

**Department for Environment, Food & Rural Affairs**

**Agreement for the Purchase of one 500kg/hr rotary kiln  
Incinerator for the Animal and Plant Health Agency in  
Weybridge, United Kingdom.**

# Contents

## Conditions of Contract

1. Definitions, interpretation, waiver and Notices
2. Co-operation
3. Contractor's responsibilities
4. Purchaser's responsibilities
5. Decisions and Contract co-ordination
6. Sufficiency of Contract Price
7. Statutory and other obligations
8. Patent and other protected rights
9. Subcontracting and third party rights
10. Not used
11. The Purchaser's Engineer
12. Contract Manager and Contractor's staff
13. Times of completion and Approved Programme
14. Delays
15. Damages for delay
16. Variations
17. Variations proposed by Contractor
18. Valuation of Variations
19. Claims
20. Confidentiality
21. Documentation
22. Inspection and pre-installation tests
23. The Site
24. Delivery to Site
25. Ownership of Materials
26. Health, safety, environment and pollution
27. Site services
28. Site working conditions
29. Meetings
30. Care of the Works
31. Insurance
32. Completion of construction
33. Taking Over
34. Site clearance
35. Performance Tests
36. Take Over Certificate
37. Liability for Defects
38. Final Certificate
39. Contract Price
40. Records and audits
41. Payment
42. Suspension of the Works
43. Termination by the Purchaser for convenience
44. Termination for Contractor's default

45. Limitations on liabilities and remedies
46. Disputes
47. Adjudication
48. Reference to an Expert
49. Arbitration
50. Bonds and parent company guarantee
51. Bribery, Modern Slavery and Data Protection
52. Purchaser's employees
53. Materials supplied by the Purchaser
54. Request for information
55. Discrimination
56. Confidentiality
57. Security

# Agreement

An **AGREEMENT** dated

between

- (1) the **Department for Environment, Food and Rural Affairs (DEFRA)** acting as part of the Crown ('the **Purchaser**');  
and  
(2) **Matthews Environmental Solutions Limited** (company registration number 07826037) whose registered office is at Unit 3, Dunkirk Lane, Hyde, Cheshire SK14 4NL ("**Contractor**")

## WHEREAS

The **Purchaser** wishes to procure the design, supply and installation, testing, commissioning and operation support for a rotary kiln incinerator process line (the "**Incinerator Plant**") to be constructed at the Purchaser's site at Weybridge, Surrey in the United Kingdom (the "**Project**").

and wishes the **Contractor** to carry out and complete the **Works** defined in the **Contract** and the Contractor is willing and able to carry out and complete the **Works** in accordance with the **Contract**.

**THIS AGREEMENT** provides as follows:

1. The following documents and their attachments (if any) shall together form the contract between the Purchaser and the Contractor and the term 'Contract' shall in all such documents be construed accordingly:
  - (a) This Agreement;
  - (b) The Conditions of Contract;
  - (c) The Schedules:
 

Schedule 1:	Description of the Works;
Schedule 2:	Documentation;
Schedule 3:	Responsibilities of Purchaser;
Schedule 4:	Health & Safety;
Schedule 5:	Environmental protection & waste disposal;
Schedule 6:	Quality assurance and validation;
Schedule 7:	Subcontracting;
Schedule 8:	Contractor's named personnel;
Schedule 9:	Training by Contractor;
Schedule 10:	Parts with limited working life and spare parts;
Schedule 11:	Times of completion;
Schedule 12:	Liquidated damages for delay;
Schedule 13:	Pre-installation tests and procedures;
Schedule 14:	Criteria for the completion of construction;
Schedule 15:	Take Over procedures;
Schedule 16:	Performance test and procedures;
Schedule 17:	Performance guarantees and damages for failure;
Schedule 18:	Valuation of Variations and claims;
Schedule 19:	Contract price and payment;
Schedule 20:	Contract co-ordination;
Schedule 21:	Reports and records;
Schedule 22:	Specification;
Schedule 23:	Contractor's Technical Proposal;
Schedule 24:	Parent company guarantee;
Schedule 25:	Form of subcontractor collateral warranty;
Schedule 26:	Site information;

Schedule 27:	Required insurances;
Schedule 28:	Not Used;
Schedule 29:	Performance Bond;
Schedule 30:	Not Used.

For the purpose of identification, the contents of the Contract, including the number of pages in each part, are listed in the Annex to this Agreement attached hereto.

2. The Contract constitutes the entire agreement between the Purchaser and the Contractor with respect to the performance of the Works and supersedes any prior negotiation, representation or agreement relating thereto, whether written or oral, except to the extent that they are expressly incorporated in the Contract. No change, alteration or modification to the Contract shall be effective unless the same shall be in writing and signed by both parties.
3. The Contract Price is the sum of five million one hundred and thirty seven thousand nine hundred and ninety nine pounds sterling and four pence (£5,137,999.04).
4. The total aggregate liability of the Contractor to the Purchaser shall be limited to the amount set out in Sub-clause 45.3.
5. The Contractor's liability in respect of Loss of or damage to property of the Purchaser and his Affiliates in accordance with Sub-clause 30.13 of the Conditions of Contract shall not exceed £5,000,000 (five million pounds) in respect of each and every claim.
6. The Deductible(s) shall be as set out in Schedule 27.
7. In case of conflict between any of the documents accompanying this Agreement, the order of precedence shall be as stated in Sub-clause 1.2 of the Conditions of Contract.
8. For the purposes of Sub-clauses 6.3, 7.3, 8.3 and 28.3 of the Conditions of Contract, the date of the Contractor's Technical Proposal shall be 15 March 2019.
9. The Purchaser hereby appoints Ove Arup & Partners Limited (company registration number 01312453) whose registered office is at 13 Fitzroy Street, London, W1T 4BQ to act as the Purchaser's Engineer for the purposes of the Contract.
10. The Contractor hereby appoints John Schofield to act as the Contract Manager for the purposes of the Contract.
11. Wherever Profit is expressly referred to in the Conditions of Contract it shall be 10% of the applicable Cost.
12. Any Notice to be served in accordance with Sub-clause 1.8 of the Conditions of Contract shall be sent to the postal address stated below:  

The Purchaser: For the attention of:  
  
Address: DEFRA, Nobel House, 17 Smith Square, London SW1P 3JR

The Contractor: For the attention of:  
  
Address: Matthews Environmental Solutions Limited, Unit 3, Dunkirk Lane, Hyde, Cheshire SK14 4NL
13. The Contract may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
14. Transmission of an executed counterpart of this Contract (but for the avoidance of doubt not just a signature page) by e-mail (in PDF, JPEG or other agreed format) shall take effect as delivery of an executed counterpart of this Contract. If this method of delivery is adopted, without prejudice to the validity of the agreement thus made, each party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.
15. No counterpart shall be effective until each party has executed and delivered at least one counterpart.
16. The Contract shall be governed by the laws of England and Wales.
17. The seat of any arbitration proceedings under Clause 49 shall be London.

Signed by ..... )  
 for and on behalf of )  
**THE DEPARTMENT FOR** ) .....  
**ENVIRONMENT, FOOD AND RURAL** )  
**AFFAIRS (DEFRA)** )  
 ) Director/Duly Authorised Signatory

Signed by ..... )  
 For and on behalf of )  
**MATTHEWS ENVIRONMENTAL** ) .....  
**SOLUTIONS LIMITED** )  
 ) Director/Duly Authorised Signatory

# Conditions of Contract

## 1. Definitions, interpretation, waiver and Notices

1.1 In the **Contract**, unless the context otherwise requires, the following expressions shall have the following meanings.

**'Affiliate'** means any entity that directly or indirectly controls, is controlled by, or is under common control with another entity. For the purposes of this definition, control means having the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the general management of the company, and 'controls' and 'controlled by' shall be construed accordingly.

**'Agreed Rate'** means three percent above the Bank of England base rate as may be current from time to time.

**'Agreement'** means the document titled 'Agreement' signed by the **Purchaser** and the **Contractor** and which refers to these **Conditions of Contract**.

**'Applications Software'** means software that has been developed specifically as part of the Works including configuration of Third Party Software or Contractor's Software and shall include source code as well as executable forms of such software.

**'Approved Programme'** means the programme of work approved in accordance with Clause 13 (Times of completion and Approved Programme) and as amended for sectional completion in accordance with the Contract.

**'Availability Test'** means the test set out in Part 6 of Schedule 16 of the Specification.

**'CDM Regulations'** means the Construction (Design and Management) Regulations 2015 or any re-enactment thereof or amendment thereto.

**'Client'** means the 'client' under the CDM Regulations'.

**'Commissioning Protocol'** means the programme and all other relevant details for the commissioning for individual equipment and Plant, in order to achieve the Construction Completion Certificate, as detailed in Schedule 14 of the Specification.

**'Conditions of Contract'** means these Clauses 1-57.

**'Confidential Information'** has the meaning stated in Sub-clause 20.1.

**'Construction Completion Certificate'** has the meaning stated in Sub-clause 32.6.

**'Construction Completion Report'** means a report to be provided by the Contractor to the Purchaser pursuant to Sub-clause 32.2, Schedule 2 and Schedule 14 of the Specification.

**'Construction Programme'** means the latest programme developed, maintained and updated by the Contractor throughout the project in accordance with Schedule 2 of the Specification.

**'Contract'** has the meaning stated in the Agreement.

**'Contract Manager'** means the individual named as such in the Agreement subject to Clause 12 (Contract Manager and Contractor's staff).

**'Contract Period'** means the length of time stated by the Approved Programme for the Works.

**'Contract Price'** means the sum stated in the Agreement and as broken down in Schedule 19 of the Specification.

**'Contractor'** means the person named as such in the Agreement or his permitted assigns.

**'Contractor's Equipment'** means all equipment, construction plant, vehicles, temporary buildings and offices, materials, tools or things brought on to the Site by the Contractor or a Subcontractor for carrying out the Works but not for permanent incorporation in the Plant.

**'Contractor's Technical Proposal'** means the contractor's technical proposal referred to in the Agreement and as set out in Schedule 23.

**'Contractor's Software'** means software owned by the Contractor.

**'Cost'** means any cost properly incurred by the Contractor in carrying out any of his obligations under the Contract, and 'Costs' shall be construed accordingly.

**'Decision'** means any decision, certificate, notification, instruction, order, agreement, approval, rejection or consent.

**'Deductible'** means the sums stated in Schedule 27 being the applicable insurance deductible under the policy or policies of insurance provided by the Contractor in accordance with Schedule 27.

**'Default Certificate'** has the meaning stated in Sub-clause 44.6.

**'Defect'** means any work done or any Materials or the Plant or any part of it is defective, incomplete, or does not comply with the Contract, provided that such matter shall not be a Defect if it is caused by:

- (a) normal wear and tear;
- (b) a failure by the Purchaser to operate and maintain the Plant in accordance with any operating and maintenance manuals provided by the Contractor; and/or
- (c) a failure by the Purchaser to comply with any of his obligations under the Contract.

**'Defects Liability Period'** means a period of 24 months, or such other period as may be established in accordance with Sub-clause 37.9 or 37.11, after the date of the relevant Take Over Certificate or other commencement date as described in Sub-clause 37.5.

**'Delay Liquidated Damages'** has the meaning ascribed in Sub-clause 15.1.

**'Design Life'** is the operating life of the Plant as defined in Schedule 22 of the Specification.

**'Designer'** means 'designer' under the CDM Regulations.

**'Disclosure Request'** shall have the meaning ascribed in Sub-clause 54.1.

**'Documentation'** means any documents in paper or electronic form, including drawings, technical software, images, designs, manuals or records, including all Documentation required in accordance with Schedule 2 of the Specification.

**'Effective Date'** means the date of the Agreement.

**'Environmental Permit'** and **'Environmental Permit Variation Application'** mean respectively the Environmental Permit and application (both as identified in Schedule 22 of the Specification) on which authorisation is based, granted by the Environment Agency permitting the operation of the Plant.

**'Expert'** means a person referred to and so called in Clause 48 (Reference to an Expert).

**'Final Certificate'** has the meaning stated in Sub-clause 38.1.

**'Final Date for Payment'** has the meaning stated in Sub-clause 41.5.

**'Force Majeure'** has the meaning stated in Sub-clause 14.6.

**'Good Industry Practice'** means the exercise of that degree of skill, care, diligence, prudence and foresight which would reasonably be expected from a skilled and experienced person engaged in the provision and operation of equivalent works and services to those required by the Contract acting in accordance with all applicable Legislation and applying the standards generally adopted by persons undertaking works or services of a similar size, nature and complexity as the Works throughout the European Union and in particular in the United Kingdom.

**'Health and Safety File'** means the 'health and safety file' under the CDM Regulations.

**'IChemE'** means the Institution of Chemical Engineers, 165-189 Railway Terrace, Rugby, Warwickshire, UK, CV21 3HQ.

**'IED'** means the Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 (integrated pollution prevention and control) (Recast) insofar as it relates to the incineration of waste, as amended from time to time.

**'Latent Defect'** means any Defect relating to the Works:

- (a) which becomes apparent to the Purchaser after the expiry of the Defects Liability Period and which would not have been discovered upon a reasonable examination by the Purchaser's Engineer at the date of expiry of the Defects Liability Period; and
- (b) which is notified by the Purchaser to the Contractor after their discovery for the purpose of allowing the Contractor to inspect the Defects discovered.

**'Latent Defects Liability Period'** means the period of six years from the expiry of the Defects Liability Period (including any extensions where applicable), save in relation to those items set out in lines 17, 18 and 19 of Table 17.1 in Schedule 17 of the Specification where the period set out therein shall be the Latent Defects Liability Period for such items.

**'Legislation'** means:

- (a) the IED;
- (b) Environmental Permit and Environmental Permit Variation Application;
- (c) any other law, regulation, ordinance, order, notification, instruction, bye-law, guideline, code or standard (including legislation regulating, relating to or imposing liability or standards of conduct concerning environmental matters) in relation to Works and the Plant supplied as part of the Works enacted, in force or having the force of law in the United Kingdom at any time during the Period of the Agreement;
- (d) any codes of practice, Acts of Parliament and other legislative instruments, regulations and standards which would be observed by an experienced, reasonable and competent contractor and which have been enacted, made or published at any time during the Period of the Agreement;
- (e) any condition in relation to the Works and the Plant supplied as part of the Works imposed pursuant to the consent for the Works and the plant supplied as part of the works or the authorisation issued by the Environment Agency; and
- (f) any conditions or requirements imposed by any other consent, permission, approval or licence which the Contractor is required to obtain pursuant to the Contract or a copy of which the Purchaser has provided to the Contractor.

**'Liquidated Damages'** means those liquidated and ascertained damages payable by the Contractor to the Purchaser in accordance with the Contract.

**'Long Stop Date'** means the date 6 months from the Time for Completion.

**'Materials'** means machinery, plant and other items of equipment and materials intended to form part of the Plant and other things needed in its operation excluding software, to be supplied by the Contractor under the Contract.

**'Milestone Event'** means the events listed as such in Schedule 19 of the Specification.

**'Milestone Payment'** means the payment due to the Contractor for achieving a Milestone Event as set out in Schedule 19 of the Specification.

**'Minimum Criteria'** means the "Rejection level" stated in Table 17.1 of Schedule 17 of the Specification.

**'Minor Items'** are items which are relatively insignificant, do not individually or collectively constitute an obstacle to the Plant being used for its intended use or the unimpeded enjoyment by the Purchaser of all the facilities comprising the Plant and which can be remedied without disrupting the operation of the Plant or the performance by the Purchaser of all of his management, operation, maintenance, education, reporting and communication functions.

**'Notice'** means a formal notice issued by the Purchaser to the Contractor or by the Contractor to the Purchaser in accordance with Sub-clause 1.8.

**'Notice of Adjudication'** means a Notice as described in Sub-clause 47.2. **'Notice of Arbitration'** means a Notice as described in Sub-clause 49.1. **'Notice of Dispute'** means a Notice as described in Sub-clause 46.4. **'Notice of Termination'** means a Notice as described in Sub-clause 43.1.

**'Operating and Maintenance Manuals'** means the manuals containing the instructions for the operation and maintenance of the Plant provided to the Purchaser by the Contractor in accordance with the Contract, as more particularly described in the Specification including Schedule 23 of the Specification.

**'Operator'** means the body responsible for operating the Plant during the Design Life.

**'Parent Company Guarantee'** means the guarantee to be provided in favour of the Purchaser by Matthews International Corporation whose principal place of business is at Two NorthShore Center, Pittsburgh, Pennsylvania, 15212-5851, U.S.A. guaranteeing the obligations of the Contractor hereunder, in the form attached in Schedule 24.

**'Performance Bond'** means the performance bond to be procured by the Contractor in favour of the Purchaser in the form set out in Schedule 29 from a UK or European Union based bank, insurance company or other surety acceptable to the Purchaser (such acceptance shall not be unreasonably withheld) in an amount of 20% of the Contract Price and expiring not earlier than the date of the Take Over Certificate.

**'Performance Test Commencement Period'** means the period of 12 weeks during which the Reliability Test (as set out in Schedule 16 of the Specification) is carried out or any extension thereof granted in accordance with Clause 35 (Performance test).

**'Performance Test Period'** means the period up to the Time for Completion within which the Performance Tests are to be carried out and completed or any extension thereof granted in accordance with Clause 35.

**'Performance Test'** means the tests (save in respect of the Availability Test) specified in Schedule 16 to meet the performance guarantees set out in Schedule 17 of the Specification.

**'Planning Application', 'Planning Authority', 'Planning Conditions', 'Planning Permission' or 'Planning Drawings'** means the application, authority, conditions, permission or drawings respectively tendered and/or approved by the local authority permitting construction of the Plant.

**'Plant' or 'Incinerator Plant'** means the Incinerator Plant as described in the Specification to be constructed at the Site including any software.

**'Primary System'** means the systems belonging to the main processes of the Plant as set out in Schedule 22 of the Specification.

**'Principal Contractor'** means the 'principal contractor' under the CDM Regulations.

**'Principal Designer'** means the 'principal designer' under the CDM Regulations.

**'Profit'** shall be as defined in the Agreement.

**'Prohibited Material'** means materials not to be specified in the Works, as defined in Schedule 22 of the Specification.

**'Purchaser's Engineer'** means the individual named as such in the Agreement subject to Clause 11 (The Purchaser's Engineer).

**'Purchaser's Engineer's Representative'** has the meaning stated in Sub-clause 11.5.

**'Purchaser'** means the person named as such in the Agreement or his permitted assigns.

**'Purchaser's Risk'** means:

- (a) the use or occupation of the Plant (or any part) by the Purchaser, his personnel, consultants, or agents, or other contractors (not being employed by the Contractor); or
- (b) any design or information provided by the Purchaser (other than any design or information which the Contractor is required to verify in accordance with his obligations under the Contract); or
- (c) any wrongful or negligent act or omission of the Purchaser, his personnel, consultants, or agents, or other contractors (not being employed by the Contractor); or
- (d) riot, war, invasion or hostilities (whether or not war be declared), terrorism, civil war, rebellion, revolution, insurrection or military or usurped power or similar events; or
- (e) save where resulting from a breach of the Contractor's obligations under the Contract, ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste, from the combustion of nuclear

fuel, radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof; or

(f) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speed.

**'Quality Assurance System or QA System'** means the quality assurance system operated by the Contractor in accordance with the requirements of Schedule 6 of the Specification.

**'Schedules'** means the schedules listed in the Agreement and forming part of the Contract.

**'Section'** means a part of the Plant identified in the Contract as a Section.

**'Security Package'** means Performance Bond and Parent Company Guarantee.

**'Shared Access'** means the site access road identified with a red line on the drawing titled "Contractor's Site Boundary" with reference APHAWB-ARP-61A-XX-DR-CX-90003.

**'Site'** means the area shown outlined by a broken red line on drawing number APHAWB-ARP-61A-XX-DR-CX-90003 and titled "Contractor's Site Boundary", which drawing is contained within Schedule 26 of the Specification.

**'Site Instruction'** means any written instruction issued by the Purchaser's Engineer except for Variation Orders.

**'Site Manager'** has the meaning stated in Sub-clause 12.2.

**'Site Materials'** means (a) any Materials from the time of their delivery to the Site; and (b) any materials which the Purchaser free-issues to the Contractor for incorporation into the Plant from the time of their delivery to the Site.

**'Specification'** means all of the Schedules 1 to 22 and 26 of the Specification inclusive including their attachments and appendices.

**'Subcontractor'** means any subcontractor or supplier of any tier to whom the preparation of any design, the supply of any Materials or the carrying out of any other part of the Works is subcontracted.

**'Take Over Certificate'** has the meaning stated in Sub-clause 36, and **'Take Over'**, **'Taking Over'** and **'Taken Over'** shall be construed accordingly.

**'Take Over Date'** means the date stated in any Take Over Certificate as being the date of achievement of Take Over.

**'Take Over Tests'** means the relevant tests and procedures as detailed in the Test Protocol, Schedule 15 of the Specification and (save in respect of the Availability Test) Schedule 16.

**'Termination Certificate'** has the meaning stated in Sub-clause 43.5.

**'Test Protocol'** means the detailed description of the Tests, prepared by the Contractor in accordance with Schedule 15 and Schedule 16 of the Specification.

**'Tests'** means the:

- (a) Pre-installation tests and procedures including off-site factory tests as detailed in Schedule 13 of the Specification;
- (b) equipment and Plant commissioning procedures and tests as detailed in the Commissioning Protocol and Schedule 14 of the Specification;
- (c) Take-Over Tests and procedures as detailed in the Test Protocol and Schedule 15 and (save in respect of the Availability Test) Schedule 16 of the Specification;
- (d) Performance Tests as detailed in the Test Protocol and (save in respect of the Availability Test) Schedule 16 of the Specification to meet the performance guarantees set out in Schedule 17 of the Specification;
- (e) all other tests required in accordance with the Contract or which are otherwise required in accordance with Good Industry Practice, and any and all of them, as the context so requires and 'Test' shall be construed accordingly.

**'Third Party Software'** means software owned by a third party.

**'Time for Completion'** means the period of time from the date of the Agreement for achieving Take Over as stated in Schedule 11 of the Specification (as may be extended in accordance with the Contract).

