

## Section 6 - General Conditions of Contract

The GCC in in this Section, read in conjunction with the Special Conditions of Contract in Section 7 and other documents listed therein, should be a complete document expressing all the rights and obligations of the contracting parties. The General Conditions herein shall not be altered.

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# General Conditions

## A. Contract and Interpretation

### 1. Definitions

1.1 The following words and expressions shall have the meanings hereby assigned them:

“Contract” means the Contract Agreement entered into between the Employer and the Contractor, together with the Contract Documents referred to therein; they shall constitute the Contract, and the term “the Contract” shall in all such documents be construed accordingly.

“Contract Documents” means the documents listed in Article 1.1 (Contract Documents) of the Contract Agreement (including any amendments thereto).

“GCC” means the General Conditions of Contract.

“SCC” means the Special Conditions of Contract.

“day” means calendar day .

“year” means 365 days.

“month” means calendar month.

“Party” means the *Employer* or the Contractor, as the context requires.

“*Employer*” means the person named as such in the SCC and includes the legal successors or permitted assigns of the Employer.

“Project Manager” means the person appointed by the Employer in the manner provided in GCC Sub-Clause 17.1 (Project Manager) hereof and named as such in the SCC to perform the duties delegated by the Employer.

“Contractor” means the person(s) named as Contractor in the Contract Agreement, and includes the legal successors or permitted assigns of the Contractor.

“Contractor’s Representative” means any person nominated by the Contractor and approved by the Employer in the manner provided in GCC Sub-Clause 17.2 (Contractor’s Representative and Construction Manager) hereof to perform the duties delegated by the Contractor.

“Contractor’s Investment” means ten (10) to fifteen (15) percent (%) of the Contract Price calculated in accordance with the Contract Agreement, Article 2 (Contract Price and Terms of Payment) and in the same currency or currencies, that the Contractor has agreed to invest for procurement of major equipment, design, engineering and start piling work immediately after the Effective Start Date of the Contract.

“Financing Documents” or “Financing Agreement” means the loan agreements, notes, indentures, security agreements, guarantees, working capital loan agreement(s) and other documents relating to

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the construction and permanent financing (including refinancing) of the Facility and any material part thereof, executed and delivered.

“Lenders” means the financial institutions that are parties to the Financing Documents, together with their respective successors and assignees.

“Financial Closing” means the execution and delivery of the Financing Documents between the BCPCL and Lenders.

“Construction Manager” means the person appointed by the Contractor’s Representative in the manner provided in GCC Sub-Clause 17.2.4.

“Subcontractor,” including manufacturers, means any person to whom execution of any part of the Facilities, including preparation of any design or supply of any Plant, is sub-contracted directly or indirectly by the Contractor, and includes its legal successors or permitted assigns.

“Dispute Board” (DB) means the person or persons named as such in the SCC appointed by agreement between the Employer and the Contractor to make a decision on or to settle any dispute or difference between the Employer and the Contractor referred to him or her by the parties pursuant to GCC Sub-Clause 44.... (Dispute Board) hereof.

“Contract Price” means the sum specified in Article 2.1 (Contract Price) of the Contract Agreement, subject to such additions and adjustments thereto or deductions therefrom, as may be made pursuant to the Contract.

“Facilities” or “The Plant” means the Plant to be supplied and installed, as well as all the Installation Services to be carried out by the Contractor under the Contract.

“Plant” means permanent plant, equipment, machinery, apparatus, articles and things of all kinds to be provided and incorporated in the Facilities by the Contractor under the Contract (including the spare parts to be supplied by the Contractor under GCC Sub-Clause 7.3 hereof), but does not include Contractor’s Equipment.

“Installation Services” means all those services ancillary to the supply of the Plant for the Facilities, to be provided by the Contractor under the Contract, such as transportation and provision of marine or other similar insurance, inspection, expediting, site preparation works (including the provision and use of Contractor’s Equipment and the supply of all construction materials required), installation, testing, precommissioning, commissioning, operations, maintenance, the provision of operations and maintenance manuals, training, etc... as the case may require.

