall take place at:  Street Address: <b>CNR MR103 and Cultural Village Drive</b>  Floor/Room number: <b>Auditorium</b>  City: <b>Ezulwini</b>  Country: <b>Eswatini</b>  Date: <b>1 July 2022</b>  Time: <b>12h00</b></p> <p>If Tenderers have the option of submitting their Tenders electronically, the electronic Tender opening procedures shall be:  _____</p>
<b>ITT 25.3</b>	<p>The Tender Submission Sheet and Sheet and Bill of Quantities <b>shall</b> be initialed by representatives of the Procuring Entities attending Tender opening. If initialization is required, it shall be conducted as follows:  <i>(Initials of the Firstname, Middlename, Lastname)</i>  _____</p>
<b>E. Evaluation, and Comparison of Tenders</b>	
<b>ITT 32.1</b>	<p>The currency that shall be used for Tender evaluation and comparison purposes to convert all Tender prices expressed in various currencies into a single currency is: _____</p> <p>The source of exchange rate shall be: _____</p> <p>The date for the exchange rate shall be: _____</p> <p>The currency(ies) of the Tender shall be converted into a single currency in accordance with the procedure under Alternative _____ that follows:  <b>Alternative A: Tenderers quote entirely in local currency</b>  For comparison of Tenders, the Tender Price, corrected pursuant to Clause 31, shall first be broken down into the respective amounts payable in various currencies by using the exchange rates specified by the Tenderer in accordance with Sub-Clause 15.1.</p> <p>In the second step, the Procuring Entities will convert the amounts in various currencies in which the Tender Price is payable (excluding Provisional Sums but including Daywork where priced competitively) to the single currency identified above at the selling rates established for similar transactions by the authority specified and on the date stipulated above.</p> <p><b>OR</b>  <b>Alternative B: Tenderers quote in local and foreign currencies</b></p>



	<p>The Procuring Entities will convert the amounts in various currencies in which the Tender Price, corrected pursuant to Clause 31, is payable (excluding Provisional Sums but including Daywork where priced competitively) to the single currency identified above at the selling rates established for similar transactions by the authority specified and on the date stipulated above.</p>
<b>ITT 33.1</b>	<p>A margin of preference <b>shall not</b> apply.  If a margin of preference applies, the application methodology shall be: N/A</p>
<b>ITT 45.1</b>	<p>The procedures for making a Procurement-related Complaint are detailed in the ESPPRA website <a href="https://www.esppra.co.sz">https://www.esppra.co.sz</a></p> <p>If a Tenderer wishes to make a Procurement-related Complaint, the Tenderer should submit its complaint following these procedures, in writing (by the quickest means available, that is by email), to: <a href="mailto:procurement@ewsc.co.sz">procurement@ewsc.co.sz</a> or <a href="mailto:info@esppra.co.sz">info@esppra.co.sz</a></p> <p><b>For the attention:</b> <i>[insert full name of person receiving complaints]</i>  <b>Title/position:</b> <i>[insert title/position]</i>  <b>Procuring Entity:</b> <b>Eswatini Water Services Corporation/</b>  <b>Email address:</b> <a href="mailto:procurement@ewsc.co.sz">procurement@ewsc.co.sz</a></p> <p>In summary, a Procurement-related Complaint may challenge any of the following:</p> <ol style="list-style-type: none"> <li>1. the terms of the Tendering Documents; and</li> <li>2. the Procuring Entity's decision to award the contract.</li> </ol>





---

## **Section III. Evaluation and Qualification Criteria**

### ***(Following Prequalification)***

This Section contains all the criteria that the Procuring Entities shall use to evaluate Tenders and qualify Tenderers. In accordance with ITT 34 and ITT 36, no other factors, methods or criteria shall be used. The Tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms.



**1. Evaluation**

In addition to the criteria listed in ITT 34.2 (a) – (e) the following criteria shall apply:

**1.1 Assessment of adequacy of Technical Proposal with Requirements**

**1.2 Multiple Contracts**, if permitted under ITT 34.4, will be evaluated as follows:

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

**1.3 Alternative Completion Times**, if permitted under ITT 13.2, will be evaluated as follows:

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

**1.4 Technical alternatives**, if permitted under ITT 13.4, will be evaluated as follows:

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

**2. Qualification**

**2.1 Update of Information**

The Tenderer shall continue to meet the criteria used at the time of prequalification.

**2.2 Financial Resources**

Using the relevant Forms No ... and No... in Section IV, Tendering Forms, the Tenderer must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet:

(i) the following cash-flow requirement:

.....

and

(ii) the overall cash flow requirements for this contract and its current Works commitment.



### 2.3 Personnel

The Tenderer must demonstrate that it has the personnel for the key positions that meet the following requirements:

No.	Position	Total Work Experience (years)	In Similar Works Experience (years)

The Tenderer shall provide details of the proposed personnel and their experience records in the relevant Information Forms included in Section IV, Tendering Forms.

### 2.4 Equipment

The Tenderer must demonstrate that it has the key equipment listed hereafter:

No.	Equipment Type and Characteristics	Minimum Number required

The Tenderer shall provide further details of proposed items of equipment using the relevant Form in Section IV, Tendering Forms.



## **Section III. *Evaluation and Qualification Criteria (Without Prequalification)***

This Section contains all the criteria that the Procuring Entities shall use to evaluate Tenders and qualify Tenderers. In accordance with ITT 34 and ITT 36, no other factors, methods or criteria shall be used. The Tenderer shall provide all the information requested in the forms included in Section IV, Tendering Forms.





**1. Evaluation**

In addition to the criteria listed in ITT 34.2 (a) – (e) the following criteria shall apply:

**1.1 Assessment of adequacy of Technical Proposal with Requirements**

**1.2 Multiple Contracts**, if permitted under ITT 34.4, will be evaluated as follows:

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

**1.3 Alternative Completion Times**, if permitted under ITT 13.2, will be evaluated as follows:

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

**1.4 Technical alternatives** , if permitted under ITT 13.4, will be evaluated as follows:

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



## 2. Qualification

<i>Factor</i>	<b>2.1 ELIGIBILITY</b>					
<b>Sub-Factor</b>	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Single Entity</b>	<b>Tenderer</b>			
			<b>Joint Venture or Association</b>			
			<b>All partners combined</b>	<b>Each partner</b>	<b>At least one partner</b>	
<b>2.1.1 Nationality</b>	Nationality in accordance with ITT 4.2.	Must meet requirement	Existing or intended JVA must meet requirement	Must meet requirement	N / A	Form ELI-1 and 2, with attachments
<b>2.1.2 Conflict of Interest</b>	No- conflicts of interests as described in ITT 4.3.	Must meet requirement	Existing or intended JVA must meet requirement	Must meet requirement	N / A	Tender Submission Sheet
<b>2.1.3 Ineligibility</b>	Not having been declared ineligible by ESPPRA as described in ITT 4.4.	Must meet requirement	Existing JVA must meet requirement	Must meet requirement	N / A	Tender Submission Sheet
<b>2.1.4 Government Owned Entity</b>	Compliance with conditions of ITT 4.5	Must meet requirement	Must meet requirement	Must meet requirement	N / A	Form ELI-1 and 2, with attachments



<i>Factor</i>	<b>2.1 ELIGIBILITY</b>					
<b>Sub-Factor</b>	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Tenderer</b>				
		<b>Single Entity</b>	<b>Joint Venture or Association</b>			
<b>All partners combined</b>			<b>Each partner</b>	<b>At least one partner</b>		
<b>2.1.5 Ineligibility based on a United Nations resolution or Eswatinin law</b>	Not having been excluded as a result of Eswatini laws or official regulations, or by an act of compliance with UN Security Council resolution, in accordance with ITT 4.7	Must meet requirement	Existing JVA must meet requirement	Must meet requirement	N / A	Tender Submission Sheet



Factor	<b>2.2 HISTORICAL CONTRACT NON-PERFORMANCE</b>					
Sub-Factor	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Tenderer</b>				
		<b>Single Entity</b>	<b>Joint Venture or Association</b>			
<b>All partners combined</b>			<b>Each partner</b>	<b>At least one partner</b>		
<b>2.2.1 History of non-performing contracts</b>	Non-performance of a contract did not occur within the last <u>  </u> five <u>  </u> (5) years prior to the deadline for application submission, based on all information on fully settled disputes or litigation. A fully settled dispute or litigation is one that has been resolved in accordance with the Dispute Resolution Mechanism under the respective contract, and where all appeal instances available to the Tenderer have been exhausted.	Must meet requirement by itself or as partner to past or existing JVA	N / A	Must meet requirement by itself or as partner to past or existing JVA	N / A	Form CON - 2



Factor	<b>2.2 HISTORICAL CONTRACT NON-PERFORMANCE</b>					
Sub-Factor	Criteria					Documentation Required
	Requirement	Tenderer				
		Single Entity	Joint Venture or Association			
All partners combined			Each partner	At least one partner		
<b>2.2.2 Pending Litigation</b>	All pending litigation shall in total not represent more than Twenty-Five percent (25%) of the Tenderer’s net worth and shall be treated as resolved against the Tenderer.	Must meet requirement by itself or as partner to past or existing JVA	N / A	Must meet requirement by itself or as partner to past or existing JVA	N / A	Form CON – 2



Factor	<b>2.3 FINANCIAL SITUATION</b>					
Sub-Factor	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Tenderer</b>				
		<b>Single Entity</b>	<b>Joint Venture or Association</b>			
<b>All partners combined</b>			<b>Each partner</b>	<b>At least one partner</b>		
<b>2.3.1 Historical Financial Performance</b>	Submission of audited balance sheets or if not required by the law of the Tenderer's country, other financial statements acceptable to the Procuring Entities, for the last three [ 3 ] years to demonstrate the current soundness of the Tenderers financial position and its prospective long term profitability.  (a)(criterion 1) (b)(criterion 2)  (c) _____	Must meet requirement	N / A	Must meet requirement	N / A	Form FIN –1 with attachments
<b>2.3.2. Average Annual Turnover</b>	Minimum average annual turnover of E50 Million, calculated as total certified payments received for	Must meet requirement	Must meet requirement	Must meet _____ percent (____%) of	Must meet _____ percent (____%) of	Form FIN –2



Factor	<b>2.3 FINANCIAL SITUATION</b>					
Sub-Factor	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Tenderer</b>				
		<b>Single Entity</b>	<b>Joint Venture or Association</b>			
<b>All partners combined</b>			<b>Each partner</b>	<b>At least one partner</b>		
	contracts in progress or completed, within the last Three (3) years			the requirement	the requirement	
<b>2.3.3.Financial Resources</b>	The Tenderer must demonstrate access to, or availability of, financial resources such as liquid assets, unencumbered real assets, lines of credit, and other financial means, other than any contractual advance payments to meet: (i) the following cash-flow requirement: Proof of available funding or credit facility amounting to E5million..... ..... ..... and	Must meet requirement	Must meet requirement	Must meet _____ percent (____%) of the requirement	Must meet _____ percent (____%) of the requirement	Form FIN –3  Form FIN-4



<b>Factor</b>	<b>2.3 FINANCIAL SITUATION</b>					
<b>Sub-Factor</b>	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Tenderer</b>				
		<b>Single Entity</b>	<b>Joint Venture or Association</b>			
<b>All partners combined</b>			<b>Each partner</b>	<b>At least one partner</b>		
	(ii) the overall cash flow requirements for this contract and its current commitments.					





Factor	<b>2.4 EXPERIENCE</b>					
Sub-Factor	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Tenderer</b>				
		<b>Single Entity</b>	<b>Joint Venture or Association</b>			
<b>All partners combined</b>			<b>Each partner</b>	<b>At least one partner</b>		
<b>2.4.1 General Experience</b>	Experience under contracts in the role of contractor, subcontractor, or management contractor for at least the last Five [5] years prior to the applications submission deadline, and with activity in at least nine (9) months in each year.	Must meet requirement	N / A	Must meet requirement	N / A	Form EXP-1
2.4.2 Specific Experience	(a) Participation as contractor, management contractor, or subcontractor, in at least Five (5) contracts within the last Five (5) years, each with a value of at least E1 Million, that have been successfully and substantially completed and that are similar to the proposed Works. The similarity shall be based on the physical size, complexity, methods/technology or other	Must meet requirement	Must meet requirements for all characteristics	N / A	Must meet requirement for one characteristic	Form EXP 2(a)



Factor	<b>2.4 EXPERIENCE</b>					
Sub-Factor	<b>Criteria</b>					<b>Documentation Required</b>
	<b>Requirement</b>	<b>Tenderer</b>				
		<b>Single Entity</b>	<b>Joint Venture or Association</b>			
<b>All partners combined</b>			<b>Each partner</b>	<b>At least one partner</b>		
	characteristics as described in Section VI, Procuring Entities's Requirements.					
<b>2.4.2 Specific Experience</b>	b) For the above or other contracts executed during the period stipulated in 2.4.2(a) above, a minimum experience in the following key activities: <ol style="list-style-type: none"> <li>1. Construction and rehabilitation of clarifiers.</li> </ol>	Must meet requirements	Must meet requirements	N / A	Must meet requirements	Form EXP-2(b)



## 2.5 Personnel

The Tenderer must demonstrate that it has the personnel for the key positions that meet the following requirements:

No.	Position	Total Work Experience (years)	In Similar Works Experience (years)
1	<b>Contractor's Representative:</b> Minimum of a Bachelor's degree in Civil Engineering and registration as a Professional Civil Engineer	15	10
2	<b>Boilermaker:</b> Certificate in Boilermaking and Trade Test (Grade 2)	5	5
3	<b>Mechanical Fitter:</b> Certificate in fitting and Trade Test (Grade 2)	5	5
5	<b>Electrician:</b> Certificate in <b>Electrical</b> and Trade Tes (Grade 2) or in Diploma in Electrical Engineering	5	5

The Tenderer shall provide details of the proposed personnel and their experience records using Forms PER-1 and PER-2 included in Section IV, Tendering Forms.



## 2.6 Equipment

The Tenderer must demonstrate that it has the key equipment listed hereafter:

No.	Equipment Type and Characteristics	Minimum Number required
1	Bulldozer (35 ton, 220kW minimum)	1
1	Medium Excavator, Cat 320D or similar	1
2	Tractor Loader Backhoe (TLB), JCB, CX3 or similar	<u>2</u>
3	20 ton crane	<u>1</u>
4	Survey Equipment Set, Total Station, GPS, Level	<u>2</u>
5	Poker Vibrators 50mm diameter	<u>5</u>
6	Tipper Truck, 10 Tons	<u>2</u>
7	Concrete Mixer, 10 m <sup>3</sup> /hr	<u>3</u>
8	Water Bowser, 8,000 litres	<u>1</u>
9	Pickup vehicles, 1Ton, 4WD	<u>2</u>
11	Dewatering pump 20l/s	<u>4</u>

The Tenderer shall provide further details of proposed items of equipment using Form EQU in Section IV, Tendering Forms.



## Section IV. Tendering Forms

### Table of Forms

<b>Tender Submission Sheet .....</b>	<b>55</b>
<b>Appendix to Tender .....</b>	<b>57</b>
Table A. Local Currency.....	57
Table B. Foreign Currency (FC).....	58
Table C. Summary of Payment Currencies.....	59
<b>Bill of Quantities .....</b>	<b>61</b>
Bill No. 1: General Items .....	<b>Error! Bookmark not defined.</b>
Bill No. 2: Earthworks .....	<b>Error! Bookmark not defined.</b>
Bill No. 3: Culverts and Bridges.....	<b>Error! Bookmark not defined.</b>
Schedule of Daywork Rates: 1. Labour .....	<b>Error! Bookmark not defined.</b>
Schedule of Daywork Rates: 2. Materials.....	<b>Error! Bookmark not defined.</b>
Schedule of Daywork Rates: 3. Contractor's Equipment.....	<b>Error! Bookmark not defined.</b>
Daywork Summary .....	<b>Error! Bookmark not defined.</b>
Summary of Specified Provisional Sums .....	<b>Error! Bookmark not defined.</b>
Grand Summary .....	<b>Error! Bookmark not defined.</b>
<b>Technical Proposal.....</b>	<b>Error! Bookmark not defined.</b>
Site Organization .....	64
Method Statement .....	65
Mobilization Schedule .....	66
Construction Schedule Form EQU: Equipment.....	67
Form EQU: Equipment.....	68
<b>Personnel.....</b>	<b>69</b>
Form PER-1: Proposed Personnel .....	69
Form PER-2: Resume of Proposed Personnel .....	70
<b>Tenderers Qualification following Prequalification .....</b>	<b>72</b>
Form ELI - 1: Tenderer Information Sheet.....	73
Form ELI - 2: JV Information Sheet.....	74
Form CON – 2: Historical Contract Non-Performance.....	75
Form FIN-1: Financial Situation.....	76
Form FIN-2: Average Annual Construction Turnover .....	77
Form FIN-3: Financial Resources.....	78
Form FIN-4: Current Contract Commitments / Works in Progress.....	79



<b>Tenderers Qualification without prequalification .....</b>	<b>80</b>
Form ELI – 1: Tenderer’s Information Sheet .....	81
Form ELI – 2: JV Information Sheet .....	82
Form CON – 2: Historical Contract Non-Performance.....	83
Form FIN – 1: Financial Situation.....	84
Form FIN – 2: Average Annual Construction Turnover .....	85
Form FIN – 3: Financial Resources .....	86
Form FIN – 4: Current Contract Commitments / Works in Progress .....	87
Form EXP – 1: General Construction Experience.....	88
Form EXP – 2(a): Specific Construction Experience .....	89
Form EXP – 2(b): Specific Construction Experience in Key Activities .....	90
<b>Form of Tender Security .....</b>	<b>91</b>
<b>Form of Tender-Securing Declaration.....</b>	<b>93</b>



## Tender Submission Sheet

*The Tenderer must prepare the Tender Submission Sheet on stationery with its letterhead clearly showing the Tenderer's complete name and address.*

***Note: All italicized text is for use in preparing this form and shall be deleted from the final products.***

Date: \_\_\_\_\_

ONT No.: \_\_\_\_\_

Invitation for Tender No.: \_\_\_\_\_

To: \_\_\_\_\_

We, the undersigned, declare that:

- (a) We have examined and have no reservations to the Tendering Document, including Addenda issued in accordance with Instructions to Tenderers (ITT)8 \_\_\_\_\_;
- (b) We offer to execute in conformity with the Tendering Document the following Works: \_\_\_\_\_;
- (c) The total price of our Tender, excluding any discounts offered in item (d) below is: \_\_\_\_\_;
- (d) The discounts offered and the methodology for their application are: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_;
- (e) Our Tender shall be valid for a period of \_\_\_\_\_ days from the date fixed for the Tender submission deadline in accordance with the Tendering Document, and it shall remain binding upon us and may be accepted at any time before the expiration of that period;
- (f) If our Tender is accepted, we commit to obtain a performance security in accordance with the Tendering Document;
- (g) We, including any subcontractors or suppliers for any part of the contract, have or will have nationalities from eligible countries, in accordance with ITT 4.2;
- (h) We, including any subcontractors or suppliers for any part of the contract, do not have any conflict of interest in accordance with ITT 4.3;
- (i) We are not participating, as a Tenderer or as a subcontractor, in more than one Tender in this Tendering process in accordance with ITT 4.3, other than alternative offers submitted in accordance with ITT 13;



- (j) We, including any of our subcontractors or suppliers for any part of the contract, have not been declared ineligible by ESPPRA, or by an act of compliance with a decision of the United Nations Security Council;
- (k) We are not a government owned entity/ We are a government owned entity but meet the requirements of ITT-4.5;<sup>6</sup>
- (l) We have paid, or will pay the following commissions, gratuities, or fees with respect to the Tendering process or execution of the Contract:

Name of Recipient	Address	Reason	Amount
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

(If none has been paid or is to be paid, indicate “none.”)

- (m) We understand that this Tender, together with your written acceptance thereof included in your notification of award, shall constitute a binding contract between us, until a formal contract is prepared and executed; and
- (n) We understand that you are not bound to accept the best-evaluated Tender or any other Tender that you may receive.
- (o) We hereby certify that we have taken steps to ensure that no person acting for us or on our behalf will engage in bribery.

Name \_\_\_\_\_ In the capacity of \_\_\_\_\_

Signed \_\_\_\_\_

Duly authorized to sign the Tender for and on behalf of \_\_\_\_\_

Dated on \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

<sup>6</sup> Tenderer to use as appropriate





## Appendix to Tender

### Schedule of Adjustment Data

[In Tables A, B, and C, below, the Tenderer shall (a) indicate its amount of local currency payment, (b) indicate its proposed source and base values of indices for the different foreign currency elements of cost, (c) derive its proposed weightings for local and foreign currency payment, and (d) list the exchange rates used in the currency conversion. In the case of very large and/or complex works contracts, it may be necessary to specify several families of price adjustment formulae corresponding to the different works involved.]