**'Variation'** has the meaning stated in Sub-clause 16.1.

**'Variation Order'** means an order by which a Variation is ordered, or other notification made to the Contractor in accordance with the Contract.

**'Works'** means the design and construction of the Plant and the design, engineering and other services to be provided by the **Contractor** including the provision, construction, operation and maintenance before Take Over, of the Plant and any other work to be carried out by the Contractor in accordance with the Contract.

1.2 The Contract documents shall be construed as mutually explanatory of one another. In the event of conflict between any of the documents comprising the Contract, the order of precedence shall be as follows:

- (a) the Agreement;
- (b) the Conditions of Contract;
- (c) Schedule 22 of the Specification;
- (d) Schedules 1 to 21 and 26 of the Specification, Schedules 24, 25 and 27 to 30; and
- (e) Schedule 23 of the Specification.

In the event of a conflict between documents of equal precedence the Purchaser's Engineer shall decide which document shall be used.

1.3 The singular shall include the plural and the plural the singular except where the context otherwise requires and the words 'he', 'him' and 'his' shall be taken to mean 'she', 'her' and 'hers' where appropriate.

1.4 No Decision required under the Contract shall be unreasonably refused or delayed.

1.5 References to:

- (a) 'day' shall mean a calendar day; and
- (b) 'includes' or 'including' shall mean includes or including without limitation.

1.6 Any communication in accordance with or in connection with the Contract shall be in writing, which shall include handwritten, typewritten or printed documents sent by hand, post, email or other means resulting in a permanent record (except that any communication seeking to terminate the Contractor's employment under the Contract or commencing dispute proceedings must be hand delivered or sent by recorded post). Communications delivered by hand or sent by post or fax shall only be deemed to have been received if delivered as described in Sub-clause 1.8.

1.7 The failure of either party to enforce any provision of the Contract shall not constitute a waiver of his right to require complete performance by the other party. A party shall only have waived his rights under the Contract if such waiver shall have been recorded in writing and signed by a duly authorised representative of that party. No waiver of any breach of the Contract shall constitute a waiver of any subsequent breach of the Contract.

1.8 Any Notice to be served by one party on the other shall:

- (a) be contained in a separate document and shall state the number(s) of the Clause(s) or Sub-clause(s) in the Contract under which the Notice is issued; and
- (b) be sent to the person at the postal address or fax number stated in the Agreement, and shall be sufficiently delivered if marked for the attention of that person and:
  - (i) left at the postal address stated in the Agreement; or
  - (ii) sent to that address by Recorded Delivery or Special Delivery post; or
  - (iii) sent by fax to the fax number stated in the Agreement.

In the case of a Notice left at the address stated in the Agreement such Notice shall be deemed to have been received on the day left at that address if left at or before 5.00 pm on a day on which banks in England were open for business, or if left after 5.00 pm such Notice shall be deemed to have been received on the next day on which banks in England were open for business.

In the case of a Notice sent by Recorded Delivery or Special Delivery post to the address stated in the Agreement or faxed to the fax number stated in the Agreement, such Notice shall be deemed to have been received on the day on which it was recorded as delivered by Recorded Delivery or Special Delivery post or by fax if delivered at or before 5.00 pm on a day on which banks in England were open for business, or if recorded as delivered after 5.00 pm such Notice shall be deemed to have been received on the next day on which banks in England were open for business.

Either party may at any time by Notice in writing to the other change the name of the person to whom a Notice should be addressed, the postal address or fax number stated in the Agreement.

- 1.9 The headings and marginal notes in the Conditions of Contract and in the Schedules shall not form part of the Contract nor shall they be taken into consideration in the interpretation of the Contract.

## 2. Co-operation

- 2.1 The parties and the Purchaser's Engineer shall each co-operate with each other in the discharge of their respective obligations under the Contract with the aim of satisfactorily completing the Plant and the Works in accordance with the Contract.
- 2.2 The parties shall deal fairly, openly and in good faith with each other. Each party shall acting reasonably disclose information which the other might reasonably need in order to exercise his rights and to perform his obligations under the Contract. In particular, each party shall promptly fully inform and provide such information as reasonably requested by the other party to the other concerning any matter which will or may prevent the Plant and Works being completed in accordance with the Contract. The parties shall work together in a manner consistent with their respective obligations under the Contract to resolve or mitigate the effect of any such matter.

## 3. Contractor's responsibilities

- 3.1 In consideration of payment by the Purchaser, the Contractor shall regularly and diligently carry out and complete the Works in accordance with the Contract.
- 3.2 All work carried out by the Contractor shall be carried out with sound workmanship and materials, safely and in accordance with Good Industry Practice and Legislation and shall be to the reasonable satisfaction of the Purchaser's Engineer.
- 3.3 The Contractor shall set out the Plant by reference to points, lines and levels of reference provided to him by the Purchaser's Engineer.
- 3.4 The Plant as completed by the Contractor shall comply with the Contract and shall be in every respect fit for the purpose for which it is intended as defined in the Specification or in any other provision of the Contract.
- 3.5 If at any time during the performance of the Contract the Contractor is of the opinion that a change to the Works or the design or method of operation of the Plant:
- (a) is necessary to eliminate a potential defect in the Plant or a specific hazard to any person or party in the performance of the Works or in the operation of the Plant which has occurred or would otherwise occur; or
  - (b) would improve operating or life cycle costs of the Plant; or
  - (c) would otherwise be beneficial to the Purchaser; the Contractor shall promptly notify the Purchaser's Engineer accordingly.
- 3.6 The Contractor shall at all times have and maintain adequate resources available for the proper and timely carrying out of the Works, including financial resources, and competent, appropriately qualified and experienced personnel.
- 3.7 Unless otherwise agreed, the Contractor shall at intervals of not more than one calendar month report to the Purchaser's Engineer in accordance with Schedule 21 of the Specification on the progress of the Works,

supporting his reports with appropriate documents including any proposed revisions to the Approved Programme.

The Contractor shall provide and maintain in accordance with Sub-clause 40.1 records as required by Schedule 21 of the Specification.

- 3.8 The Contractor shall maintain, and cause Subcontractors to maintain, a Quality Assurance System. The existence of such a Quality Assurance System shall not relieve the Contractor from any of his other duties, obligations or liabilities under the Contract. The Contractor shall also prepare and implement a validation plan, if such a requirement is included in Schedule 6 of the Specification. The Purchaser may at its discretion deploy additional supervision should the Contractor (in the Purchaser's reasonable opinion) fail to provide adequate resources and the Contractor shall upon request reimburse the Purchaser the cost of doing so.
- 3.9 The Contractor shall provide training as described in Schedule 9 of the Specification.
- 3.10 The Contractor shall provide at his own expense:
- (1) The Performance Bond within 7 days of the date of the Agreement.
  - (2) Not used.
  - (3) Not used.
  - (4) The Parent Company Guarantee prior to the Effective Date.
  - (5) a collateral warranty in the form set out in Schedule 25 with the Subcontractors and subject to such changes as the Purchaser may agree (such agreement not to be unreasonably withheld or delayed) (each a "Collateral Warranty") provided by the Subcontractor in favour of the Purchaser in respect of the parts/systems of the Plant identified in Schedule 7 of the Specification. The Contractor shall procure that any such Collateral Warranty shall be executed by the relevant Subcontractor and the Contractor and delivered to the Purchaser within 7 days of the execution of the subcontract to which the Collateral Warranty relates. Any failure to do so shall entitle the Purchaser to withhold in full any Milestone Payment to the Contractor which relates to or contains an element of the subcontract package for which a Collateral Warranty or Warranties have not been provided.

Notwithstanding any other provisions of the Contract no further sums shall become due to the Contractor under the Contract whilst he remains in default of this Sub-clause 3.10.

## 4. Purchaser's responsibilities

- 4.1 The Purchaser, through the Purchaser's Engineer, shall provide the Contractor with the documentation described in Schedule 3 of the Specification and with all such further information and Decisions as are referred to in the Contract or are necessary to be provided by the Purchaser to permit the Contractor to carry out and complete the Works at the times specified in the Contract. If no such times are specified, the Purchaser shall make such provision within a reasonable time with regard to any date stated in Schedule 11 of the Specification the Approved Programme, the actual progress of the Works and all other relevant circumstances.
- 4.2 The Purchaser shall comply with its obligations in Schedule 3 of the Specification and shall carry out any work or provide any materials, facilities, or services which are indicated as a responsibility of the Purchaser in Schedule 3 of the Specification. Subject to any express descriptions thereof in the Contract, such work, materials, facilities or services shall be carried out and provided:
- (a) with sound workmanship and materials, safely and in accordance with Good Industry Practice and Legislation;
  - (b) in a manner consistent with the proper carrying out and completion of the Works in accordance with the Contract;
  - (c) at the times specified in the Contract, or if no such times are specified, at reasonable times having regard to any date or period stated in Schedule 11 of the Specification, the Approved Programme, the actual progress of the Works and all other relevant circumstances.
- 4.3 If the Purchaser will incur costs which are to be reimbursed by the Contractor under the Contract, the Purchaser shall notify the Contractor before incurring such costs and shall keep adequate contemporary records of the

work, materials and resources involved. Such records shall be open to inspection by the Contract Manager at all reasonable times.

- 4.4 Subject to any other provision of the Contract if the Contractor incurs additional Cost as a result of any breach of contract by the Purchaser the Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims).
- 4.5 The Purchaser shall provide personnel with adequate skills and experience:
- (a) to carry out their duties under the Contract; and
  - (b) to operate and maintain the Plant from the date of the Take Over Certificate, and shall make such personnel available for training in accordance with Schedule 9 of the Specification.
- 4.6 The Purchaser shall ensure that his and the Purchaser's Engineer's personnel and anybody working under their control shall at all times when at the Site be familiar with and comply strictly with the requirements stated in Schedules 4 (Health & Safety) and 5 (Environmental protection & waste disposal) and any site safety regulations, safe working procedures and health and safety instructions issued to the Contractor from time to time by the Purchaser's Engineer or the Purchaser and shall further ensure that where necessary such personnel have undergone suitable safety training and certification.
- 4.7 The Contractor shall not be liable for the consequences of any errors or omissions in or arising from work carried out after the Effective Date by the Purchaser or on the Purchaser's behalf by others (other than in respect of any design or information which the Contractor is required to verify in accordance with his obligations under the Contract).

## 5. Decisions and Contract co-ordination

- 5.1 Every Decision, objection, proposal, claim or report to be issued, given or made under the Contract shall be issued, given or made in writing. If any Decision, objection, proposal, claim or report is issued, given or made orally, it shall be confirmed in writing by the issuing party within seven days and shall be effective from the time and date of confirmation.
- 5.2 Any challenge, where permitted by the Contract, to a Decision, objection, proposal, claim or report shall be supported by a statement and a summary of material facts upon which it relies and shall unless otherwise provided be made within fourteen days of the receipt of the said Decision, objection, proposal, claim or report.
- 5.3 Records of meetings signed in accordance with Sub-clause 29.3 shall constitute a report in the context of this Clause 5 and shall have the same effect as a Decision.
- 5.4 In carrying out the Contract both parties shall comply with the requirements set out in Schedule 20 of the Specification.
- 5.5 No approval, consent, comment, confirmation, acknowledgement, etc given to the Contractor by the Purchaser or the Purchaser's Engineer shall relieve the Contractor in any way from its obligations under the Contract unless expressly stated in the Contract.

## 6. Sufficiency of Contract Price

- 6.1 Subject to the provisions of the Contract, the cost of carrying out the Works shall be at the risk of the Contractor, who shall be deemed to have obtained all information and taken account of all circumstances which may affect such cost before agreeing to the Contract Price.
- 6.2 Save for information provided by or on behalf of the Purchaser in relation to the matters set out in Sub-clause 6.3 where the Purchaser shall be responsible for the accuracy of such information, the Contractor shall be responsible for checking, and shall assume full responsibility for, the accuracy of information provided to him by the Purchaser or on the Purchaser's behalf. The Purchaser makes no representation or warranty as to the accuracy of any survey, report, document, statement or information prepared by or on behalf of the Purchaser and shall have no liability to the Contractor (and the Contractor shall not be entitled to an addition to Contract Price or to an extension of time) for any defect, deficiency, omission, mistake, or otherwise therein.
- 6.3 If during the carrying out of the Works the Contractor encounters on the Site any physical condition which at the date of the Contractor's Technical Proposal as stated in the Agreement would not reasonably have been foreseen by a properly qualified and competent contractor having all the information which the Contractor then

had or could have obtained by a visual inspection of the Site or by reasonable enquiry, and if the Contractor considers that he will in consequence of such condition incur an increase in the time or Cost of performing his obligations under the Contract, he shall notify the Purchaser's Engineer within fourteen days of becoming aware of such unforeseen condition and otherwise shall comply with the requirements of Clause 19. Any such notification shall:

- (a) expressly state that it is given under this Sub-clause 6.3;
- (b) specify the condition encountered;
- (c) specify the steps which the Contractor is taking or proposing to take to overcome the condition encountered;
- (d) contain estimates of the effect on the Approved Programme of the condition and the additional Cost which the Contractor is likely to incur; and
- (e) state how the Contractor proposes to minimise such effect and additional Cost and/or time.

If the Contractor is unable to include in such notification any of the information listed in (b) to (e) above, he shall provide it to the Purchaser's Engineer in accordance with Clause 19.

The Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 in respect of the additional reasonably incurred Cost of:

- (i) complying with any instructions of the Purchaser's Engineer; or
- (ii) in the absence of any instruction from the Purchaser's Engineer, doing whatever is reasonably necessary,

in consequence of the conditions specified in a notification issued under this Sub-clause 6.3.

## **7. Statutory and other obligations**

7.1 The Purchaser and the Contractor shall in all matters relating to the Contract comply with all Legislation. The Contractor shall obtain all permits required from government and local authority or any other necessary permissions in connection with the use of the Site and the carrying out of the Works with the exception of those permits or permissions, if any, shown as a responsibility of the Purchaser in Schedule 3 of the Specification.

7.2 The Contractor shall develop, implement and maintain the Health and Safety and Environmental Plans stated in Schedules 4 and 5 of the Specification to take account of the development of the design, construction and maintenance procedures of the Plant having particular regard to the health and safety of all personnel involved with construction work on the Site and of all personnel who will be involved with the operation and maintenance of the Plant, and the impact of the Plant and its operation on the environment.

Such requirements shall not release the Contractor from any of his legal responsibilities for safety or environmental protection within the Site.

7.3 If after the date of the Contractor's Technical Proposal as stated in the Agreement, there shall be enacted or brought into force, or if there is a change in, any Legislation which causes an increase or decrease in the Cost to the Contractor of carrying out any part of the Works then provided such enactment, bringing into force or change would not have been reasonably foreseeable to the Contractor on the date of the Contractor's Technical Proposal, either party or the Purchaser's Engineer may give notification within fourteen days of such circumstances and the Purchaser's Engineer shall determine an appropriate addition to or deduction from the Contract Price by means of a Variation Order. When reasonably requested to do so by the Purchaser's Engineer the Contractor shall assist in such determination by the provision to the Purchaser's Engineer of the make-up of the Contract Price or of any relevant part thereof.

7.4 Notwithstanding anything contained in this Clause 7, all taxes, levies, rates, charges, national insurance contributions and the like assessed on the Contractor including any changes therein and all taxes, withholdings and the like on or calculated by reference to the Contractor's profits or deemed profits shall be borne by the Contractor. For the avoidance of doubt this Sub-clause 7.4 does not apply to Value Added Tax, provision for which is made in Sub-clause 41.13.

## 8. Patent and other protected rights

8.1 The Contractor shall be responsible for all fees, royalties and other charges, payable under the terms of any licence or permission obtained by him in respect of:

- (a) any design of the Plant provided by the Contractor;
- (b) the manufacture and supply of the Plant;
- (c) any work done or method employed in the carrying out of the Works; and
- (d) Third Party Software.

8.2 Not used.

8.3 If any design of the Plant provided by the Contractor, or any item of the Plant manufactured or supplied by him, or any work done or method employed by him in carrying out the Works should infringe or be claimed to infringe any patent, registered design, design right, trade mark, copyright or other intellectual property right protected by law, the Contractor shall indemnify the Purchaser against all damages, liabilities, claims, costs and expenses that may result from such infringement or claimed infringement, provided always that this indemnity shall not apply to any such patent, registered design, design right, trade mark, copyright or any other property right protected by law first granted, registered or created after the date of the Contractor's Technical Proposal as stated in the Agreement nor to any use of the Plant otherwise than for the purpose or in the manner indicated by or reasonably to be inferred from the Contract. The Contractor shall use reasonable endeavours to keep the Purchaser's Engineer informed of any further patent, registered design, design right, trade mark or copyright which may be published, registered or created and which may affect the obligations of the parties hereunder.

8.4 In the event of any claim being made or proceedings commenced against the Purchaser to which the indemnity set out in Sub-clause 8.3 applies, the Purchaser shall promptly notify the Contractor who shall:

- (a) immediately discuss with the Purchaser, the action(s) that the Contractor intends to take in dealing with such claim and in conducting such proceedings;
- (b) deal with such claim and conduct such proceedings in the Purchaser's name; and
- (c) at all times keep the Purchaser fully informed as to his progress in dealing with such claim or conducting such proceedings.

If within twenty-one days of the Purchaser's notification the Contractor fails to notify the Purchaser that he intends to deal with such claim or conduct such proceedings then the Purchaser shall be free to deal with such claim or conduct such proceedings on his own behalf. Unless the Contractor has failed to notify the Purchaser within the period stated above, or fails at any time to comply with the other requirements of this Sub-clause 8.4, the Purchaser shall not make any admission prejudicial to such proceedings.

8.5 If any Documentation or instructions provided to the Contractor by the Purchaser or the Purchaser's Engineer shall cause or be claimed to cause an infringement of any patent, registered design, design right, trade mark, copyright or other intellectual property right protected by law the Purchaser shall indemnify the Contractor against all damages, liabilities, claims, costs and expenses that may result from such infringement or claimed infringement.

8.6 In the event of any claim being made or proceedings commenced against the Contractor to which the indemnity set out in Sub-clause 8.5 applies, the Contractor shall promptly notify the Purchaser who shall:

- (a) immediately discuss with the Contractor the action(s) that the Purchaser intends to take in dealing with such claim and in conducting such proceedings;
- (b) deal with such claim and conduct such proceedings in the Contractor's name;
- (c) at all times keep the Contractor fully informed as to his progress in dealing with such claim or conducting such proceedings.

If within twenty-one days of the Contractor's notification the Purchaser fails to notify the Contractor that he intends to deal with such claim or conduct such proceedings then the Contractor shall be free to deal with such claim or conduct such proceedings on his own behalf. Unless the Purchaser has failed to notify the Contractor within the period stated above, or fails at any time to comply with the other requirements of this Sub-clause 8.6, the Contractor shall not make any admission prejudicial to such proceedings.

- 8.7 The copyright and all other intellectual rights in all Documentation provided by the Contractor under the Contract shall remain vested in the Contractor or his Subcontractors as the case may be, subject to any pre-existing rights of the Purchaser or any third party.
- 8.8 The Purchaser shall have the irrevocable right to use such Documentation in connection with the design and construction of the Plant. The Purchaser shall have the further irrevocable right to use such Documentation without additional payment to the Contractor in connection with the operation, maintenance and repair of the Plant, for all purposes associated with constructing, completing and commissioning the Plant in the circumstances described in Clause 44 and for the purpose of making any improvement to, enlargement or demolition of the Plant, provided that such improvement or enlargement does not result in the construction of any separate or additional production plant or does not result in an increase in the production capacity of the Plant of more than twenty-five per cent over the original design.
- 8.9 The Contractor shall grant to or obtain for the Purchaser an irrevocable royalty-free licence to use, modify and adapt for the lifetime of the Plant all Applications Software and Third Party Software and Contractor's Software necessary for the operation or maintenance of the Plant.
- 8.10 Within twenty-eight days of the issue of the relevant Take-Over Certificate, the Contractor shall supply to the Purchaser a copy of the Applications Software, together with all Documentation necessary to allow the Purchaser to maintain, modify and compile the Applications Software into an executable form in combination with the Third Party Software and the Contractor's Software.
- 8.11 The Contractor shall make available for inspection and examination by the Purchaser's Engineer full details of test protocols, raw test data, tests records, test reports, details of test software, software codes and details of any calculations.

## 9. Subcontracting and third party rights

- 9.1a. The Purchaser may without the prior consent of the Contractor assign or transfer its rights under the Contract to any other person in whole or in part. The Contractor may not so assign or transfer without the previous written consent of the Purchaser. Where such proposed assignment is pursuant to the Contractor's banking or other financial obligations, the Purchaser's consent shall not be unreasonably withheld or delayed.
- 9.1b. The Purchaser may novate its obligations under the Contract to any public body acquiring the whole of the Agreement and having the legal capacity, power and authority to become a party to and to perform the obligations of the Purchaser under this Agreement. The Contractor shall take all steps reasonably required to effect such novation.
- 9.2 The Contractor may not subcontract the whole of the Works. Subject to Schedule 7 of the Specification, the Contractor may subcontract any part of the Works as the Contractor considers appropriate.

The subcontracting by the Contractor of any part of the Works shall not relieve the Contractor in any way from his obligations under the Contract.

- 9.3 The Contractor shall use reasonable endeavours:
- (a) to ensure that each of his Subcontractors is required to observe equivalent contractual obligations to those set out in these Conditions of Contract and to observe any provisions of the Contract which apply to subcontracts: and
  - (b) to include in any subcontract for any work or Materials a provision that the Subcontractor shall make good any Defect in such work or Materials notified at any time before the expiry of the applicable Defects Liability Period and that the Purchaser shall be entitled to enforce such provision directly against the Subcontractor.

Where such Subcontractors' contractual obligations materially depart from being equivalent to those set out in these Conditions of Contract the Contractor shall obtain prior approval from the Purchaser, such approval not to be unreasonably withheld or delayed. In the absence of such approval no payments relating to work for the relevant Subcontractor shall become due. To enable monitoring of these obligations, the Purchaser's Engineer shall be entitled to request draft and final version (as applicable) of any Subcontract, which the Contractor shall provide within 5 Working Days. Where Subcontracts are governed by a law other than the law of England, the Contractor shall provide assistance and pay the Purchaser's reasonable legal costs of review of such Subcontracts.