“Contractor’s Equipment” means all facilities, equipment, machinery, tools, apparatus, appliances or things of every kind required in or for installation, completion and maintenance of Facilities that are to be provided by the Contractor, but does not include Plant, or other things intended to form or forming part of the

Facilities.

“Mandatory Spare Parts” means spare parts required up to Final Acceptance of the Facilities (or any part of the Facilities where the Contract provides for acceptance of the Facilities in parts).

“Country of Origin” means the countries and territories eligible under the rules of the Bank as further elaborated in the SCC.

“Site” means the land and other places upon which the Facilities are to be installed, and such other land or places as may be specified in the Contract as forming part of the Site.

“Effective Start Date” means the date of fulfillment of all conditions stated in Article 3 (Effective Start Date) of the Contract Agreement, upon which the period until the Time for Operational Acceptance shall be counted from.

“Time for Operational Acceptance” means the time within which Operational Acceptance of the Facilities as a whole (or of a part of the Facilities where a separate Time for Operational Acceptance of such part has been prescribed) is to be attained, as referred to in GCC Clause 8 and in accordance with the relevant provisions of the Contract.

“Mechanical Completion” means that the Facilities (or a specific part thereof where specific parts are specified in the Contract) have been completed operationally and structurally and put in a tight and clean condition, that all work in respect of Precommissioning of the Facilities or such specific part thereof has been completed, and that the Facilities or specific part thereof are ready for Commissioning as provided in GCC Clause 24 (Mechanical Completion) hereof.

“Precommissioning” means the testing, checking and other requirements specified in the Employer’s Requirements that are to be carried out by the Contractor in preparation for Commissioning as provided in GCC Clause 24 (Mechanical Completion) hereof.

“Commissioning” means operation of the Facilities or any part thereof by the Contractor following Mechanical Completion, which operation is to be carried out by the Contractor as provided in GCC Sub-Clause 25.1 (Commissioning) hereof, for the purpose of carrying out Guarantee Test(s).

“Guarantee Test(s)” means the test(s) specified in the Employer’s Requirements to be carried out to ascertain whether the Facilities or a specified part thereof is able to attain the Performance Guarantees specified in the Appendix (Performance Guarantees) to the Contract Agreement in accordance with the provisions of GCC Sub-Clause 25.2 (Guarantee Test) hereof.

“Operational Acceptance” means the acceptance by the Employer of the Facilities (or any part of the Facilities where the Contract provides for acceptance of the Facilities in parts), which certifies the Contractor’s fulfillment of the Contract in respect of Performance Guarantees of the Facilities (or the relevant part thereof) in accordance with the provisions of GCC Clause 28 (Performance Guarantees) hereof and shall include deemed acceptance in

accordance with GCC Clause 25 (Commissioning and Operational Acceptance) hereof.

“Defect Liability Period” means the period of validity of the warranties given by the Contractor commencing at successful completion of Reliability Run, during which the Contractor is responsible for defects with respect to the Facilities (or the relevant part thereof) as provided in GCC Clause 27 (Defect Liability) hereof.

“Final Acceptance” means acceptance of the Facilities after the expiration of Defect Liability Period as defined in detail in GCC 27.12 (Final Acceptance).

“Engineer” means the engineering consultant for Payra 2 x 660MW Coal Based Power Plant who assists the Project Manager in respect of execution of the Contract, approving the design/drawings and supervising the Contractor’s works.

“Reliability Run” means continuous running test within the limits of minimum and maximum rated output for a period of thirty (30) days, following the Grid System Operator’s requirements as defined in detail in Section V, chapter 39, Clause 2.5 [Reliability Run Test] after the successful completion of the Guarantee Test.

“Work” shall mean the equipment, supplies, materials, labor and all other works and services to be furnished by the Contractor under the Contract and the carrying out of all obligations imposed by the Contract on the Contractor.

## 2. Contract Documents

2.1 Subject to Article 1.2 (Order of Precedence) of the Contract Agreement, all documents forming part of the Contract (and all parts thereof) are intended to be correlative, complementary and mutually explanatory. The Contract shall be read as a whole.