**Table A. Local Currency**

Index code*	Index description*	Source of index*	Base value and date*	Tenderer's related currency amount	Tenderer's proposed weighting
	Nonadjustable	—	—	—	A: _____* B: _____ C: _____ D: _____ E: _____
<b>Total</b>					<b>1.00</b>

[\* To be entered by the Procuring Entities]



**Table B. Foreign Currency (FC)**

**State type:** ..... [If the Tenderer is allowed to quote in local and foreign currencies and the Tenderer wishes to quote in more than one foreign currency, this table should be repeated for each foreign currency.]

Index code	Index description	Source of index	Base value and date	Tenderer's related source currency in type/amount	Equivalent in FC1	Tenderer's proposed weighting
	Nonadjustable	—	—	—		A: _____ * _____ B: _____ C: _____ D: _____ E: _____
<b>Total</b>						<b>1.00</b>

[\* To be entered by the Procuring Entities]



### Table C. Summary of Payment Currencies

Table: Alternative A

For .....[insert name of Section of the Works]

Name of payment currency	A Amount of currency	B Rate of exchange (local currency per unit of foreign)	C Local currency equivalent $C = A \times B$	D Percentage of Net Tender Price (NBP) $\frac{100 \times C}{NBP}$
Local currency _____		1.00		
Foreign currency #1 _____				
Foreign currency #2 _____				
Foreign currency # _____				
Net Tender Price				100.00
Provisional sums expressed in local currency	[To be entered by the Procuring Entities]		[To be entered by the Procuring Entities]	
<b>TENDER PRICE</b>				



**Table: Alternative B**

*To be used only with Alternative B Prices directly quoted in the currencies of payment.  
(Clause ITT 15.1)*

Summary of currencies of the Tender for \_\_\_\_\_ *[insert name of Section of the Works]*

<i>Name of currency</i>	<i>Amounts payable</i>
Local currency: _____	
Foreign currency #1: _____	
Foreign currency #2: _____	
Foreign currency #3: _____	



## Bill of Quantities

The Bill of Quantities will be issued to the Bidders during the compulsory site inspection meeting.





## Technical Proposal

- **Site Organization**
- **Method Statement**
- **Mobilization Schedule**
- **Construction Schedule**
- **Equipment**
- **Personnel**
- **Others**



## Site Organization





## Method Statement



## Mobilization Schedule



## Construction Schedule



## Form EQU: Equipment

The Tenderer shall provide adequate information to demonstrate clearly that it has the capability to meet the requirements for the key equipment listed in Section III, Evaluation and Qualification Criteria. A separate Form shall be prepared for each item of equipment listed, or for alternative equipment proposed by the Tenderer.

Item of equipment		
Equipment information	Name of manufacturer	Model and power rating
	Capacity	Year of manufacture
Current status	Current location	
	Details of current commitments	
Source	Indicate source of the equipment <input type="checkbox"/> Owned <input type="checkbox"/> Rented <input type="checkbox"/> Leased <input type="checkbox"/> Specially manufactured	

Omit the following information for equipment owned by the Tenderer.

Owner	Name of owner	
	Address of owner	
	Telephone	Contact name and title
	Fax	Telex
Agreements	Details of rental / lease / manufacture agreements specific to the project	



## Personnel

### Form PER-1: Proposed Personnel

Tenderers should provide the names of suitably qualified personnel to meet the specified requirements stated in Section III. The data on their experience should be supplied using the Form below for each candidate.

<b>1.</b>	<b>Title of position*</b>
	<b>Name</b>
<b>2.</b>	<b>Title of position*</b>
	<b>Name</b>
<b>3.</b>	<b>Title of position*</b>
	<b>Name</b>
<b>4.</b>	<b>Title of position*</b>
	<b>Name</b>

\*As listed in Section III.



## Form PER-2: Resume of Proposed Personnel

<b>Name of Tenderer</b>
-------------------------

<b>Position</b>		
-----------------	--	--

<b>Personnel information</b>	<b>Name</b>	<b>Date of birth</b>
	<b>Professional qualifications</b>	

<b>Present employment</b>	<b>Name of Procuring Entities</b>	
	<b>Address of Procuring Entities</b>	
	<b>Telephone</b>	<b>Contact (manager / personnel officer)</b>
	<b>Fax</b>	<b>E-mail</b>
	<b>Job title</b>	<b>Years with present Procuring Entities</b>

Summarize professional experience over the last 20 years, in reverse chronological order. Indicate particular technical and managerial experience relevant to the project.

From	To	Company / Project / Position / Relevant technical and management experience



<b>From</b>	<b>To</b>	<b>Company / Project / Position / Relevant technical and management experience</b>



## **Tenderers Qualification following Prequalification**

The Tenderer shall update the information given during the corresponding prequalification exercise to demonstrate that he continues to meet the criteria used at the time of prequalification regarding

- (a) Eligibility**
- (b) Pending Litigation**
- (c) Financial Situation**

For this purpose, the Tenderer shall use the relevant forms included in this Section.





## Form ELI - 1: Tenderer Information Sheet

Tenderer Information	
<b>Tenderer's legal name</b>	
<b>In case of JV, legal name of each partner</b>	
<b>Tenderer's country of constitution</b>	
<b>Tenderer's year of constitution</b>	
<b>Tenderer's legal address in country of constitution</b>	
<b>Tenderer's authorized representative</b> (name, address, telephone numbers, fax numbers, e-mail address)	
<p><b>Attached are copies of the following original documents.</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> 1. In case of single entity, articles of incorporation or constitution of the legal entity named above, in accordance with ITT 4.1 and 4.2.</li> <li><input type="checkbox"/> 2. Authorization to represent the firm or JV named in above, in accordance with ITT 20.2.</li> <li><input type="checkbox"/> 3. In case of JV, letter of intent to form JV or JV agreement, in accordance with ITT 4.1.</li> <li><input type="checkbox"/> 4. In case of a government-owned entity, any additional documents not covered under 1 above required to comply with ITT 4.5.</li> </ul>	



## Form ELI - 2: JV Information Sheet

*Each member of a JV must fill in this form*

JV / Specialist Subcontractor Information	
<b>Tenderer's legal name</b>	
<b>JV Partner's or Subcontractor's legal name</b>	
<b>JV Partner's or Subcontractor's country of constitution</b>	
<b>JV Partner's or Subcontractor's year of constitution</b>	
<b>JV Partner's or Subcontractor's legal address in country of constitution</b>	
<b>JV Partner's or Subcontractor's authorized representative information</b> (name, address, telephone numbers, fax numbers, e-mail address)	
<p><b>Attached are copies of the following original documents.</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> 1. Articles of incorporation or constitution of the legal entity named above, in accordance with ITT 4.1 and 4.2.</li> <li><input type="checkbox"/> 2. Authorization to represent the firm named above, in accordance with ITT 20.2.</li> <li><input type="checkbox"/> 3. In the case of government-owned entity, documents establishing legal and financial autonomy and compliance with commercial law, in accordance with ITT Sub-Clause 4.5.</li> </ul>	



## Form CON – 2: Historical Contract Non-Performance

*[The following table shall be filled in for the Tenderer and for each partner of a Joint Venture]*

Tenderer’s Legal Name: \_\_\_\_\_  
 Date: \_\_\_\_\_  
 Joint Venture Party Legal Name: \_\_\_\_\_  
 ONT No. and title: \_\_\_\_\_  
 Page \_\_\_\_\_ of \_\_\_\_\_ pages

Non-Performing Contracts in accordance with Section III, Qualification Criteria and Requirements			
<input type="checkbox"/> Contract non-performance did not occur during the ____ years specified in Section III, Qualification Criteria and Requirements, Sub-Factor 2.1.			
<input type="checkbox"/> Contract(s) not performed during the ____ years specified in Section III, Qualification Criteria and Requirements, requirement 2.1			
Year	Non performed portion of contract	Contract Identification	Total Contract Amount (current value, E equivalent)
		Contract Identification: Name of Procuring Entities: Address of Procuring Entities: Reason(s) for non performance:	
Pending Litigation, in accordance with Section III, Qualification Criteria and Requirements			
<input type="checkbox"/> No pending litigation in accordance with Section III, Qualification Criteria and Requirements, Sub-Factor 2.2.			
<input type="checkbox"/> Pending litigation in accordance with Section III, Qualification Criteria and Requirements, Sub-Factor 2.2 as indicated below.			
Year	Outcome as Percentage of Total Assets	Contract Identification	Total Contract Amount (current value, E equivalent)
		Contract Identification: Name of Procuring Entities: Address of Procuring Entities: Matter in dispute:	



## Form FIN-1: Financial Situation

*Each Tenderer or member of a JV must fill in this form*

Financial Data for Previous 3 Years [E Equivalent]		
Year 1:	Year 2:	Year 3:

### Information from Balance Sheet

<b>Total Assets</b>			
<b>Total Liabilities</b>			
<b>Net Worth</b>			
<b>Current Assets</b>			
<b>Current Liabilities</b>			

### Information from Income Statement

<b>Total Revenues</b>			
<b>Profits Before Taxes</b>			
<b>Profits After Taxes</b>			

- Attached are copies of financial statements (balance sheets including all related notes, and income statements) for the last three years, as indicated above, complying with the following conditions.
- All such documents reflect the financial situation of the Tenderer or partner to a JV, and not sister or parent companies.
  - Historic financial statements must be audited by a certified accountant.
  - Historic financial statements must be complete, including all notes to the financial statements.
  - Historic financial statements must correspond to accounting periods already completed and audited (no statements for partial periods shall be requested or accepted).



## Form FIN-2: Average Annual Construction Turnover

*Each Tenderer or member of a JV must fill in this form*

Annual Turnover Data for the Last 3 Years (Construction only)			
Year	Amount Currency	Exchange Rate	E Equivalent
<b>Average Annual Construction Turnover</b>			

The information supplied should be the Annual Turnover of the Tenderer or each member of a JV in terms of the amounts billed to clients for each year for work in progress or completed, converted to Es at the rate of exchange at the end of the period reported.



### Form FIN-3: Financial Resources

Specify proposed sources of financing, such as liquid assets, unencumbered real assets, lines of credit, and other financial means, net of current commitments, available to meet the total construction cash flow demands of the subject contract or contracts as indicated in Section III (Evaluation and Qualification Criteria)

No.	Source of financing	Amount (E equivalent)
1		
2		
3		



### Form FIN-4: Current Contract Commitments / Works in Progress

Tenderers and each partner to a JVA should provide information on their current commitments on all contracts that have been awarded, or for which a letter of intent or acceptance has been received, or for contracts approaching completion, but for which an unqualified, full completion certificate has yet to be issued.

Name of contract	Procuring Entities, contact address/tel/fax	Value of outstanding work (current E equivalent)	Estimated completion date	Average monthly invoicing over last six months (E/month)
1.				
2.				
3.				
4.				
5.				
etc.				



## **Tenderers Qualification without prequalification**

To establish its qualifications to perform the contract in accordance with Section III (Evaluation and Qualification Criteria) the Tenderer shall provide the information requested in the corresponding Information Sheets included hereunder.





## Form ELI – 1: Tenderer’s Information Sheet

Tenderer’s Information	
<b>Tenderer’s legal name</b>	
<b>In case of JV, legal name of each partner</b>	
<b>Tenderer’s country of constitution</b>	
<b>Tenderer’s year of constitution</b>	
<b>Tenderer’s legal address in country of constitution</b>	
<b>Tenderer’s authorized representative</b> (name, address, telephone numbers, fax numbers, e-mail address)	
<p><b>Attached are copies of the following original documents.</b></p> <p><input type="checkbox"/> 1. In case of single entity, articles of incorporation or constitution of the legal entity named above, in accordance with ITT 4.1 and 4.2.</p> <p><input type="checkbox"/> 2. Authorization to represent the firm or JV named in above, in accordance with ITT 20.2.</p> <p><input type="checkbox"/> 3. In case of JV, letter of intent to form JV or JV agreement, in accordance with ITT 4.1.</p> <p><input type="checkbox"/> 4. In case of a government-owned entity, any additional documents not covered under 1 above required to comply with ITT 4.5.</p>	



## Form ELI – 2: JV Information Sheet

*Each member of a JV must fill in this form*

JV / Specialist Subcontractor Information	
<b>Tenderer's legal name</b>	
<b>JV Partner's or Subcontractor's legal name</b>	
<b>JV Partner's or Subcontractor's country of constitution</b>	
<b>JV Partner's or Subcontractor's year of constitution</b>	
<b>JV Partner's or Subcontractor's legal address in country of constitution</b>	
<b>JV Partner's or Subcontractor's authorized representative information</b> (name, address, telephone numbers, fax numbers, e-mail address)	
<p><b>Attached are copies of the following original documents.</b></p> <p><input type="checkbox"/> 1. Articles of incorporation or constitution of the legal entity named above, in accordance with ITT 4.1 and 4.2.</p> <p><input type="checkbox"/> 2. Authorization to represent the firm named above, in accordance with ITT 20.2.</p> <p><input type="checkbox"/> 3. In the case of government-owned entity, documents establishing legal and financial autonomy and compliance with commercial law, in accordance with ITT 4.5.</p>	



## Form CON – 2: Historical Contract Non-Performance

*[The following table shall be filled in for the Tenderer and for each partner of a Joint Venture]*

Tenderer’s Legal Name: \_\_\_\_\_  
 Date: \_\_\_\_\_  
 Joint Venture Party Legal Name: \_\_\_\_\_  
 ONT No. and title: \_\_\_\_\_  
 Page \_\_\_\_\_ of \_\_\_\_\_ pages

Non-Performing Contracts in accordance with Section III, Qualification Criteria and Requirements			
<input type="checkbox"/> Contract non-performance did not occur during the ____ years specified in Section III, Qualification Criteria and Requirements, Sub-Factor 2.1.			
<input type="checkbox"/> Contract(s) not performed during the ____ years specified in Section III, Qualification Criteria and Requirements, requirement 2.1			
Year	Non performed portion of contract	Contract Identification	Total Contract Amount (current value, E equivalent)
		Contract Identification: Name of Procuring Entities: Address of Procuring Entities: Reason(s) for non performance:	
Pending Litigation, in accordance with Section III, Qualification Criteria and Requirements			
<input type="checkbox"/> No pending litigation in accordance with Section III, Qualification Criteria and Requirements, Sub-Factor 2.2.			
<input type="checkbox"/> Pending litigation in accordance with Section III, Qualification Criteria and Requirements, Sub-Factor 2.2 as indicated below.			
Year	Outcome as Percentage of Total Assets	Contract Identification	Total Contract Amount (current value, E equivalent)
		Contract Identification: Name of Procuring Entities:] Address of Procuring Entities: Matter in dispute:	



## Form FIN – 1: Financial Situation

*Each Tenderer or member of a JV must fill in this form*

Financial Data for Previous 3 Years [E Equivalent]		
Year 1:	Year 2:	Year 3:

### Information from Balance Sheet

<b>Total Assets</b>			
<b>Total Liabilities</b>			
<b>Net Worth</b>			
<b>Current Assets</b>			
<b>Current Liabilities</b>			

### Information from Income Statement

<b>Total Revenues</b>			
<b>Profits Before Taxes</b>			
<b>Profits After Taxes</b>			

- Attached are copies of financial statements (balance sheets including all related notes, and income statements) for the last three years, as indicated above, complying with the following conditions.
- All such documents reflect the financial situation of the Tenderer or partner to a JV, and not sister or parent companies.
  - Historic financial statements must be audited by a certified accountant.
  - Historic financial statements must be complete, including all notes to the financial statements.
  - Historic financial statements must correspond to accounting periods already completed and audited (no statements for partial periods shall be requested or accepted).



## Form FIN – 2: Average Annual Construction Turnover

*Each Tenderer or member of a JV must fill in this form*

Annual Turnover Data for the Last 3 Years (Construction only)			
Year	Amount Currency	Exchange Rate	E Equivalent
<b>Average Annual Construction Turnover</b>			

The information supplied should be the Annual Turnover of the Tenderer or each member of a JV in terms of the amounts billed to clients for each year for work in progress or completed, converted to Es at the rate of exchange at the end of the period reported.



### Form FIN – 3: Financial Resources

Specify proposed sources of financing, such as liquid assets, unencumbered real assets, lines of credit, and other financial means, net of current commitments, available to meet the total construction cash flow demands of the subject contract or contracts as indicated in Section III (Evaluation and Qualification Criteria)

Financial Resources		
No.	Source of financing	Amount (E equivalent)
1		
2		
3		



### Form FIN – 4: Current Contract Commitments / Works in Progress

Tenderers and each partner to a JV should provide information on their current commitments on all contracts that have been awarded, or for which a letter of intent or acceptance has been received, or for contracts approaching completion, but for which an unqualified, full completion certificate has yet to be issued.

Current Contract Commitments					
No.	Name of Contract	Procuring Entities's Contact Address, Tel, Fax	Value of Outstanding Work [Current E Equivalent]	Estimated Completion Date	Average Monthly Invoicing Over Last Six Months [E/month]
1					
2					
3					
4					
5					



## Form EXP – 1: General Construction Experience

*Each Tenderer or member of a JV must fill in this form*

General Construction Experience				
Starting Month Year	Ending Month Year	Years	Contract Identification and Name Name and Address of Procuring Entities Brief Description of the Works Executed by the Tenderer	Role of Tenderer





## Form EXP – 2(a): Specific Construction Experience

Fill up one (1) form per contract.

Contract of Similar Size and Nature			
Contract No ..... of ..... ..	Contract Identification		
Award Date	Completion Date		
Role in Contract	Contractor	Management Contractor	Subcontractor
Total Contract Amount	E		
If partner in a JV or subcontractor, specify participation of total contract amount	Percent of Total	Amount	
Procuring Entities's Name Address Telephone/Fax Number E-mail			
Description of the similarity in accordance with Criteria 2.4.2(a) of Section III			



### Form EXP – 2(b): Specific Construction Experience in Key Activities

Fill up one (1) form per contract

Contract with Similar Key Activities		
Contract No ..... of ..... ..	Contract Identification	
Award Date	Completion Date	
Role in Contract	<input type="checkbox"/> Contractor	<input type="checkbox"/> Management Contractor <input type="checkbox"/> Subcontractor
Total Contract Amount	E	
If partner in a JV or subcontractor, specify participation of total contract amount	Percent of Total	Amount
Procuring Entities's Name Address Telephone Number Fax Number E-mail		
Description of the key activities in accordance with Criteria 2.4.2(b) of Section III		



## Form of Tender Security

(Bank Guarantee)

\_\_\_\_\_

**Beneficiary:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**TENDER GUARANTEE No.:** \_\_\_\_\_

We have been informed that \_\_\_\_\_ (hereinafter called "the Tenderer") has submitted to you its Tender dated \_\_\_\_\_ (hereinafter called "the Tender") for the execution of \_\_\_\_\_ under Invitation for Tenders No. \_\_\_\_\_ ("the IFB").

Furthermore, we understand that, according to your conditions, Tenders must be supported by a Tender guarantee.

At the request of the Tenderer, we \_\_\_\_\_ hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of \_\_\_\_\_ (\_\_\_\_\_) upon receipt by us of your first demand in writing accompanied by a written statement stating that the Tenderer is in breach of its obligation(s) under the Tender conditions, because the Tenderer:

- (a) has withdrawn its Tender during the period of Tender validity specified by the Tenderer in the Form of Tender; or
- (b) having been notified of the acceptance of its Tender by the Procuring Entities during the period of Tender validity, (i) fails or refuses to execute the Contract Agreement or (ii) fails or refuses to furnish the performance security, in accordance with the ITT.

This guarantee will expire: (a) if the Tenderer is the successful Tenderer, upon our receipt of copies of the contract signed by the Tenderer and the performance security issued to you upon the instruction of the Tenderer; and (b) if the Tenderer is not the successful Tenderer, upon the earlier of (i) our receipt of a copy your notification to the Tenderer of the name of the successful Tenderer; or (ii) twenty-eight days after the expiration of the Tenderer's Tender.



Consequently, any demand for payment under this guarantee must be received by us at the office on or before that date.

This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 458.

---

*[signature(s)]*

***Note: All italicized text is for use in preparing this form and shall be deleted from the final product.***



## Form of Tender-Securing Declaration

Date: \_\_\_\_\_  
 Tender No.: \_\_\_\_\_  
 Alternative No.: \_\_\_\_\_

To:

We, the undersigned, declare that:

We understand that, according to your conditions, Tenders must be supported by a Tender-Securing Declaration.