- 9.4 No subcontract shall contain any provision that makes payment to the Subcontractor by the Contractor dependent upon the receipt by the Contractor of any payment due under the Contract.

- 9.5 The Contractor shall include in any subcontract under which Confidential Information referred to in Sub-clause 20.2 is to be disclosed to the Subcontractor a provision that the Subcontractor shall observe the same obligations of confidentiality as those of the Contractor, and that the Purchaser shall be entitled to enforce such provision directly against the Subcontractor.
- 9.6 The Purchaser agrees that his obligations under Sub-clauses 20.3, 30.11 and 30.14 shall be capable of being enforced directly by any Subcontractor.
- 9.7 The Contractor agrees that his obligations under Sub-clauses 30.10 and 30.13 shall be capable of being enforced directly by the Purchaser's Engineer or any Affiliate of the Purchaser to whom the relevant indemnity applies.
- 9.8 Save as expressly provided in this Clause 9, no person other than a party to this Contract shall have any right to enforce any of its terms under the Contracts (Rights of Third Parties) Act 1999. The Purchaser and the Contractor may by agreement rescind or vary the Contract without the consent of any beneficiary who has rights to enforce a term of the Contract, even if as a result that beneficiary's rights to enforce a term of the Contract will be varied or extinguished.

## 10. Not used

## 11. The Purchaser's Engineer

- 11.1 The Purchaser's Engineer shall have full authority to act on behalf of the Purchaser in connection with the Contract, and:
- (a) the Purchaser shall cause the Purchaser's Engineer to perform reasonably and in a timely manner every act required under the Contract to be performed by the Purchaser's Engineer;
  - (b) any obligation stated under the Contract to be an obligation of the Purchaser's Engineer shall be deemed to be an obligation of the Purchaser;
  - (c) the Purchaser shall be responsible for any act, neglect or omission of the Purchaser's Engineer as if it were an act, neglect or omission of the Purchaser; and
  - (d) in all matters where the Purchaser's Engineer is required or authorised under the Contract to exercise his discretion or make a judgment or form an opinion he shall do so to the best of his skill and judgment as a professional engineer and shall be impartial between the Purchaser and Contractor.
- 11.2 At any time during the performance of the Works by the Contractor (and without prejudice to Clause 16), the Purchaser's Engineer may give the Contractor a Site Instruction to clarify matters arising in respect of the Works or to expedite the progress of the Works. The Contractor shall act promptly upon the Site Instruction. If the Contractor considers that the Site Instruction constitutes a Variation under the Contract he shall write to the Purchaser's Engineer giving his reasons. If the Purchaser's Engineer acting reasonably agrees that the Site Instruction constitutes a Variation he shall issue a Variation Order in accordance with Clause 16.
- 11.3 The Purchaser may from time to time appoint some other individual as Purchaser's Engineer in place of the individual previously so named or appointed and shall notify the Contractor without delay.
- 11.4 If the individual initially named in the Contract is not an employee of the Purchaser or any Affiliate of the Purchaser, the Purchaser shall not thereafter have the right to appoint as Purchaser's Engineer any individual who is an employee of the Purchaser or any Affiliate of the Purchaser, unless the Contractor consents.
- 11.5 The Purchaser's Engineer may notify the Contractor of the appointment of any individual to act as a Purchaser's Engineer's Representative and may from time to time by further notification change such appointment. Any such Purchaser's Engineer's Representative shall have authority to reject any designs, workmanship or materials which are not in accordance with the Contract, but the Contractor may within seven days of such rejection and before complying with it appeal against it to the Purchaser's Engineer. Any such Purchaser's Engineer's Representative shall also have authority to receive on behalf of the Purchaser's Engineer any notification to be given to the Purchaser's Engineer under the Contract by the Contractor, but the Contractor shall also send a copy of any such notification directly to the Purchaser's Engineer.
- 11.6 Subject to Sub-clauses 12.5 and 28.4, the Purchaser's Engineer may notify the Contractor that he authorises any Purchaser's Engineer's Representative to exercise any of the powers and functions of the Purchaser's

Engineer under the Contract and may by further notification cancel or modify any such authority, but not with retrospective effect.

- 11.7 If in the absence of the necessary authority from the Purchaser's Engineer a Purchaser's Engineer's Representative has given the Contractor any Decision which should have been given by the Purchaser's Engineer, the Contractor may, within seven days of receipt, advise the Purchaser's Engineer of such Decision. Unless the Purchaser's Engineer withdraws that Decision within seven days of receipt of such advice, the Decision shall have effect as if it had been given by the Purchaser's Engineer. In the event that the Contractor does not advise the Purchaser's Engineer of any such Decision within seven days of receipt, the Decision shall be deemed to have been given with the authority of the Purchaser's Engineer provided that it was given in writing.
- 11.8 Except as otherwise provided in or under the Contract, all communications between the Purchaser and the Contractor relating to the Works shall be between the Purchaser's Engineer and the Contract Manager.
- 11.9 Without prejudice to any other provision of this Contract the Contractor shall comply with any request of the Purchaser's Engineer to take steps to enable the Purchaser's Engineer to fulfil an entitlement in this Contract where the Contractor's action is necessary to fulfil that right.

## **12. Contract Manager and Contractor's staff**

- 12.1 The Contract Manager shall have full authority to act on the Contractor's behalf in connection with the Contract. The Contractor shall not replace the Contract Manager without the consent of the Purchaser's Engineer. The Contractor shall at all times until the issue of the last Final Certificate ensure that a suitable individual is appointed to act as Contract Manager. The Contract Manager shall appoint a deputy to act in his place in his absence. The Contract Manager shall notify the Purchaser's Engineer of the appointment of such a deputy who shall be deemed to have full authority to act on the Contractor's behalf.
- 12.2 From the commencement of work at the Site until the whole of the Plant has been Taken Over by the Purchaser, the Contractor shall ensure that a suitable individual is employed at the Site as Site Manager. The Contractor shall notify the Purchaser's Engineer of the individual so appointed as Site Manager and shall not make or change such appointment without the prior consent or requirement of the Purchaser's Engineer.

The Site Manager shall supervise all work done at the Site by the Contractor and shall receive on behalf of the Contractor all Decisions given to the Contractor at the Site by the Purchaser's Engineer or any Purchaser's Engineer's Representative. The Site Manager shall be present at the Site during normal working hours except when on leave, sick or absent for reasons connected with the proper performance of the Contract or as agreed with the Purchaser's Engineer. Whenever the Site Manager is absent from the Site during normal working hours, a suitable individual shall be appointed to act as his deputy. The Site Manager shall not be employed by the Contractor to do work under other contracts without the agreement of the Purchaser's Engineer.

- 12.3 The Contractor shall provide the further supervisory staff specified in Schedule 8 of the Specification. The Contractor shall ensure that at all times there are sufficient suitably qualified and experienced staff to supervise all work being done by the Contractor at the Site and, where required by the Contract, to advise and assist the Purchaser in starting up the Plant, carrying out the Performance Tests and operating the Plant until the Plant is Taken Over.
- 12.4 The Contractor shall not replace any key personnel named in Schedule 8 of the Specification without the consent of the Purchaser's Engineer.
- 12.5 If the Purchaser's Engineer is of the opinion that the Site Manager, any Subcontractor or any member of the Contractor's supervisory staff at the Site is incompetent or has misconducted himself or been in material breach of his duties, he may notify the Contractor that he requires such person to leave the Site with immediate effect. The Contractor shall be under an obligation to act on the Purchaser's Engineer's notification forthwith and to replace such person as soon as practicable. Provided it is given in good faith and does not amount to unlawful discrimination, any Decision given by the Purchaser's Engineer under this Sub-clause 12.5 shall be final, conclusive and binding. The Purchaser's Engineer shall not delegate the power to give notification under this Sub-clause 12.5. The Purchaser shall have no obligation to pay the Contractor for replacing the person.

## **13. Times of completion and Approved Programme**

- 13.1 Subject to Clause 14 (Delays), the Contractor shall complete the construction of the Plant and the Take Over Tests on or before the date, or within the period, specified in Schedule 11 of the Specification and do any other thing in the performance of the Contract on or before the dates, or within the periods, specified in Schedule 11 of the Specification.

- 13.2 The Contractor shall within the time stated in Schedule 11 of the Specification, prepare and submit to the Purchaser's Engineer for his approval a programme of work setting out in any manner that the Purchaser's Engineer may reasonably require the sequence in which and dates by which the Contractor proposes to perform his obligations under the Contract and the date(s) by which the Contractor reasonably requires that the Purchaser should provide any further Documentation or information or take any other action to permit the Contractor to perform his obligations. The programme shall take account of all matters which may affect the completion of the Works. If the programme submitted by the Contractor is consistent with all dates and periods specified in the Contract and is otherwise reasonable and the content and format of the programme complies with the requirements set out in Schedule 2 of the Specification, the Purchaser's Engineer shall approve it and it shall be the Approved Programme.

The Contractor shall use reasonable endeavours to perform his obligations under the Contract in accordance with the Approved Programme.

- 13.3 If required by the Purchaser's Engineer, the Contractor shall submit details of the qualifications and experience of the personnel whom the Contractor proposes to employ on the Works at various times, and the other resources which he will have available in order to perform his obligations under the Contract and in accordance with the Approved Programme. The details shall be in such form as required by the Purchaser's Engineer. The Contractor shall employ and make available personnel and resources conforming to such proposals.
- 13.4 If at any time progress falls behind the Approved Programme, or it becomes clear that it will fall behind, the Purchaser's Engineer may require the Contractor either to take such steps as may be practicable in order to achieve the Approved Programme or to revise the Approved Programme in the light of the circumstances and to re-submit it to him for his approval. If the Purchaser's Engineer approves the revised programme it shall thereafter be the Approved Programme.
- 13.5 Without prejudice to Sub-clause 13.4, if the Purchaser's Engineer decides that progress by the Contractor in carrying out the Works is likely to prejudice the Contractor's ability to complete the construction of the Plant in accordance with Sub-clause 13.1, and that this is due to a cause for which the Contractor is responsible, the Purchaser's Engineer may notify the Contractor to that effect. Following such notification the Contractor shall remedy the potential delay at his own cost.
- 13.6 If when the Purchaser's Engineer requires the Contractor to revise the Approved Programme, the Contractor fails to submit a revised programme within two weeks, or if the Contractor submits a revised programme which the Purchaser's Engineer is unable to approve for good reason, the Purchaser's Engineer may instruct the Contractor to make reasonable revisions to the programme and the Contractor shall as soon as possible make such revisions and the revised programme shall thereafter be the Approved Programme.
- 13.7 The exercise by the Purchaser's Engineer of his powers under Sub-clauses 13.4, 13.5 and 13.6 above shall not change any of the Contractor's obligations to the Purchaser under the Contract.

## 14. Delays

- 14.1 If the Contractor is delayed in the performance of any of his obligations under the Contract by any of the matters specified in Sub-clause 14.4 or by Force Majeure he shall notify the Purchaser's Engineer as soon as possible and in any event within fourteen days of when the Contractor could have become aware of the delay.

As soon as reasonably possible after that, and in any event within fourteen days, the Contractor shall notify the Purchaser's Engineer of any extension to any date or period specified in the Contract for the completion of such obligations as he considers would be fair and reasonable in the circumstances. The Contractor shall keep records made at the time of the circumstances, extent and effect of such delay.

The Purchaser's Engineer shall as soon as possible, and in any event within fourteen days of receipt of the Contractor's notification as to the extension to any date or period specified in the Contract that the Contractor considers would be fair and reasonable, notify to the Contractor an initial assessment of any extension to any date or period specified in the Contract which the Purchaser's Engineer considers appropriate based on the information available to him at that time.

Thereafter the Purchaser's Engineer may from time to time review and notify to the Contractor the need for and amount of any extension to any date or period specified in the Contract sought by the Contractor having regard to all the information available to the Purchaser's Engineer at the time of any review.

The Purchaser's Engineer shall undertake a review having regard to all the information available to him of the need for and amount of any extension sought by the Contractor after the later of either the occurrence of any date or the expiration of any period specified in the Contract or as applicable the occurrence of any extension of any date or the expiration of any extension of any period stated in the Contract.

The Purchaser's Engineer shall undertake a final review having regard to all the information available to him of the need for and amount of any extension sought by the Contractor after the Contractor has completed his obligations in respect of any date or period specified in the Contract.

In no circumstances shall a later review reduce the amount of an extension previously notified to the Contractor.

14.2 In deciding the appropriate extension to any date or period specified in the Contract the Purchaser's Engineer shall have regard to the following:

- (a) an extension shall only be granted when the matter causing the delay, being a matter which is specified in Sub-clause 14.4 or is an event of Force Majeure, affects achieving the completion of the Plant or the Works or any part of the Plant or the Works by any date or by the end of any period stated in the Contract;
- (b) all the information currently available to the Purchaser's Engineer;
- (c) the amount of any extension in respect of a particular cause of delay shall be fair and reasonable; and
- (d) in the event of extension for a cause which occurs at a time when the Contractor is already in delay for which no extension is allowable, the delay accrued prior to the allowable extension shall not be excused.

14.3 The notification to the Contractor of any extension to any date or period, or any change in any extension, shall be by means of a Variation Order stating the appropriate extension to the dates or periods stated in the Contract and the Contractor shall revise the Approved Programme and submit it to the Purchaser's Engineer for approval in accordance with Sub-clause 13.4.

14.4 The matters entitling the Contractor to an extension under Sub-clause 14.1 are delays caused by:

- (a) the occurrence of conditions or circumstances to which Sub-clause 7.3 applies; or
- (b) a Variation ordered by the Purchaser's Engineer, other than a Variation ordered by reason of the Contractor's default; or
- (c) the giving in accordance with Sub-clause 42.1 of any instruction by the Purchaser's Engineer to suspend any part of the Works, except where due to the Contractor's default; or
- (d) a breach of the Contract by the Purchaser; or
- (e) not used;
- (f) the time taken for the Purchaser to confirm to the Contractor the availability of funds in accordance with Sub-clause 30.8; or
- (g) loss or damage to the Plant and Site Materials if such loss or damage is due to a Purchaser's Risk; or
- (h) the discovery on or at the Site of fossils, antiquities or human remains where the Contractor is required to comply with any instruction of the Purchaser in respect of such matters.

14.5 If the Purchaser is delayed by an event of Force Majeure in the performance of any of his obligations under the Contract, he shall as soon as possible so notify the Contractor and the Purchaser's Engineer.

As soon as reasonably possible after that the Purchaser shall advise the Contractor and the Purchaser's Engineer as to the effect of such event of Force Majeure, and shall advise the Contractor and the Purchaser's Engineer of any change in the effect of such event of Force Majeure including the cessation of the event of Force Majeure.

14.6 '**Force Majeure**' shall mean one or more of the following circumstances which is beyond the reasonable control of, or preventative steps that could reasonably be taken by, the relevant party and prevents or impedes the due performance of the Contract by that Party:

- (a) government action or trade embargo; or
- (b) war, hostilities or acts of terrorism; or
- (c) riot or civil commotion; or
- (d) epidemic; or

- (e) earthquake, flood, fire or other natural physical disaster; or
- (f) severe weather conditions of an intensity which exceed that of any other severe weather conditions which have been recorded by the Met Office at its Weybridge observation station within the previous thirty year period; or
- (g) denial of the use of any railway, port, airport, shipping service or other means of public transport; or
- (h) industrial disputes, other than any solely confined to the Contractor or his Subcontractors or their personnel.

The mere shortage of labour, materials, or utilities shall not constitute Force Majeure unless caused by circumstances which are themselves Force Majeure.

- 14.7 Both parties shall at all times use reasonable endeavours to minimise any delay in the performance of their obligations under the Contract, whatever may be the cause of such delay.
- 14.8 In the event that either party is delayed by Force Majeure each party shall bear his own costs arising from such delay.
- 14.9 If performance of the Works is substantially prevented by Force Majeure for a continuous period of one hundred and twenty days, either party may by Notice to the other terminate the employment of the Contractor. In the event of such termination the rights and obligations of the parties shall be the same as if the Purchaser had issued a Notice of Termination under Sub-clause 43.1.

## 15. Damages for delay

- 15.1 If the Contractor fails to achieve Take Over of the Plant within the Time for Completion or fails to complete the Performance Tests within the Performance Test Period, the Contractor shall pay the Purchaser (or the Contractor agrees that the Purchaser may set off from payments due to the Contractor) Liquidated Damages as specified in Schedule 12 of the Specification ("**Delay Liquidated Damages**").
- 15.2 After Delay Liquidated Damages have become payable in respect of any part of the Plant or Works, if the Purchaser's Engineer issues a Variation Order or any event occurs which delays the Contractor and in the opinion of the Purchaser's Engineer properly entitles the Contractor in accordance with Clause 14 (Delays) to an extension of time in respect of such further delay to that part of the Plant or Works, the Purchaser's Engineer shall immediately so notify the Contractor and the Purchaser.

The Purchaser's further entitlement to Delay Liquidated Damages in respect of that part of the Plant or Works shall thereupon be suspended until the Purchaser's Engineer notifies the Contractor and Purchaser that such further delay has come to an end.

Such suspension shall not invalidate any entitlement to Delay Liquidated Damages which became payable before the period of further delay started.

- 15.3 In the event that the Contractor becomes liable for the maximum Delay Liquidated Damages under Sub-clause 15.1 such liability shall constitute a material breach within the meaning of Sub-Clause 44.2 (c) and the provisions of Sub-Clause 44.2 shall then apply.
- 15.4 The Purchaser and the Contractor agree that Delay Liquidated Damages are an agreed genuine pre-estimate of the losses to the Purchaser deriving from delay in Take Over of the Plant beyond the Time for Completion or a failure by the Contractor to complete the Performance Tests within the Performance Test Period and recovery by the Purchaser of Delay Liquidated Damages pursuant to this Clause 15 shall be in full and final satisfaction of the Contractor's liability for delay (subject always to Sub-clause 15.3 above and the Contractor's liability on termination of this Contract).

### 15A Rejection

- 15A.1 Without prejudice to Sub-Clause 44.1, the Purchaser may at its discretion give notice to the Contractor that the Purchaser rejects the Works if the circumstances in each of a) and b) below occur on the same date:
- a) the Purchaser has become entitled to the maximum amount of Liquidated Damages for delay under Sub-Clause 15 (as referred to in Sub-Clause 44.1(d); and
  - b) the Works have failed to achieve any one of the Minimum Criteria by the Longstop Date.

## 15A.2 Abandonment or Suspension

15A.2.1 The Purchaser may at its discretion give notice to the Contractor that the Purchaser rejects the Works if (i) the circumstances relating to abandonment or suspension of the Works in Sub-Clause 44.2 occur; and (ii) the Contractor fails to recommence the Works within 30 days of the Purchaser giving notice to the Contractor and its Parent Company that it intends to exercise its rights under this Sub-Clause 15A to reject the Works.

## 15A.3 Consequences of Rejection

15A.3.1 Following receipt by the Contractor of a notice issued by the Purchaser in accordance with sub-clause 15A.1 and 15A.2 the Contractor shall:

- a) remove all Contractor's Equipment from the Site; and
- b) remove the Works from the Site; and
- c) restore the Site to its original condition to the extent reasonably requested by the Purchaser.

As soon as is practicable and in accordance with a timetable accepted by the Purchaser (which timetable shall be provided by the Contractor to the Purchaser within 14 days of the Purchaser notice stating that the Purchaser rejects the Works). The Contractor shall carry out its obligations to remove the Contractor's Equipment, the Works and restore the Site. In the event that the Contractor fails to carry out its obligations to remove the Contractor's Equipment, the Works and restore the Site the Purchaser shall be entitled to instruct others to do so and to recover the Costs incurred by the Purchaser in consequence thereof from the Contractor as a debt.

The Purchaser shall be entitled to be repaid by the Contractor, within 30 days of a written request from the Purchaser, the part of the Contract Price already paid to the Contractor.

## 16. Variations

16.1 A Variation shall mean any change from that stated in the Contract to the Plant, to the Works, to the Site, to the method of working, or to the sequence or the timing of work. The Contractor shall make no Variation except as ordered by the Purchaser's Engineer.

16.2 At any time during the performance of the Contract the Purchaser's Engineer may order a Variation and, subject to this Clause 16, the Contractor shall carry it out as if the Variation were part of the original Contract. The Variation shall be valued in accordance with Clause 18 (Valuation of Variations).

16.3 The Purchaser's Engineer may at any time instruct the Contractor to prepare or to assist him in the preparation of a potential Variation and the Contractor shall comply with such instruction and give to the Purchaser's Engineer his recommendations for the form and scope together with an estimate of the Cost and impact on the Approved Programme of the Variation at such time and in such detail as the Purchaser's Engineer shall require.

16.4 Notwithstanding that consequent additions to or deductions from the Contract Price remain to be decided or agreed, the Purchaser's Engineer may issue a Variation Order in accordance with Sub-clause 16.2 if he considers that delaying the Variation Order pending such decision or agreement would unnecessarily prejudice the satisfactory completion of the Works or cause avoidable harm to the interests of the Purchaser. In all other cases the Purchaser's Engineer shall give the Contractor reasonable opportunity to comment upon any Variation he proposes to order and shall request the Contractor to state his proposal for consequent adjustments to the Works. The Contractor shall give his proposal within fourteen days of receipt of such request or within such longer period as the Purchaser's Engineer may agree.

16.5 If the Contractor is of the opinion that compliance with any Variation Order would prevent him from or hinder him in fulfilling any obligation under the Contract, he shall so notify the Purchaser's Engineer as soon as reasonably possible and not later than fourteen days from receipt of the Variation Order giving reasons why he considers he would be so prevented or hindered. Any Variation Order in respect of which such a notification is given by the Contractor shall cease to be binding unless and until it is confirmed by the Purchaser's Engineer with or without modifications. The obligations of the Contractor shall be as set out in the Variation Order or any modification to it.