## 3. Interpretation

- 3.1 In the Contract, except where the context requires otherwise:
- (a) words indicating one gender include all genders;
  - (b) words indicating the singular also include the plural and words indicating the plural also include the singular;
  - (c) provisions including the word “agree”, “agreed” or “agreement” require the agreement to be record in writing;
  - (d) the word “tender” is synonymous with “bid”, “tenderer” with “bidder” and “tender documents” with “bidding documents”; and
  - (e) “written” or “in writing” means hand-written, type-written, printed or electronically made, and resulting in a permanent record.

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

### 3.2 Incoterms

Unless inconsistent with any provision of the Contract, the meaning of any trade term and the rights and obligations of parties thereunder shall be as prescribed by Incoterms.

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*Incoterms* means international rules for interpreting trade terms published by the International Chamber of Commerce (latest edition), 38 Cours Albert 1<sup>er</sup>, 75008 Paris, France.

### 3.3 Entire Agreement

Subject to GCC Sub-Clause 16.4 hereof, the Contract constitutes the entire agreement between the Employer and Contractor with respect to the subject matter of Contract and supersedes all communications, negotiations and agreements (whether written or oral) of parties with respect thereto made prior to the date of Contract.

### 3.4 Amendment

No amendment or other variation of the Contract shall be effective unless it is in writing, is dated, expressly refers to the Contract, and is signed by a duly authorized representative of each party hereto.

### 3.5 Independent Contractor

The Contractor shall be an independent contractor performing the Contract. The Contract does not create any agency, partnership, joint venture or other joint relationship between the parties hereto. Subject to the provisions of the Contract, the Contractor shall be solely responsible for the manner in which the Contract is performed. All employees, representatives or Subcontractors engaged by the Contractor in connection with the performance of the Contract shall be under the complete control of the Contractor and shall not be deemed to be employees of the Employer, and nothing contained in the Contract or in any subcontract awarded by the Contractor shall be construed to create any contractual relationship between any such employees, representatives or Subcontractors and the Employer.

### 3.6 Non-Waiver

3.6.1 Subject to GCC Sub-Clause 3.6.2 below, no relaxation, forbearance, delay or indulgence by either party in enforcing any of the terms and conditions of the Contract or the granting of time by either party to the other shall prejudice, affect or restrict the rights of that party under the Contract, nor shall any waiver by either party of any breach of Contract operate as waiver of any subsequent or continuing breach of Contract.

3.6.2 Any waiver of a party's rights, powers or remedies under the Contract must be in writing, must be dated and signed by an authorized representative of the party granting such waiver, and must specify the right and the extent to which it is being waived.

### 3.7 Severability

If any provision or condition of the Contract is prohibited or rendered invalid or unenforceable, such prohibition, invalidity or unenforceability shall not affect the validity or enforceability of any other provisions and conditions of the Contract.

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**3.8 Country of Origin**

“Origin” means the place where the plant and component parts thereof are mined, grown, produced or manufactured, and from which the services are provided. Plant components are produced when, through manufacturing, processing, or substantial or major assembling of components, a commercially recognized product results that is substantially in its basic characteristics or in purpose or utility from its components.

**4. Communications** 4.1 Wherever these Conditions provide for the giving or issuing of approvals, certificates, consents, determinations, notices, requests and discharges, these communications shall be:

- (a) in writing and delivered against receipt; and
- (b) delivered, sent or transmitted to the address for the recipient’s communications as stated in the Contract Agreement.

When a certificate is issued to a Party, the certifier shall send a copy to the other Party. When a notice is issued to a Party, by the other Party or the Project Manager, a copy shall be sent to the Project Manager or the other Party, as the case may be.

When the Contractor corresponds with the Project Manager, the Contractor shall send a copy of correspondences to the Engineer.

**5. Law and Language** 5.1 The Contract shall be governed by and interpreted in accordance with laws of the country specified in the SCC.

5.2 The ruling language of the Contract shall be that stated in the SCC.

5.3 The language for communications shall be the ruling language unless otherwise stated in the SCC.

**6. Fraud and Corruption** 6.1 The Employer requires that bidders, suppliers, and contractors, observe the highest standard of ethics during the execution of this Contract. In pursuance of this policy, the Employer::

(a) defines, for the purposes of this provision, the terms set forth below as follows:

- (i) “corrupt practice” means the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party;
- (ii) “fraudulent practice” means any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation;
- (iii) “coercive practice” means impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;
- (iv) “collusive practice” means an arrangement between two or more parties designed to achieve an improper



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purpose, including influencing improperly the actions of another party;

- (b) will reject a proposal for award if it determines that the Bidder recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive, or obstructive practices or other integrity violations in competing for the Contract.