We accept that we will automatically be suspended from being eligible for Tendering in any contract with Government for the period of time of \_\_\_\_\_ starting on \_\_\_\_\_, if we are in breach of our obligation(s) under the Tender conditions, because we:

- (a) have withdrawn our Tender during the period of Tender validity specified in the Tender Submission Sheet; or
- (b) having been notified of the acceptance of our Tender by the Procuring Entities during the period of Tender validity, (i) fail or refuse to execute the Contract, if required, or (ii) fail or refuse to furnish the Performance Security, in accordance with the ITT.

We understand this Tender-Securing Declaration shall expire if we are not the successful Tenderer, upon the earlier of (i) our receipt of your notification to us of the name of the successful Tenderer; or (ii) twenty-eight days after the expiration of our Tender.

Signed: \_\_\_\_\_

In the capacity of \_\_\_\_\_

Name: \_\_\_\_\_

Duly authorized to sign the Tender for and on behalf of: [insert complete name of Tenderer]

Dated on \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

Corporate Seal (where appropriate)

*[Note: In case of a Joint Venture, the Tender-Securing Declaration must be in the name of all partners to the Joint Venture that submits the Tender.]*





# Section V. Eligible Countries

## Eligibility for the Provision of Goods, Works and Services

1. In accordance with Section 61 of the Public Procurement Act No. 07 of 2011 and Clause 155 of the Public Procurement Regulations of 2020, Government permits firms and individuals from all countries to offer goods, works and services for Government-financed projects. As an exception, firms of a Country or goods manufactured in a Country may be excluded if:

- (i): as a matter of law or official regulation, the Government prohibits commercial relations with that Country, provided that Cooperating Partners involved are satisfied that such exclusion does not preclude effective competition for the supply of the Goods or Works required, or
- (ii): by an Act of Compliance with a Decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Government prohibits any import of goods from that Country or any payments to persons or entities in that Country.

2. For the information of Tenderers, at the present time firms, goods and services from the following countries are excluded from this Tendering:

-

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# **PART 2 –WORKS REQUIREMENTS**





# Section VI. Works Requirements

## Contents

Scope of Works.....	100
Specification .....	101
Drawings.....	102
Supplementary Information .....	103



# Scope of Works

## INTRODUCTION

The Corporation intends to construct 2 reinforced concrete reservoirs to replace the galvanized chlorine contact tanks and booster tank.

## BACKGROUND OF THE PROJECT;

The Eswatini Water Services Corporation plans to change the existing galvanized oxidation tank and chlorine contact tanks to reinforced concrete structures. The existing galvanized tanks have excessively corroded and possible collapse of the contact tanks can cause serious damage to the treatment plant.

## 2.0 PROJECT SCOPE OF WORKS;

The project scope of works include the following;

### Chlorine contact and booster tanks

Construction of 2x 1ML reinforced concrete reservoirs and the decommissioning of existing tanks.



# Specification



# Drawings



# Supplementary Information







# **PART 3 – CONDITIONS OF CONTRACT AND CONTRACT FORMS**





## Section VII. General Conditions (GC)

<b>1.</b>	<b>General Provisions .....</b>	<b>113</b>
1.1	Definitions.....	113
1.2	Interpretation.....	119
1.3	Communications .....	120
1.4	Law and Language.....	120
1.5	Priority of Documents.....	120
1.6	Contract Agreement .....	121
1.7	Assignment .....	121
1.8	Care and Supply of Documents .....	121
1.9	Delayed Drawings or Instructions .....	122
1.10	Procuring Entities’s Use of Contractor’s Documents.....	123
1.11	Contractor’s Use of Procuring Entities’s Documents.....	123
1.12	Confidential Details .....	123
1.13	Compliance with Laws .....	124
1.14	Joint and Several Liability .....	124
1.15	Inspections and Audit by the Government.....	125
<b>2.</b>	<b>The Procuring Entities .....</b>	<b>125</b>
2.1	Right of Access to the Site.....	125
2.2	Permits, Licences or Approvals .....	126
2.3	Procuring Entities’s Personnel.....	126
2.4	Procuring Entities’s Financial Arrangements .....	127
2.5	Procuring Entities’s Claims .....	127
<b>3.</b>	<b>The Engineer .....</b>	<b>128</b>
3.1	Engineer’s Duties and Authority .....	128
3.2	Delegation by the Engineer.....	130
3.3	Instructions of the Engineer .....	130
3.4	Replacement of the Engineer .....	131
3.5	Determinations.....	131
<b>4.</b>	<b>The Contractor .....</b>	<b>131</b>
4.1	Contractor’s General Obligations .....	132
4.2	Performance Security.....	134
4.3	Contractor’s Representative.....	135
4.4	Subcontractors.....	135
4.5	Assignment of Benefit of Subcontract.....	136
4.6	Co-operation .....	136
4.7	Setting Out .....	137
4.8	Safety Procedures.....	138
4.9	Quality Assurance.....	138



4.10	Site Data.....	138
4.11	Sufficiency of the Accepted Contract Amount.....	139
4.12	Unforeseeable Physical Conditions .....	139
4.13	Rights of Way and Facilities.....	141
4.14	Avoidance of Interference.....	141
4.15	Access Route.....	141
4.16	Transport of Goods .....	142
4.18	Protection of the Environment.....	142
4.19	Electricity, Water and Gas .....	142
4.22	Security of the Site.....	146
4.23	Contractor's Operations on Site.....	146
4.24	Fossils .....	146
<b>5.</b>	<b>Nominated Subcontractors .....</b>	<b>147</b>
5.1	Definition of "nominated Subcontractor" .....	147
5.2	Objection to Nomination.....	147
5.3	Payments to nominated Subcontractors .....	148
5.4	Evidence of Payments.....	148
<b>6.</b>	<b>Staff and Labour .....</b>	<b>149</b>
6.1	Engagement of Staff and Labour .....	149
6.2	Rates of Wages and Conditions of Labour .....	149
6.3	Persons in the Service of Procuring Entities.....	150
6.4	Labour Laws .....	150
6.5	Working Hours.....	150
6.6	Facilities for Staff and Labour .....	150
6.7	Health and Safety.....	150
6.8	Contractor's Superintendence.....	152
6.9	Contractor's Personnel.....	152
6.10	Records of Contractor's Personnel and Equipment.....	152
6.11	Disorderly Conduct.....	152
6.12	Foreign Personnel .....	153
6.13	Supply of Foodstuffs.....	153
6.14	Supply of Water .....	153
6.15	Measures against Insect and Pest Nuisance .....	153
6.16	Alcoholic Liquor or Drugs.....	153
6.17	Arms and Ammunition .....	153
6.18	Festivals and Religious Customs .....	154
6.19	Funeral Arrangements.....	154
6.20	Prohibition of Forced or Compulsory Labour .....	154
6.21	Prohibition of Harmful Child Labour .....	154
6.22	Employment Records of Workers.....	154
6.23	Workers' Organisations .....	154
6.24	Non-Discrimination and Equal Opportunity.....	155
<b>7.</b>	<b>Plant, Materials and Workmanship.....</b>	<b>155</b>
7.1	Manner of Execution.....	155



Section	VII.	General	Conditions
			109
7.2	Samples .....		155
7.3	Inspection .....		155
7.4	Testing .....		156
7.5	Rejection .....		157
7.6	Remedial Work .....		157
7.7	Ownership of Plant and Materials .....		158
7.8	Royalties .....		158
<b>8.</b>	<b>Commencement, Delays and Suspension .....</b>		<b>158</b>
8.1	Commencement of Works .....		158
8.2	Time for Completion .....		159
8.3	Programme .....		159
8.4	Extension of Time for Completion .....		161
8.5	Delays Caused by Authorities .....		161
8.6	Rate of Progress .....		162
8.7	Delay Damages .....		162
8.8	Suspension of Work .....		163
8.9	Consequences of Suspension .....		163
8.10	Payment for Plant and Materials in Event of Suspension .....		163
8.11	Prolonged Suspension .....		164
8.12	Resumption of Work .....		164
<b>9.</b>	<b>Tests on Completion .....</b>		<b>164</b>
9.1	Contractor's Obligations .....		164
9.2	Delayed Tests .....		165
9.3	Retesting .....		165
9.4	Failure to Pass Tests on Completion .....		165
<b>10.</b>	<b>Procuring Entities's Taking Over .....</b>		<b>166</b>
10.1	Taking Over of the Works and Sections .....		166
10.2	Taking Over of Parts of the Works .....		167
10.3	Interference with Tests on Completion .....		168
<b>11.</b>	<b>Defects Liability .....</b>		<b>168</b>
11.1	Completion of Outstanding Work and Remedying Defects .....		169
11.2	Cost of Remedying Defects .....		169
11.3	Extension of Defects Notification Period .....		169
11.4	Failure to Remedy Defects .....		170
11.5	Removal of Defective Work .....		170
11.6	Further Tests .....		171
11.7	Right of Access .....		171
11.8	Contractor to Search .....		171
11.9	Performance Certificate .....		171
11.10	Unfulfilled Obligations .....		172
11.11	Clearance of Site .....		172
<b>12.</b>	<b>Measurement and Evaluation .....</b>		<b>172</b>



12.1	Works to be Measured .....	172
12.2	Method of Measurement .....	173
12.3	Evaluation .....	173
12.4	Omissions.....	174
<b>13.</b>	<b>Variations and Adjustments .....</b>	<b>175</b>
13.1	Right to Vary.....	175
13.2	Value Engineering .....	176
13.3	Variation Procedure .....	177
13.4	Payment in Applicable Currencies.....	177
13.5	Provisional Sums .....	177
13.6	Daywork.....	178
13.7	Adjustments for Changes in Legislation.....	179
13.8	Adjustments for Changes in Cost .....	179
<b>14.</b>	<b>Contract Price and Payment.....</b>	<b>181</b>
14.1	The Contract Price .....	181
14.2	Advance Payment .....	182
14.3	Application for Interim Payment Certificates.....	183
14.4	Schedule of Payments .....	184
14.5	Plant and Materials intended for the Works .....	185
14.6	Issue of Interim Payment Certificates.....	186
14.7	Payment.....	187
14.8	Delayed Payment .....	188
14.9	Payment of Retention Money .....	188
14.10	Statement at Completion.....	189
14.11	Application for Final Payment Certificate .....	190
14.12	Discharge	191
14.13	Issue of Final Payment Certificate .....	191
14.14	Cessation of Procuring Entities's Liability .....	191
14.15	Currencies of Payment.....	192
<b>15.</b>	<b>Termination by Procuring Entities .....</b>	<b>193</b>
15.1	Notice to Correct.....	193
15.2	Termination by Procuring Entities.....	193
15.3	Valuation at Date of Termination .....	194
15.4	Payment after Termination .....	195
15.5	Procuring Entities's Entitlement to Termination for Convenience.....	195
15.6	Corrupt or Fraudulent Practices .....	195
<b>16.</b>	<b>Suspension and Termination by Contractor .....</b>	<b>197</b>
16.1	Contractor's Entitlement to Suspend Work .....	197
16.2	Termination by Contractor.....	198
16.3	Cessation of Work and Removal of Contractor's Equipment .....	199
16.4	Payment on Termination.....	200
<b>17.</b>	<b>Risk and Responsibility .....</b>	<b>200</b>



Section	VII.	General	Conditions 111
17.1	Indemnities.....		200
17.2	Contractor’s Care of the Works .....		201
17.3	Procuring Entities’s Risks.....		202
17.4	Consequences of Procuring Entities’s Risks.....		202
17.5	Intellectual and Industrial Property Rights .....		203
17.6	Limitation of Liability.....		204
17.7	Use of Procuring Entities’s Accomodation/Facilities.....		204
<b>18.</b>	<b>Insurance .....</b>		<b>205</b>
18.1	General Requirements for Insurances .....		205
18.2	Insurance for Works and Contractor’s Equipment .....		207
18.3	Insurance against Injury to Persons and Damage to Property .....		208
18.4	Insurance for Contractor’s Personnel.....		209
<b>19.</b>	<b>Force Majeure .....</b>		<b>210</b>
19.1	Definition of Force Majeure .....		210
19.3	Duty to Minimise Delay.....		211
19.4	Consequences of Force Majeure .....		211
19.5	Force Majeure Affecting Subcontractor .....		212
19.6	Optional Termination, Payment and Release.....		212
19.7	Release from Performance .....		213
<b>20.</b>	<b>Claims, Disputes and Arbitration.....</b>		<b>213</b>
20.1	Contractor’s Claims .....		213
20.2	Appointment of the Dispute Board.....		215
20.3	Failure to Agree on the Composition of the Dispute Board .....		216
20.4	Obtaining Dispute Board’s Decision .....		217
20.5	Amicable Settlement.....		218
20.6	Arbitration.....		218
20.7	Failure to Comply with Dispute Board’s Decision.....		219
20.8	Expiry of Dispute Board’s Appointment .....		219



## Section VII. General Conditions (GC)

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*[Name of Procuring Entities]*

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*[Name of Contract]*

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## General Conditions

### 1. General Provisions

#### 1.1 Definitions

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

##### 1.1.1 The Contract

1.1.1.1 “Contract” means the Contract Agreement, the Letter of Acceptance, the Tender Submission Sheet, these Conditions, the Specification, the Drawings, the Schedules, and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance.

1.1.1.2 “Contract Agreement” means the contract agreement referred to in Sub-Clause 1.6 [Contract Agreement].

1.1.1.3 “Letter of Acceptance” means the letter of formal acceptance, signed by the Procuring Entities, of the Tender Submission Sheet, including any annexed memoranda comprising agreements between and signed by both Parties. If there is no such letter of acceptance, the expression “Letter of Acceptance” means the Contract Agreement and the date of issuing or receiving the Letter of Acceptance means the date of signing the Contract Agreement.

1.1.1.4 “Tender Submission Sheet” means the document entitled Tender Submission Sheet or letter of Sheet or Tender Submission Sheet, which was completed by the Contractor and includes the signed offer to the Procuring Entities for the Works.

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

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

## 1.1.2 Parties and Persons

- 1.1.1.7 “Schedules” means the document(s) entitled schedules, completed by the Contractor and submitted with the Tender Submission Sheet, as included in the Contract. Such document may include the Bill of Quantities, data, lists, and schedules of rates and/or prices.
- 1.1.1.8 “Tender” means the Tender Submission Sheet and all other documents which the Contractor submitted with the Tender Submission Sheet, as included in the Contract.
- 1.1.1.9 “Bill of Quantities”, “Daywork Schedule” and “Schedule of Payment Currencies” mean the documents so named (if any) which are comprised in the Schedules.
- 1.1.1.10 “Contract Data” means the pages completed by the Procuring Entities entitled contract data which constitute Part A of the Particular Conditions.
- 1.1.2.1 “Party” means the Procuring Entities or the Contractor, as the context requires.
- 1.1.2.2 “Procuring Entities” means the person named as Procuring Entities in the Contract Data and the legal successors in title to this person.
- 1.1.2.3 “Contractor” means the person(s) named as contractor in the Tender Submission Sheet accepted by the Procuring Entities and the legal successors in title to this person(s).
- 1.1.2.4 “Engineer” means the person appointed under Section 57 of the Public Procurement Act of 2011 to act as Contract Manager; for the purposes of the Contract and named in the Contract Data, or other person appointed from time to time by the Procuring Entities and notified to the Contractor under Sub-Clause 3.4 [Replacement of the Engineer].
- 1.1.2.5 “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.



- 1.1.2.6 “Procuring Entities’s Personnel” means the Engineer, the assistants referred to in Sub-Clause 3.2 [Delegation by the Engineer] and all other staff, labour and other employees of the Engineer and of the Procuring Entities; and any other personnel notified to the Contractor, by the Procuring Entities or the Engineer, as Procuring Entities’s Personnel.
- 1.1.2.7 “Contractor’s Personnel” means the Contractor’s Representative and all personnel whom the Contractor utilises on Site, who may include the staff, labour and other employees of the Contractor and of each Subcontractor; and any other personnel assisting the Contractor in the execution of the Works.
- 1.1.2.8 “Subcontractor” means any person named in the Contract as a subcontractor, or any person appointed as a subcontractor, for a part of the Works; and the legal successors in title to each of these persons.
- 1.1.2.9 “DB” means the person or three persons appointed under Sub-Clause 20.2 [Appointment of the Dispute Board] or Sub-Clause 20.3 [Failure to Agree on the Composition of the Dispute Board].
- 1.1.2.10 “FIDIC” means the Fédération Internationale des Ingénieurs-Conseils, the international federation of consulting engineers.
- 1.1.2.11 “Government” refers to the Government of the Kingdom of Eswatini, any Procuring Entities or the relevant approvals authority as defined in the Public Procurement Act of 2011.
- 1.1.2.12 “ESPPRA” refers to the Eswatini Public Procurement Authority.
- 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 the Tender.
- 1.1.3.2 “Commencement Date” means the date notified under Sub-Clause 8.1 [Commencement of Works].
- 1.1.3.3 “Time for Completion” means the time for completing the Works or a Section (as the case may be) under Sub-Clause 8.2 [Time for Completion], as



stated in the Contract Data (with any extension under Sub-Clause 8.4 [Extension of Time for Completion]), calculated from the Commencement Date.

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

1.1.3.5 “Taking-Over Certificate” means a certificate issued under Clause 10 [Procuring Entities’s Taking Over].

1.1.3.6 “Tests after Completion” means the tests (if any) which are specified in the Contract and which are carried out in accordance with the Specification after the Works or a Section (as the case may be) are taken over by the Procuring Entities.

1.1.3.7 “Defects Notification Period” means the period for notifying defects in the Works or a Section (as the case may be) under Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects], which extends over twelve months except if otherwise stated in the Contract Data (with any extension under Sub-Clause 11.3 [Extension of Defects Notification Period]), calculated from the date on which the Works or Section is completed as certified under Sub-Clause 10.1 [Taking Over of the Works and Sections].

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

1.1.3.9 “day” means a calendar day and “year” means 365 days.

#### **1.1.4 Money and Payments**

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

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



- 1.1.4.3 “Cost” means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.
- 1.1.4.4 “Final Payment Certificate” means the payment certificate issued under Sub-Clause 14.13 [Issue of Final Payment Certificate].
- 1.1.4.5 “Final Statement” means the statement defined in Sub-Clause 14.11 [Application for Final Payment Certificate].
- 1.1.4.6 “Foreign Currency” means a currency in which part (or all) of the Contract Price is payable, but not the Local Currency.
- 1.1.4.7 “Interim Payment Certificate” means a payment certificate issued under Clause 14 [Contract Price and Payment], other than the Final Payment Certificate.
- 1.1.4.8 “Local Currency” means the currency of the Country.
- 1.1.4.9 “Payment Certificate” means a payment certificate issued under Clause 14 [Contract Price and Payment].
- 1.1.4.10 “Provisional Sum” means a sum (if any) which is specified in the Contract as a provisional sum, for the execution of any part of the Works or for the supply of Plant, Materials or services under Sub-Clause 13.5 [Provisional Sums].
- 1.1.4.11 “Retention Money” means the accumulated retention moneys which the Procuring Entities retains under Sub-Clause 14.3 [Application for Interim Payment Certificates] and pays under Sub-Clause 14.9 [Payment of Retention Money].
- 1.1.4.12 “Statement” means a statement submitted by the 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 “Contractor’s Equipment” means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Contractor’s Equipment excludes Temporary Works, Procuring



Entities's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Permanent Works.

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

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

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

1.1.5.5 "Plant" means the apparatus, machinery and other equipment intended to form or forming part of the Permanent Works, including vehicles purchased for the Procuring Entities and relating to the construction or operation of the Works.

1.1.5.6 "Section" means a part of the Works specified in the Contract Data as a Section (if any).

1.1.5.7 "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.

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

### **1.1.6 Other Definitions**

1.1.6.1 "Contractor's Documents" means the calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature (if any) supplied by the Contractor under the Contract.

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

1.1.6.3 "Procuring Entities's Equipment" means the apparatus, machinery and vehicles (if any) made available by the Procuring Entities for the use of the Contractor in the execution of the Works, as stated in the Specification; but does not include Plant



which has not been taken over by the Procuring Entities.

- 1.1.6.4 “Force Majeure” is defined in Clause 19 [Force Majeure].
- 1.1.6.5 “Laws” means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority.
- 1.1.6.6 “Performance Security” means the security (or securities, if any) under Sub-Clause 4.2 [Performance Security].
- 1.1.6.7 “Site” means the places where the Permanent Works are to be executed including storage and working areas and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site.
- 1.1.6.8 “Unforeseeable” means not reasonably foreseeable by an experienced contractor by the Base Date.
- 1.1.6.9 “Variation” means any change to the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments].