16.6 The Contractor may object to any Variation ordered or proposed if compliance with it would:

- (a) when combined with all Variations previously ordered, have a value of more than twenty-five per cent of the Contract Price; or

- (b) in the case of a Variation Order issued after the date of a Take Over Certificate for all or part of the Plant, have a value of more than five per cent of the Contract Price; or
- (c) cause the Contractor to infringe any Legislation, including health, safety or environmental legislation; or
- (d) cause the Contractor to infringe any patent, registered design, design right, copyright or other protected right of any third party; or
- (e) require the Contractor to act in breach of any legally binding undertaking or agreement with a third party; or
- (f) require the Contractor to do work or to exercise skills which are not of the kind he undertakes in the ordinary course of his business; or
- (g) involve the employment or use of resources beyond the current capacity of the Contractor where he can demonstrate that such resources are unavailable to him or cannot reasonably be obtained.

Any such objection by the Contractor shall be made to the Purchaser's Engineer as soon as reasonably possible and not later than fourteen days from receipt of the Variation Order, giving reasons for his objection. In such case the Purchaser's Engineer shall notify the Contractor either that he withdraws the Variation Order or proposal, or that he does not accept the validity of the Contractor's objection. The decision of the Contractor not to object to any Variation ordered or proposed under this Clause 16 shall not affect his right to object to any subsequent Variation Order or proposal.

16.7 Not used.

16.8 The Contractor shall establish and maintain contemporary records of the work, Materials and resources required to undertake any Variation and their Cost together with such additional records as the Purchaser's Engineer may reasonably direct prior to or at the time of issuing the Variation Order, and all such records shall be open to inspection by the Purchaser's Engineer.

16.9 Any disagreement arising under:

- (a) Sub-clause 16.5 concerning any modification to the obligations of the Contractor; or
- (b) Sub-clause 16.6 concerning the validity of the Contractor's objection to a Variation Order.

## 17. Variations proposed by Contractor

17.1 The Contractor may at any time during the performance of the Contract submit to the Purchaser's Engineer a proposal for a Variation. Initially such proposal should be given as a brief outline as soon as the Contractor is first aware of the possibility of the Variation.

17.2 If the Purchaser's Engineer wishes to give the proposal further consideration he shall agree with the Contractor the extent of the detail that he requires the Contractor to prepare in substantiating the proposal or in developing full details of the proposed Variation, and thereafter the Contractor shall undertake such preparatory work.

17.3 If the Purchaser's Engineer decides that the proposed Variation should be incorporated into the Works or the Approved Programme, he shall so order and Clause 16 (Variations) shall apply. The Purchaser's Engineer may instead order or propose an alternative Variation under Clause 16.

The Purchaser's Engineer's Decision on any proposal for a Variation or on a detailed proposed Variation under Sub-clauses 17.1 and 17.2 respectively shall be given within fourteen days of receipt of the proposal for a Variation or of the detailed proposed Variation, or such longer period as the Purchaser's Engineer notifies the Contractor within the said fourteen days is reasonably required for the Purchaser's Engineer and the Purchaser to consider the proposal for a Variation or detailed proposed Variation.

Other than in the special circumstances described in Sub-clause 17.4, a Decision of the Purchaser's Engineer not to order a Variation or propose an alternative Variation shall be final, conclusive and binding.

17.4 The special circumstances referred to in Sub-clause 17.3 are those where the Contractor has stated in his proposal that the object of the Variation is to eliminate a potential defect in the Plant or the Works or a hazard to any person or property in the performance of the Works or in the operation or maintenance of the Plant including any breach of a duty imposed by any health and safety or environmental Legislation.

Any disagreement arising under this Sub-clause 17.4 concerning the Purchaser's Engineer's Decision not to order a Variation or propose an alternative Variation in such special circumstances which is not settled in accordance with Clause 46 may be referred to an Expert in accordance with Clause 48.

If such potential defect or hazard derives from a failure of the Contractor or if it should have been taken into account by the Contractor under Clause 6 (Sufficiency of Contract Price), the Contractor shall not be entitled to any addition to the Contract Price for the cost of implementing a Variation to the extent that it derives from the requirement to eliminate the potential defect or hazard.

- 17.5 If the Contractor becomes aware that any item of the Plant or any part of the Works to be performed by the Contractor has been incorrectly specified in the Contract, the Contractor shall immediately notify the Purchaser's Engineer. The Purchaser's Engineer and the Contractor shall as soon as possible meet to consider what action and what Variation may be needed.

## 18. Valuation of Variations

- 18.1 Where a fixed price quotation for a Variation is provided by the Contractor and accepted by the Purchaser's Engineer the price stated in the quotation and accepted shall be the addition to or deduction from the Contract Price to be made in respect of such Variation.
- 18.2 Where a fixed price quotation for a variation is not agreed under Sub-clause 18.1 then, subject to Schedule 18 of the Specification the amount, if any, to be added to or deducted from the Contract Price in respect of any Variation shall be such amount as the Purchaser's Engineer and the Contractor may agree. In the absence of such agreement, the Purchaser's Engineer shall as soon as practicable decide such amount which shall in all circumstances be reasonable having regard to Schedule 18 of the Specification and such amount (if any) shall be paid in accordance with a payment schedule agreed with the Variation.

## 19. Claims

- 19.1 If the Contractor intends to claim any additional payment which does not arise out of a Variation, he shall notify the Purchaser's Engineer of such intention within fourteen days of the date upon which the Contractor could reasonably have become aware of the event which gives rise to the claim, and shall establish and maintain records relevant to the claim, together with such additional records as the Purchaser's Engineer may direct. All such records shall be open to inspection by the Purchaser's Engineer.
- 19.2 The Contractor shall as soon as possible thereafter submit his claim to the Purchaser's Engineer supported by a written statement of grounds and a summary of material facts upon which he relies, together with copies of contemporaneous records and any records made in accordance with Sub-clause 19.1. The Purchaser's Engineer may request any reasonable additional information that he considers necessary to evaluate the claim and the Contractor shall provide such information as soon as reasonably practicable.
- 19.3 The amount, if any, to be added to the Contract Price in respect of any claim by the Contractor shall be such amount as the Purchaser's Engineer and the Contractor may agree. In the absence of such agreement, the Purchaser's Engineer shall as soon as practicable decide such amount which shall be calculated in accordance with the rates and prices contained in Schedule 18 of the Specification so far as these may be applicable (or otherwise it shall be such amount as shall in all the circumstances be reasonable having regard to Schedule 18 of the Specification) and having regard to any prejudice caused to the Purchaser by any late notice under Sub-clause 19.1. Any such agreement or decision shall be recorded by means of a Variation Order.
- 19.4 Where it is stated in the Contract that an addition to the Contract Price is to be determined in accordance with this Clause 19, the Contractor shall be entitled to the additional Cost he properly incurs plus Profit. The Contractor shall not be entitled to any Cost or extension of time incurred as a result of any failure on the part of the Contractor to comply with any of the provisions of the Contract including those of this Clause 19 and any provisions relating to time for provision of notices.
- 19.5 Any claim by the Purchaser made in accordance with Sub-clause 4.3 shall be submitted to the Contractor as soon as possible after the work to which the costs relate has been completed and be supported by a written statement of grounds and a summary of material facts upon which the Purchaser relies together with copies of records made in accordance with Sub-clause 4.3. The Purchaser and the Contractor may agree the costs in respect of any claim by the Purchaser. In the absence of such agreement, the Purchaser's Engineer shall decide the amount as soon as practicable.
- 19.6 For the avoidance of doubt, this Clause 19 sets out the procedure for making a claim for an additional payment or adjustment to the Contract Price that is expressly provided for in the Contract. It does not, of itself, give rise to any right in favour of the Contractor to claim any additional payment or adjustment to the Contract Price.

## 20. Confidentiality

- 20.1 **'Confidential Information'** shall mean all Documentation and other technical or commercial information in any form obtained directly or indirectly from the Purchaser by the Contractor, or directly or indirectly from the Contractor by the Purchaser, or which is generated by the Contractor or any Subcontractor in connection with the Contract, whether before or after the date of the Contract other than information:
- (a) which is or becomes publicly available other than by any unauthorised action of either of the parties to this Contract; or
  - (b) which is or comes into the possession of one party other than in breach of a duty of confidence to the other party; or
  - (c) which is expressly approved for disclosure by the party to whom the information relates.
- 20.2 The Contractor shall not, without the previous consent of the Purchaser, use, publish or disclose to any person, nor cause nor permit any of his Affiliates, personnel or Subcontractors to use, publish or disclose any Confidential Information obtained from the Purchaser other than for the performance of his duties under the Contract.
- 20.3 Except as permitted in Clause 8 (Patent and other protected rights) the Purchaser shall not, without the previous consent of the Contractor, use, publish or disclose to any person, nor cause nor permit any of his Affiliates, or personnel to use, publish or disclose to any person any Confidential Information obtained from the Contractor or any Subcontractor otherwise than for the design, construction, operation, repair, maintenance, modification, re-use or removal of the Plant and associated facilities.
- 20.4 The Contractor shall not, other than for the purposes of performing the Works, take or permit to be taken any photograph or other image of the whole or any part of the Plant or any other property of the Purchaser or his Affiliates, or any physical or virtual model of it, without the prior consent of the Purchaser. Any such photograph or other image shall be regarded as Confidential Information within the terms of Sub-clause 20.1. No photograph or other image so taken shall be used for the purposes of publicity without the prior written consent of the Purchaser.
- 20.5 This Clause 20 shall survive and remain in full force for a period of ten years following the issue of the last Final Certificate under Clause 38 (Final Certificate) or final Default Certificate under Clause 44 (Termination for Contractor's default) unless otherwise stated in these Conditions of Contract.
- 20.6 The Contractor shall use all reasonable endeavours to obtain the Purchaser's prior written approval of any communications with the general public or public authorities concerning the Works and shall immediately notify the Purchaser of the content of any communications received that could reasonably be anticipated to be of interest to the Purchaser. The Purchaser's Engineer may enquire regarding the existence of such communications from time to time.

## 21. Documentation

- 21.1 The Contractor shall appoint competent persons who shall be responsible for the checking and approval of all Documentation provided by the Contractor. No Documentation shall be both checked and approved by the same individual. If such persons are not named in the Contract, the Contractor shall make such appointments and shall notify the Purchaser's Engineer accordingly.
- 21.2 The Contractor shall submit to the Purchaser's Engineer for his approval the Documentation listed in Schedule 2 of the Specification under the heading 'Submitted during design phase for approval' at the time or times stated in Schedule 2 of the Specification and/or Schedule 11 of the Specification or in the Approved Programme.

Within fourteen days of the receipt by him of any Documentation for his approval, the Purchaser's Engineer shall return one copy thereof to the Contractor with his approval, conditional approval or rejection endorsed on it. If the Purchaser's Engineer fails to take any such action within the said fourteen days (or such other period as determined in accordance with this Contract, the Documentation shall be deemed to have been approved by the Purchaser's Engineer and the Contractor shall notify the Purchaser's Engineer accordingly.

The provisions of the second paragraph of this Sub-clause 21.2 shall not apply to the approval of the design referred to in with Part 2.3 of Schedule 11 of the Specification, which design shall be returned with the Purchaser's Engineer's approval, conditional approval or rejection within two calendar months of receipt by the Purchaser's Engineer and, where such design is not approved (either conditionally or otherwise) or rejected within two calendar months of receipt, shall not be deemed to have been approved by the Purchaser's Engineer.

21.3 The Purchaser's Engineer's approval of any Documentation submitted to him shall not relieve the Contractor of any of his responsibilities under the Contract. The Contractor shall not depart from any approved Documentation unless he has first submitted amended Documentation to the Purchaser's Engineer and obtained his approval thereof.

21.4 The Purchaser's Engineer shall not reject any Documentation except on the grounds that the Documentation is not in accordance with some express provision of the Contract, or that it is not in accordance with Good Industry Practice or is likely to have an adverse effect on health or safety or on the environment.

In each case where the Purchaser's Engineer rejects any Documentation he shall give his reasons and the Contractor shall amend and re-submit such amended Documentation to the Purchaser's Engineer.

Any disagreement arising under this Sub-clause 21.4 which is not settled in accordance with Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

21.5 If the Purchaser's Engineer gives conditional approval to any Documentation subject to any comment or query he may have, he shall make such comment or query on or attached to such Documentation. The Contractor may with the Purchaser's Engineer's consent proceed on the basis of the conditional approval.

The Contractor shall in any event re-submit the Documentation with his response to the comment or query and the Purchaser's Engineer shall in accordance with Sub-clause 21.2 approve such Documentation without conditions when it is re-submitted in accordance with the conditional approval.

21.6 The Purchaser's Engineer shall have the right at any time on reasonable notice to examine any Documentation which has been or is being prepared by the Contractor or his Subcontractors for the purposes of the Contract except any Documentation of a class or description which Schedule 2 of the Specification or any Condition of Contract states shall not be shown to the Purchaser's Engineer.

21.7 In addition to the Documentation to be submitted under Sub-clause 21.2, Schedule 2 of the Specification may include a description of other Documentation which is to be provided to the Purchaser's Engineer, under a heading 'Documentation for information only'. The Contractor shall submit such Documentation to the Purchaser's Engineer as soon as each becomes available in the form specified in Schedule 2 of the Specification.

21.8 Documentation relating to any items subject to statutory design requirements and/or insurance approval shall be made available to the Purchaser's Engineer or to the Purchaser and/or his insurers or their agents at times appropriate for such purposes, taking account of the Approved Programme.

21.9 At a time or within a period (if any) specified in Schedule 11 of the Specification and before the Plant is Taken Over in accordance with Clause 33 (Taking Over), the Contractor shall supply the draft Documentation and manuals specified in Schedule 2 of the Specification which are ultimately to be provided as "Final and "As-Built" documentation" for the Plant as actually constructed. The draft Documentation shall be timely, sufficient and complete for the Purchaser to organize his procedures and resources to plan the operation and maintenance of the Plant in accordance with the Contractor's operating and maintenance requirements and to purchase such Consumables, parts and components as may be required for the maintenance of the Plant. The Contractor shall supply the final "Final and As-Built" Documentation not later than ninety days following the Take-Over of the Plant.

21.10 The Purchaser's Engineer shall review the Documentation supplied by the Contractor in accordance with Sub-clauses 21.8 and 21.9 for completeness and accuracy, and may require it to be amended by the Contractor as necessary.

21.11 Whenever the Contractor makes any change to the Plant as described in the Documentation provided in accordance with Sub-clause 21.9, he shall, within a period of sixty days, provide the Purchaser with new Documentation revised to take account of such change.

21.12 The Contractor shall promptly correct any error, discrepancy or omission in any Documentation prepared by him or on his behalf. If the need for correction has arisen by reason of any incomplete or inaccurate data, Documentation or information provided by the Purchaser or the Purchaser's Engineer on which the Contractor reasonably relied, the Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims). Otherwise the work of the Contractor in so doing shall be at his own cost.

21.13 The Contractor shall if required by the Purchaser's Engineer correct any error, discrepancy or omission in any Documentation provided to him by the Purchaser or the Purchaser's Engineer for the purposes of the Works and overcome the consequences of such error, discrepancy or omission and shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19. However, if the need for correction

has arisen by reason of any inaccurate data, Documentation or information provided by the Contractor and on which the Purchaser or the Purchaser's Engineer reasonably relied, the Contractor shall himself bear his additional cost.

- 21.14 Provided that the Purchaser complies with Sub-clause 4.3 and submits a claim in accordance with Sub-clause 19.5, the Contractor shall reimburse to the Purchaser any cost of abortive activity which the Purchaser has incurred in reliance on any Documentation which, in accordance with Sub-clauses 21.12 and 21.13, the Contractor is to correct at his own cost.

## 22. Inspection and pre-installation tests

- 22.1 The Purchaser's Engineer shall be entitled at all times to have access to any place where work under the Contract is being carried out or Materials are being manufactured or fabricated, for the purpose of checking the progress of manufacture or fabrication, inspecting and observing the work or carrying out tests on the work or Materials. The Purchaser's Engineer shall give reasonable notice of the access and facilities he requires and the Contractor shall secure such access and facilities both at those premises under his own control and those under the control of his Subcontractors.
- 22.2 The Contractor shall arrange and be responsible for all factory and other off-site tests and those, if any, carried out at the Site prior to installation, including those listed in Schedule 13 of the Specification, and shall provide the Purchaser's Engineer with copies of the test results in accordance with the Quality Assurance System.
- 22.3 Whenever the Contractor is ready to conduct a pre-installation test he shall notify the Purchaser's Engineer of the place and time at which he intends to conduct it, the time being not less than ten days later than the date of such notification. The Contractor shall conduct the test at the time and place so notified.

If the Purchaser's Engineer does not attend the test, the Contractor shall nevertheless be entitled to carry it out in his absence, and copies of the test results shall be deemed to be a correct record of the test provided that the test is carried out and the results are recorded in accordance with the Quality Assurance System.

- 22.4 The Purchaser's Engineer may require any additional pre-installation test not described in Schedule 13 of the Specification to be conducted for the purpose of deciding whether any work or Materials are in accordance with the Contract. The Purchaser's Engineer shall notify the Contractor of any such requirement by means of a Variation Order in sufficient time to enable the Contractor to conduct such test without impeding the performance of his other obligations under the Contract. Sub-clauses 22.2 and 22.3 shall apply to any such test. Unless the additional test is one that is normally conducted as part of the practice of the place where work is being done or Materials are being manufactured or fabricated, the Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims).
- 22.5 The Contractor shall provide or shall arrange for the provision of all labour, materials and equipment necessary for the proper carrying out of all pre-installation tests under this Clause 22.
- 22.6 If any item of work or Materials fails to pass any pre-installation test, the Contractor shall either rectify or replace the relevant item and, unless the Purchaser's Engineer dispenses with a repetition of the test, shall repeat the test following a further notification given under Sub-clause 22.3. The period of such notification may however be less than ten days if a lesser period is reasonable in the circumstances.
- 22.7 The Contractor shall be responsible for the cost of any repeat inspection or test in the event of an inspection or test failure.
- 22.8 The rights of the Purchaser's Engineer under this Clause 22 may be exercised by any authorised nominee of the Purchaser's Engineer.

## 23. The Site

- 23.1 The Purchaser shall give the Contractor access to and possession of the Site or parts of the Site:
- (a) by or before the relevant date or dates specified in the Contract; or
  - (b) if no such date or dates are specified, then in accordance with the Approved Programme; or
  - (c) if there is no Approved Programme, or if no such date or dates are specified then in reasonable time to permit the Contractor to perform his obligations under the Contract.

Such access and possession shall continue until the issue of the Take Over Certificate.

Following issue of the Take Over Certificate and in accordance with the Contract the Purchaser shall allow such access as is necessary for the Contractor to correct Defects and to perform his other rights and obligations under the Contract.

- 23.2 The Purchaser shall arrange that the Site includes a suitable right of access for the Contractor from a convenient point on the public highway along with supplies of power, water and any other utilities which it notifies the Purchaser it may reasonably require. Except for information provided in accordance with Sub-clause 4.1, the Purchaser does not guarantee and makes no representation as to the suitability or availability of any route or utility.
- 23.3 The Contractor shall use every reasonable means to prevent any of the roads (including temporary roads), railways (if any), and all associated bridges and other structures connecting with or on routes to the Site from being damaged by any traffic (including in particular, any traffic deemed to be 'extraordinary traffic' within the meaning of Legislation) generated by the Contractor or any Subcontractor. In order to avoid unnecessary damage to any such roads, railways, bridges or other structures, the Contractor shall select appropriate routes and vehicles or restrict and distribute loads such that the movement to or from the Site of Contractor's Equipment, Materials or plant is limited as far as reasonably possible.

If the Works involve the use by the Contractor of waterborne transport, this Sub-clause 23.3 shall be construed as though 'road' or 'route' includes a river, canal, lock, dock, sea wall or other structure related to a waterway, berth or port and 'traffic' includes any kind of waterborne craft, and shall have effect accordingly.

- 23.4 The Contractor shall ensure that every aspect of and all operations connected with the Works are carried out so as not to damage or to interfere unnecessarily with any of the operations being carried out by others on or about the Site or with the convenience of the public or the access to or to the occupation and use of any public or private property. Any damage to the Site or the Shared Access caused by the Contractor or its Subcontractors shall be made good by the Contractor immediately.
- 23.5 The Contractor shall permit the Purchaser and the Purchaser's Engineer and their personnel and the Purchaser's nominees to enter the Site at all reasonable hours for the purpose of inspecting the Works, receiving training or carrying out their work whether or not under or in connection with the Contract. The Contractor shall also permit other contractors or suppliers engaged by the Purchaser to enter the Site and carry out work or deliver goods at all reasonable hours, but unless the Contract expressly provides otherwise, the Contractor shall not be required to allow them to have such access or facilities as would significantly interfere with the performance of his obligations under the Contract.
- 23.6 The Contractor shall not permit to enter the Site any person whose presence on the Site is not necessary for the carrying out of the Works or for the carrying out of other work on behalf of the Purchaser without the prior consent of the Purchaser or the Purchaser's Engineer.
- 23.7 The Contractor shall take full account of and comply with the Purchaser's site and security rules for contractors and ensure that his Subcontractors do likewise. Where the Site is under the control of the Contractor as Principal Contractor, the Purchaser shall comply with the Contractor's rules for the Site provided that such rules shall not unreasonably prevent access to the Site.

## **24. Delivery to Site**

- 24.1 The Contractor shall be responsible for the delivery to the Site of all Materials and Contractor's Equipment in accordance with the requirements of the Contract. The delivery arrangements for materials to be provided by the Purchaser shall be as stated in Schedule 3 of the Specification.
- 24.2 Unless otherwise agreed with the Purchaser's Engineer, the Contractor shall not deliver or cause to be delivered anything to the Site until adequate facilities have been provided at the Site for its proper unloading and storage and preservation.
- 24.3 If the Contractor wishes any Materials or Contractor's Equipment to be delivered to the Site before the time, if any, specified in the Approved Programme, he shall obtain the consent of the Purchaser's Engineer before such delivery is made.
- 24.4 If any Materials or Contractor's Equipment are to be delivered to the Site seven days or more after the time, if any, specified in the Approved Programme, the Contractor shall draw this to the attention of the Purchaser's Engineer immediately upon his becoming aware of the delay.