## 1.2 Interpretation

In the Contract, except where the context requires otherwise:

- (a) words indicating one gender include all genders;
- (b) words indicating the singular also include the plural and words indicating the plural also include the singular;
- (c) provisions including the word “agree,” “agreed” or “agreement” require the agreement to be record in writing;
- (d) “written” or “in writing” means hand-written, type-written, printed or electronically made, and resulting in a permanent record; and
- (e) the word “tender” is synonymous with “Tender”, and “tenderer” with “Tenderer” and the words “tender documents” with “Tendering documents”

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



In these Conditions, provisions including the expression "Cost plus profit" require this profit to be one-twentieth (5%) of this Cost unless otherwise indicated in the Contract Data.

### **1.3 Communications**

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

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

Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed. When a certificate is issued to a Party, the certifier shall send a copy to the other Party. When a notice is issued to a Party, by the other Party or the Engineer, a copy shall be sent to the Engineer or the other Party, as the case may be.

### **1.4 Law and Language**

The Contract shall be governed by the laws of the Kingdom of Eswatini.

The ruling language of the Contract shall be English.

The language for communications shall be English.

### **1.5 Priority of Documents**

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

- (a) the Contract Agreement (if any),
- (b) the Letter of Acceptance,





- (c) the Tender,
- (d) the Special Conditions – Part A,
- (e) the Special Conditions – Part B
- (f) these General Conditions
- (g) the Specification,
- (h) the Drawings, and
- (i) the Schedules and any other documents forming part of the Contract.

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

#### **1.6 Contract Agreement**

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

#### **1.7 Assignment**

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

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

#### **1.8 Care and Supply of Documents**

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

Each of the Contractor's Documents shall be in the custody and care of the Contractor, unless and until taken over by the Procuring Entities. Unless otherwise stated in the Contract,

the Contractor shall supply to the Engineer six copies of each of the Contractor's Documents.

The Contractor shall keep, on the Site, a copy of the Contract, publications named in the Specification, the Contractor's Documents (if any), the Drawings and Variations and other communications given under the Contract. The Procuring Entities'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 in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other Party of such error or defect.

### **1.9 Delayed Drawings or Instructions**

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

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

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

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

However, if and to the extent that the Engineer's failure was caused by any error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor's



Documents, the Contractor shall not be entitled to such extension of time, Cost or profit

**1.10 Procuring Entities's Use of Contractor's Documents**

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

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

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

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

**1.11 Contractor's Use of Procuring Entities's Documents**

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

**1.12 Confidential Details**

The Contractor's and the Procuring Entities's Personnel shall disclose all such confidential and other information as may be reasonably required in order to verify the Contractor's



compliance with the Contract and allow its proper implementation.

Each of them shall treat the details of the Contract as private and confidential, except to the extent necessary to carry out their respective obligations under the Contract or to comply with applicable Laws. Each of them shall not publish or disclose any particulars of the Works prepared by the other Party without the previous agreement of the other Party. However, the Contractor shall be permitted to disclose any publicly available information, or information otherwise required to establish his qualifications to compete for other projects.

### **1.13 Compliance with Laws**

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

- (a) the Procuring Entities shall have obtained (or shall obtain) the planning, zoning, building permit or similar permission for the Permanent Works, and any other permissions described in the Specification as having been (or to be) obtained by the Procuring Entities; and the Procuring Entities shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so; and
- (b) the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works and the remedying of any defects; and the Contractor shall indemnify and hold the Procuring Entities harmless against and from the consequences of any failure to do so, unless the Contractor is impeded to accomplish these actions and shows evidence of its diligence.

### **1.14 Joint and Several Liability**

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

- (a) these persons shall be deemed to be jointly and severally liable to the Procuring Entities for the performance of the Contract;



- (b) these persons shall notify the Procuring Entities of their leader who shall have authority to bind the Contractor and each of these persons; and
- (c) the Contractor shall not alter its composition or legal status without the prior consent of the Procuring Entities.

### **1.15 Inspections and Audit by the Government**

The Contractor shall permit, and shall cause its Subcontractors and subconsultants to permit, the Government and/or persons appointed by the Government to inspect the Site and all accounts and records relating to the performance of the Contract and the submission of the Tender, and to have such accounts and records audited by auditors appointed by the Government if requested by the Government. The Contractor's and its Subcontractors' and subconsultants' attention is drawn to Sub-Clause 15.6 [Corrupt or Fraudulent Practices] which provides, inter alia, that acts intended to materially impede the exercise of the Government's inspection and audit rights provided for under Sub-Clause 1.15 constitute a prohibited practice subject to contract termination (as well as to a determination of ineligibility pursuant to ESPPRA's prevailing sanctions procedures).

## **2. The Procuring Entities**

### **2.1 Right of Access to the Site**

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

If no such time is stated in the Contract Data, the Procuring Entities shall give the Contractor right of access to, and possession of, the Site within such times as required to enable the Contractor to proceed without disruption in accordance with the programme submitted under Sub-Clause 8.3 [Programme].

If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Procuring Entities to give any such right or possession within such time, the Contractor shall give

notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

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

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

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

## **2.2 Permits, Licences or Approvals**

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

- (a) copies of the Laws of the Country which are relevant to the Contract but are not readily available, and
- (b) any permits, licences or approvals required by the Laws of the Country:
  - (i) which the Contractor is required to obtain under Sub-Clause 1.13 [Compliance with Laws],
  - (ii) for the delivery of Goods, including clearance through customs, and
  - (iii) for the export of Contractor's Equipment when it is removed from the Site.

## **2.3 Procuring Entities's Personnel**

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

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



**2.4 Procuring Entities's Financial Arrangements**

The Procuring Entities shall submit, before the Commencement Date and thereafter within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Procuring Entities to pay the Contract Price punctually (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. Before the Procuring Entities makes any material change to his financial arrangements, the Procuring Entities shall give notice to the Contractor with detailed particulars.

In addition, if ESPPRA has notified to the Procuring Entities that ESPPRA has suspended the Contractor pursuant to Public Procurement Act of 2011, the Procuring Entities shall give notice of such suspension to the Contractor with detailed particulars, including the date of such notification, with a copy to the Engineer, within 7 days of the Procuring Entities having received the suspension notification from ESPPRA. If alternative funds will be available in appropriate currencies to the Procuring Entities to continue making payments to the Contractor beyond a date 60 days after the date of notification of the suspension, the Procuring Entities shall provide reasonable evidence in such notice of the extent to which such funds will be available.

**2.5 Procuring Entities's Claims**

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

The notice shall be given as soon as practicable and no longer than 28 days after the Procuring Entities became aware, or should have become 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 Procuring Entities considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5



[Determinations] to agree or determine (i) the amount (if any) which the Procuring Entities 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 in the Contract Price and Payment Certificates. The Procuring Entities shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.

### 3. The Engineer

#### 3.1 Engineer's Duties and Authority

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

The Engineer shall have no authority to amend the Contract.

The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Procuring Entities before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. The Procuring Entities shall promptly inform the Contractor of any change to the authority attributed to the Engineer.

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

Except as otherwise stated in these Conditions:

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





similar act by the Engineer (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.

- (d) Any act by the Engineer in response to a Contractor's request except otherwise expressly specified shall be notified in writing to the Contractor within 28 days of receipt.

The following provisions shall apply:

The Engineer shall obtain the specific approval of the Procuring Entities before taking action under the following Sub-Clauses of these Conditions:

- (a) Sub-Clause 4.12 [Unforeseeable Physical Conditions]: Agreeing or determining an extension of time and/or additional cost.
- (b) Sub-Clause 13.1 [Right to Vary]: Instructing a Variation, except;
- (i) in an emergency situation as determined by the Engineer, or
- (ii) if such a Variation would increase the Accepted Contract Amount by less than the percentage specified in the Contract Data.
- (c) Sub-Clause 13.3 [Variation Procedure]: Approving a proposal for Variation submitted by the Contractor in accordance with Sub Clause 13.1 [Right to Vary] or 13.2 [Value Engineering].
- (d) Sub-Clause 13.4 [Payment in Applicable Currencies]: Specifying the amount payable in each of the applicable currencies

Notwithstanding the obligation, as set out above, to obtain approval, if, in the opinion of the Engineer, an emergency occurs affecting the safety of life or of the Works or of adjoining property, he may, without relieving the Contractor of any of his duties and responsibility under the Contract, instruct the Contractor to execute all such work or to do all such things as may, in the opinion of the Engineer, be necessary to abate or reduce the risk. The Contractor shall



forthwith comply, despite the absence of approval of the Procuring Entities, with any such instruction of the Engineer. The Engineer shall determine an addition to the Contract Price, in respect of such instruction, in accordance with Clause 13 [Variations and Adjustments] and shall notify the Contractor accordingly, with a copy to the Procuring Entities.

### **3.2 Delegation by the Engineer**

The Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include a resident engineer, and/or independent inspectors appointed to inspect and/or test items of Plant and/or Materials. The assignment, delegation or revocation shall be in writing and shall not take effect until copies have been received by both Parties.

However, unless otherwise agreed by both Parties, the Engineer shall not delegate the authority to determine any matter in accordance with Sub-Clause 3.5 [Determinations].

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

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

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

### **3.3 Instructions of the Engineer**

The Engineer may issue to the Contractor (at any time) instructions and additional or modified Drawings which may be necessary for the execution of the Works and the remedying of any defects, all in accordance with the Contract. The Contractor shall only take instructions from the Engineer, or



from an assistant to whom the appropriate authority has been delegated under this Clause. If an instruction constitutes a Variation, Clause 13 [Variations and Adjustments] shall apply.

The Contractor shall comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Contract. Whenever practicable, their instructions shall be given in writing. If the Engineer or a delegated assistant:

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

then the confirmation shall constitute the written instruction of the Engineer or delegated assistant (as the case may be).

### **3.4 Replacement of the Engineer**

If the Procuring Entities intends to replace the Engineer, the Procuring Entities shall, not less than 21 days before the intended date of replacement, give notice to the Contractor of the name, address and relevant experience of the intended replacement Engineer. If the Contractor considers the intended replacement Engineer to be unsuitable, he has the right to raise objection against him by notice to the Procuring Entities, with supporting particulars, and the Procuring Entities shall give full and fair consideration to this objection.

### **3.5 Determinations**

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

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars within 28 days from the receipt of the corresponding claim or request except when otherwise specified. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].

## **4. The Contractor**



#### 4.1 Contractor's General Obligations

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

The Contractor shall provide the Plant and Contractor's Documents specified in the Contract, and all Contractor's Personnel, Goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for this design, execution, completion and remedying of defects.

All equipment, material, and services to be incorporated in or required for the Works shall have their origin in any eligible source country as defined in Section V.

The Contractor shall be responsible for the adequacy, stability and safety of all Site operations and of all methods of construction. Except to the extent specified in the Contract, the Contractor (i) shall be responsible for all Contractor's Documents, Temporary Works, and such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract, and (ii) shall not otherwise be responsible for the design or specification of the Permanent Works.

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

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

- (a) the Contractor shall submit to the Engineer the Contractor's Documents for this part in accordance with the procedures specified in the Contract;
- (b) these Contractor's Documents shall be in accordance with the Specification and Drawings, shall be written in the language for communications defined in Sub-Clause 1.4 [Law and Language], and shall include additional information required by the Engineer to add to the Drawings for co-ordination of each Party's designs;
- (c) the Contractor shall be responsible for this part and it shall, when the Works are completed, be fit for such purposes for



which the part is intended as are specified in the Contract;  
and

- (d) prior to the commencement of the Tests on Completion, the Contractor shall submit to the Engineer the “as-built” documents and, if applicable, operation and maintenance manuals in accordance with the Specification and in sufficient detail for the Procuring Entities to operate, maintain, dismantle, reassemble, adjust and repair this part of the Works. Such part shall not be considered to be completed for the purposes of taking-over under Sub-Clause 10.1 [Taking Over of the Works and Sections] until these documents and manuals have been submitted to the Engineer.

#### 4.2 Performance Security

The Contractor shall obtain (at his cost) a Performance Security for proper performance, in the amount and currencies stated in the Contract Data. If an amount is not stated in the Contract Data, this Sub-Clause shall not apply.

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

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

The Procuring Entities shall not make a claim under the Performance Security, except for amounts to which the Procuring Entities is entitled under the Contract.

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

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

Without limitation to the provisions of the rest of this Sub-Clause, whenever the Engineer determines an addition or a reduction to the Contract Price as a result of a change in cost and/or legislation or as a result of a Variation amounting to more than 25 percent of the portion of the Contract Price payable in a specific currency, the Contractor shall at the Engineer's request promptly increase, or may decrease, as the case may be, the value of the Performance Security in that currency by an equal percentage.



**4.3 Contractor's Representative**

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

Unless the Contractor's Representative is named in the Contract, the Contractor shall, prior to the Commencement Date, submit to the Engineer for consent the name and particulars of the person the Contractor proposes to appoint as Contractor's Representative. If consent is withheld or subsequently revoked in terms of Sub-Clause 6.9 [Contractor's Personnel], or if the appointed person fails to act as Contractor's Representative, the Contractor shall similarly submit the name and particulars of another suitable person for such appointment.

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

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

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

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

The Contractor's Representative shall be fluent in the language for communications defined in Sub-Clause 1.4 [Law and Language]. If the Contractor's Representative's delegates are not fluent in the said language, the Contractor shall make competent interpreters available during all working hours in a number deemed sufficient by the Engineer.

**4.4 Subcontractors**

The Contractor shall not subcontract the whole of the Works.



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

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

The Contractor shall ensure that the requirements imposed on the Contractor by Sub-Clause 1.12 [Confidential Details] apply equally to each Subcontractor.

Where practicable, the Contractor shall give fair and reasonable opportunity for contractors from the Country to be appointed as Subcontractors.

#### **4.5 Assignment of Benefit of Subcontract**

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

#### **4.6 Co-operation**

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

- (a) the Procuring Entities's Personnel,
- (b) any other contractors employed by the Procuring Entities, and





- (c) the personnel of any legally constituted public authorities,

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

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

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

#### 4.7 Setting Out

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

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

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

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

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



determine (i) whether and (if so) to what extent the error could not reasonably have been discovered, and (ii) the matters described in sub-paragraphs (a) and (b) above related to this extent.

**4.8 Safety Procedures** The Contractor shall:

- (a) comply with all applicable safety regulations,
- (b) take care for the safety of all persons entitled to be on the Site,
- (c) use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger to these persons,
- (d) provide fencing, lighting, guarding and watching of the Works until completion and taking over under Clause 10 [Procuring Entities's Taking Over], and
- (e) provide any Temporary Works (including roadways, footways, guards and fences) which may be necessary, because of the execution of the Works, for the use and protection of the public and of owners and occupiers of adjacent land.

**4.9 Quality Assurance** The Contractor shall institute a quality assurance system to demonstrate compliance with the requirements of the Contract. The system shall be in accordance with the details stated in the Contract. The Engineer shall be entitled to audit any aspect of the system.

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

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

**4.10 Site Data**

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



the Procuring Entities's possession after the Base Date. The Contractor shall be responsible for interpreting all such data.

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

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

**4.11 Sufficiency of the Accepted Contract Amount**

The Contractor shall be deemed to:

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

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

**4.12 Unforeseeable Physical Conditions**

In this Sub-Clause, "physical conditions" means natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when

executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions.

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

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

If and to the extent that the Contractor encounters physical conditions which are Unforeseeable, gives such a notice, and suffers delay and/or incurs Cost due to these conditions, the Contractor shall be entitled subject to notice under Sub-Clause 20.1 [Contractor's Claims] to:

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

Upon receiving such notice and inspecting and/or investigating these physical conditions, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) whether and (if so) to what extent these physical conditions were Unforeseeable, and (ii) the matters described in sub-paragraphs (a) and (b) above related to this extent.

However, before additional Cost is finally agreed or determined under sub-paragraph (ii), the Engineer may also review whether other physical conditions in similar parts of the Works (if any) were more favourable than could reasonably have been foreseen when the Contractor submitted the Tender. If and to the extent that these more favourable conditions were encountered, the Engineer may proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the reductions in Cost which were due to these conditions, which may be included (as deductions) in the Contract Price and Payment Certificates. However, the net effect of all adjustments under sub-paragraph (b) and all these reductions,



for all the physical conditions encountered in similar parts of the Works, shall not result in a net reduction in the Contract Price.

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

**4.13 Rights of Way and Facilities**

Unless otherwise specified in the Contract the Procuring Entities shall provide access to and possession of the Site including special and/or temporary rights-of-way which are necessary for the Works. The Contractor shall obtain, at his risk and cost, any additional rights of way or facilities outside the Site which he may require for the purposes of the Works.

**4.14 Avoidance of Interference**

The Contractor shall not interfere unnecessarily or improperly with:

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

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

**4.15 Access Route**

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

Except as otherwise stated in these Conditions:

- (a) the Contractor shall (as between the Parties) be responsible for any maintenance which may be required for his use of access routes;
- (b) the Contractor shall provide all necessary signs or directions along access routes, and shall obtain any permission which may be required from the relevant authorities for his use of routes, signs and directions;

- (c) the Procuring Entities shall not be responsible for any claims which may arise from the use or otherwise of any access route;
- (d) the Procuring Entities does not guarantee the suitability or availability of particular access routes; and
- (e) Costs due to non-suitability or non-availability, for the use required by the Contractor, of access routes shall be borne by the Contractor.

#### **4.16 Transport of Goods**

Unless otherwise stated in the Particular Conditions:

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

#### **4.17 Contractor's Equipment**

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

#### **4.18 Protection of the Environment**

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

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

#### **4.19 Electricity, Water and Gas**

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



require for his construction activities and to the extent defined in the Specifications, for the tests.

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

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

**4.20 Procuring  
Entities's  
Equipment and  
Free-Issue  
Materials**

The Procuring Entities shall make the Procuring Entities'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 Specification. Unless otherwise stated in the Specification:

- (a) the Procuring Entities shall be responsible for the Procuring Entities's Equipment, except that
- (b) the Contractor shall be responsible for each item of Procuring Entities'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 Procuring Entities's Equipment shall be agreed or determined by the Engineer in accordance with Sub-Clause 2.5 [Procuring Entities's Claims] and Sub-Clause 3.5 [Determinations]. The Contractor shall pay these amounts to the Procuring Entities.

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



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





**4.21 Progress Reports**

Unless otherwise stated in the Particular Conditions, monthly progress reports shall be prepared by the Contractor and submitted to the Engineer in six copies. The first report shall cover the period up to the end of the first calendar month following the Commencement Date. Reports shall be submitted monthly thereafter, each within 7 days after the last day of the period to which it relates.

Reporting shall continue until the Contractor has completed all work which is known to be outstanding at the completion date stated in the Taking-Over Certificate for the Works.

Each report shall include:

- (a) charts and detailed descriptions of progress, including each stage of design (if any), Contractor's Documents, procurement, manufacture, delivery to Site, construction, erection and testing; and including these stages for work by each nominated Subcontractor (as defined in Clause 5 [Nominated Subcontractors]),
- (b) photographs showing the status of manufacture and of progress on the Site;
- (c) for the manufacture of each main item of Plant and Materials, the name of the manufacturer, manufacture location, percentage progress, and the actual or expected dates of:
  - (i) commencement of manufacture,
  - (ii) Contractor's inspections,
  - (iii) tests, and
  - (iv) shipment and arrival at the Site;
- (d) the details described in Sub-Clause 6.10 [Records of Contractor's Personnel and Equipment];
- (e) copies of quality assurance documents, test results and certificates of Materials;
- (f) list of notices given under Sub-Clause 2.5 [Procuring Entities'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** Unless otherwise stated in the Particular Conditions:

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

**4.23 Contractor's Operations on Site**

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

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

Upon the issue of a Taking-Over Certificate, the Contractor shall clear away and remove, from 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 obligations under the Contract.

**4.24 Fossils**

All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological or archaeological interest found on the Site shall be placed under the care and



authority of the Procuring Entities. The Contractor shall take reasonable precautions to prevent Contractor's Personnel or other persons from removing or damaging any of these findings.

The Contractor shall, upon discovery of any such finding, promptly give notice to the Engineer, 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 Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

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

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

## 5. Nominated Subcontractors

### 5.1 Definition of "nominated Subcontractor"

In the Contract, "nominated Subcontractor" means a Subcontractor:

- (a) who is stated in the Contract as being a nominated Subcontractor, or
- (b) whom the Engineer, under Clause 13 [Variations and Adjustments], instructs the Contractor to employ as a Subcontractor subject to Sub-Clause 5.2 [Objection to Notification].

### 5.2 Objection to Nomination

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

- (a) there are reasons to believe that the Subcontractor does not have sufficient competence, resources or financial strength;



- (b) the nominated Subcontractor does not accept to indemnify the Contractor against and from any negligence or misuse of Goods by the nominated Subcontractor, his agents and employees; or
- (c) the nominated Subcontractor does not accept to enter into a subcontract which specifies that, for the subcontracted work (including design, if any), the nominated Subcontractor shall:
  - (i) undertake to the Contractor such obligations and liabilities as will enable the Contractor to discharge his obligations and liabilities under the Contract;
  - (ii) indemnify the Contractor against and from all obligations and liabilities arising under or in connection with the Contract and from the consequences of any failure by the Subcontractor to perform these obligations or to fulfil these liabilities; and
  - (iii) be paid only if and when the Contractor has received from the Procuring Entities payments for sums due under the Subcontract referred to under Sub-Clause 5.3 [Payment to nominated Subcontractors].

**5.3 Payments to nominated Subcontractors**

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

**5.4 Evidence of Payments**

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

- (a) submits this reasonable evidence to the Engineer, or
- (b)



- (i) satisfies the Engineer in writing that the Contractor is reasonably entitled to withhold or refuse to pay these amounts, and
- (ii) submits to the Engineer reasonable evidence that the nominated Subcontractor has been notified of the Contractor's entitlement,

then the Procuring Entities may (at his sole discretion) pay, direct to the nominated Subcontractor, part or all of such amounts previously certified (less applicable deductions) as are due to the nominated Subcontractor and for which the Contractor has failed to submit the evidence described in subparagraphs (a) or (b) above. The Contractor shall then repay, to the Procuring Entities, the amount which the nominated Subcontractor was directly paid by the Procuring Entities.

## 6. Staff and Labour

### 6.1 Engagement of Staff and Labour

Except as otherwise stated in the Specification, the Contractor shall make arrangements for the engagement of all staff and labour, local or otherwise, and for their payment, feeding, transport, and, when appropriate, housing.

The Contractor is encouraged, to the extent practicable and reasonable, to employ staff and labour with appropriate qualifications and experience from sources within the Country.

### 6.2 Rates of Wages and Conditions of Labour

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

The Contractor shall inform the Contractor's Personnel about their liability to pay personal income taxes in the Country in respect of such of their salaries, wages, allowances and any benefits as are subject to tax under the Laws of the Country for the time being in force, and the Contractor shall perform such duties in regard to such deductions thereof as may be imposed on him by such Laws.



- 6.3 Persons in the Service of Procuring Entities** The Contractor shall not recruit, or attempt to recruit, staff and labour from amongst the Procuring Entities's Personnel.
- 6.4 Labour Laws** The Contractor shall comply with all the relevant labour Laws applicable to the Contractor's Personnel, including Laws relating to their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights.
- The Contractor shall require his employees to obey all applicable Laws, including those concerning safety at work.
- 6.5 Working Hours** No work shall be carried out on the Site on locally recognised days of rest, or outside the normal working hours stated in the Contract Data, unless:
- (a) otherwise stated in the Contract,
  - (b) the Engineer gives consent, or
  - (c) the work is unavoidable, or necessary for the protection of life or property or for the safety of the Works, in which case the Contractor shall immediately advise the Engineer.
- 6.6 Facilities for Staff and Labour** Except as otherwise stated in the Specification, the Contractor shall provide and maintain all necessary accommodation and welfare facilities for the Contractor's Personnel. The Contractor shall also provide facilities for the Procuring Entities's Personnel as stated in the Specification.
- The Contractor shall not permit any of the Contractor's Personnel to maintain any temporary or permanent living quarters within the structures forming part of the Permanent Works.
- 6.7 Health and Safety** The Contractor shall at all times take all reasonable precautions to maintain the health and safety of the Contractor's Personnel. In collaboration with local health authorities, the Contractor shall ensure that medical staff, first aid facilities, sick bay and ambulance service are available at all times at the Site and at any accommodation for Contractor's and Procuring Entities's Personnel, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics.
- The Contractor shall appoint an accident prevention officer at the Site, responsible for maintaining safety and protection



against accidents. This person shall be qualified for this responsibility, and shall have the authority to issue instructions and take protective measures to prevent accidents. Throughout the execution of the Works, the Contractor shall provide whatever is required by this person to exercise this responsibility and authority.

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

**HIV-AIDS Prevention.** The Contractor shall conduct an HIV-AIDS awareness programme via an approved service provider, and shall undertake such other measures as are specified in this Contract to reduce the risk of the transfer of the HIV virus between and among the Contractor's Personnel and the local community, to promote early diagnosis and to assist affected individuals.

The Contractor shall throughout the contract (including the Defects Notification Period): (i) conduct Information, Education and Consultation Communication (IEC) campaigns, at least every other month, addressed to all the Site staff and labour (including all the Contractor's employees, all Sub-Contractors and Consultants' employees, and all truck drivers and crew making deliveries to Site for construction activities) and to the immediate local communities, concerning the risks, dangers and impact, and appropriate avoidance behavior with respect to of Sexually Transmitted Diseases (STD)—or Sexually Transmitted Infections (STI) in general and HIV/AIDS in particular; (ii) provide male or female condoms for all Site staff and labour as appropriate; and (iii) provide for STI and HIV/AIDS screening, diagnosis, counseling and referral to a dedicated national STI and HIV/AIDS program, (unless otherwise agreed) of all Site staff and labour.

The Contractor shall include in the program to be submitted for the execution of the Works under Sub-Clause 8.3 [Programme] an alleviation program for Site staff and labour and their families in respect of Sexually Transmitted Infections (STI) and Sexually Transmitted Diseases (STD) including HIV/AIDS. The STI, STD and HIV/AIDS alleviation program shall indicate when, how and at what cost the Contractor plans to satisfy the requirements of this Sub-Clause and the related specification. For each component, the



program shall detail the resources to be provided or utilized and any related sub-contracting proposed. The program shall also include provision of a detailed cost estimate with supporting documentation. Payment to the Contractor for preparation and implementation this program shall not exceed the Provisional Sum dedicated for this purpose.

**6.8 Contractor's Superintendence**

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

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

**6.9 Contractor's Personnel**

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

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

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

**6.10 Records of Contractor's Personnel and Equipment**

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

**6.11 Disorderly Conduct**

The Contractor shall at all times take all reasonable precautions to prevent any unlawful, riotous or disorderly





conduct by or amongst the Contractor's Personnel, and to preserve peace and protection of persons and property on and near the Site.

**6.12 Foreign Personnel**

The Contractor may bring in to the Country any foreign personnel who are necessary for the execution of the Works to the extent allowed by the applicable Laws. The Contractor shall ensure that these personnel are provided with the required residence visas and work permits. The Procuring Entities will, if requested by the Contractor, use his best endeavours in a timely and expeditious manner to assist the Contractor in obtaining any local, state, national, or government permission required for bringing in the Contractor's personnel.

The Contractor shall be responsible for the return of these personnel to the place where they were recruited or to their domicile. In the event of the death in the Country of any of these personnel or members of their families, the Contractor shall similarly be responsible for making the appropriate arrangements for their return or burial.

**6.13 Supply of Foodstuffs**

The Contractor shall arrange for the provision of a sufficient supply of suitable food as may be stated in the Specification at reasonable prices for the Contractor's Personnel for the purposes of or in connection with the Contract.

**6.14 Supply of Water**

The Contractor shall, having regard to local conditions, provide on the Site an adequate supply of drinking and other water for the use of the Contractor's Personnel.

**6.15 Measures against Insect and Pest Nuisance**

The Contractor shall at all times take the necessary precautions to protect the Contractor's Personnel employed on the Site from insect and pest nuisance, and to reduce their danger to health. The Contractor shall comply with all the regulations of the local health authorities, including use of appropriate insecticide.

**6.16 Alcoholic Liquor or Drugs**

The Contractor shall not, otherwise than in accordance with the Laws of the Country, import, sell, give barter or otherwise dispose of any alcoholic liquor or drugs, or permit or allow importation, sale, gift barter or disposal thereto by Contractor's Personnel.

**6.17 Arms and Ammunition**

The Contractor shall not give, barter, or otherwise dispose of, to any person, any arms or ammunition of any kind, or allow Contractor's Personnel to do so.

- 6.18 Festivals and Religious Customs** The Contractor shall respect the Country's recognized festivals, days of rest and religious or other customs.
- 6.19 Funeral Arrangements** The Contractor shall be responsible, to the extent required by local regulations, for making any funeral arrangements for any of his local employees who may die while engaged upon the Works.
- 6.20 Prohibition of Forced or Compulsory Labour** The contractor shall not employ "forced or compulsory labour" in any form. "Forced or compulsory labour" consists of all work or service, not voluntarily performed, that is extracted from an individual under threat of force or penalty.
- 6.21 Prohibition of Harmful Child Labour** The Contractor shall not employ any child to perform any work that is economically exploitative, or is likely to be hazardous to, or to interfere with, the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development.
- 6.22 Employment Records of Workers** The Contractor shall keep complete and accurate records of the employment of labour at the Site. The records shall include the names, ages, genders, hours worked and wages paid to all workers. These records shall be summarized on a monthly basis and submitted to the Engineer, and these records shall be available for inspection by Auditors during normal working hours. These records shall be included in the details to be submitted by the Contractor under Sub-Clause 6.10 [Records of Contractor's Personnel and Equipment].
- 6.23 Workers' Organisations** In countries where the relevant labour laws recognise workers' rights to form and to join workers' organisations of their choosing without interference and to bargain collectively, the Contractor shall comply with such laws. Where the relevant labour laws substantially restrict workers' organisations, the Contractor shall enable alternative means for the Contractor's Personnel to express their grievances and protect their rights regarding working conditions and terms of employment. In either case described above, and where the relevant labour laws are silent, the Contractor shall not discourage the Contractor's Personnel from forming or joining workers' organisations of their choosing or from bargaining collectively, and shall not discriminate or retaliate against the Contractor's Personnel who participate, or seek to participate, in such organisations and bargain collectively. The Contractor shall engage with such workers' representatives. Workers' organisations are expected to fairly represent the workers in the workforce.



**6.24 Non-Discrimination and Equal Opportunity**

The Contractor shall not make employment decisions on the basis of personal characteristics unrelated to inherent job requirements. The Contractor shall base the employment relationship on the principle of equal opportunity and fair treatment, and shall not discriminate with respect to aspects of the employment relationship, including recruitment and hiring, compensation (including wages and benefits), working conditions and terms of employment, access to training, promotion, termination of employment or retirement, and discipline. In countries where the relevant labour laws provide for non discrimination in employment, the Contractor shall comply with such laws. When the relevant labour laws are silent on nondiscrimination in employment, the Contractor shall meet this Sub-Clause's requirements. Special measures of protection or assistance to remedy past discrimination or selection for a particular job based on the inherent requirements of the job shall not be deemed discrimination.

**7. Plant, Materials and Workmanship****7.1 Manner of Execution**

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

**7.2 Samples**

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

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

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

**7.3 Inspection**

The Procuring Entities's Personnel shall at all reasonable times:



- (a) have full access to all parts of the Site and to all places from which natural Materials are being obtained, and
- (b) during production, manufacture and construction (at the Site and elsewhere), be entitled to examine, inspect, measure and test the materials and workmanship, and to check the progress of manufacture of Plant and production and manufacture of Materials.

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

#### **7.4 Testing**

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

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

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

The Engineer shall give the Contractor not less than 24 hours' notice of the Engineer's intention to attend the tests. If the Engineer does not attend at the time and place agreed, the Contractor may proceed with the tests, unless otherwise



instructed by the Engineer, and the tests shall then be deemed to have been made in the Engineer's presence.

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

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

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

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

### 7.5 Rejection

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

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

### 7.6 Remedial Work

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

- (a) remove from the Site and replace any Plant or Materials which is not in accordance with the Contract,



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

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

If the Contractor fails to comply with the instruction, the Procuring Entities 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 [Procuring Entities's Claims] pay to the Procuring Entities all costs arising from this failure.

#### **7.7 Ownership of Plant and Materials**

Except otherwise specified in the Contract, each item of Plant and Materials shall, to the extent consistent with the Laws of the Country, become the property of the Procuring Entities at whichever is the earlier of the following times, free from liens and other encumbrances:

- (a) when it is incorporated in the Works;
- (b) when the Contractor is paid the corresponding value of the Plant and Materials under Sub-Clause 8.10 [Payment for Plant and Materials in Event of Suspension].

#### **7.8 Royalties**

Unless otherwise stated in the Specification, the Contractor shall pay all royalties, rents and other payments for:

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

### **8. Commencement, Delays and Suspension**

#### **8.1 Commencement of Works**

Except otherwise specified in the Particular Conditions, the Commencement Date shall be the date at which the following precedent conditions have all been fulfilled and the Engineer's instruction recording the agreement of both Parties on such



fulfilment and instructing to commence the Works is received by the Contractor:

- (a) signature of the Contract Agreement by both Parties, and if required, approval of the Contract by relevant authorities in the Country;
- (b) delivery to the Contractor of reasonable evidence of the Procuring Entities's Financial arrangements (under Sub-Clause 2.4 [Procuring Entities's Financial Arrangements])
- (c) except if otherwise specified in the Contract Data, possession of the Site given to the Contractor together with such permission(s) under (a) of Sub-Clause 1.13 [Compliance with Laws] as required for the commencement of the Works; and
- (d) receipt by the Contractor of the Advance Payment under Sub-Clause 14.2 [Advance Payment] provided that the corresponding bank guarantee has been delivered by the Contractor.
- (e) If the said Engineer's instruction is not received by the Contractor within 180 days from his receipt of the Letter of Acceptance, the Contractor shall be entitled to terminate the Contract under Sub-Clause 16.2 [Termination by Contractor].

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

## 8.2 Time for Completion

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

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

## 8.3 Programme

The Contractor shall submit a detailed time programme to the Engineer within 28 days after receiving the notice under Sub-



Clause 8.1 [Commencement of Works]. The Contractor shall also submit a revised programme whenever the previous programme is inconsistent with actual progress or with the Contractor's obligations. Each programme shall include:

- (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design (if any), Contractor's Documents, procurement, manufacture of Plant, delivery to Site, construction, erection and testing,
- (b) each of these stages for work by each nominated Subcontractor (as defined in Clause 5 [Nominated Subcontractors]),
- (c) the sequence and timing of inspections and tests specified in the Contract, and
- (d) a supporting report which includes:
  - (i) a general description of the methods which the Contractor intends to adopt, and of the major stages, in the execution of the Works, and
  - (ii) details showing the Contractor's reasonable estimate of the number of each class of Contractor's Personnel and of each type of Contractor's Equipment, required on the Site for each major stage.

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

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

If, at any time, the Engineer gives notice to the Contractor that a programme fails (to the extent stated) to comply with the Contract or to be consistent with actual progress and the Contractor's stated intentions, the Contractor shall submit a





revised programme to the Engineer in accordance with this Sub-Clause.

**8.4 Extension of Time for Completion**

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

- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]) or other substantial change in the quantity of an item of work included in the Contract,
- (b) a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions,
- (c) exceptionally adverse climatic conditions,
- (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or
- (e) any delay, impediment or prevention caused by or attributable to the Procuring Entities, the Procuring Entities's Personnel, or the Procuring Entities's other contractors.

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

**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**

If, at any time:

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

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

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

Additional costs of revised methods, including acceleration measures, instructed by the Engineer to reduce delays resulting from causes listed under Sub-Clause 8.4 [Extension of Time for Completion] shall be paid by the Procuring Entities, without generating, however, any other additional payment benefit to the Contractor.

## **8.7 Delay Damages**

If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall be subject to notice under Sub-Clause 2.5 [Procuring Entities's Claims] pay delay damages to the Procuring Entities for this default. These delay damages shall be the sum stated in the Contract Data, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Contract Data.



These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by Procuring Entities] 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.

#### **8.8 Suspension of Work**

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

The Engineer may also notify the cause for the suspension. If and to the extent that the cause is notified and is the responsibility of the 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 Engineer's instructions under Sub-Clause 8.8 [Suspension of Work] and/or from resuming the work, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

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

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

The 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 Procuring Entities's property in accordance with the Engineer's instructions.

### **8.11 Prolonged Suspension**

If the suspension under Sub-Clause 8.8 [Suspension of Work] has continued for more than 84 days, the Contractor may request the Engineer's permission to proceed. If the Engineer does not give permission within 28 days after being requested to do so, the Contractor may, by giving notice to the Engineer, treat the suspension as an omission under Clause 13 [Variations and Adjustments] of the affected part of the Works. If the suspension affects the whole of the Works, the Contractor may give notice of termination under Sub-Clause 16.2 [Termination by Contractor].

### **8.12 Resumption of Work**

After the permission or instruction to proceed is given, the Contractor and the Engineer shall jointly examine the Works and the Plant and Materials affected by the suspension. The Contractor shall make good any deterioration or defect in or loss of the Works or Plant or Materials, which has occurred during the suspension after receiving from the Engineer an instruction to this effect under Clause 13 [Variations and Adjustments].

## **9. Tests on Completion**

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

The Contractor shall carry out the Tests on Completion in accordance with this Clause and Sub-Clause 7.4 [Testing], after providing the documents in accordance with subparagraph (d) of Sub-Clause 4.1 [Contractor's General Obligations].

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

In considering the results of the Tests on Completion, the Engineer shall make allowances for the effect of any use of the Works by the Procuring Entities on the performance or other characteristics of the Works. As soon as the Works, or a Section, have passed any Tests on Completion, the Contractor



shall submit a certified report of the results of these Tests to the Engineer.

### **9.2 Delayed Tests**

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

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

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

### **9.3 Retesting**

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

### **9.4 Failure to Pass Tests on Completion**

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

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

In the event of sub-paragraph (c), the Contractor shall proceed in accordance with all other obligations under the Contract, and the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Procuring Entities as a result of this failure. Unless the relevant reduction



for this failure is stated (or its method of calculation is defined) in the Contract, the Procuring Entities may require the reduction to be (i) agreed by both Parties (in full satisfaction of this failure only) and paid before this Taking-Over Certificate is issued, or (ii) determined and paid under Sub-Clause 2.5 [Procuring Entities's Claims] and Sub-Clause 3.5 [Determinations].

## **10. Procuring Entities's Taking Over**

### **10.1 Taking Over of the Works and Sections**

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

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

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

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

If the Engineer fails either to issue the Taking-Over Certificate or to reject the Contractor's application within the period of 28 days, and if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Taking-Over



Certificate shall be deemed to have been issued on the last day of that period.

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

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

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

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

If the Contractor incurs Cost as a result of the Procuring Entities taking over and/or using a part of the Works, other than such use as is specified in the Contract or agreed by the Contractor, the Contractor shall (i) give notice to the Engineer and (ii) be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to payment of any such Cost plus profit, which shall be included in the Contract Price. After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine this Cost and profit.

If a Taking-Over Certificate has been issued for a part of the Works (other than a Section), the delay damages thereafter for completion of the remainder of the Works shall be reduced. Similarly, the delay damages for the remainder of the Section (if any) in which this part is included shall also be reduced. For any period of delay after the date stated in this Taking-Over



Certificate, the proportional reduction in these delay damages shall be calculated as the proportion which the value of the part so certified bears to the value of the Works or Section (as the case may be) as a whole. The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these proportions. The provisions of this paragraph shall only apply to the daily rate of delay damages under Sub-Clause 8.7 [Delay Damages], and shall not affect the maximum amount of these damages.

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

If the Contractor is prevented, for more than 14 days, from carrying out the Tests on Completion by a cause for which the Procuring Entities is responsible, the Procuring Entities shall be deemed to have taken over the Works or Section (as the case may be) on the date when the Tests on Completion would otherwise have been completed.

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

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

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

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

### **10.4 Surfaces Requiring Reinstatement**

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

## **11. Defects Liability**





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

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

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

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

**11.2 Cost of Remedying Defects**

All work referred to in sub-paragraph (b) of Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects] shall be executed at the risk and cost of the Contractor, if and to the extent that the work is attributable to:

- (a) any design for which the Contractor is responsible,
- (b) Plant, Materials or workmanship not being in accordance with the Contract, or
- (c) 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 Procuring Entities and Sub-Clause 13.3 [Variation Procedure] shall apply.

**11.3 Extension of Defects Notification Period**

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

If delivery and/or erection of Plant and/or Materials was suspended under Sub-Clause 8.8 [Suspension of Work] or Sub-Clause 16.1 [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 remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Procuring Entities, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of this date.