- 24.5 The Contractor shall bear the risk and be liable for any loss of or damage to Materials until they are delivered to the Site irrespective of any fault or negligence of the Purchaser or the Purchaser's Engineer.
- 24.6 If the Purchaser free-issues to the Contractor any materials for incorporation into the Plant and the Contractor first takes possession of them at a location other than the Site, then the Contractor shall bear the risk and be liable for any loss of or damage to any such materials from the time when the Contractor first takes possession of them until delivery to the Site irrespective of any fault or negligence of the Purchaser or the Purchaser's Engineer.

## 25. Ownership of Materials

- 25.1 The ownership of Materials shall pass to the Purchaser at whichever is the earlier of the following:
- (a) upon delivery to the Site; or
  - (b) when the Contractor becomes entitled to the final payment in respect of such Materials and such payment has been made.

The Contractor shall insert such provisions in subcontracts as will cause this to happen.

- 25.2 Whenever the ownership of any Materials passes to the Purchaser prior to delivery to the Site, the Contractor shall arrange for the Materials to be marked as the Purchaser's property and shall ensure that they are stored and handled separately from other materials.
- 25.3 When so requested, the Contractor shall provide to the Purchaser's Engineer proof of ownership and its transfer to the Purchaser.

## 26. Health, safety, environment and pollution

- 26.1 The Purchaser and the Contractor shall comply with all health, safety and environmental Legislation.

Without prejudice to the generality of the foregoing obligation, the Works shall be carried out in compliance with the Health and Safety at Work Act 1974 (as amended by Schedule 2 to the Consumer Protection Act 1987) and all applicable Regulations made thereunder, including the Construction (Design and Management) Regulations 2015 or any statutory re-enactment or amendment thereof for the time being in force.

- 26.2 The Contractor shall be responsible for the safety of his own operations and those of any Subcontractor and shall ensure that:
- (a) a safe working environment is maintained at all times;
  - (b) all persons on the Site, whether or not employed by the Contractor or any Subcontractor, are properly protected from risk of injury and danger to health arising out of or in connection with the carrying out of the Works;
  - (c) all property under his control is properly protected from damage or loss;
  - (d) all construction activities are subject to appropriate risk assessment and that relevant construction method statements are issued;
  - (e) any hazardous material is identified and suitable safety notices issued; and
  - (f) any hazardous material for which he is responsible is safely contained or removed from the Site.
- 26.3 The Contractor shall be responsible for the provision of all necessary safety equipment, materials, first aid and emergency arrangements throughout the duration of the construction activities as further described in Schedule 4 of the Specification.
- 26.4 The Contractor shall ensure that his personnel, Subcontractors, and anybody working under their control shall be familiar with, and shall at all times comply strictly with, the requirements stated in Schedules 4 (Health & Safety) and 5 (Environmental protection & waste disposal) and any site safety regulations, safe working procedures and health and safety instructions issued to the Contractor from time to time by the Purchaser's Engineer or the Purchaser and shall further ensure that where necessary his or his Subcontractor's personnel have undergone suitable safety training and certification.

- 26.5 Without prejudice to the Contractor's general responsibility for safety as stated in Sub-clauses 26.1 and 26.2, the Contractor shall:
- (a) take due notice of all instructions or advice given by the Purchaser's designated Health and Safety Supervisor; and
  - (b) nominate a competent person to be responsible for the proper observance of all safety requirements and procedures during work on the Site.
- 26.6 The Contractor shall ensure that none of his or any Subcontractor's personnel performs any activity relating to the performance of the Works under the influence of intoxicating liquor, drugs or other similar substances.
- 26.7 The Contractor shall indemnify the Purchaser against any clean-up cost that results from any escape or release of hazardous or polluting material:
- (a) from any Contractor's Equipment; or
  - (b) which occurred prior to the issue of the relevant Take Over Certificate and was caused by a failure of the Contractor to exercise the reasonable skill and care to be expected of a properly qualified and competent contractor; or
  - (c) which occurred after the issue of the relevant Take Over Certificate and before the issue of the relevant Final Certificate and was sudden or accidental and was caused by a failure of the Contractor to exercise the reasonable skill and care to be expected of a properly qualified and competent contractor.

The Purchaser shall indemnify the Contractor against any reasonable clean-up cost connected with the Site and the carrying out of the Works at the Site that results from any escape or release of hazardous or polluting material to the extent recovered under relevant insurance other than (i) as described at (a), (b) or (c) above or (ii) in respect of clean up costs connected to the Contractor's breach of its obligations under this Agreement

Liability for any loss or damage which may result from the escape or release of hazardous or polluting material other than clean-up costs shall be in accordance with Clause 30 (Care of the Works).

- 26.8 The Purchaser shall be the Client in respect of the Works pursuant to the CDM Regulations. Without prejudice to the Contractor's general responsibility for safety under this Clause 26, the Contractor accepts the roles of Principal Contractor, Principal Designer and Designer under the CDM Regulations, save (in respect of the role of Principal Contractor) where the Contractor is notified by the Purchaser or the Purchaser's Engineer that another entity will act as Principal Contractor for the Site. The Contractor shall ensure, providing training where necessary, that all Subcontractors fulfil their duties as contractors and/or Designers, as appropriate, under the CDM Regulations.

## 27. Site services

- 27.1 The Contractor shall provide all Materials, Contractor's Equipment, labour, consumables, services and facilities that may be necessary at the Site for the proper carrying out and completion of the Works other than those, if any, which the Contract requires the Purchaser to provide.
- 27.2 The facilities and services to be provided by the Contractor shall include but not be limited to: temporary roads and parking; temporary offices, stores and warehousing; communications; sanitary and canteen facilities for persons engaged in the Works; cleaning and other services; and all necessary or specified safety, security, firefighting, first aid and other medical facilities.
- 27.3 All temporary buildings, structures, equipment and facilities provided by the Contractor at the Site shall be properly maintained and cleaned by the Contractor, and at all times during the carrying out of the Works the Site shall be kept by the Contractor in a safe, clean and orderly condition and reasonably free from waste materials and rubbish.
- 27.4 If the Contract states in Schedule 3 of the Specification or elsewhere that the Purchaser shall provide any services or facilities for use by the Contractor, then unless otherwise stated, use by the Contractor shall be free of charge. Such use by the Contractor shall be subject to any condition that the Purchaser's Engineer may reasonably require.
- 27.5 Any Documentation relating to Contractor's Equipment and facilities which the Contractor by law or the Contract is required to have, make or obtain shall, if required, be produced for inspection by the Purchaser's Engineer or Purchaser and/or his insurers or their agents.

- 27.6 The Contractor shall not remove Contractor's Equipment from the Site without the prior consent of the Purchaser's Engineer, but the Purchaser's Engineer shall not refuse consent if the Contractor's Equipment are no longer required for the carrying out of the Works.

## 28. Site working conditions

- 28.1 Subject to Sub-clause 28.3, the Contractor shall pay rates of wages and allowances and observe hours and conditions of employment which are not less favourable than those established for the relevant trade or industry by any general agreement or award applying to the place where any work for the Contract is being carried out and shall impose the same obligations on his Subcontractors.
- 28.2 The Contractor shall at all times keep the Purchaser's Engineer informed of any matter likely to affect industrial relations at the Site.
- 28.3 The Contractor shall comply with and be responsible for the cost of compliance with any general agreement made between representatives of workmen and employers who will be engaged in work at the Site as to the rates of wages and allowances to be paid to and general working conditions for workmen employed at the Purchaser's premises where the Site is situated, provided that such agreement was either already in force at the date of the Contractor's Technical Proposal as stated in the Agreement or is one to which the Contractor is already or becomes a party.
- 28.4 The Contractor shall ensure the immediate removal from the Site of any person or subcontractor, other than his Site Manager or a member of his Site staff to whom Sub-clause 12.5 applies, whom the Purchaser's Engineer shall by notice require to be removed for reason of misconduct, incompetence or material breach of any of the rules, requirements, regulations, procedures and instructions referred to in Sub-clauses 23.7 and 26.4. Provided it is given in good faith and does not amount to unlawful discrimination, any Decision given by the Purchaser's Engineer shall be final, conclusive and binding. The Purchaser's Engineer shall not delegate the power to give a notice under this Sub-clause 28.4. The Purchaser shall have no obligation to pay the Contractor for replacing the person.
- 28.5 Unless otherwise stated in the Contract, the Contractor shall not, except in an emergency, carry out any work on the Site at times outside the normal working hours, if any, specified in Schedule 1 of the Specification without the prior agreement of the Purchaser's Engineer.

## 29. Meetings

- 29.1 Meetings to review progress and discuss matters relating to the Works shall be held on a regular basis on dates to be fixed by the Purchaser's Engineer. The Contractor also may request that a meeting be held at another time if the circumstances require it, and the Purchaser's Engineer shall not unreasonably reject such a request. Meetings shall be attended by the Purchaser's Engineer or the Purchaser's Engineer's Representative and by the Contract Manager or Site Manager and may be attended by other persons, including representatives of Subcontractors and Key Personnel, as required by the Purchaser's Engineer.
- 29.2 The Purchaser's Engineer shall provide a person to record the proceedings of each meeting. Within seven days of the meeting the Purchaser's Engineer shall give two copies of the records signed by him to the Contract Manager. If the Contract Manager accepts the records as sufficient and accurate, he shall sign one copy and return it to the Purchaser's Engineer within a further seven days. If not, the Contract Manager shall agree any modification with the Purchaser's Engineer and the amended copies shall be signed by both of them. If agreement cannot be reached upon any modification to the record of the meeting, the disagreements remaining shall be noted and attached to all copies of the record.
- 29.3 Only records signed by both the Contract Manager and the Purchaser's Engineer or deemed to have been accepted by the Contract Manager shall constitute approved records for the purposes of Sub-clause 5.3.

## 30. Care of the Works

- 30.1 If the Contract provides for the Plant to be Taken Over by Sections, the references to the Plant in this Clause 30 shall apply as if a reference to the Plant were a reference to a Section.
- 30.2 In this Clause 30, 'Personnel' of a legal entity means any person engaged by and working under the direction and control of that legal entity.

- 30.3 The Plant shall be under the care and control of the Contractor until the Plant is Taken Over by the Purchaser. Access to the Site and all activities on it under the Contract shall, subject to Sub-clause 23.5, be under the control of the Contractor until the whole of the Plant is Taken Over by the Purchaser.
- 30.4 Subject to Sub-clause 30.5, the Contractor shall to the extent instructed in writing by the Purchaser make good any loss or damage to the Plant and/or Site Materials that may occur prior to the issue of the Take Over Certificate and after the Take Over Certificate to the extent the loss or damage arises out of the Contractor's obligation to make good during the Defects Liability Period and Latent Defects Liability Period provided that the Contractor's liability shall not exceed the sums recovered under the insurances the Contractor is required to maintain in accordance with Schedule 27 and the relevant Deductible plus any cost that the Contractor would have incurred under Clause 37 (Liability for Defects) if replacement or rectification of any Defect in the Plant had been put in hand immediately prior to the physical loss of or damage to the Plant.
- 30.5 The Contractor shall have no liability for loss or damage to the Plant and Site Materials if such loss or damage is due to a Purchaser's Risk.
- 30.6 Not used.
- 30.7 Not used.
- 30.8 Not used.
- 30.9 The Contractor shall make good at the Contractor's cost any loss or damage that may occur to the Documentation prior to its delivery to the Purchaser and/or the Purchaser's Engineer.
- 30.10 The Contractor shall indemnify the Purchaser, any Affiliate of the Purchaser and the Purchaser's Engineer against all damages, liabilities, claims, costs and expenses in respect of the death, illness or injury to:
- (a) Personnel of the Contractor; and
  - (b) Personnel of a Subcontractor,
- irrespective of any fault or negligence of the Purchaser, any Affiliate of the Purchaser, or the Purchaser's Engineer.
- 30.11 The Purchaser shall indemnify the Contractor and any Subcontractor, against all damages, liabilities, claims, costs and expenses, in respect of the death, illness or injury to:
- (a) Personnel of the Purchaser;
  - (b) Personnel of any Affiliate of the Purchaser; and
  - (c) the Purchaser's Engineer and any Personnel of the Purchaser's Engineer;
- irrespective of any fault or negligence of the Contractor or any Subcontractor.
- 30.12 The Contractor shall indemnify the Purchaser against all losses, damages, liabilities, claims, costs and expenses of the Contractor and/or any Subcontractor in respect of loss of or damage to:
- (a) the Contractor's Equipment;
  - (b) any other property of the Contractor; and
  - (c) any other property of any Subcontractor;
- irrespective of any fault or negligence of the Purchaser.
- 30.13 The Contractor shall indemnify the Purchaser and any Affiliate of the Purchaser against all losses, damages, liabilities, claims, costs and expenses in respect of loss of or damage to:
- (a) the property of the Purchaser; and
  - (b) the property of any Affiliate of the Purchaser;
- to the extent caused by the wrongful or negligent act or omission of the Contractor, any Subcontractor, or the Personnel of the Contractor or any Subcontractor. The Contractor's total liability to the Purchaser and any

Affiliate of the Purchaser under this clause shall be limited to the amount as may be stated in the Agreement or, if no such sum is stated, to £5,000,000 (five million pounds) in respect of each and every claim.

30.14 Subject to Sub-clause 30.13, the Purchaser shall indemnify the Contractor and any Subcontractor against all damages, liabilities, claims, costs and expenses in respect of loss of or damage to:

- (a) the property of the Purchaser (other than the Plant and Site Materials; and
- (b) the property of any Affiliate of the Purchaser;

irrespective of any fault or negligence of the Contractor or any Subcontractor.

30.15 Subject to Sub-clause 30.11 and 30.14, the Contractor shall indemnify the Purchaser against all damages, liabilities, claims, costs and expenses in respect of loss of or damage to:

- (a) the property of a third party; and
- (b) the death, illness or injury to a third party;

to the extent caused by the wrongful or negligent act or omission of the Contractor, any Subcontractor, or the Personnel of the Contractor or any Subcontractor.

## 31. Insurance

31.1 Not used.

31.2 The Contractor shall, on or before the date of this Contract, take out and maintain or procure the maintenance of the insurances described in Schedule 27 (Required Insurances) with reputable insurers carrying out business in the UK or European Union.

31.3 The Contractor shall obtain the approval of the Purchaser in respect of the insurances to be provided under Schedule 27 (Required Insurances) and shall provide to the Purchaser details of any other insurances he is required to provide by the Contract or by Legislation along with details, in a timely manner, of any additions or restrictions thereto which may be made from time to time.

31.4 The Contractor shall provide to the Purchaser evidence that the insurances it is required to maintain pursuant to this Contract are being maintained in accordance with the requirements of Schedule 27 (Required Insurances) and that the premiums have been paid.

31.5 If the Contractor fails to produce satisfactory evidence that he has obtained and maintained any insurance required by this Contract, the Purchaser shall be free, having given seven days' notice of his intention, to provide and maintain such insurance and pay the premium as may be necessary for that purpose. The cost of such premium shall be reimbursed by the Contractor within twenty-eight days of being notified of the amount.

31.6 Neither party shall take any action or fail to take any reasonable action, or (insofar as it is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under any insurance policy in which that Party is an insured, a co-insured, a joint insured or an additional insured person.

31.7 The Contractor shall be liable for the Deductible on the insurances described in Schedule 27 except where the loss/damage/liability that gave rise to the claim was caused by an act, omission default or negligence of the Purchaser or the Purchaser is able to recover the costs of the Deductible from another party.

## 32. Completion of construction

32.1 If the Contract provides for the completion of construction of the Plant to be by Sections, Sub-clauses 32.2 to 32.9 shall apply as if a reference to the Plant were a reference to a Section.

32.2 As soon as the Plant, or any part of it, is in the opinion of the Contractor, substantially complete and ready for inspection he shall so notify the Purchaser's Engineer by means of a Construction Completion Report. The Contractor shall propose a programme for such inspection and for any tests, commencing not sooner than seven days nor later than fourteen days after the date of the notification unless the Purchaser's Engineer agrees otherwise.

- 32.3 Unless otherwise agreed between the Purchaser's Engineer and the Contractor, the Contractor shall begin such inspection and tests at the time notified and carry them out in accordance with the Quality Assurance System. The Purchaser's Engineer shall be entitled to attend and observe them. The Contractor shall give the Purchaser's Engineer every reasonable facility to satisfy himself as to the results of the tests.
- 32.4 Unless the Contract otherwise provides, or the Contractor and the Purchaser's Engineer otherwise agree, the Contractor shall provide all labour, materials and equipment necessary for the carrying out of the inspection and tests.
- 32.5 If the Purchaser's Engineer does not attend any inspection or test in accordance with Sub-clause 32.3, the Contractor shall nevertheless be entitled to carry it out in his absence, and copies of the test results shall be deemed to be a correct record of the test provided that the test is carried out and the results are recorded in accordance with the Quality Assurance System.
- 32.6 Upon satisfactory completion of any such inspection and tests then, provided that the Purchaser's Engineer is satisfied that the Plant is Substantially Complete and the Construction Completion Report fulfils the requirements of Schedule 2 of the Specification, the Purchaser's Engineer shall complete and issue to the Contractor with a copy to the Purchaser a Construction Completion Certificate confirming that the Contractor has demonstrated to the Purchaser's Engineer that the Plant or any part of it (which in the absolute discretion of the Purchaser's Engineer is appropriate) is Substantially Complete and in a condition such that the Take Over Tests may be carried out in accordance with Clause 33. Such Construction Completion Certificate may include a note of any Minor Items or non-Minor Items requiring completion before the issue of a Take Over Certificate. Any Minor Items that must be completed by Take Over are to be identified by the Purchaser's Engineer (acting reasonably).
- 32.7 If the Purchaser's Engineer is not satisfied that the Plant or any part of it (which in the opinion of the Purchaser's Engineer is appropriate) is Substantially Complete, he may endorse the draft Construction Completion Report accordingly, stating in what way the Plant or part is incomplete. The Contractor shall then complete the Plant or part as necessary and shall repeat the procedure described in Sub-clause 32.2.
- Sub-clause 22.7 shall apply to any repeat inspection or test.
- 32.8 If in Schedule 11 of the Specification, a date is specified for the completion of construction of the Plant the Purchaser's Engineer shall, as soon as he has signed all the Construction Completion Certificates in accordance with Sub-clause 32.6, issue a Construction Completion Certificate for the Plant.
- 32.9 Any disagreement arising under this Clause 32 concerning the issue of a Construction Completion Certificate which is not settled in accordance with Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

### **33. Taking Over**

- 33.1 If the Contract provides for the Plant to be Taken Over by Sections, Sub-clauses 33.2 to 33.13 shall apply as if a reference to the Plant were a reference to a Section.
- 33.2 As soon as the construction of the Plant has been demonstrated to be complete in accordance with Clause 32 (Completion of construction) and is, in the opinion of the Contractor, ready for carrying out any of the Take Over procedures (which shall include the Take Over Tests and the Performance Tests), the Contractor shall so notify the Purchaser's Engineer and shall specify a time not sooner than seven days and not later than fourteen days after the date of the notification when the Contractor intends to begin to carry out such procedures. If the Purchaser's Engineer requires the Contractor to carry out any Take Over procedures or Take Over Tests which are not included in the Schedules, he shall order a Variation.
- 33.3 Unless otherwise agreed between the Purchaser's Engineer and the Contractor, the Contractor shall begin such procedures at the time notified and carry them out in accordance with the Quality Assurance System. The Purchaser's Engineer shall be entitled to attend and observe them. The Contractor shall give the Purchaser's Engineer every reasonable facility to satisfy himself as to the results of any Take Over Tests.
- 33.4 Unless the Contract otherwise provides, or the Contractor and the Purchaser's Engineer otherwise agree, the Contractor shall provide all labour, materials and equipment necessary for the carrying out of the Take Over Tests. The Contractor shall perform the Take Over Tests using both the Contractor's and Purchaser's employees (suitably trained by the Contractor) in accordance with the manuals provided by the Contractor in accordance with Clause 21 (Documentation) and such other instruction as the Purchaser may give in the course of carrying out such tests. If any such instruction conflicts in any way with or significantly adds to the manuals, the Contractor shall issue it as soon as possible as an amendment to the manuals.

- 33.5 If the Purchaser's Engineer does not attend any Take Over procedure in accordance with Sub-clause 33.3, the Contractor shall nevertheless be entitled to carry it out in his absence, and copies of the test results shall be deemed to be a correct record of the test provided that the test is carried out and the results are recorded in accordance with the Quality Assurance System.
- 33.6 If the Plant fails to pass a Take Over Test, the Contractor, after making such adjustments as he considers necessary, shall repeat such test at a time agreed between the Contractor and the Purchaser's Engineer, or notified in accordance with Sub-clause 33.2, and the Purchaser's Engineer shall be entitled to attend and observe the test. If the Purchaser's Engineer is of the opinion that any such adjustment made by the Contractor makes it desirable, he may require the Contractor to repeat any Take Over Test which has already been successfully carried out, and the Contractor shall do so. Subject only to this Sub-clause 33.6 the Contractor shall not be bound to repeat for the purposes of this Clause 33 any Take Over Test that has already been successfully carried out.

Sub-clause 22.7 shall apply to any repeat take over test.

## 34. Site clearance

- 34.1 Unless otherwise agreed with the Purchaser's Engineer, the Contractor shall within fourteen days after the Purchaser has Taken Over the Plant dismantle and remove from the Site all waste and debris, Contractor's Equipment, including temporary buildings and structures, and other things of his, other than those that are necessary for the proper performance of the Contractor's remaining obligations and shall leave the Site in an orderly and safe condition.
- 34.2 As soon as the whole of the Plant has been Taken Over the Contractor shall remove all his equipment and other possessions from the Site other than such things as are then known to be required for making good Defects under Clause 37 (Liability for Defects) and any Materials which are to be handed over to the Purchaser in accordance with Sub-clause 34.5.
- 34.3 No Materials shall be removed from the Site unless:
- (a) they are not in accordance with the Contract and are being removed for the purpose of:
    - (i) modification; or
    - (ii) replacement; or
  - (b) the Purchaser's Engineer has previously consented to their removal; or
  - (c) in the case of bulk materials, they are surplus to the requirements of the Works.
- 34.4 The ownership of all Materials removed from the Site in accordance with Sub-clauses 34.3 (a)(ii), (b) and (c) shall revert to the Contractor upon removal. Materials falling within the description of Sub-clause 34.3 (a)(i) shall be marked as the Purchaser's property and stored and handled separately from other materials.
- 34.5 The Contractor shall remove any surplus Materials, except that if the parties shall so agree any surplus Materials shall be handed over to the Purchaser by the Contractor before he leaves the Site and an addition to the Contract Price shall be determined in accordance with and subject to Clause 19 (Claims) to take account of such Materials being additional to the requirements of the Works.