If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor under Sub-Clause 11.2 [Cost of Remedying Defects], the Procuring Entities 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 [Procuring Entities's Claims] pay to the Procuring Entities the costs reasonably incurred by the Procuring Entities in remedying the defect or damage;
- (b) require the Engineer to agree or determine a reasonable reduction in the Contract Price in accordance with Sub-Clause 3.5 [Determinations]; or
- (c) if the defect or damage deprives the Procuring Entities of substantially the whole benefit of the Works or any major part of the Works, terminate the Contract as a whole, or in respect of such major part which cannot be put to the intended use. Without prejudice to any other rights, under the Contract or otherwise, the Procuring Entities shall then be entitled to recover all sums paid for the Works or for such part (as the case may be), plus financing costs and the cost of dismantling the same, clearing the Site and returning Plant and Materials to the Contractor.

#### **11.5 Removal of Defective Work**

If the defect or damage cannot be remedied expeditiously on the Site and the Procuring Entities gives consent, the Contractor may remove from the Site for the purposes of repair such items of Plant as are defective or damaged. This consent



may require the Contractor to increase the amount of the Performance Security by the full replacement cost of these items, or to provide other appropriate security.

### **11.6 Further Tests**

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

These tests shall be carried out in accordance with the terms applicable to the previous tests, except that they shall be carried out at the risk and cost of the Party liable, under Sub-Clause 11.2 [Cost of Remedying Defects], for the cost of the remedial work.

### **11.7 Right of Access**

Until the Performance Certificate has been issued, the Contractor shall have such right of access to the Works as is reasonably required in order to comply with this Clause, except as may be inconsistent with the Procuring Entities's reasonable security restrictions.

### **11.8 Contractor to Search**

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

### **11.9 Performance Certificate**

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

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

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



### **11.10 Unfulfilled Obligations**

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

### **11.11 Clearance of Site**

Upon receiving the Performance Certificate, the 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 receipt by the Contractor of the Performance Certificate, the Procuring Entities may sell or otherwise dispose of any remaining items. The Procuring Entities 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 Procuring Entities's costs, the Contractor shall pay the outstanding balance to the Procuring Entities.

## **12. Measurement and Evaluation**

### **12.1 Works to be Measured**

The Works shall be measured, and valued for payment, in accordance with this Clause. The Contractor shall show in each application under Sub-Clauses 14.3 [Application for Interim Payment Certificates], 14.10 [Statement at Completion], and 14.11 [Application for Final Payment Certificate] the quantities and other particulars detailing the amounts which he considers to be entitled under the Contract.

Whenever the Engineer requires any part of the Works to be measured, reasonable notice shall be given to the Contractor's Representative, who shall:

- (a) promptly either attend or send another qualified representative to assist the Engineer in making the measurement, and
- (b) supply any particulars requested by the Engineer.

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

Except as otherwise stated in the Contract, wherever any Permanent Works are to be measured from records, these shall be prepared by the Engineer. The Contractor shall, as and



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

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

### **12.2 Method of Measurement**

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

measurement shall be made of the net actual quantity of each item of the Permanent Works, and

the method of measurement shall be in accordance with the Bill of Quantities or other applicable Schedules.

### **12.3 Evaluation**

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

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

Any item of work included in the Bill of Quantities for which no rate or price was specified shall be considered as included in other rates and prices in the Bill of Quantities and will not be paid for separately.

However, a new rate or price shall be appropriate for an item of work if:

(a)

- (i) the measured quantity of the item is changed by more than 25% from the quantity of this item in the Bill of Quantities or other Schedule,
- (ii) this change in quantity multiplied by such specified rate for this item exceeds 0.25% of the Accepted Contract Amount,
- (iii) this change in quantity directly changes the Cost per unit quantity of this item by more than 1%, and
- (iv) this item is not specified in the Contract as a “fixed rate item”;

or

- (b)
  - (i) the work is instructed under Clause 13 [Variations and Adjustments],
  - (ii) no rate or price is specified in the Contract for this item, and
  - (iii) no specified rate or price is appropriate because the item of work is not of similar character, or is not executed under similar conditions, as any item in the Contract.

Each new rate or price shall be derived from any relevant rates or prices in the Contract, with reasonable adjustments to take account of the matters described in sub-paragraph (a) and/or (b), as applicable. If no rates or prices are relevant for the derivation of a new rate or price, it shall be derived from the reasonable Cost of executing the work, together with profit, taking account of any other relevant matters.

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

#### 12.4 Omissions

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

- (a) the Contractor will incur (or has incurred) cost which, if the work had not been omitted, would have been deemed



to be covered by a sum forming part of the Accepted Contract Amount;

- (b) the omission of the work will result (or has resulted) in this sum not forming part of the Contract Price; and
- (c) this cost is not deemed to be included in the evaluation of any substituted work;

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

### **13. Variations and Adjustments**

#### **13.1 Right to Vary**

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

The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that (i) the Contractor cannot readily obtain the Goods required for the Variation, or (ii) such Variation triggers a substantial change in the sequence or progress of the Works. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction.

Each Variation may include:

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

- (f) changes to the sequence or timing of the execution of the Works.

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

### 13.2 Value Engineering

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

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

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

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

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





**13.3 Variation Procedure**

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

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

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

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

**13.4 Payment in Applicable Currencies**

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

**13.5 Provisional Sums**

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

- (a) work to be executed (including Plant, Materials or services to be supplied) by the Contractor and valued under Sub-Clause 13.3 [Variation Procedure]; and/or

- (b) Plant, Materials or services to be purchased by the Contractor, from a nominated Subcontractor (as defined in Clause 5 [Nominated Subcontractors]) or otherwise; and for which there shall be included in the Contract Price:
- (i) the actual amounts paid (or due to be paid) by the Contractor, and
  - (ii) a sum for overhead charges and profit, calculated as a percentage of these actual amounts by applying the relevant percentage rate (if any) stated in the appropriate Schedule. If there is no such rate, the percentage rate stated in the Contract Data shall be applied.

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

### 13.6 Daywork

For work of a minor or incidental nature, the Engineer may instruct that a Variation shall be executed on a daywork basis. The work shall then be valued in accordance with the Daywork Schedule included in the Contract, and the following procedure shall apply. If a Daywork Schedule is not included in the Contract, this Sub-Clause shall not apply.

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

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

- (a) the names, occupations and time of Contractor's Personnel,
- (b) the identification, type and time of Contractor's Equipment and Temporary Works, and
- (c) the quantities and types of Plant and Materials used.

One copy of each statement will, if correct, or when agreed, be signed by the Engineer and returned to the Contractor. The Contractor shall then submit priced statements of these resources to the Engineer, prior to their inclusion in the next



Statement under Sub-Clause 14.3 [Application for Interim Payment Certificates].

### **13.7 Adjustments for Changes in Legislation**

The Contract Price shall be adjusted to take account of any increase or decrease 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.

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 Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

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

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

Notwithstanding the foregoing, the Contractor shall not be entitled to an extension of time if the relevant delay has already been taken into account in the determination of a previous extension of time and such Cost shall not be separately paid if the same shall already have been taken into account in the indexing of any inputs to the table of adjustment data in accordance with the provisions of Sub-Clause 13.8 [Adjustments for Changes in Cost] .

### **13.8 Adjustments for Changes in Cost**

In this Sub-Clause, "table of adjustment data" means the completed table of adjustment data for local and foreign currencies included in the Schedules. If there is no such table of adjustment data, this Sub-Clause shall not apply.

If this Sub-Clause applies, the amounts payable to the Contractor shall be adjusted for rises or falls in the cost of labour, Goods and other inputs to the Works, by the addition or deduction of the amounts determined by the formulae prescribed in this Sub-Clause. To the extent that full compensation for any rise or fall in Costs is not covered by the provisions of this or other Clauses, the Accepted Contract

Amount shall be deemed to have included amounts to cover the contingency of other rises and falls in costs.

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

$P_n = a + b L_n / L_o + c E_n / E_o + d M_n / M_o + \dots$  where:

“ $P_n$ ” is the adjustment multiplier to be applied to the estimated contract value in the relevant currency of the work carried out in period “ $n$ ”, this period being a month unless otherwise stated in the Contract Data ;

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

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

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

“ $L_o$ ”, “ $E_o$ ”, “ $M_o$ ”, ... are the base cost indices or reference prices, expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the Base Date.

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



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

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

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

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

## **14. Contract Price and Payment**

### **14.1 The Contract Price**

Unless otherwise stated in the Particular Conditions:

- (a) the Contract Price shall be agreed or determined under Sub-Clause 12.3 [Evaluation] 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 the Bill of Quantities or other Schedule are estimated quantities and are not to be taken as the actual and correct quantities:
  - (i) of the Works which the Contractor is required to execute, or
  - (ii) for the purposes of Clause 12 [Measurement and Evaluation]; and



- (d) the Contractor shall submit to the Engineer, within 28 days after the Commencement Date, a proposed breakdown of each lump sum price in the Schedules. The Engineer may take account of the breakdown when preparing Payment Certificates, but shall not be bound by it.
- (e) Notwithstanding the provisions of subparagraph (b), Contractor's Equipment, including essential spare parts therefor, imported by the Contractor for the sole purpose of executing the Contract shall be exempt from the payment of import duties and taxes upon importation.

## 14.2 Advance Payment

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

Unless and until the Procuring Entities receives this guarantee, or if the total advance payment is not stated in the Contract Data, this Sub-Clause shall not apply.

The Engineer shall deliver to the Procuring Entities and to the Contractor an Interim Payment Certificate for the advance payment or its first instalment after receiving a Statement (under Sub-Clause 14.3 [Application for Interim Payment Certificates]) and after the Procuring Entities receives (i) the Performance Security in accordance with Sub-Clause 4.2 [Performance Security] and (ii) a guarantee in amounts and currencies equal to the advance payment. This guarantee shall be issued by an entity and from within a country (or other jurisdiction) approved by the Procuring Entities, and shall be in the form annexed to the Special Conditions or in another form approved by the Procuring Entities.

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

Unless stated otherwise in the Contract Data, the advance payment shall be repaid through percentage deductions from



the interim payments determined by the Engineer in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates], as follows:

- (a) deductions shall commence in the next interim Payment Certificate following that in which the total of all certified interim payments (excluding the advance payment and deductions and repayments of retention) exceeds 30 percent (30%) of the Accepted Contract Amount less Provisional Sums; and
- (b) deductions shall be made at the amortisation rate stated in the Contract Data of the amount of each Interim Payment Certificate (excluding the advance payment and deductions for its repayments as well as deductions for retention money) in the currencies and proportions of the advance payment until such time as the advance payment has been repaid; provided that the advance payment shall be completely repaid prior to the time when 90 per cent (90%) of the Accepted Contract Amount less Provisional Sums has been certified for payment.

If the advance payment has not been repaid prior to the issue of the Taking-Over Certificate for the Works or prior to termination under Clause 15 [Termination by Procuring Entities], Clause 16 [Suspension and Termination by Contractor] or Clause 19 [Force Majeure] (as the case may be), the whole of the balance then outstanding shall immediately become due and in case of termination under Clause 15 [Termination by Procuring Entities] and Sub-Clause 19.6 [Optional Termination, Payment and Release], payable by the Contractor to the Procuring Entities.

### **14.3 Application for Interim Payment Certificates**

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

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

- (a) the estimated contract value of the Works executed and the Contractor's Documents produced up to the end of



the month (including Variations but excluding items described in sub-paragraphs (b) to (g) below);

- (b) any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 [Adjustments for Changes in Legislation] and Sub-Clause 13.8 [Adjustments for Changes in Cost];
- (c) any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Contract Data to the total of the above amounts, until the amount so retained by the Procuring Entities reaches the limit of Retention Money (if any) stated in the Contract Data;
- (d) any amounts to be added for the advance payment and (if more than one instalment) and to be deducted for its repayments in accordance with Sub-Clause 14.2 [Advance Payment];
- (e) any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.5 [Plant and Materials intended for the Works];
- (f) any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration]; and
- (g) the deduction of amounts certified in all previous Payment Certificates.

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

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

- (a) the instalments quoted in this schedule of payments shall be the estimated contract values for the purposes of sub-paragraph (a) of Sub-Clause 14.3 [Application for Interim Payment Certificates];
- (b) Sub-Clause 14.5 [Plant and Materials intended for the Works] shall not apply; and
- (c) if these instalments are not defined by reference to the actual progress achieved in executing the Works, and if actual progress is found to be less or more than that on which this schedule of payments was based, then the Engineer may proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine revised





instalments, which shall take account of the extent to which progress is less or more than that on which the instalments were previously based.

If the Contract does not include a schedule of payments, the Contractor shall submit non-binding estimates of the payments which he expects to become due during each quarterly period. The first estimate shall be submitted within 42 days after the Commencement Date. Revised estimates shall be submitted at quarterly intervals, until the Taking-Over Certificate has been issued for the Works.

**14.5 Plant and  
Materials intended  
for the Works**

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

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

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

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

and either:

- (b) the relevant Plant and Materials:
  - (i) are those listed in the Schedules for payment when shipped,
  - (ii) have been shipped to the Country, en route to the Site, in accordance with the Contract; and
  - (iii) are described in a clean shipped bill of lading or other evidence of shipment, which has been



submitted to the Engineer together with evidence of payment of freight and insurance, any other documents reasonably required, and a bank guarantee in a form and issued by an entity approved by the Procuring Entities in amounts and currencies equal to the amount due under this Sub-Clause: this guarantee may be in a similar form to the form referred to in Sub-Clause 14.2 [Advance Payment] and shall be valid until the Plant and Materials are properly stored on Site and protected against loss, damage or deterioration;

or

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

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

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

#### **14.6 Issue of Interim Payment Certificates**

No amount will be certified or paid until the Procuring Entities has received and approved the Performance Security. Thereafter, the Engineer shall, within 28 days after receiving a Statement and supporting documents, deliver to the Procuring Entities and to the Contractor an Interim Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with all supporting particulars for any reduction or withholding made by the Engineer on the Statement if any.



However, prior to issuing the Taking-Over Certificate for the Works, the Engineer shall not be bound to issue an Interim Payment Certificate in an amount which would (after retention and other deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Contract Data. In this event, the Engineer 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 Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

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

#### 14.7 Payment

The Procuring Entities shall pay to the Contractor:

- (a) the first instalment of the advance payment within 42 days after issuing the Letter of Acceptance or within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [Performance Security] and Sub-Clause 14.2 [Advance Payment], whichever is later;
- (b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents, any discrepancy being rectified in the next payment to the Contractor; and
- (c) the amount certified in the Final Payment Certificate within 56 days after the Procuring Entities receives this Payment Certificate or, at a time when the -the Contractor is suspended, the undisputed amount shown in the Final Statement, within 56 days after the date of



notification of the suspension in accordance with Sub-Clause 16.2.

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

#### **14.8 Delayed Payment**

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of its sub-paragraph (b)) of the date on which any Interim Payment Certificate is issued.

Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the Bank of Eswatini of the currency of payment, or if not available, the interbank offered rate, and shall be paid in such currency.

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**

When the Taking-Over Certificate has been issued for the Works, the first half of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a

Taking-Over Certificate is issued for a Section or part of the Works, a proportion of the Retention Money shall be certified and paid. This proportion shall be half (50%) of the proportion calculated by dividing the estimated contract value of the Section or part, by the estimated final Contract Price.

Promptly after the latest of the expiry dates of the Defects Notification Periods, the outstanding balance of the Retention Money shall be certified by the Engineer for payment to the Contractor. If a Taking-Over Certificate was issued for a Section, a proportion of the second half of the Retention Money shall be certified and paid promptly after the expiry date of the Defects Notification Period for the Section. This proportion shall be half (50%) of the proportion calculated by dividing the estimated contract value of the Section by the estimated final Contract Price.



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

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

Unless otherwise stated in the Particular Conditions, when the Taking-Over Certificate has been issued for the Works and the first half of the Retention Money has been certified for payment by the Engineer, the Contractor shall be entitled to substitute a guarantee, in the form annexed to the Special Conditions or in another form approved by the Procuring Entities and provided by an entity approved by the Procuring Entities, for the second half of the Retention Money. The Contractor shall ensure that the guarantee is in the amounts and currencies of the second half of the Retention Money and is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects, as specified for the Performance Security in Sub-Clause 4.2. On receipt by the Procuring Entities of the required guarantee, the Engineer shall certify and the Procuring Entities shall pay the second half of the Retention Money. The release of the second half of the Retention Money against a guarantee shall then be in lieu of the release under the second paragraph of this Sub-Clause. The Procuring Entities shall return the guarantee to the Contractor within 21 days after receiving a copy of the Performance Certificate.

If the Performance Security required under Sub-Clause 4.2 is in the form of a demand guarantee, and the amount guaranteed under it when the Taking-Over Certificate is issued is more than half of the Retention Money, then the Retention Money guarantee will not be required. If the amount guaranteed under the Performance Security when the Taking-Over Certificate is issued is less than half of the Retention Money, the Retention Money guarantee will only be required for the difference between half of the Retention Money and the amount guaranteed under the Performance Security.

#### **14.10 Statement at Completion**

Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Engineer six copies of a Statement at completion with supporting



documents, in accordance with Sub-Clause 14.3 [Application for Interim Payment Certificates], showing:

- (a) the 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, and
- (c) an estimate of any other amounts which the Contractor considers will become due to him under the Contract. Estimated amounts shall be shown separately in this Statement at completion.

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

#### **14.11 Application for Final Payment Certificate**

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

- (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 Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require within 28 days from receipt of the said draft and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed. This agreed statement is referred to in these Conditions as the “Final Statement”.

However if, following discussions between the Engineer and the Contractor and any changes to the draft final statement which are agreed, it becomes evident that a dispute exists, the Engineer shall deliver to the Procuring Entities (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 Board’s Decision] or Sub-Clause 20.5 [Amicable Settlement], the Contractor shall then prepare and submit to the Procuring Entities (with a copy to the Engineer) a Final Statement.



**14.12 Discharge**

When submitting the Final Statement, the Contractor shall submit a 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 Performance Security and the outstanding balance of this total, in which event the discharge shall be effective on such date.

**14.13 Issue of Final Payment Certificate**

Within 28 days after receiving the Final Statement and discharge in accordance with Sub-Clause 14.11 [Application for Final Payment Certificate] and Sub-Clause 14.12 [Discharge], the Engineer shall deliver to the Procuring Entities and to the Contractor, the Final Payment Certificate which shall state:

- (a) the amount which he fairly determines is finally due, and
- (b) after giving credit to the Procuring Entities for all amounts previously paid by the Procuring Entities and for all sums to which the Procuring Entities is entitled, the balance (if any) due from the Procuring Entities to the Contractor or from the Contractor to the Procuring Entities, 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 Engineer shall request the Contractor to do so. If the Contractor fails to submit an application within a period of 28 days, the Engineer shall issue the Final Payment Certificate for such amount as he fairly determines to be due.

**14.14 Cessation of Procuring Entities's Liability**

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

However, this Sub-Clause shall not limit the Procuring Entities's liability under his indemnification obligations, or the



Procuring Entities's liability in any case of fraud, deliberate default or reckless misconduct by the Procuring Entities.

#### **14.15 Currencies of Payment**

The Contract Price shall be paid in the currency or currencies named in the Schedule of Payment Currencies. If more than one currency is so named, payments shall be made as follows:

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





## 15. Termination by Procuring Entities

- 15.1 Notice to Correct** If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.
- 15.2 Termination by Procuring Entities** The Procuring Entities shall be entitled to terminate the Contract if the Contractor:
- (a) fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1 [Notice to Correct],
  - (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,
  - (c) without reasonable excuse fails:
    - (i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or
    - (ii) to comply with a notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work], within 28 days after receiving it,
  - (d) subcontracts the whole of the Works or assigns the Contract without the required agreement,
  - (e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events, or
  - (f) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:
    - (i) for doing or forbearing to do any action in relation to the Contract, or
    - (ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract,

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

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

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

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

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

The Procuring Entities 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 Procuring Entities, these items may be sold by the Procuring Entities in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

### **15.3 Valuation at Date of Termination**

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



**15.4 Payment after Termination**

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

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

**15.5 Procuring Entities's Entitlement to Termination for Convenience**

The Procuring Entities shall be entitled to terminate the Contract, at any time for the Procuring Entities's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Procuring Entities returns the Performance Security. The Procuring Entities shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor or to avoid a termination of the Contract by the Contractor under Sub-Clause 16.2 [Termination by Contractor].

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 16.4 [Payment on Termination].