If the Purchaser shall so require, the Contractor shall remove surplus materials which were supplied by the Purchaser and dispose of them on behalf of the Purchaser. The proceeds of such disposal may be deducted from any sums that would otherwise be payable under the Contract by the Purchaser, or at the Purchaser's option paid by the Contractor to the Purchaser immediately following such disposal. Otherwise such surplus materials shall be handed over by the Contractor before he leaves the Site.

## 35. Performance Tests

- 35.1 Not used.
- 35.2 If the Contract provides for the performance of the Plant to be tested in Sections, Sub-clauses 35.2 to 35.16 shall apply as if a reference to the Plant were a reference to a Section.

35.3 The Performance Tests to be carried out on the Plant shall be (save in respect of the Availability Test) those specified in Schedule 16 of the Specification to meet the performance guarantees set out in Schedule 17. If any unspecified test is subsequently proposed, the Contractor and the Purchaser's Engineer shall discuss whether such tests should be carried out. If they agree that the test should be carried out, the Purchaser's Engineer shall order the test as a Variation.

35.4 The Performance Tests shall be commenced within the Performance Test Commencement Period alongside the Take Over Tests. If the Performance Tests have not been commenced within the Performance Test Commencement Period the Purchaser's Engineer shall decide an appropriate extension to the Performance Test Commencement Period.

If the Performance Tests have not been commenced within the Performance Test Commencement Period because of a delay which is caused by or is the responsibility of the Purchaser and if the Contractor incurs additional Cost as a consequence of such delay the Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims).

If the Performance Tests have not been commenced within the Performance Test Commencement Period because of a delay which is caused by or is the responsibility of the Contractor he shall not be entitled to an addition to the Contract Price as a consequence of such delay.

If the Performance Tests have not been commenced within the Performance Test Commencement Period because of a delay which is neither caused by nor is the responsibility of either the Purchaser or the Contractor the Contractor shall not be entitled to an addition to the Contract Price as a consequence of such delay.

35.5 The Performance Tests shall be carried out by the Purchaser in the presence of the Contractor, unless the Contractor fails or declines to attend. The Purchaser shall notify the Contractor and the Purchaser's Engineer at least fourteen days in advance of his readiness to carry out the Performance Tests, including a proposal for the time at which the test should commence. The Contractor shall confirm, at least seven days before the time proposed by the Purchaser, if he will attend the test. If the Contractor declines or does not attend any Performance Tests the Purchaser shall nevertheless be entitled to carry them out in his absence. The Performance Test Period shall commence when the first performance test commences.

35.6 The Performance Tests shall be carried out within the Performance Test Period.

If the Performance Tests have not been completed within the Performance Test Period because of a delay which is caused by or is the responsibility of the Purchaser the Purchaser's Engineer shall decide an appropriate extension to the Performance Test Period. If the Contractor thereby incurs additional Cost the Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19.

If the Performance Tests have not been completed within the Performance Test Period because of a delay which is caused by or is the responsibility of the Contractor the Purchaser's Engineer shall decide an appropriate extension to the Performance Test Period. The Contractor shall not be entitled to an addition to the Contract Price under this Sub-clause 35.6 as a consequence of such delay.

If the Performance Tests have not been completed within the Performance Test Period because of a delay which is neither caused by nor is the responsibility of either the Purchaser or the Contractor the Purchaser's Engineer shall decide an appropriate extension to the Performance Test Period. The Contractor shall not be entitled to an addition to the Contract Price under this Sub-clause 35.6 as a consequence of such delay.

35.7 The Performance Tests shall be carried out as far as practicable under any conditions detailed in Schedule 17 of the Specification.

35.8 Subject to Sub-clause 35.7, the Performance Tests shall be carried out to completion unless an authorised representative of the Purchaser, the Purchaser's Engineer or the Contractor shall order it to be stopped because its continuance would be unsafe or could damage the Plant or other property or the Purchaser stops the test for any other reason.

35.9 The Contractor shall be responsible for ensuring that the data collected during the Performance Tests are a true and correct record of the tests and such data shall be provided to the Purchaser's Engineer as soon as it is available.

35.10 If the Plant fails to pass any Performance Test or if any Performance Tests is stopped before its completion the Purchaser shall within a reasonable time:

(a) not used;

- (b) permit the Contractor to make any adjustment and/or modification to any part of the Plant provided that the Purchaser's Engineer is satisfied that the proposed adjustment and/or modification is likely to result in an improvement to the performance of the Plant;
- (c) shut down any part of the Plant, if the Contractor reasonably requires it for either of the reasons stated in (a) or (b) above;
- (d) restart the Plant after completion of any adjustment and/or modification; and/or
- (e) permit the Contractor to repeat any Performance Test; provided that the Performance Test Period has not expired.

If, upon expiry of the initial Performance Test Period, the Contractor has failed to pass the Performance Test but is able to demonstrate forthwith and to the reasonable satisfaction of the Purchaser's Engineer that there is a reasonable prospect of passing such Performance Test within a further period then, upon receipt of the Contractor's application the Purchaser's Engineer shall extend the Performance Test Period by such period.

Any investigation into a failure to pass a Performance Test and any adjustments and modifications shall be made by the Contractor as soon as practicable.

The timing of any shutdown referred to in (c) above shall be agreed between the Contractor and the Purchaser's Engineer, taking into account whether such shutdown is convenient to the Purchaser.

The Contractor shall, if so required by the Purchaser's Engineer, submit to the Purchaser's Engineer for his approval details of the adjustments and/or modifications which he proposes to make.

The Contractor shall make such adjustments and/or modifications at his own cost, provided that if the need for them was caused by the Purchaser or by any other contractor employed by the Purchaser, the Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19.

35.11 If by the end of the Performance Test Period the Plant has failed any Performance Test and provided that the results of the Performance Tests are within any limit for the application of liquidated damages specified in Schedule 17 of the Specification, the Contractor shall pay any Liquidated Damages due to the Purchaser in respect of such failure in accordance with Schedule 17 of the Specification.

35.12 If by the end of the Performance Test Period the results of any Performance Test remain outside any limit for the application of liquidated damages specified in Schedule 17 of the Specification, the Purchaser may at his option instruct the Purchaser's Engineer to extend the Performance Test Period and instruct the Contractor to investigate or to co-operate with the Purchaser's Engineer or others in the investigation of the reasons for the shortfall in performance.

The Contractor shall bear his own cost of any such additional work, including any costs associated with any repeat Performance Test. The provisions of this Clause 35 shall apply to any repeated Performance Test.

35.13 Subject to Clause 15A and Sub-Clause 35.12, if by the end of the Performance Test Period the results of any Performance Test are outside any limit for Liquidated Damages specified in Schedule 17 of the Specification the Purchaser's Engineer shall determine the amount of compensation due from the Contractor to the Purchaser for failure of the Plant to comply with a guarantee stated in Schedule 17 of the Specification.

35.14 Subject to Sub-clause 35.15 if by the end of the Performance Test Period:

- (a) any Performance Test has been started but not completed (other than a repeat Performance Test as described at (b) below); or
- (b) any repeat Performance Test, to be carried out after the Contractor has made any adjustment or modification to the Plant as a consequence of a failed earlier test, has not been completed (whether or not such repeat test was started),

the Purchaser's Engineer shall determine the results of any Performance Test not completed. Such results shall be used to assess whether the Plant has failed to achieve one or more performance levels for which Liquidated Damages are payable as set out in Schedule 17 of the Specification and if there has been a failure then the Contractor shall pay any Liquidated Damages due to the Purchaser in respect of such failure in accordance with Schedule 17 of the Specification.

35.15 If for any reason which is not the responsibility of the Contractor, any Performance Test has not been started for the first time in sufficient time to allow its completion within the Performance Test Period, such Performance Test shall be deemed to have been passed.

- 35.16 Any disagreement arising under this Clause 35 which is not settled in accordance with Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

## 36. Take Over Certificate

- 36.1 As soon as any Minor Items and non Minor Items referred to in Sub-clause 32.6 have been completed and all the Take Over procedures, Take Over Tests and Performance Tests have been successfully carried out, including any which affect the operability or safety of the Plant, the Purchaser's Engineer shall issue a certificate (a Take Over Certificate) for the Plant to the Contractor with a copy to the Purchaser whereupon the Plant, apart from any parts that are excluded from the Taking Over by the terms of the Certificate, shall be at the risk of the Purchaser. The Purchaser shall thereupon be responsible for the care, safety, operation, servicing and maintenance of the Plant so certified and shall have the right to operate the Plant.
- 36.2 For the purposes of Sub-clause 36.1, the successful carrying out of the Performance Tests shall include
- (a) payment or allowance by the Contractor of Liquidated Damages in accordance with Sub-clause 35.11 for failure of the Plant to comply with one or more guarantees stated in Schedule 17 of the Specification;
  - (b) payment or allowance by the Contractor of Liquidated Damages in accordance with Sub-clause 35.14 for any shortfall in performance of the Plant assessed in accordance with Schedule 17 of the Specification; and/or
  - (c) the deemed passing of the Performance Test in accordance with sub-clause 35.15 in respect of one or more guarantees stated in Schedule 17 of the Specification.
- 36.3 The Take Over Certificate may include a list of Minor Items still to be completed by the Contractor. The Purchaser's Engineer may, at any time until such Minor Items are rectified by the Contractor, specify the timetable for rectification of such Minor Items.
- 36.4 As soon as shall be reasonably possible after the issue of the Take Over Certificate the Contractor shall complete to the satisfaction of the Purchaser's Engineer all items (including Minor Items unless specifically deferred by the Purchaser's Engineer) noted on the Take Over Certificate as not being complete at the date of the Take Over Certificate. If the Contractor fails so to do the Purchaser's Engineer may arrange for such work to be carried out by others in accordance with Sub-clause 37.6.
- 36.5 Notwithstanding the failure of the Plant to pass any Take Over Test or if certain procedures have not been carried out, the Purchaser's Engineer may with the Contractor's consent and at the absolute discretion of the Purchaser issue a Take Over Certificate in respect of the Plant. Such a Certificate may either exclude from Taking Over such parts of the Plant as are specified, being parts for which the Take Over Tests have not been carried out, or may specify the Take Over Tests which the Plant has failed to pass. In either case the Contractor shall carry out any omitted procedure or repeat any Take Over Test which the Plant has not passed as and when required by the Purchaser's Engineer who shall give fourteen days notice of such requirement. The Contractor shall become entitled to a separate Take Over Certificate as soon as the applicable Take Over Tests have been completed satisfactorily.
- 36.6 Any effect on the results of a deferred Take Over procedure conducted in accordance with Sub-clause 36.5 which can reasonably be shown to be due to the prior use of the Plant by the Purchaser shall be taken into account in assessing such results.
- If the Contractor incurs any additional Cost as a result of such a deferment, other than any Cost resulting from any breach of contract by the Contractor, he shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims).
- 36.7 After the issue of a Take Over Certificate, and until the Final Certificate has been issued, the Contractor shall have the right of access, by himself or with any relevant Subcontractor, during all reasonable working hours at their own risk and cost to inspect any part of the Plant and to take notes of the related working, performance and maintenance records. Access shall only be allowed to the Contractor's and any Subcontractor's personnel whose names have previously been communicated in writing to the Purchaser's Engineer and the Purchaser not less than ten days before access is required. Subject to the Purchaser's Engineer's approval, the Contractor may at his own risk and cost make any tests which he considers desirable, provided such tests do not interfere unreasonably with the Purchaser's use or maintenance of the Plant.
- 36.8 Following the issue of the Take Over Certificate, the Purchaser shall carry out the Availability Tests in accordance with Part 6 of Schedule 16.

- 36.9 Any disagreement arising under this Clause 36 concerning the issue of a Take Over Certificate which is not settled in accordance with the provisions of Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

## 37. Liability for Defects

- 37.1 If the Contract provides for the Plant to be Taken Over by Sections, Sub-clauses 37.2 to 37.14 shall apply as if a reference to the Plant were a reference to a Section.

- 37.2 If at any time before the Plant is Taken Over in accordance with Clause 33 (Taking Over) or during the Defects Liability Period, the Purchaser's Engineer:

- (a) decides that any matter is a Defect; and
- (b) as soon as reasonably practicable, notifies the Contractor of the particulars of the Defect,

the Contractor shall make good the Defect so notified as soon as reasonably practicable (and in any event within three weeks of notification) at a time convenient to the Purchaser and the Purchaser shall allow the Contractor access to the Plant as is necessary for this purpose. The Contractor shall, if so required by the Purchaser's Engineer, submit his proposals for making good any Defect to the Purchaser's Engineer for his approval.

- 37.3 The Contractor shall bear his own cost of making good any Defect and shall reimburse the Purchaser its costs losses and expenses arising from such Defect.

- 37.4 If a Defect is made good after the issue of a Take Over Certificate the Purchaser's Engineer may require the Contractor to repeat any appropriate take over test for the purpose of establishing that the Defect has been made good. Sub-clause 22.7 shall apply to any such repeat test.

- 37.5 If in the course of making good any Defect which arises during the Defects Liability Period the Contractor repairs, replaces or renews any part of the Plant, this Clause 37 shall apply to that part of the Plant so repaired, replaced or renewed and the Defects Liability Period for such part shall commence afresh from the date that the repair, replacement or renewal of such part was completed.

- 37.6 If the Contractor does not make good within a reasonable time any Defect which he is liable to make good under Sub-clause 37.2 or complete any item noted on a Take Over Certificate as described in Sub-clause 33.8 then the Purchaser may, in addition to any other remedies or relief available to him under the Contract, proceed to do the work in such a manner as the Purchaser's Engineer may decide, including the employment of a third party, provided that the Purchaser gives at least fourteen days' notice of his intention.

- 37.7 If the Purchaser reasonably requires that any Defect notified to the Contractor under Sub-clause 37.2 which arises during the Defects Liability Period be made good urgently and the Contractor is unable or fails to comply within a reasonable time, the Purchaser may, in addition to any other remedies or relief available to him under the Contract and without further notification, proceed to do the work in such a manner as the Purchaser's Engineer may decide, including the employment of a third party.

- 37.8 If the Purchaser has made good a Defect in accordance with Sub-clause 37.6 or 37.7, the Contractor shall reimburse the Purchaser his reasonable cost of so doing provided that the Purchaser complies with Sub-clause 4.3 and submits a claim in accordance with Sub-clause 19.5. The Purchaser's Engineer and the Contractor may agree the amount to be paid by the Contractor, or in the absence of agreement the Purchaser's Engineer shall determine such amount as may be reasonable. Such amount shall be:

- (a) deducted from any money that would otherwise be payable under the Contract; or
- (b) paid by the Contractor to the Purchaser.

Any disagreement arising under this Sub-clause 37.8 which is not settled in accordance with Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

Where a Defect is made good by the Purchaser, the Contractor shall inspect the work and take responsibility for the making good as if it had been done by himself.

- 37.9 If the Plant cannot be used because of a Defect to which this Clause 37 applies, the Defects Liability Period shall be extended by a period equal to the period during which it cannot be used. Similarly the Defects Liability Period shall be extended by any period wherein the Plant cannot be used by reason of the Contractor putting

or attempting to put the Plant into such condition that it passes any relevant Take Over procedure under Clause 33 or any relevant Performance Test under Clause 35 (Performance test).

- 37.10 If for any reason the Purchaser does not allow the Contractor the necessary access to repair or correct any Defect, including permitting the Contractor to remove any defective Materials, the Contractor shall have no obligation to make such repair. However if the Purchaser merely defers the timing of such repair or corrective work for his own convenience the Contractor shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims) in respect of any additional Cost which the Contractor incurs as a consequence of such deferment, irrespective of the underlying liability for the cost of the repair or corrective work. In no circumstance shall the Purchaser require the deferment of the commencement of any repair or correction beyond the end of the relevant Defects Liability Period or any extension in accordance with this Clause 37.
- 37.11 If any part of the Plant has a guaranteed working life under normal running conditions stated in Schedule 10 of the Specification to be less than the period stated in Sub-clause 1.1 in the definition of the Defects Liability Period, then the Defects Liability Period for such part shall be the guaranteed working life so stated.
- 37.12 Not used.
- 37.13 The Contractor shall be responsible for making good any Latent Defect which may be discovered and notified by the Purchaser to the Contractor during the Latent Defects Liability Period.

The obligations of the Contractor to bear the cost and consequent losses and expenses of such work shall be as set out in Sub-clause 37.3.

- 37.14 If the Contractor shall neglect or refuse to make good within a reasonable time any Latent Defect which he is liable to make good under Sub-clause 37.13, the Purchaser may, without prejudice to any other remedies or relief available to him under the Contract, itself undertake or procure the necessary remedial work, provided that the Purchaser shall give at least 14 days written notice of his intention to do so. The Contractor shall reimburse the Purchaser on demand his Costs incurred provided that the Purchaser complies with the terms of Sub-clause 4.3 and submits a claim in accordance with Sub-clause 19.5.

## 38. Final Certificate

- 38.1 Subject to Sub-clause 38.2, as soon as the Defects Liability Period for the Plant has expired and the Contractor has made good in accordance with Clause 37 (Liability for Defects) all Defects that have within such period appeared in the Plant the Purchaser's Engineer shall issue a certificate (a 'Final Certificate') to the Contractor with a copy to the Purchaser stating that the Plant and any related work have finally been completed and the date of that completion.
- 38.2 If Clause 37 continues to apply to any part of the Works, the Purchaser's Engineer shall as soon as Sub-clause 38.1 is otherwise satisfied, issue a Final Certificate for the remainder of the Works in which such part is located, clearly identifying such part as being excluded from the Final Certificate. Such part shall then be the subject of a separate Final Certificate.
- 38.3 The Contractor shall save for any Latent Defects have no right or obligation to do any further work to any part of the Plant after a Final Certificate has been issued in respect of that part and that Final Certificate shall constitute conclusive evidence for all purposes and in any proceedings whatsoever between the Purchaser and the Contractor that the Contractor has completed that part of the Plant and made good all Defects therein in all respects in accordance with his obligations under the Contract.

Where there is more than one Final Certificate the last to be issued shall be identified as being the last Final Certificate.

No Final Certificate shall be conclusive as stated above if it was procured by any fraud on the part of the Contractor or any Subcontractor.

- 38.4 Save where there is an allegation of fraud, any disagreement arising under this Clause 38 concerning whether or not a Final Certificate should have been issued which is not settled in accordance with Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

## 39. Contract Price

- 39.1 Subject to any other term of the Contract, the Contract Price shall be the sum stated in the Agreement.

- 39.2 Any money paid in respect of any indemnity under the Contract shall not form an addition to the Contract Price, except as may be agreed in accordance with Sub-clause 30.8(b) for any payment under the indemnity set out in Sub-clause 30.7.

## 40. Records and audits

- 40.1 The Contractor's books and records and related documents including those required under Sub-clauses 3.7, 14.1 and 19.1 and Schedule 21 of the Specification or under any other provision of the Contract shall be kept and maintained until:
- (a) six years after the issue of the last Final Certificate; or
  - (b) any audit undertaken in accordance with Sub-clause 40.2 is complete; or
  - (c) any dispute resolution procedure is complete,
- whichever is the last to occur.
- 40.2 The Purchaser and the Purchaser's Engineer shall have the right at any time to carry out audits of such books and records and related documents referred to in Sub-clause 40.1 and to have such audits carried out by an auditing firm appointed by the Purchaser. Such audit shall commence no later than three hundred and sixty five days after the date of the last Final Certificate. It shall not extend to the make-up of any fixed or unit rate or price.

## 41. Payment

- 41.1 The Purchaser shall pay the Contractor the Contract Price in instalments as provided in Schedule 19 of the Specification provided that:
- (a) the Milestone Payment against each Milestone Event shall become due only when the Milestone Event has been achieved in full; and
  - (b) the cumulative value claimed by the Contractor in respect of the Works up to the end of the relevant calendar month may not exceed the cumulative amount up to the end of that month as set out in Schedule 19 of the Specification.
- 41.2 If any instalment is to be paid upon the completion of a specified task or milestone, the Contractor shall only be entitled to apply for payment for that instalment when he can provide evidence of completion of the task or milestone as stated in Schedule 19 of the Specification.
- 41.3 The Contractor shall submit a request for payment to the Purchaser's Engineer at intervals of not less than one calendar month showing:
- (a) the Contractor's assessment of the amount to be paid for Works carried out up to the end of the period for which it is submitted, together with any other scheduled payment as may have become payable;
- plus
- (b) the amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract.
- less
- (c) the total of all sums previously certified by the Purchaser's Engineer for payment.

The Contractor's requests for payment shall be supported by all relevant documentary evidence appropriately itemised.

The Contractor's final request for payment shall state that it is his final request for payment.

- 41.4 Within fourteen days of the due date for payment referred to in clause 41.5 below, or in the case of the final request for payment within fifty-six days of its receipt, the Purchaser's Engineer shall issue a certificate to the Contractor and the Purchaser for the instalment to which the request for payment relates. The certificate shall

show the sum which the Purchaser's Engineer considers to be due at the payment due date determined in accordance with Sub-clause 41.5, and the basis on which it has been calculated. The total certified shall comprise all sums listed in the Contractor's statement which, in the opinion of the Purchaser's Engineer, are properly payable under the Contract and shall show separately any elements within the sums certified in respect of nominated Subcontractors. The Purchaser's Engineer may in any certificate delete, correct or modify any sum previously certified by him as he shall consider proper.