**15.6 Corrupt or Fraudulent Practices**

If the Procuring Entities determines that the Contractor and/or any of its personnel, or its agents, or its Subcontractors, subconsultants, services providers, suppliers and/or their employees has engaged in corrupt, fraudulent, collusive coercive, or obstructive practices, in competing for or in executing the Contract, then the Procuring Entities may, after giving 14 days notice to the Contractor, terminate the Contractor's employment under the Contract and expel him from the Site, and the provisions of Clause 15 shall apply as if



such expulsion had been made under Sub-Clause 15.2 [Termination by Procuring Entities].

Should any employee of the Contractor be determined to have engaged in corrupt, fraudulent, collusive, coercive, or obstructive practice during the execution of the Works, then that employee shall be removed in accordance with Sub-Clause 6.9 [Contractor's Personnel].

For the purposes of this Sub-Clause:

- (i) "corrupt practice" is the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party<sup>7</sup>;
- (ii) "fraudulent practice" is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation<sup>8</sup>;
- (iii) "collusive practice" is an arrangement between two or more parties<sup>9</sup> designed to achieve an improper purpose, including to influence improperly the actions of another party;
- (iv) "coercive practice" is impairing or harming, or threatening to impair or harm, directly or indirectly, any party<sup>10</sup> or the property of the party to influence improperly the actions of a party;
- (v) "obstructive practice" is
  - (aa) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order

<sup>7</sup> "Another party" refers to a public official acting in relation to the procurement process or contract execution]. In this context, "public official" includes Government staff and employees of other organizations taking or reviewing procurement decisions.

<sup>8</sup> "Party" refers to a public official; the terms "benefit" and "obligation" relate to the procurement process or contract execution; and the "act or omission" is intended to influence the procurement process or contract execution.

<sup>9</sup> "Parties" refers to participants in the procurement process (including public officials) attempting to establish tender prices at artificial, non competitive levels.

<sup>10</sup> "Party" refers to a participant in the procurement process or contract execution.



to materially impede a Government investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or

- (bb) acts intended to materially impede the exercise of the Government's inspection and audit rights provided for under Sub-Clause 1.15 [Inspections and Audits by the Government].

## 16. Suspension and Termination by Contractor

### 16.1 Contractor's Entitlement to Suspend Work

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

Notwithstanding the above, if ESPPRA has suspended payments to the Contractor pursuant to the Public Procurement Act of 2011, in whole or in part, for the execution of the Works, and no alternative funds are available as provided for in Sub-Clause 2.4 [Procuring Entities's Financial Arrangements], the Contractor may by notice suspend work or reduce the rate of work at any time, but not less than 7 days after the Procuring Entities having received the suspension notification from ESPPRA.

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



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

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

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

## **16.2 Termination by Contractor**

The Contractor shall be entitled to terminate the Contract if:

- (a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] in respect of a failure to comply with Sub-Clause 2.4 [Procuring Entities's Financial Arrangements],
- (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate,
- (c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-Clause 14.7 [Payment] within which payment is to be made (except for deductions in accordance with Sub-Clause 2.5 [Procuring Entities's Claims]),
- (d) the Procuring Entities substantially fails to perform his obligations under the Contract in such manner as to materially and adversely affect the economic balance of the Contract and/or the ability of the Contractor to perform the Contract,
- (e) the Procuring Entities fails to comply with Sub-Clause 1.6 [Contract Agreement] or Sub-Clause 1.7 [Assignment],



- (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [Prolonged Suspension], or
- (g) the Procuring Entities 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.
- (h) In the event that ESPPRA suspends the Contractor pursuant to the Public Procurement Act of 2011, and the Contractor has not received the sums due to him upon expiration of the 14 days referred to in Sub-Clause 14.7 [Payment] for payments under Interim Payment certificates, the Contractor may, without prejudice to the Contractor's entitlement to financing charges under Sub-Clause 14.8 [Delayed Payment], take one of the following actions, namely (i) suspend work or reduce the rate of work, or (ii) terminate his employment under the Contract by giving notice to the Procuring Entities, with a copy to the Engineer, such termination to take effect 14 days after the giving of the notice.
- (i) the Contractor does not receive the Engineer's instruction recording the agreement of both Parties on the fulfilment of the conditions for the Commencement of Works under Sub-Clause 8.1 [Commencement of Works].

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

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

### **16.3 Cessation of Work and Removal of Contractor's Equipment**

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



- (a) cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works,
- (b) hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and
- (c) remove all other Goods from the Site, except as necessary for safety, and leave the Site.

#### **16.4 Payment on Termination**

After a notice of termination under Sub-Clause 16.2 [Termination by Contractor] has taken effect, the Procuring Entities shall promptly:

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

### **17. Risk and Responsibility**

#### **17.1 Indemnities**

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

- (a) bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful act or breach of the Contract by the Procuring Entities, the Procuring Entities's Personnel, or any of their respective agents, and
- (b) damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss arises out of or in the course of or by reason of the Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, unless and to the extent that any such damage or loss is attributable to any negligence, wilful act or breach





of the Contract by the Procuring Entities, the Procuring Entities's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.

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

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

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

After responsibility has accordingly passed to the Procuring Entities, 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.

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 [Procuring Entities'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 Procuring Entities's Risks

The risks referred to in Sub-Clause 17.4 [Consequences of Procuring Entities's Risks] below, insofar as they directly affect the execution of the Works in the Country, are:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- (b) rebellion, terrorism, sabotage by persons other than the Contractor's Personnel, 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,
- (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 Procuring Entities of any part of the Permanent Works, except as may be specified in the Contract,
- (g) design of any part of the Works by the Procuring Entities's Personnel or by others for whom the Procuring Entities is responsible, and
- (h) 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 Procuring Entities's Risks

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

If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

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



- (b) payment of any such Cost, which shall be included in the Contract Price. In the case of sub-paragraphs (f) and (g) of Sub-Clause 17.3 [Procuring Entities's Risks], Cost plus profit shall be payable.

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

### **17.5 Intellectual and Industrial Property Rights**

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

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

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

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

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

If a Party is entitled to be indemnified under this Sub-Clause, the indemnifying Party may (at its cost) conduct negotiations for the settlement of the claim, and any litigation or arbitration which



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

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

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than as specifically provided in Sub-Clause 8.7 [Delay Damages]; Sub-Clause 11.2 [Cost of Remedying Defects]; Sub-Clause 15.4 [Payment after Termination]; Sub-Clause 16.4 [Payment on Termination]; Sub-Clause 17.1 [Indemnities]; Sub-Clause 17.4 (b) [Consequences of Procuring Entities's Risks] and Sub-Clause 17.5 [Intellectual and Industrial Property Rights].

The total liability of the Contractor to the Procuring Entities, under or in connection with the Contract other than under Sub-Clause 4.19 [Electricity, Water and Gas], Sub-Clause 4.20 [Procuring Entities's Equipment and Free-Issue Material], Sub-Clause 17.1 [Indemnities] and Sub-Clause 17.5 [Intellectual and Industrial Property Rights], shall not exceed the sum resulting from the application of a multiplier (less or greater than one) to the Accepted Contract Amount, as stated in the Contract Data, or (if such multiplier or other sum is not so stated), the Accepted Contract Amount.

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

#### **17.7 Use of Procuring Entities's Accommodation/Facilities**

The Contractor shall take full responsibility for the care of the Procuring Entities provided accommodation and facilities, if any, as detailed in the Specification, from the respective dates of hand-over to the Contractor until cessation of occupation (where hand-over or cessation of occupation may take place after the date stated in the Taking-Over Certificate for the Works).

If any loss or damage happens to any of the above items while the Contractor is responsible for their care arising from any cause whatsoever other than those for which the Procuring Entities is liable, the Contractor shall, at his own cost, rectify the loss or damage to the satisfaction of the Engineer.



## 18. Insurance

### 18.1 General Requirements for Insurances

In this Clause, “insuring Party” means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in the relevant Sub-Clause.

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

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

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

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

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

- (a) evidence that the insurances described in this Clause have been effected, and
- (b) copies of the policies for the insurances described in Sub-Clause 18.2 [Insurance for Works and Contractor’s



Equipment] and Sub-Clause 18.3 [Insurance against Injury to Persons and Damage to Property].

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

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

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

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

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

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



**18.2 Insurance for Works and Contractor's Equipment**

The Contractor shall be entitled to place all insurance relating to the Contract (including, but not limited to the insurance referred to Clause 18) with insurers from any eligible source country.

The insuring Party shall insure the Works, Plant, Materials and Contractor's Documents for not less than the full reinstatement cost including the costs of demolition, removal of debris and professional fees and profit. This insurance shall be effective from the date by which the evidence is to be submitted under sub-paragraph (a) of Sub-Clause 18.1 [General Requirements for Insurances], until the date of issue of the Taking-Over Certificate for the Works.

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

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

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

- (a) shall be effected and maintained by the Contractor as insuring Party,
- (b) shall be in the joint names of the Parties, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated to the Party actually bearing the costs of rectifying the loss or damage,
- (c) shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 [Procuring Entities's Risks],
- (d) shall also cover, to the extent specifically required in the Tendering documents of the Contract, loss or damage to a part of the Works which is attributable to the use or occupation by the Procuring Entities of another part of the Works, and loss or damage from the risks listed in sub-paragraphs (c), (g) and (h) of Sub-Clause 17.3



[Procuring Entities's Risks], excluding (in each case) risks which are not insurable at commercially reasonable terms, with deductibles per occurrence of not more than the amount stated in the Contract Data (if an amount is not so stated, this sub-paragraph (d) shall not apply), and

- (e) may however exclude loss of, damage to, and reinstatement of:
  - (i) a part of the Works which is in a defective condition due to a defect in its design, materials or workmanship (but cover shall include any other parts which are lost or damaged as a direct result of this defective condition and not as described in sub-paragraph (ii) below),
  - (ii) a part of the Works which is lost or damaged in order to reinstate any other part of the Works if this other part is in a defective condition due to a defect in its design, materials or workmanship,
  - (iii) a part of the Works which has been taken over by the Procuring Entities, except to the extent that the Contractor is liable for the loss or damage, and
  - (iv) Goods while they are not in the Country, subject to Sub-Clause 14.5 [Plant and Materials intended for the Works].

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

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

The insuring Party shall insure against each Party's liability for any loss, damage, death or bodily injury which may occur to any physical property (except things insured under Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment]) or to any person (except persons insured under





Sub-Clause 18.4 [Insurance for Contractor's Personnel]), which may arise out of the Contractor's performance of the Contract and occurring before the issue of the Performance Certificate.

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

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

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

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

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

The insurance shall cover the Procuring Entities and the Engineer against liability for claims, damages, losses and expenses (including legal fees and expenses) arising from



injury, sickness, disease or death of any person employed by the Contractor or any other of the Contractor's Personnel, except that this insurance may exclude losses and claims to the extent that they arise from any act or neglect of the Procuring Entities or of the Procuring Entities's Personnel.

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

## 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 conditions (a) to (d) above are satisfied:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- (ii) rebellion, terrorism, sabotage by persons other than the Contractor's Personnel, revolution, insurrection, military or usurped power, or civil war,
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel,
- (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 its substantial 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 its obligations for so long as such Force Majeure prevents it from performing them.

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

**19.3 Duty to Minimise Delay**

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

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

**19.4 Consequences of Force Majeure**

If the Contractor is prevented from performing its substantial 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
- (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), occurs in the Country, payment of any such Cost, including the costs of rectifying or replacing the Works and/or Goods damaged or destroyed by Force Majeure, to the extent they are not indemnified through the insurance policy referred to in Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment].

After receiving this notice, the Engineer 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 to relief from force majeure on terms additional to or broader than those specified in this Clause, such additional or broader force majeure events or circumstances shall not excuse the Contractor's non-performance or entitle him to relief under this Clause.

**19.6 Optional Termination, Payment and Release**

If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment].

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

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;
- (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Procuring Entities when paid for by the Procuring Entities, and the Contractor shall place the same at the Procuring Entities's disposal;
- (c) other Costs or liabilities which in the circumstances were reasonably and necessarily incurred by the Contractor in the expectation of completing the Works;
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and



- (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

### **19.7 Release from Performance**

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

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

## **20. Claims, Disputes and Arbitration**

### **20.1 Contractor's Claims**

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

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Procuring Entities shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause 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 Engineer. Without admitting the Procuring Entities's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

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

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

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

Within the above defined period of 42 days, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the



additional payment (if any) to which the Contractor is entitled under the Contract.

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

If the Engineer does not respond within the timeframe defined in this Clause, either Party may consider that the claim is rejected by the Engineer and any of the Parties may refer it to the Dispute Board in accordance with Sub-Clause 20.4 [Obtaining Dispute Board's Decision].

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

## **20.2 Appointment of the Dispute Board**

Disputes shall be referred to a DB for decision in accordance with Sub-Clause 20.4 [Obtaining Dispute Board's Decision]. The Parties shall appoint a DB by the date stated in the Contract Data.

The DB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons ("the members"), each of whom shall be fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual documents. If the number is not so stated and the Parties do not agree otherwise, the DB shall comprise three persons.

If the Parties have not jointly appointed the DB 21 days before the date stated in the Contract Data and the DB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The first two members shall recommend and the Parties shall agree upon the third member, who shall act as chairman.



However, if a list of potential members has been agreed by the Parties and is included in the Contract, the members shall be selected from those on the list, other than anyone who is unable or unwilling to accept appointment to the DB.

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

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

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

If a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Procuring Entities or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DB (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 on the Composition of the Dispute Board**

If any of the following conditions apply, namely:

- (a) the Parties fail to agree upon the appointment of the sole member of the DB by the date stated in the first paragraph of Sub-Clause 20.2, [Appointment of the Dispute Board],
- (b) either Party fails to nominate a member (for approval by the other Party), or fails to approve a member nominated by the other Party, of a DB of three persons by such date,





- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the Contract Data shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DB. 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 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 Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.

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

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

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

If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention



to commence arbitration. If the DB 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 and intention to commence arbitration.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

If the DB 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 DB'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 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 a notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

#### **20.6 Arbitration**

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

- (a) For contracts with foreign contractors, international arbitration with proceedings administered by the institution appointed in the Contract Data, conducted in accordance with the rules of arbitration of the appointed institution, if any, or in accordance with UNCITRAL arbitration rules, at the choice of the appointed institution,
- (b) the place of arbitration shall be the city where the headquarters of the appointed arbitration institution is located,



- (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language], and
- (d) For contracts with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the Procuring Entities's country.

The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DB, relevant to the dispute. Nothing shall disqualify representatives of the Parties and the Engineer 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 DB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DB 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 Engineer and the DB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

**20.7 Failure to Comply with Dispute Board's Decision**

In the event that a Party fails to comply with a final and binding DB 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 Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference.

**20.8 Expiry of Dispute Board's Appointment**

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

- (a) Sub-Clause 20.4 [Obtaining Dispute 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].





## APPENDIX

### A General Conditions of Dispute Board Agreement

#### 1. Definitions

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

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

The Procuring Entities and the Contractor have entered (or intend to enter) into a contract, which is called the "Contract" and is defined in the Dispute Board Agreement, which incorporates this Appendix. In the Dispute Board 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 Board Agreement, it shall take effect on the latest of the following dates:

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

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

#### 3. Warranties

The Member warrants and agrees that he/she is and shall be impartial and independent of the Procuring Entities, the Contractor and the Engineer. The Member shall promptly disclose, to each of them and to the Other Members (if any), any fact or circumstance



which might appear inconsistent with his/her warranty and agreement of impartiality and independence.

When appointing the Member, the Procuring Entities 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 Procuring Entities, the Contractor or Engineer, nor any financial interest in the Contract except for payment under the Dispute Board Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Procuring Entities, the Contractor or the Engineer, except in such circumstances as were disclosed in writing to the Procuring Entities and the Contractor before they signed the Dispute Board Agreement;
- (c) have disclosed in writing to the Procuring Entities, the Contractor and the Other Members (if any), before entering into the Dispute Board Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Procuring Entities, the Contractor or the Engineer, and any previous involvement in the overall project of which the Contract forms part;
- (d) not, for the duration of the Dispute Board Agreement, be employed as a consultant or otherwise by the Procuring Entities, the Contractor or the Engineer, except as may be agreed in writing by the Procuring Entities, the Contractor and the Other Members (if any);
- (e) comply with the annexed procedural rules and with Sub-Clause 20.4 of the Conditions of Contract;
- (f) not give advice to the Procuring Entities, the Contractor, the Procuring Entities's Personnel or the Contractor's Personnel



concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;

- (g) not while a Member enter into discussions or make any agreement with the Procuring Entities, the Contractor or the Engineer regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Board Agreement;
- (h) ensure his/her availability for all site visits and hearings as are necessary;
- (i) become conversant with the Contract and with the progress of the Works (and of any other parts of the project of which the Contract forms part) by studying all documents received which shall be maintained in a current working file;
- (j) treat the details of the Contract and all the DB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Procuring Entities, the Contractor and the Other Members (if any); and
- (k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Procuring Entities and the Contractor, subject to the agreement of the Other Members (if any).

**5. General  
Obligations of the  
Procuring  
Entities and the  
Contractor**

The Procuring Entities, the Contractor, the Procuring Entities'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 DB's activities under the Contract and the Dispute Board Agreement. The Procuring Entities and the Contractor shall be responsible for compliance with this provision, by the Procuring Entities's Personnel and the Contractor's Personnel respectively.

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

- (a) be appointed as an arbitrator in any arbitration under the Contract;
- (b) be called as a witness to give evidence concerning any dispute before arbitrator(s) appointed for any arbitration under the Contract; or



- (c) be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith.

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

Whenever the Procuring Entities or the Contractor refers a dispute to the DB under Sub-Clause 20.4 of the Conditions of Contract, which will require the Member to make a site visit and attend a hearing, the Procuring Entities or the Contractor shall provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the Member. No account shall be taken of any other payments due or paid to the Member.

## 6. Payment

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

- (a) a retainer fee per calendar month, which shall be considered as payment in full for:
  - (i) being available on 28 days' notice for all site visits and hearings;
  - (ii) becoming and remaining conversant with all project developments and maintaining relevant files;
  - (iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and
  - (iv) all services performed hereunder except those referred to in sub-paragraphs (b) and (c) of this Clause.

The retainer fee shall be paid with effect from the last day of the calendar month in which the Dispute Board Agreement becomes effective; until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works.

With effect from the first day of the calendar month following the month in which the Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by one third. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Board Agreement is otherwise terminated.

- (b) a daily fee which shall be considered as payment in full for:





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

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

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

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

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



If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Board Agreement, the Procuring Entities shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the DB; and without prejudice to the Procuring Entities's rights or remedies. In addition to all other rights arising from this default, the Procuring Entities 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 of the Conditions of Contract.

If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under Clause 7.

## **7. Termination**

At any time: (i) the Procuring Entities and the Contractor may jointly terminate the Dispute Board Agreement by giving 42 days' notice to the Member; or (ii) the Member may resign as provided for in Clause 2.

If the Member fails to comply with the Dispute Board Agreement, the Procuring Entities and the Contractor may, without prejudice to their other rights, terminate it by notice to the Member. The notice shall take effect when received by the Member.

If the Procuring Entities or the Contractor fails to comply with the Dispute Board Agreement, the Member may, without prejudice to his other rights, terminate it by notice to the Procuring Entities and the Contractor. The notice shall take effect when received by them both.

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

## **8. Default of the Member**

If the Member fails to comply with any of his obligations under Clause 4 (a) - (d) above, he shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Procuring Entities and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.



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

## **9. Disputes**

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



## PROCEDURAL RULES

Unless otherwise agreed by the Procuring Entities and the Contractor, the DB shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Procuring Entities or the Contractor. Unless otherwise agreed by the Procuring Entities, the Contractor and the DB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.

The timing of and agenda for each site visit shall be as agreed jointly by the DB, the Procuring Entities and the Contractor, or in the absence of agreement, shall be decided by the DB. The purpose of site visits is to enable the DB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and, as far as reasonable, to endeavour to prevent potential problems or claims from becoming disputes.

Site visits shall be attended by the Procuring Entities, the Contractor and the Engineer and shall be co-ordinated by the Procuring Entities in co-operation with the Contractor. The Procuring Entities 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 DB shall prepare a report on its activities during the visit and shall send copies to the Procuring Entities and the Contractor.

The Procuring Entities and the Contractor shall furnish to the DB one copy of all documents which the DB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DB and the Procuring Entities or the Contractor shall be copied to the other Party. If the DB comprises three persons, the Procuring Entities and the Contractor shall send copies of these requested documents and these communications to each of these persons.

If any dispute is referred to the DB in accordance with Sub-Clause 20.4 of the Conditions of Contract, the DB shall proceed in accordance with Sub-Clause 20.4 and these Rules. Subject to the time allowed to give notice of a decision and other relevant factors, the DB shall:

- (a) act fairly and impartially as between the Procuring Entities 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.

The DB 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 Procuring Entities and the Contractor be presented to it prior to or at the hearing.



Except as otherwise agreed in writing by the Procuring Entities and the Contractor, the DB 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 Procuring Entities, the Contractor and the Engineer, and to proceed in the absence of any party who the DB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.

The Procuring Entities and the Contractor empower the DB, among other things, to:

- (a) establish the procedure to be applied in deciding a dispute,
- (b) decide upon the DB's own jurisdiction, and as to the scope of any dispute referred to it,
- (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,
- (d) take the initiative in ascertaining the facts and matters required for a decision,
- (e) make use of its own specialist knowledge, if any,
- (f) decide upon the payment of financing charges in accordance with the Contract,
- (g) decide upon any provisional relief such as interim or conservatory measures, and
- (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer, relevant to the dispute.

The DB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DB shall make and give its decision in accordance with Sub-Clause 20.4, or as otherwise agreed by the Procuring Entities and the Contractor in writing. If the DB 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 Procuring Entities and the Contractor; and
- (c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless:
  - (i) either the Procuring Entities or the Contractor does not agree that they do so, or
  - (ii) the absent Member is the chairman and he/she instructs the other Members not to make a decision.



## **Section VIII. Standard Conditions (SC)**

The following Special Conditions shall supplement the GC. Whenever there is a conflict, the provisions herein shall prevail over those in the GC.



### Part A - Contract Data

Conditions	Sub-Clause	Data
<b>Procuring Entities's name and address</b>	1.1.2.2 & 1.3	Eswatini Water Services Corporation CNR MR103 and Cultural Village Drive Ezulwini
<b>Engineer's name and address</b>	1.1.2.4 & 1.3	Ramashka Architects P.O. Box 20 Mbabane
<b>Time for Completion</b>	1.1.3.3	14 months
<b>Defects Notification Period</b>	1.1.3.7	365 days.
<b>Sections</b>	1.1.5.6	<i>If Sections are to be used, refer to Table: Summary of Sections below</i>
<b>Electronic transmission systems</b>	1.3	procurement@ewsc.co.sz
<b>Time for the Parties entering into a Contract Agreement</b>	1.6	28 days
<b>Time for access to the Site</b>	2.1	<u>No later than the Commencement Day, except for the following parts (if applicable, with detailed description of parts concerned: _____ days after Commencement Date</u>
<b>Engineer's Duties and Authority</b>	3.1(b)(ii)	Variations resulting in an increase of the Accepted Contract Amount in excess of 0% shall require approval of the Procuring Entities.
<b>Performance Security</b>	4.2	The performance security will be in the form of a <i>Bank Guarantee</i> in the amount(s) of 10 % percent of the Accepted Contract Amount and in the same currency (ies) of the Accepted Contract Amount
<b>Normal working hours</b>	6.5	Monday to Friday 7:00 am to 5:00pm Saturday 7:00am to 1:00pm
<b>Delay damages for the Works</b>	8.7 & 14.15(b)	0.1 % of the Contract Price per day. <i>If Sections are to be used, refer to Table: Summary of Sections below</i>





Conditions	Sub-Clause	Data
<b>Maximum amount of delay damages</b>	8.7	15% of the final Contract Price.
<b>Provisional Sums</b>	13.5.(b)(ii)	<i>[If there are Provisional Sums, insert a percentage for adjustment of Provisional Sums]</i> _____ %
<b>Adjustments for Changes in Cost</b>	13.8	Period “n” applicable to the adjustment multiplier “Pn”: _____ <i>[Insert the period if different from one (1) month; if period “n” is one (1) month, insert “not applicable”]</i>
<b>Total advance payment</b>	14.2	<u>0</u> % Percentage of the Accepted Contract Amount payable in the currencies and proportions in which the Accepted Contract Amount is payable <i>[Insert number and timing of installments if applicable]</i>
<b>Repayment amortization rate of advance payment</b>	14.2(b)	N/A
<b>Percentage of Retention</b>	14.3	10%
<b>Limit of Retention Money</b>	14.3	10% of the Accepted Contract Amount
<b>Plant and Materials</b>	14.5(b)(i)	If Sub-Clause 14.5 applies: Plant and Materials for payment Free on Board _____ <i>[list]</i> .
	14.5(c)(i)	Plant and Materials for payment when delivered to the Site
<b>Minimum Amount of Interim Payment Certificates</b>	14.6	5% of the Accepted Contract Amount.
<b>Publishing source of commercial interest rates for financial charges in case of delayed payment</b>	14.8	
<b>Maximum total liability of the Contractor to the Procuring Entities</b>	17.6	The product of one (1) times the Accepted Contract Amount,
<b>Periods for submission of insurance:</b>	18.1	



<b>Conditions</b>	<b>Sub-Clause</b>	<b>Data</b>
a. evidence of insurance. b. relevant policies		28 days 28 days
<b>Maximum amount of deductibles for insurance of the Procuring Entities's risks</b>	18.2(d)	<i>[Insert maximum amount of deductibles]</i>
<b>Minimum amount of third party insurance</b>	18.3	Insurance required for the Works: E500 000.00 Insurance required for Goods One Hundred Thousand Emalangi  Insurance required for liability for breach of professional duty: One Million Eswatini Lilangeni  Insurance required for injury to employees: One Hundred Thousand Emalangi
<b>Date by which the DB shall be appointed</b>	20.2	28 days after the Commencement date
<b>The DB shall be comprised of</b>	20.2	One (1) Member
<b>List of potential DB sole members</b>	20.2	Proposed by Employer 1. Marc Hammick
<b>Appointment (if not agreed) to be made by</b>	20.3	Association of Arbitrators (Southern Africa) President / Chairman
<b>Rules of arbitration</b>	20.6(a)	UNCITRAL arbitration rules

Table: Summary of Sections

<b>Section Name/Description (Sub-Clause 1.1.5.6)</b>	<b>Time for Completion (Sub-Clause 1.1.3.3)</b>	<b>Damages for Delay (Sub-Clause 8.7)</b>

## **Part B - Specific Provisions**

### **Sub-Clause 14.1 The Contract Price**

*(Alternative paragraph)*



- (e) Notwithstanding the provisions of subparagraph (b), Contractor's Equipment, including essential spare parts therefore, imported by the Contractor for the sole purpose of executing the Contract shall be temporarily exempt from the payment of import duties and taxes upon initial importation, provided the Contractor shall post with the customs authorities at the port of entry an approved export bond or bank guarantee, valid until the Time for Completion plus six months, in an amount equal to the full import duties and taxes which would be payable on the assessed imported value of such Contractor's Equipment and spare parts, and callable in the event the Contractor's Equipment is not exported from the Country on completion of the Contract. A copy of the bond or bank guarantee endorsed by the customs authorities shall be provided by the Contractor to the Procuring Entities upon the importation of individual items of Contractor's Equipment and spare parts. Upon export of individual items of Contractor's Equipment or spare parts, or upon the completion of the Contract, the Contractor shall prepare, for approval by the customs authorities, an assessment of the residual value of the Contractor's Equipment and spare part to be exported, based on the depreciation scale(s and other criteria used by the customs authorities for such purposes under the provisions of the applicable Laws. Import duties and taxes shall be due and payable to the customs authorities by the Contractor on (a) the difference between the initial imported value and the residual value of the Contractor's Equipment and spare parts to exported; and (b) on the initial imported value that Contractor's Equipment and spare parts remaining in the Country after completion of the Contract. Upon payment of such dues within 28 days of being invoiced, the bond or bank guarantee shall be reduced or released accordingly; otherwise the security shall be called in the full amount remaining.





# Section IX. Annex to the Special Conditions - Contract Forms

## Table of Forms

Notification of Award .....	ii
Contract Agreement .....	iii
Performance Security .....	v
Advance Payment Security .....	ix
Retention Money Security .....	xi



## Notification of Award

### LETTER OF ACCEPTANCE



[date]

To: [name and address of the Contractor]

This is to notify you that your Tender dated [date] for execution of the [name of the Contract and identification number, as given in the Contract Data] for the Accepted Contract Amount of the equivalent of [amount in numbers and words] [name of currency], as corrected and modified in accordance with the Instructions to Tenderers, is hereby accepted by our Agency.

You are requested to furnish the Performance Security within 28 days in accordance with the Conditions of Contract, using for that purpose one of the Performance Security Forms included in Section IX, Annex to the Special Conditions - Contract Forms, of the Tendering Document

Authorized Signature: \_\_\_\_\_

Name and Title of Signatory: \_\_\_\_\_

Name of Agency: \_\_\_\_\_

**Attachment: Contract Agreement**



## Contract Agreement

THIS AGREEMENT made the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, between \_\_\_\_\_ of \_\_\_\_\_ (hereinafter "the Procuring Entities"), of the one part, and \_\_\_\_\_ of \_\_\_\_\_ (hereinafter "the Contractor"), of the other part:

WHEREAS the Procuring Entities desires that the Works known as \_\_\_\_\_ should be executed by the Contractor, and has accepted a Tender by the Contractor for the execution and completion of these Works and the remedying of any defects therein,

The Procuring Entities and the Contractor agree as follows:

1. In this Agreement words and expressions shall have the same meanings as are respectively assigned to them in the Contract documents referred to.
2. The following documents shall be deemed to form and be read and construed as part of this Agreement. This Agreement shall prevail over all other Contract documents.
  - (i) the Letter of Acceptance
  - (ii) the Tender Submission Sheet
  - (iii) the addenda Nos \_\_\_\_\_ (if any)
  - (iv) the Special Conditions
  - (v) the General Conditions;
  - (vi) the Specification
  - (vii) the Drawings; and
  - (viii) the completed Schedules,
3. In consideration of the payments to be made by the Procuring Entities to the Contractor as indicated in this Agreement, the Contractor hereby covenants with the Procuring Entities to execute the Works and to remedy defects therein in conformity in all respects with the provisions of the Contract.
4. The Procuring Entities hereby covenants to pay the Contractor in consideration of the execution and completion of the Works and the remedying of defects therein, the Contract Price or such other sum as may become payable under the provisions of the Contract at the times and in the manner prescribed by the Contract.

IN WITNESS whereof the parties hereto have caused this Agreement to be executed in accordance with the laws of \_\_\_\_\_ on the day, month and year indicated above.



Signed by \_\_\_\_\_ (for the Procuring Entities)

Signed by \_\_\_\_\_ (for the Contractor)





# Performance Security

## Option 1: (Demand Guarantee)

\_\_\_\_\_ [Bank's Name, and Address of Issuing Branch or Office]

**Beneficiary:** \_\_\_\_\_ [Name and Address of Procuring Entities]

**Date:** \_\_\_\_\_

**PERFORMANCE GUARANTEE No.:** \_\_\_\_\_

We have been informed that \_\_\_\_\_ [name of Contractor] (hereinafter called "the Contractor") has entered into Contract No. \_\_\_\_\_ [reference number of the contract] dated \_\_\_\_\_ with you, for the execution of \_\_\_\_\_ [name of contract and brief description of Works] (hereinafter called "the Contract").

Furthermore, we understand that, according to the conditions of the Contract, a performance guarantee is required.

At the request of the Contractor, we \_\_\_\_\_ [name of Bank] hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of \_\_\_\_\_ [amount in figures] (\_\_\_\_\_) [amount in words],<sup>1</sup> such sum being payable in the types and proportions of currencies in which the Contract Price is payable, upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation(s) under the Contract, without your needing to prove or to show grounds for your demand or the sum specified therein.

This guarantee shall expire, no later than the .... Day of ....., 2...<sup>2</sup>, and any demand for payment under it must be received by us at this office on or before that date.

<sup>1</sup> The Guarantor shall insert an amount representing the percentage of the Contract Price specified in the Contract and denominated either in the currency(cies) of the Contract or a freely convertible currency acceptable to the Employer.

<sup>2</sup> Insert the date twenty-eight days after the expected completion date. The Employer should note that in the event of an extension of the time for completion of the Contract, the Employer would need to request an extension of this guarantee from the Guarantor. Such request must be in writing and must be made prior to the expiration date established in the guarantee. In preparing this guarantee, the Employer might consider adding the following text to the form, at the end of the penultimate paragraph: "The Guarantor agrees to a one-time extension of this guarantee for a period not to exceed [six months][one year], in response to the Employer's written request for such extension, such request to be presented to the Guarantor before the expiry of the guarantee."



This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 458, except that subparagraph (ii) of Sub-article 20(a) is hereby excluded.

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*[signature(s)]*

***Note: All italicized text (including footnotes) is for use in preparing this form and shall be deleted from the final product.***



## Option 2: Performance Bond

By this Bond \_\_\_\_\_ as Principal (hereinafter called "the Contractor") and \_\_\_\_\_] as Surety (hereinafter called "the Surety"), are held and firmly bound unto \_\_\_\_\_] as Obligee (hereinafter called "the Procuring Entities") in the amount of \_\_\_\_\_, for the payment of which sum well and truly to be made in the types and proportions of currencies in which the Contract Price is payable, the Contractor and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS the Contractor has entered into a written Agreement with the Procuring Entities dated the \_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_, for \_\_\_\_\_ in accordance with the documents, plans, specifications, and amendments thereto, which to the extent herein provided for, are by reference made part hereof and are hereinafter referred to as the Contract.

NOW, THEREFORE, the Condition of this Obligation is such that, if the Contractor shall promptly and faithfully perform the said Contract (including any amendments thereto), then this obligation shall be null and void; otherwise, it shall remain in full force and effect. Whenever the Contractor shall be, and declared by the Procuring Entities to be, in default under the Contract, the Procuring Entities having performed the Procuring Entities's obligations thereunder, the Surety may promptly remedy the default, or shall promptly:

- (1) complete the Contract in accordance with its terms and conditions; or
- (2) obtain a Tender or Tenders from qualified Tenderers for submission to the Procuring Entities for completing the Contract in accordance with its terms and conditions, and upon determination by the Procuring Entities and the Surety of the lowest responsive Tenderer, arrange for a Contract between such Tenderer and Procuring Entities and make available as work progresses (even though there should be a default or a succession of defaults under the Contract or Contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the Balance of the Contract Price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "Balance of the Contract Price," as used in this paragraph, shall mean the total amount payable by Procuring Entities to Contractor under the Contract, less the amount properly paid by Procuring Entities to Contractor; or
- (3) pay the Procuring Entities the amount required by Procuring Entities to complete the Contract in accordance with its terms and conditions up to a total not exceeding the amount of this Bond.

The Surety shall not be liable for a greater sum than the specified penalty of this Bond.



Any suit under this Bond must be instituted before the expiration of one year from the date of the issuing of the Taking-Over Certificate.

No right of action shall accrue on this Bond to or for the use of any person or corporation other than the Procuring Entities named herein or the heirs, executors, administrators, successors, and assigns of the Procuring Entities.

In testimony whereof, the Contractor has hereunto set his hand and affixed his seal, and the Surety has caused these presents to be sealed with his corporate seal duly attested by the signature of his legal representative, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_  
\_\_\_\_\_.

SIGNED ON \_\_\_\_\_ on behalf of \_\_\_\_\_

By \_\_\_\_\_ in the capacity of \_\_\_\_\_

In the presence of \_\_\_\_\_

SIGNED ON \_\_\_\_\_ on behalf of \_\_\_\_\_

By \_\_\_\_\_ in the capacity of \_\_\_\_\_

In the presence of \_\_\_\_\_



# Advance Payment Security

## Demand Guarantee

\_\_\_\_\_ [Bank's Name, and Address of Issuing Branch or Office]

**Beneficiary:** \_\_\_\_\_ [Name and Address of Procuring Entities]

**Date:** \_\_\_\_\_

**ADVANCE PAYMENT GUARANTEE No.:** \_\_\_\_\_

We have been informed that \_\_\_\_\_ [name of Contractor] (hereinafter called "the Contractor") has entered into Contract No. \_\_\_\_\_ [reference number of the contract] dated \_\_\_\_\_ with you, for the execution of \_\_\_\_\_ [name of contract and brief description of Works] (hereinafter called "the Contract").

Furthermore, we understand that, according to the conditions of the Contract, an advance payment in the sum \_\_\_\_\_ [amount in figures] (\_\_\_\_\_) [amount in words] is to be made against an advance payment guarantee.

At the request of the Contractor, we \_\_\_\_\_ [name of Bank] hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of \_\_\_\_\_ [amount in figures] (\_\_\_\_\_) [amount in words]<sup>1</sup> upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation under the Contract because the Contractor used the advance payment for purposes other than the costs of mobilization in respect of the Works.

It is a condition for any claim and payment under this guarantee to be made that the advance payment referred to above must have been received by the Contractor on its account number \_\_\_\_\_ at \_\_\_\_\_ [name and address of Bank].

The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the Contractor as indicated in copies of interim statements or payment certificates which shall be presented to us. This guarantee shall expire, at the latest, upon our receipt of a copy of the interim payment certificate indicating that eighty (80) percent

<sup>1</sup> The Guarantor shall insert an amount representing the amount of the advance payment and denominated either in the currency(ies) of the advance payment as specified in the Contract, or in a freely convertible currency acceptable to the Employer.



of the Contract Price has been certified for payment, or on the \_\_\_ day of \_\_\_\_\_, 2\_\_\_,<sup>2</sup> whichever is earlier. Consequently, any demand for payment under this guarantee must be received by us at this office on or before that date..

This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 458.

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*[signature(s)]*

***Note: All italicized text (including footnotes) is for use in preparing this form and shall be deleted from the final product.***

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<sup>2</sup> *Insert the expected expiration date of the Time for Completion. The Employer should note that in the event of an extension of the time for completion of the Contract, the Employer would need to request an extension of this guarantee from the Guarantor. Such request must be in writing and must be made prior to the expiration date established in the guarantee. In preparing this guarantee, the Employer might consider adding the following text to the form, at the end of the penultimate paragraph: "The Guarantor agrees to a one-time extension of this guarantee for a period not to exceed [six months][one year], in response to the Employer's written request for such extension, such request to be presented to the Guarantor before the expiry of the guarantee."*



# Retention Money Security

## Demand Guarantee

\_\_\_\_\_ [Bank's Name, and Address of Issuing Branch or Office]

**Beneficiary:** \_\_\_\_\_ [Name and Address of Procuring Entities]

**Date:** \_\_\_\_\_

**RETENTION MONEY GUARANTEE No.:** \_\_\_\_\_

We have been informed that \_\_\_\_\_ [name of Contractor] (hereinafter called "the Contractor") has entered into Contract No. \_\_\_\_\_ [reference number of the contract] dated \_\_\_\_\_ with you, for the execution of \_\_\_\_\_ [name of contract and brief description of Works] (hereinafter called "the Contract").

Furthermore, we understand that, according to the conditions of the Contract, when the Taking-Over Certificate has been issued for the Works and the first half of the Retention Money has been certified for payment, payment of [insert the second half of the Retention Money or if the amount guaranteed under the Performance Guarantee when the Taking-Over Certificate is issued is less than half of the Retention Money, the difference between half of the Retention Money and the amount guaranteed under the Performance Security] is to be made against a Retention Money guarantee.

At the request of the Contractor, we \_\_\_\_\_ [name of Bank] hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of \_\_\_\_\_ [amount in figures] (\_\_\_\_\_) [amount in words]<sup>1</sup> upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation under the Contract because the Contractor used the advance payment for purposes other than the costs of mobilization in respect of the Works.

It is a condition for any claim and payment under this guarantee to be made that the payment of the second half of the Retention Money referred to above must have been received by the

<sup>1</sup> The Guarantor shall insert an amount representing the amount of the second half of the Retention Money or or if the amount guaranteed under the Performance Guarantee when the Taking-Over Certificate is issued is less than half of the Retention Money, the difference between half of the Retention Money and the amount guaranteed under the Performance Security and denominated either in the currency(ies) of the second half of the Retention Money as specified in the Contract, or in a freely convertible currency acceptable to the Employer.



Contractor on its account number \_\_\_\_\_ at \_\_\_\_\_ *[name and address of Bank]*.

This guarantee shall expire, at the latest, 21 days after the date when the Procuring Entities has received a copy of the Performance Certificate issued by the Engineer. Consequently, any demand for payment under this guarantee must be received by us at this office on or before that date.

This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC Publication No. 458.

\_\_\_\_\_  
*[signature(s)]*

***Note: All italicized text (including footnotes) is for use in preparing this form and shall be deleted from the final product.***