- 41.5 The due date for payment shall be nine days (or fifty-one days in the case of the final request for payment) after the date of receipt by the Purchaser's Engineer of the Contractor's request for payment in accordance with Sub-clause 41.3. The Purchaser shall pay the amount certified under Sub-clause 41.4 by a date (the Final Date for Payment) which shall be twenty-eight days (or seventy days in the case of the final request for payment) after the date of receipt by the Purchaser's Engineer of the Contractor's request for payment in accordance with Sub-clause 41.3.
- 41.6 If for any reason the Purchaser, or the Purchaser's Engineer on his behalf, fails to notify the sum due in accordance with Sub-clause 41.4 the sum notified by the Contractor in his request for payment in accordance with Sub-clause 41.3 shall be due for payment by the Final Date for Payment.
- 41.7 If the Purchaser intends to pay less than the sum due in accordance with Sub-clause 41.4 or 41.6 for any reason including any sum that may be due from the Contractor to the Purchaser under the Contract or any sum not payable in accordance with Sub-clause 44.5, the Purchaser shall notify the Contractor via a "pay less notice" not later than one day before the Final Date for Payment, specifying the amount he considers to be due on the date the notice is given and the basis on which that sum is calculated.
- 41.8 If the Purchaser does not make payment in full by the Final Date for Payment of the amount of an instalment:
- (a) in accordance with any notice issued under Sub-clause 41.7; or
  - (b) certified and notified in accordance with Sub-clause 41.4; or
  - (c) where applicable in accordance with Sub-clause 41.6;

or if either party does not make any payment due under any other provision of the Contract by the Final Date for Payment and a valid pay less notice has not been served, the amount not paid shall bear interest compounded daily from the Final Date for Payment until the amount not paid is received by the other party at an annual rate which is two per cent above the Agreed Rate for the first month of delay. The annual rate of interest shall be increased by a further two per cent at the end of each further month of delay, up to the end of the third month. If the delay exceeds three months the annual rate of interest shall thereafter be ten per cent above the Agreed Rate.

- 41.9 If the Purchaser does not make payment in full by the Final Date for Payment of the amount of an instalment:
- (a) in accordance with any notice issued under Sub-clause 41.7; or
  - (b) certified and notified in accordance with Sub-clause 41.4; or
  - (c) where applicable in accordance with Sub-clause 41.6;

and a valid pay less notice has not been served, the Contractor may issue a Notice to the Purchaser informing him of the Contractor's intention to suspend performance of any or all of his obligations under the Contract. If such failure shall continue for seven days after the issue of such Notice, then at any time thereafter and provided such failure is still continuing, the Contractor may suspend further performance of any or all as applicable of his obligations under the Contract until payment is made.

The Purchaser's Engineer shall determine by means of a Variation Order an extension to the Approved Programme and appropriate dates in Schedule 11 of the Specification for the full period of suspension plus any reasonable additional time incurred by the Contractor in resuming his obligations and those of his Subcontractors. If the Contractor incurs additional Cost as a result of such suspension and subsequent resumption he shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims).

- 41.10 If the suspension of performance of any, but not all, of the Contractor's obligations in accordance with Sub-clause 41.9 continues for a period of sixty days the Contractor at any time thereafter may with immediate effect issue a Notice and copied to the to the Purchaser and copied to the Purchaser's Engineer that such obligation is excluded from the Contract. Thereafter the Purchaser's Engineer shall by means of a Variation Order confirm the exclusion together with the applicable deduction from the Contract Price.

If the suspension of performance of all of the Contractor's obligations in accordance with Sub-clause 41.9 continues for a period of sixty days the Contractor at any time thereafter may with immediate effect terminate his employment under the Contract by a Notice issued to the Purchaser and copied to the Purchaser's Engineer and thereupon the rights and obligations of the parties shall be as stated in Clause 43 (Termination by the Purchaser for convenience).

41.11 If the amount of a payment which is:

- (a) notified in accordance with Sub-clause 41.4 (and no notice is given by the Purchaser under Sub-clause 41.7 in respect of such payment); or
- (b) stated in a notice given by the Purchaser under Sub-clause 41.7,

is referred to an adjudicator appointed in accordance with Clause 47 (Adjudication) and if the decision of the adjudicator as to the amount which is to be paid by the Purchaser is that more shall be paid than the amount stated as in (a) or (b) as applicable, the additional amount shall be paid not later than:

- (i) seven days from the date of the adjudicator's decision; or
- (ii) the Final Date for Payment; whichever is the later.

41.12 If as a result of any audit in accordance with Sub-clause 40.2 or otherwise an error is discovered in the amount paid to the Contractor then such error shall be corrected in the next payment due under the Contract.

If such error is discovered following the making of the last payment to be certified by the Purchaser's Engineer, the finding of the error shall be notified by one party to the other party as soon as possible. The amount to be paid to or from the Contractor shall, if notification is not challenged within twenty-eight days, become due for payment twenty-eight days after the date of such notification with the Final Date for Payment being forty-two days after the date of notification.

If such notification is challenged the parties shall attempt to agree any amount to be paid. If not agreed within fifty-six days of the notification the Purchaser's Engineer shall determine the amount to be paid. The amount to be paid shall be due fourteen days after the date of agreement or determination, with the Final Date for Payment twenty-eight days after the date of agreement or determination.

41.13 The Contract Price excludes Value Added Tax (VAT) and to the extent that the tax is properly chargeable, the Purchaser shall pay such tax as an addition to payments otherwise due to the Contractor. All VAT shall be paid in Pounds Sterling.

41.14 Payment to the Contractor will be paid into the bank account to be nominated by the Contractor.

41.15 Where any monies are to be reimbursed to the Purchaser by the Contractor under the Contract, the Purchaser shall be entitled to either (in its discretion) off-set such monies against any sums payable to the Contractor under the Contract or to recover such monies as a debt.

41.16 The Purchaser shall be entitled to deduct and retain 5% (five per cent) of the total aggregate amount included in the final Milestone Payment before the issue of the Take Over Certificate (the "Retention").

41.17 The following provisions shall apply to the Retention:

- (a) the Purchaser shall owe no fiduciary duty to the Contractor in respect of the Retention;
- (b) any interest earned on the Retention shall be permanently retained by the Purchaser; and
- (c) the Retention shall be released by the Purchaser to the Contractor with the next Milestone Payment following the issue of the Final Certificate.

41.18 In the event that the Contractor fails to comply with its obligations under Clause 37 to rectify a Defect, the Purchaser shall be entitled to deduct from the balance of the Retention from time to time such amounts as are equal to the costs, reasonably and properly incurred by the Purchaser in rectifying or procuring the rectification of any such Defect.

## 42. Suspension of the Works

- 42.1 The Purchaser's Engineer may instruct the Contractor to suspend performance of all or any part of the Works for any reason whatsoever and the Contractor shall comply with such instruction. The Purchaser's Engineer shall state in any such instruction the reason for the suspension. On receipt of such an instruction, the Contractor shall immediately advise the Purchaser's Engineer of any part of the Works which needs to be continued to maintain the safety and security of the Plant and/or the Works.
- 42.2 The Purchaser's Engineer may subsequently instruct the Contractor to resume some or all of the suspended Works. Upon receipt of such an instruction the Contractor shall resume such Works as are ordered to be resumed as soon as is reasonably practicable.
- 42.3 Any extension of the relevant dates or periods stated in Schedule 11 of the Specification notified by the Purchaser's Engineer in accordance with Clause 14 (Delays) shall take account of the additional time required by the Contractor in re-establishing his activities and those of his Subcontractors.
- 42.4 If the Contractor incurs any additional Cost as a consequence of complying with an instruction to suspend any part of the Works given by the Purchaser's Engineer, other than an instruction given by reason of the Contractor's default, he shall be entitled to an addition to the Contract Price determined in accordance with and subject to Clause 19 (Claims).
- 42.5 If the Contractor's performance of any of the Works is suspended for a continuous period of ninety days, other than by reason of the Contractor's default, at any time thereafter and provided that such performance is still suspended, the Contractor may issue a Notice to the Purchaser and to the Purchaser's Engineer requiring that the Purchaser's Engineer shall within fourteen days of such Notice either issue an instruction to resume the suspended Works, or issue a Variation Order excluding that part of the Works to which the instruction to suspend applies. If the Purchaser's Engineer shall fail to do so then upon the expiry of such period of notice the employment of the Contractor shall unless otherwise agreed be deemed to have been terminated and thereupon the rights and obligations of the parties shall be as stated in Clause 43 (Termination by the Purchaser for convenience).

## 43. Termination by the Purchaser for convenience

- 43.1 The Purchaser may at any time issue a Notice (a 'Notice of Termination') to the Contractor instructing the Contractor to cease the further carrying out of the Works for any reason whatsoever other than a reason to which Clause 44 (Termination for Contractor's default) applies.
- 43.2 The Contractor shall upon receipt of the Notice of Termination cease the carrying out of the Works, other than such work as the Purchaser's Engineer may instruct. The Contractor shall upon completion of such work, remove any Contractor's Equipment from the Site and withdraw from the Site leaving it in a safe and tidy condition.

The Purchaser's Engineer shall issue a Take Over Certificate in respect of any part of the Plant for which a Take Over Certificate has not been issued, and shall if the Contractor is required to carry out any further work prior to his withdrawal from the Site or to provide any Materials or Documentation applicable to the Plant issue any further Take Over Certificate as may be appropriate. Thereafter Clauses 37 (Liability for Defects) and 38 (Final Certificate) shall apply, provided always that the Contractor shall have no liability in connection with the performance or non-performance of any Subcontractor or supplier where the Contractor's subcontract with or rights in relation to such Subcontractor or supplier has been assigned to the Purchaser under Sub-clause 43.3 and/ or 43.4.

- 43.3 As soon as practicable after receipt of the Notice of Termination, the Contractor shall if so required by the Purchaser:
- (a) ensure that his Subcontractors cease work in accordance with and subject to Sub-clause 43.2 so far as is possible by the exercise by the Contractor of such powers of termination, omission or cancellation as are available to him in the relevant subcontracts; and/or
  - (b) to the extent permitted by the subcontract, assign any subcontract to the Purchaser.
- 43.4 Upon receipt of the Notice of Termination or on such later date as may be specified in the Notice of Termination, the Contractor shall transfer to the Purchaser to the extent desired by the Purchaser all or any rights held by the Contractor relating to Materials and the Plant together with the obligations connected with them. The Contractor shall also deliver to the Purchaser all erection plans, schedules and Documentation and other data prepared by

the Contractor or Subcontractors in connection with the Works and all Confidential Information and all other Documentation supplied to the Contractor by or on behalf of the Purchaser in connection with the Works.

43.5 Within ninety days of the Contractor's withdrawal from the Site, or if the Contractor has not entered the Site before receipt of the Notice of Termination within ninety days of his receipt of the Notice of Termination, the Purchaser's Engineer shall, subject to Sub-clause 43.7, issue to the Purchaser and to the Contractor a certificate (a Termination Certificate') which shall state:

- (a) the total amount (if any) due to the Contractor under the Contract for the Works carried out prior to the receipt by the Contractor of the Notice of Termination;
- (b) any amount due to any third party in respect of which the Contractor has (prior to the receipt by him of the Notice of Termination) properly and irrevocably entered into a commitment relating directly to the Contract; and
- (c) the amount of any other Cost properly incurred by the Contractor in connection with the termination authorised by the Purchaser's Engineer, plus Profit thereon,

calculated in accordance with the Contract.

The balance, if any, due to the Contractor shall be the sum of the amounts referred to in (a), (b) and (c) less that amount already paid to the Contractor. If the amount already paid to the Contractor exceeds the sum of (a), (b), and (c), the balance shall become due from the Contractor to the Purchaser.

Any disagreement arising under this Sub-clause 43.5 concerning the amounts payable to the Contractor which is not settled in accordance with Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

43.6 As soon as practicable, the Contractor and the Purchaser shall provide the Purchaser's Engineer with all such information and documents as he may reasonably require for the purpose of issuing the Termination Certificate.

43.7 If by the expiry of the period specified in Sub-clause 43.5 it is not possible for the Purchaser's Engineer to issue a Termination Certificate by reason of any matter which prevents the determination of the amounts referred to in Sub-clause 43.5, the Purchaser's Engineer shall, at the expiration of such period, issue a provisional Termination Certificate which shall contain the best estimate that can be made of any amounts referred to in Sub-clause 43.5 and of the resultant balance due. As soon thereafter as the determination of the amounts referred to in Sub-clause 43.5 becomes practicable, the Purchaser's Engineer shall issue a final Termination Certificate which shall operate as a correction or adjustment of the provisional Termination Certificate.

If in the Purchaser's Engineer's opinion it is appropriate to do so, he may issue more than one provisional Termination Certificate prior to the issue of the final Termination Certificate.

43.8 Payment of the balance due under any Termination Certificate shall be made between the Purchaser and the Contractor in accordance with any provisional or final Termination Certificate and Clause 41 (Payment) shall apply as appropriate.

43.9 Nothing in this Clause 43 shall affect the continuing operation of Sub-clauses 9.6, 9.7 and 9.8 and Clauses 8 (Patent and other protected rights), 20 (Confidentiality), 45 (Limitations on liabilities and remedies), 46 (Disputes), 47 (Adjudication), 48 (Reference to an Expert) and 49 (Arbitration) and, to the extent that the Contractor has carried out the Works, Clauses 30 (Care of the Works), 31 (Insurance) and 37 (Liability for Defects).

## 44. Termination for Contractor's default

44.1 If

- (a) The Contractor goes into liquidation (other than a voluntary liquidation for the purposes of reconstruction or amalgamation) or has an administration order made against it or carries on its business or any part of it under an administrator or receiver or manager for the benefit of its creditors or any of them (or is subject to any procedure analogous to liquidation or administration in its local jurisdiction); or
- (b) the Take Over Certificate has not been issued by the Long Stop Date; or
- (c) the Purchaser's Engineer determines that there is no reasonable likelihood of the Contractor being able to complete the Works to the standard required by this Contract in order to issue the Take Over Certificate by the Long Stop Date; or

(d) the limit of any liquidated damages liability of the Contractor in this Contract is reached,

then, without prejudice to any other rights or remedies, the Purchaser may forthwith issue a Notice terminating the employment of the Contractor under the Contract.

44A If the Contractor is in breach of any of the documents under the Security Package the Purchaser may forthwith issue a Notice terminating the employment of the Contractor under the Contract.

44.2 If the Contractor is in default in that he:

- (a) without reasonable cause wholly suspends or abandons the carrying out of the Works before their completion; or
- (b) fails to proceed regularly and diligently with the Works; or
- (c) commits any other material breach of the Contract;

then, without prejudice to any other rights or remedies which the Purchaser may possess, the Purchaser may issue a Notice to the Contractor of such default.

If the Contractor fails to commence the rectification of the default within a period of fourteen days after receipt of such Notice, and/or thereafter fails diligently to pursue the rectification of such default, the Purchaser may within fifty-six days of such Notice issue a further Notice terminating the employment of the Contractor under the Contract.

The Purchaser may at any time give to the Contractor a second or subsequent Notice of the same default.

44.3 Upon termination of the Contractor's employment under Sub-clause 44.1 or 44.2:

- (a) except as the Purchaser's Engineer may direct or permit, the Contractor shall forthwith leave the Site and shall have no right to re-enter the Site or to undertake any work, including the rectification of any Defect or to remove any Contractor's Equipment or Materials;
- (b) the Purchaser may himself or through others complete the Works and he or they may enter upon the Site and use the Contractor's Equipment and Materials and the Purchaser shall not be liable to the Contractor for any fair wear or tear or accidental damage that may occur to the Contractor's Equipment or Materials;
- (c) the Contractor shall deliver promptly to the Purchaser all erection plans, schedules and Documentation and other data prepared by the Contractor or Subcontractors in connection with the Works and all Confidential Information and all other Documentation supplied to the Contractor by or on behalf of the Purchaser in connection with the Works; and
- (d) the Contractor shall, if so required by the Purchaser and to the extent permitted by the subcontract, assign any subcontract to the Purchaser.

44.4 If any item of Contractor's Equipment or Materials which has not become the property of the Purchaser or any other thing is used for the completion of the Works in accordance with Sub-clause 44.3(a), when that item or thing is no longer required for the purposes of the Works:

- (a) the Purchaser shall notify the Contractor of the availability of such item or thing and shall make such item or thing available for the Contractor to collect and remove immediately and the Contractor shall so collect and remove such item or thing within twenty-one days of such notification;
- (b) if the Contractor does not collect and remove the item or thing within a period of twenty-one days of its being made available in accordance with paragraph (a) above, the Contractor shall be deemed to have consented irrevocably to the disposal of the item or thing by the Purchaser and the Purchaser may thereafter dispose of that item or thing as he in his absolute discretion sees fit and any proceeds (less the cost of such disposal) shall be paid to the Contractor. The Contractor shall be liable to pay to the Purchaser those costs of disposal not recovered by the Purchaser from any proceeds. The Purchaser's Engineer shall certify the amounts payable to or by the Contractor in accordance with this Sub-clause 44.4 and Clause 41 (Payment) shall apply as appropriate save that the Final Date for Payment shall be fourteen days after the issue of the Purchaser's Engineer's certificate.

Any money payable under this Sub-clause 44.4 shall not form part of the Contract Price.

- 44.5 Upon the termination of the Contractor's employment under this Clause 44 the Purchaser shall have no obligation to make any further payment, whether or not such payment shall have been certified by the Purchaser's Engineer prior to termination, other than as may be certified in accordance with Sub-clause 44.6, 44.7 or 44.9.

The Purchaser shall issue any necessary notice under Sub-clause 41.7.

- 44.6 Within ninety days of the completion of the Works in accordance with Sub-clause 44.3 (b) (including all testing and remedying of Defects, such that the total cost to be incurred by the Purchaser has been incurred) the Purchaser's Engineer shall, subject to Sub-clause 44.9, issue to the Purchaser and the Contractor a certificate (a 'Default Certificate') which shall give a full statement of account including:

- (a) all sums due to the Purchaser from the Contractor including any cost incurred by the Purchaser in completing the Works in accordance with Sub-clause 44.3(b) which is in addition to that which the Purchaser would have incurred if the Contractor had completed the Works in accordance with the Contract; and
- (b) all sums due to the Contractor in respect of work completed by the Contractor prior to the termination of his employment other than any such work of a temporary nature necessitated by such termination.

Having allowed for all previous payments made to the Contractor and any sum due to the Purchaser from the Contractor, the Default Certificate shall state the balance due to or from the Contractor.

- 44.7 If within sixty days of the date of the termination of the Contractor's employment the Purchaser has not taken steps to complete the Works and the Plant in accordance with Sub-clause 44.3, the Default Certificate shall be issued by the Purchaser's Engineer to the Purchaser and the Contractor within ninety days of such date of the termination. The Default Certificate shall state the total amount (if any) due to the Contractor under the Contract for the Works carried out prior to the termination of the Contractor's employment less the amount of any additional cost properly incurred by the Purchaser for any necessary work authorised by the Purchaser's Engineer in connection with the termination.

Having allowed for all previous payments made to the Contractor and any sum due to the Purchaser from the Contractor, the Default Certificate shall state the balance due to or from the Contractor.

- 44.8 As soon as practicable, the Contractor and the Purchaser shall provide the Purchaser's Engineer with all such information and documents as he may reasonably require for the purpose of issuing the Default Certificate.

- 44.9 If by the expiry of the period specified in Sub-clause 44.6 or 44.7 it is not possible for the Purchaser's Engineer to issue a Default Certificate by reason of any matter which prevents the determination of the amounts referred to in Sub-clause 44.6 or 44.7, the Purchaser's Engineer shall, at the expiration of such period, issue a provisional Default Certificate which shall contain the best estimate that can be made of any amounts referred to in Sub-clause 44.6 or 44.7 and of the resultant balance due. As soon thereafter as the determination of the amounts referred to in Sub-clause 44.6 or 44.7 becomes practicable, the Purchaser's Engineer shall issue a final Default Certificate which shall operate as a correction or adjustment of the provisional Default Certificate.

If in the Purchaser's Engineer's opinion it is appropriate to do so, he may issue more than one provisional Default Certificate prior to the issue of the final Default Certificate.

- 44.10 Any disagreement arising under this Clause 44 concerning the amounts payable by or to the Contractor which is not settled in accordance with the provisions of Clause 46 (Disputes) may be referred to an Expert in accordance with Clause 48 (Reference to an Expert).

- 44.11 Payment of the balance due under any Default Certificate shall be made between the Purchaser and the Contractor in accordance with any provisional or final Default Certificate and Clause 41 shall apply as appropriate.

- 44.12 If the issue by the Purchaser of any Notice terminating or purporting to terminate the employment of the Contractor under this Clause 44 is subsequently determined to have been invalid, such Notice shall not constitute a repudiation of the Contract by the Purchaser but shall be deemed to have been a Notice of Termination issued in accordance with Sub-clause 43.1, and thereupon the rights and obligations of the parties shall be as stated in Clause 43 (Termination by the Purchaser for convenience) and not as stated in this Clause 44.

- 44.13 Nothing in this Clause 44 shall affect the continuing operation of Sub-clauses 9.6, 9.7 and 9.8, Clauses 8 (Patent and other protected rights), 20 (Confidentiality), 45 (Limitations on liabilities and remedies), 46 (Disputes), 47

(Adjudication), 48 (Reference to an Expert) and 49 (Arbitration) and, to the extent that the Contractor has carried out the Works, Clauses 30 (Care of the Works), 31 (Insurance) and 37 (Liability for Defects).

## 45. Limitations on liabilities and remedies

45.1 Notwithstanding any other provision of the Contract neither the Contractor nor the Purchaser shall be liable to the other for:

- (a) wastage, loss or contamination during its use in the Plant of any process consumable which shall be deemed to include chemicals, biochemicals, catalysts and utilities; and
- (b) loss or deferment of anticipated or actual profit, loss of revenue, loss of use, loss of production, business interruption or any similar damage or for any consequential or indirect losses of any kind resulting from or arising out of or in connection with the Works or the performance of them or any act or omission relating to them however caused;

except in respect of:

- (i) recoveries obtained as a result of the insurance provided under Clause 31 (Insurance) and Schedule 27; or
- (ii) any sum included within the Delay Liquidated Damages under Sub-clause 15.1; or
- (iii) any sum included within the Liquidated Damages for failure to pass the Performance Test under Sub-clause 35.12; or
- (iv) any Profit that the Contractor is entitled to; or
- (v) the Purchaser's lost profit and cost of business interruption associated with Defects and Latent Defects set out in Clause 37 (Defects); or
- (vi) any such losses suffered by a third party (excluding any Affiliate of the Purchaser or the Contractor) to the extent included in any award for damages to or settlement with the third party in connection with a claim covered by the indemnities under Sub-clauses 8.3, 8.5, 26.7 and 30.15.

45.2 Except in the case of termination of the Contractor's employment under Clause 44 (Termination for Contractor's default) or a repudiation of the Contract by either party, the liability of either party to the other arising out of or in connection with the Contract or the Works, whether by reason of any breach of contract or of statutory duty or tortious or negligent act or omission shall be limited to the damages, remedies and reimbursements expressly provided in the Contract. Nothing in the Contract shall in any way be interpreted as affecting or limiting any liability which the Contractor may have under the Consumer Protection Act 1987 or in respect of personal injury or death caused by the negligence of the Contractor (as defined in Section 1 of the Unfair Contract Terms Act 1977).

45.3 Other than in respect of any liability under sub-clauses 8.3, 26.7, 30.13, 30.15 and 31.7, the total aggregate liability of the Contractor to the Purchaser arising out of or in connection with the Contract and the Works (including without limitation any liability arising as a result of the termination of this Contract and any payments under the documents in the Security Package) shall not exceed the aggregate of the Contract Price plus the cost of any Variation valued in accordance with Clause 18 plus the value of any insured sums recovered.

For the purposes of this Sub-clause 45.3 any deduction from or abatement of the Contract Price to which the Purchaser may become entitled as a result of:

- (a) a Defect; or
- (b) any other failure of the Contractor to comply with the terms of the Contract;

shall be deemed to be a liability of the Contractor to the Purchaser.

45.4 Sub-clauses 45.1 and 45.3 shall apply whether or not either party shall be held to have repudiated the Contract.

45.5 Any exclusion or limitation of liability under the Contract shall as between the parties exclude or limit such liability in contract, tort/delict including negligence or otherwise.

- 45.6 Liquidated Damages shall be in full and final satisfaction of the Contractor's liability for delay (without prejudice to the right the Purchaser may have where it terminates the Contract pursuant to Clause 15.3 to claim the additional costs of completing the Works under Clause 44),
- 45.7 If, for any reason, Liquidated Damages due under any provision of the Contract are found to be invalid or unenforceable, the Purchaser will be entitled to claim in respect of the breach of the Contract to which the Liquidated Damages relate general damages provided always that such general damages shall be (a) capped at the levels or rates of the corresponding Liquidated Damages that they are replacing as set out in this Contract; and (b) limited to the maximum amount that could have been claimed under this Contract for Liquidated Damages had the corresponding Liquidated Damages that they are replacing been valid and enforceable.
- 45.8 In respect of Liquidated Damages the limitations on liability set out in Sub-clauses 15.1 and 35.12 shall apply.
- 45.9 If the employment of the Contractor under this Contract is terminated then the Purchaser and the Contractor shall take all reasonable steps to mitigate their losses as a result of and arising from such termination.
- 45.10 The Purchaser's liability to the Contractor in tort or contract in any matters under or related to this Contract shall be limited to the value of payments certified due pursuant to the Milestone Schedule and any sums recovered pursuant to Insurances held by the Purchaser in connection with the relevant liability.

## 46. Disputes

- 46.1 The Purchaser and the Contractor shall endeavour to avoid the escalation of problems into disputes as defined in Sub-clause 46.4 and to avoid disputes both between themselves and with third parties including Subcontractors. The parties acknowledge and agree that this shall not prejudice any right either party may have under Clause 47 to refer any dispute or difference to adjudication at any time, if that party so wishes, notwithstanding the definition of 'dispute' in Sub-clause 46.4.
- 46.2 In order to avoid the development of disputes and to facilitate their clear definition and early resolution, the procedures set out in Clauses 46 (Disputes), 47 (Adjudication), 48 (Reference to an Expert) and 49 (Arbitration) shall be applied as appropriate.
- 46.3 If the Contractor is dissatisfied with any Decision or valuation of the Purchaser's Engineer, or of any person to whom the Purchaser's Engineer may have delegated any of his authority or responsibility, or if the Purchaser or the Contractor is dissatisfied with any other matter arising under or in connection with the Contract, either party may at any time refer such dissatisfaction to the Purchaser's Engineer giving full details of the nature of the matter. The Purchaser's Engineer shall give a Decision on the matter (giving the reasons for such Decision) to the Purchaser and the Contractor within twenty-eight days of such reference to him.
- 46.4 The Purchaser and the Contractor agree that no matter shall constitute or give rise to a dispute unless it has been referred to the Purchaser's Engineer under Sub-clause 46.3 and:
- (a) the Purchaser's Engineer has failed to give his Decision on the matter within the prescribed time; or
  - (b) a Decision given within the prescribed time is either unacceptable to the Purchaser and/or the Contractor or has not been implemented within twenty-one days of the Decision,
- and, as a consequence, either the Purchaser or the Contractor has issued to the other a Notice (a 'Notice of Dispute') setting out the nature of the dispute with a copy to the Purchaser's Engineer. For the purposes of the performance of the Works and all matters arising out of or in connection with the Contract, the word 'dispute' shall be construed in accordance with this Sub-clause 46.4.
- 46.5 Notwithstanding the existence of any dispute or any reference to the Purchaser's Engineer under Sub-clause 46.3, the Purchaser and the Contractor shall continue to perform their obligations under the Contract.
- 46.6 The parties shall attempt in good faith to negotiate a settlement of any dispute or difference.
- 46.7 If a dispute cannot be resolved by negotiation the parties may by agreement refer it to mediation in accordance with the procedures of the Centre for Effective Dispute Resolution (CEDR), the Chartered Institute of Arbitrators (CI Arb) or some other appropriate body.
- 46.8 No Decision, opinion, direction, or valuation given by the Purchaser's Engineer shall disqualify him from being called as a witness and giving evidence before any third party, an Expert, adjudicator or arbitrator on any matter whatsoever relating to a dispute.

## 47. Adjudication

- 47.1 This Clause 47 shall only apply to disputes arising under a construction contract as defined in the Housing Grants, Construction and Regeneration Act 1996, or any amendment or re-enactment thereof.
- 47.2 Notwithstanding any provision in the Contract for a dispute to be referred to an Expert in accordance with Clause 48 (Reference to an Expert) or to arbitration in accordance with Clause 49 (Arbitration), either party shall have the right to refer any dispute or difference (including any matter not referred to the Purchaser's Engineer in accordance with Sub-clause 46.3) as to a matter under or in connection with the Contract to adjudication and either party may, at any time, issue a Notice (a 'Notice of Adjudication') to the other stating his intention to do so. The ensuing adjudication shall be conducted in accordance with the edition of the 'Adjudication Rules' published by IChemE current at the time of service of the Notice of Adjudication.
- 47.3 Unless the adjudicator has already been appointed, he is to be appointed to a timetable with the object of securing his appointment and referral of the dispute to him within seven days of the service of the Notice of Adjudication. The adjudicator shall be appointed in accordance with the Adjudication Rules.
- 47.4 The adjudicator shall reach his decision within twenty-eight days of referral or such other longer period as may be agreed between the parties after the dispute has been referred.
- 47.5 The adjudicator may extend the period of twenty-eight days by up to fourteen days with the consent of the party by whom the dispute was referred.
- 47.6 The adjudicator shall act impartially.
- 47.7 The adjudicator may take the initiative in ascertaining the facts and the law.
- 47.8 The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.
- 47.9 The adjudicator may correct his decision so as to remove a clerical or typographical error arising by accident or omission.
- 47.10 The adjudicator may include in his decision a direction as to the allocation of his fees and expenses as between the parties.
- 47.11 The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith. Furthermore, any personnel of the adjudicator acting in connection with the carrying out of the adjudication shall be similarly protected from liability.

## 48. Reference to an Expert

- 48.1 Subject to the provisions of Clause 46 (Disputes), any dispute which in accordance with the Contract is a matter which may be referred to an Expert in accordance with this Clause 48 shall be so referred upon one party issuing a Notice thereof to the other. Furthermore, if the parties so agree any other dispute arising out of or in connection with the Contract may be referred to an Expert.

Any such reference shall be conducted in accordance with the edition of the 'Rules for Expert Determination' published by IChemE current at the time of the Expert's appointment unless the parties otherwise agree prior to the appointment of the Expert. The Expert shall be appointed in accordance with the Rules for Expert Determination.

- 48.2 The Expert shall decide all disputes referred to him as an expert and not as an arbitrator. Any decision of the Expert may revise or overrule any Decision of the Purchaser's Engineer other than any decision expressly stated in the Contract to be final, conclusive and binding.
- 48.3 The powers of the Expert to decide disputes shall include decisions as to factual issues and the interpretation of the Contract.
- 48.4 The Purchaser and the Contractor shall give the Expert every assistance in deciding any dispute referred to him and shall give him access to the Site and to their premises and shall provide him with any information and Documentation that he may reasonably require.

- 48.5 The Expert shall have power by his decision to fix the reasonable amount of his fees in connection therewith and they shall be borne in equal shares between the Purchaser and the Contractor.
- 48.6 If the Contractor has complied with any Decision of the Purchaser's Engineer which is overruled by the Expert, and has thereby suffered or incurred any loss or additional expense in the performance of the Contract, then provided that the Contractor has notified the Purchaser's Engineer that he disputes such Decision before complying with it, the Expert may in his discretion award the Contractor a reasonable sum in respect of such loss or additional expense, notwithstanding that the overruling of the Decision would not otherwise entitle the Contractor to any additional payment under the Contract.
- 48.7 The Purchaser and the Contractor agree to be bound by any decision of the Expert under this Clause 48, which decision shall be final, conclusive and binding, and shall comply with any direction given therein and shall not question the correctness of any such decision or direction in any proceedings.
- 48.8 Neither the Purchaser nor the Contractor shall be entitled to suspend performance of the Contract by reason of the reference of a dispute to an Expert.
- 48.9 Any dispute which is referred to an Expert ceases to be referable to arbitration under Clause 49 (Arbitration).
- 48.10 A limitation period on actions in litigation or arbitration which applies to the Contract under the applicable law shall apply also to the issue of a Notice to refer a dispute to an Expert in accordance with Sub-clause 48.1.

## 49. Arbitration

- 49.1 Any dispute, other than failure to give effect to a decision of an adjudicator given under Clause 47 (Adjudication) or of an Expert given under Clause 48 (Reference to an Expert), which has not been referred to an Expert in accordance with Clause 48 shall be referred to a single arbitrator by one party serving a Notice (a 'Notice of Arbitration') on the other.
- 49.2 The arbitration shall be conducted in accordance with the procedure set out in the edition of the 'Arbitration Rules' published by IChemE current at the time of the appointment of the arbitrator. The arbitrator shall be appointed in accordance with the Arbitration Rules.
- 49.3 The arbitrator shall have full power to open up, review, revise or overrule any Decision of the Purchaser's Engineer, other than any Decision expressly stated in the Contract to be final, conclusive and binding.
- Neither party shall be limited in arbitration to the evidence or arguments put to the Purchaser's Engineer or to an adjudicator in accordance with Sub-clause 46.3 and Clause 47 respectively.
- 49.4 The Purchaser and the Contractor agree to be bound by any decision, award or ruling of an arbitrator under this Clause 49 and shall comply therewith. The Purchaser and the Contractor hereby agree to exclude any right to appeal to the Court under the Arbitration Act 1996.
- 49.5 If the Contractor has complied with any Decision of the Purchaser's Engineer which is overruled by the arbitrator, and has thereby suffered or incurred any loss or additional expense in the performance of the Contract, then provided that the Contractor has notified the Purchaser's Engineer that he disputes such Decision before complying with it, the arbitrator may in his discretion award the Contractor a reasonable sum in respect of such loss or additional expense, notwithstanding that the overruling of the Decision would not otherwise entitle the Contractor to any additional payment under the Contract.

## 50. Bonds and parent company guarantee

- 50.1 The Contractor shall procure the Security Package in accordance with the terms of this Contract.
- 50.2 The Contractor shall ensure that:
- (a) not used;
  - (b) the Performance Bond is in the form required by this Contract and is valid until the issue of the Take Over Certificate; and
  - (c) the Parent Company Guarantee is in the form required by this Contract and is valid until the expiry of the Contractor's liability under this Contract.

- 50.3 If any of the Security Package is not provided in accordance within one month of the relevant date for provision stated in Sub-clause 3.10, the Purchaser may, in his absolute discretion, without prejudice to any rights or claims he may have against the Contractor by reason of the Contractor's non-compliance with any of the provisions of this Clause, and within seven days after the expiry of the said period, by notice in writing to the Contractor, terminate the Contract forthwith. The Purchaser shall thereupon not be liable for any claim or demand from the Contractor in respect of anything then already done or furnished or in respect of any other matter or thing whatsoever in connection with the Contract. The Purchaser shall be entitled to be repaid by the Contractor all reasonable costs properly incurred by the Purchaser in the selection of a replacement contractor.
- 50.4 The Contractor shall procure that the issuer of the Performance Bond shall have a rating by Standard and Poor's of A- or higher.
- 50.5 The Contractor shall within twenty (20) Business Day of a notice from the Purchaser to do so:
- (a) where the Bonds ceases to be in full force and effect (except where the bonds expires in accordance with their respective terms); or
  - (b) if the Bonds issuer's credit rating is reduced at any time to a rating lower than A- by Standard and Poor's and the reduction is not due to a general movement on the surety market also affecting other sureties' rating,
- convene the Purchaser for a meeting with the purpose of discussing and agreeing with the Purchaser the form of security based upon the actual stage of the project execution, other (remaining) bonds or security being in place and any other relevant risk exposure element.
- 50.6 If agreed that a replacement bond shall be put in place, the Contractor shall procure (at its own cost) a replacement of such bond as close as possible to the applicable form set out in the relevant schedule (and with any amendments to such form to be approved by the Purchaser) from a UK or European Union based bank, insurance company or other surety acceptable to the Purchaser (such acceptance shall not be unreasonably withheld) whose credit rating is not less than A- from Standard and Poor's. The expiry date of any replacement bond shall be no earlier than the expiry date in the original Bond.
- 50.7 In the event there are no financial institutions generally in the market (and not specific to the Contractor) who have a credit rating no less than A- from Standard and Poor's, then the Contractor shall notify the Purchaser and the Contractor shall, within 30 days of receipt of such notification, obtain a replacement bond from a financial institution with the highest long term credit rating available at the time. Following the provision of a replacement bond pursuant to this Sub-clause 50.12, the Contractor shall continue to assess whether any financial institutions providing bonds comply with the credit rating requirement and, if the Contractor becomes aware of any financial institution which so complies, the Contractor shall procure a replacement bond from such financial institution.
- 50.8 Once the form of replacement bond has been agreed, the Purchaser shall execute all documentation required by the new bank, insurance company or other surety and (ii) return the original Bond with a statement, in a form reasonably required by the original Bond issuer that such Bond is returned for full and irrevocable cancellation.
- 50.9 The provisions of Sub-clauses 50.6 to 50.8 shall apply to any replacement bond procured in accordance with this Clause 50.
- 50.10 If the parties fail to reach agreement on any replacement bonds to be provided within 14 days of a notice from the Purchaser in accordance with Sub-clause 50.5, the Purchaser shall be entitled to refer the matter for dispute resolution.
- 50.11 The Contractor may (at its discretion) provide cash security which is acceptable to the Purchaser (acting reasonably) in lieu of any replacement bond that it is required to provide under this Clause 50 and where such cash security is for the same amount as the bond it replaces, the Purchaser shall be deemed to be acting unreasonably if it withholds its consent. The Purchaser shall hold the cash security and may only use it on the same terms and for the same purposes as the bond it replaces. If the Contractor subsequently provides a bond which complies with the terms of this Contract, the Purchaser shall return the cash security, less any valid drawings made on it.
- 50.12 Upon the issue of the expiry of the Bonds or any replacement bond in accordance with the terms of the Bonds or any replacement bond, the Purchaser shall return the Bonds or any replacement bond to the Contractor and the Purchaser shall not bring any new claim under a returned Bond or replacement bond.
- 50.13 The Purchaser will account to the Contractor for any amount that has been paid under the Performance Bond and/or replacement bond and/or cash security to the extent that the amount paid exceeds the true amount of the Purchaser's loss (as established and ascertained pursuant to this Contract, including (where applicable) in accordance with Sub-Clauses 47 to 49), together with interest at the Agreed Rate on the relevant excess amount

from the date of the payment to the Purchaser under the Performance Bond and/or replacement bond and/or cash security until and including the date of the Purchaser's accounting to the Contractor for such excess amount. For the avoidance of doubt and notwithstanding anything to the contrary in this Contract, the Purchaser confirms that any amounts payable by the Purchaser pursuant to this Sub-clause 50.13 shall not be subject to any exclusion to and/or limitation on the Purchaser's liability pursuant to Clause 45

## **51. Bribery, Modern Slavery and Data Protection**

- 51.1 The Contractor shall comply with all applicable laws, statutes, regulations and codes relating to anti-bribery, anti-corruption and the prohibition of slavery including but not limited to the Bribery Act 2010 and the Modern Slavery Act 2015 and any anti-bribery, anti-corruption and prohibition of slavery policies which the Purchaser may have as may be notified to the Contractor from time to time.
- 51.2 The Contractor shall have and shall maintain in place throughout the term of this Contract its own policies and procedures to ensure compliance with laws, statutes, regulations and codes set out in Sub-clause 51.1 and shall enforce them as and when appropriate.
- 51.3 The Contractor shall ensure that it acts in accordance with the General Data Protection Regulations (EU) 2016/279 ("GDPR"), the Data Protection Act 2018 and guidance issued by the Information Commissioner. If in or in relation to this Contract, the Contractor records, stores, controls, uses or processes any personal data (as defined in the GDPR) it will do so in a manner which is fully compliant with GDPR and any other relevant legal requirements. The Contractor must draw this clause to the attention of any person whose personal data the Contractor provides, or has provided, to the Purchaser in connection with this Contract.
- 51.4 If the Contractor is in breach of this Clause 51, the Purchaser shall be entitled to issue a Notice of Termination under, and in accordance with Clause 44 (Termination for Contractor's default).

## **52. Purchaser's employees**

- 52.1 The Contractor, his agents or any Subcontractor shall not engage employees of the Purchaser in connection with the Contract for the duration of the Contract. A similar provision shall be included in any subcontract that the Contractor may enter into in connection with the Works.

## **53. Materials supplied by the Purchaser**

- 53.1 If the Contract states that the Purchaser shall supply any materials for the Works in accordance with Sub-clause 4.2 the Contractor shall make good at his own expense any loss of or damage to any such materials while they are in the Contractor's possession and control.

## **54. Request for information**

- 54.1 A Disclosure Request is a request for information relating to this contract received by the Purchaser pursuant to the Freedom of Information Act 2000, the Environmental Information Regulations 2004 or otherwise.
- 54.2 The Contractor acknowledges that the Purchaser may receive Disclosure Requests and that the Purchaser may be obliged (subject to the application of any relevant exemption and, where applicable, the public interest test) to disclose information (including commercially sensitive information) pursuant to a Disclosure Request. The Contractor shall respond to any such consultation promptly and within any deadline set by the Purchaser's Engineer and acknowledges that it is for the Purchaser to determine whether or not such information should be disclosed.
- 54.3 When requested to do so by the Purchaser's Engineer, the Contractor shall promptly provide information in its possession relating to this contract and assist and co-operate with the Purchaser's Engineer to enable the Purchaser to respond to a Disclosure Request within the time limit set out in the relevant legislation.
- 54.4 In no event shall the Contractor or any Subcontractor respond directly to a Disclosure Request from any third parties unless expressly authorised to do so by the Purchaser's Engineer or Purchaser.

## 55. Discrimination

- 55.1 The Contractor shall not discriminate directly or indirectly or by way of victimisation or harassment against any person contrary to the Race Relations Act 1976, the Sex Discrimination Act 1975, the Disability Discrimination Acts 1995 and 2005 or the Equality Act 2010 (the "Discrimination Acts").
- 55.2 The Contractor shall co-operate with and assists the Purchaser to satisfy its duty under the Discrimination Acts to eliminate unlawful discrimination and to promote equality of opportunity between persons of different racial groups and between disabled people and other people.
- 55.3 Where an employee or Subcontractor employed by the Contractor is required to carry out any activity alongside the Purchaser's employees in any premises, the Contractor shall ensure that each such employee or Subcontractor complies with the Purchaser's employment policies and codes of practice relating to discrimination and equal opportunities.
- 55.4 The Contractor shall notify the Purchaser's Engineer in writing as soon as he becomes aware of any investigation or proceedings brought against the Contractor under the Discrimination Acts in connection with this contract and shall:
- (a) provide any information requested by the investigating body, court or tribunal in the timescale allotted,
  - (b) attend (and permits a representative from the Purchaser to attend) any associated meetings,
  - (c) promptly allow access to any relevant documents and information and
  - (d) co-operate fully and promptly with the investigatory body, court or tribunal.
- 55.5 The Contractor shall indemnify the Purchaser against all costs, charges, expenses (including legal and administrative expenses) and payments made by the Purchaser arising out of or in connection with any investigation or proceedings under the Discrimination Acts resulting from any act or omission of the Contractor.
- 55.6 The Contractor shall include in the conditions of contract for each Subcontractor obligations substantially similar to those set out above.

## 56. Confidentiality

- 56.1 The Contractor shall not, and shall procure that its personnel, Subcontractors and agents shall not, disclose any information concerning the Contract obtained either by the Contractor or by any person employed by him except for the purposes of the Contract.

## 57. Security

- 57.1 The Contractor shall submit to the Purchaser's Engineer details of people who are to be employed by him and his Subcontractors in connection with the Works. The details shall include a list of names and addresses, the capacities in which they are employed, and other information required by the Purchaser's Engineer and the Contractor shall ensure that, in accordance with Schedule 26, each of the Contractor's employees and its Subcontractor's employees have a Disclosure and Barring Service certificate which is no more than 3 months old and have no unspent convictions.
- 57.2 The Purchaser's Engineer may instruct the Contractor to take measures to prevent unauthorised persons being admitted on to the Site.
- 57.3 Employees of the Contractor and his Subcontractors shall carry a pass whilst they are on the parts of the Site stated in the Site Information.