## **B. Subject Matter of Contract**

### **7. Scope of Facilities**

- 7.1 Unless otherwise expressly limited in the Employer's Requirements, the Contractor's obligations cover the provision of all Plant and the performance of all Installation Services required for the design, the manufacture (including procurement, quality assurance, construction, installation, associated civil works, Precommissioning and delivery) of the Plant and the installation, completion and commissioning of the Facilities in accordance with the plans, procedures, specifications, drawings, codes and any other documents as specified in the Section 5, Employer's Requirements. Such specifications include, but are not limited to, the provision of supervision and engineering services; the supply of labor, materials, equipment, spare parts (as specified in GCC Sub-Clause 7.3 below) and accessories; Contractor's Equipment; construction utilities and supplies; temporary materials, structures and facilities; transportation (including, without limitation, unloading and hauling to, from and at the Site); and storage, except for those supplies, works and services that will be provided or performed by the Employer, as set forth in the Appendix (Scope of Works and Supply by the Employer) to the Contract Agreement.
- 7.2 The Contractor shall, unless specifically excluded in the Contract, perform all such work and/or supply all such items and materials not specifically mentioned in the Contract but that can be reasonably inferred from the Contract as being required for attaining Operational Acceptance of the Facilities as if such work and/or items and materials were expressly mentioned in the Contract.
- 7.3 In addition to the supply of Mandatory Spare Parts included in the Contract, the Contractor agrees to supply spare parts required for the operation and maintenance of the Facilities for the period specified in the SCC and the provisions, if any, specified in the SCC. However, the identity, specifications and quantities of such spare parts and the terms and conditions relating to the supply thereof are to be agreed between the Employer and the Contractor, and the price of such spare parts shall be that given in Price Schedule No. 6, which shall be added to the Contract Price. The price of such spare parts shall include the purchase price therefore and other costs and expenses (including the Contractor's fees) relating to the supply of spare parts.

### **8. Time for Commencement**

- 8.1 The Contractor shall commence work on the Facilities within the

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- and Operational Acceptance**
- period specified in the SCC and without prejudice to GCC Sub-Clause 26.2 hereof, the Contractor shall thereafter proceed with the Facilities in accordance with the time schedule specified in the Appendix 4 (Time Schedule) to the Contract Agreement.
- 8.2 The Contractor shall attain Operational Acceptance of the Facilities or of a part where a separate time for Operational Acceptance of such part is specified in the Contract, within the time stated in the SCC or within such extended time to which the Contractor shall be entitled under GCC Clause 40 hereof.
- 9. Contractor's Responsibilities**
- 9.1 The Contractor shall design, manufacture including associated purchases and/or subcontracting, install and complete the Facilities in accordance with the Contract. When completed, the Facilities should be fit for the purposes for which they are intended as defined in the Contract.
- 9.2 The Contractor confirms that it has thoroughly investigated and satisfied itself as to all general, local and marine, and groundwater conditions at site and the areas and waters adjacent thereto, including but not limited to:
- 9.2.1 Sea, air, river and land transportation and access and right of way to the Site, including the availability and condition of roads and ports and rights-of-way, conditions affecting transportation, access and egress;
- 9.2.2 Handling and storage of materials;
- 9.2.3 Availability and quality of labor, water, rock and power;
- 9.2.4 Rainfall and other climatic conditions, tides, currents, soundings and ground water and other hydrological conditions (including monsoons);
- 9.2.5 Topography, ground surface, sub-surface, seismic, shore, harbor, marine (including sea currents), seawater, seabed, hydrographic and bathymetric conditions;
- 9.2.6 The nature and quantity of surface, sub-surface and marine (including seabed and its sub-surface) materials or obstacles to be encountered;
- 9.2.7 Equipment, machinery and materials required by Contractor prior to and during performance of obligations;
- 9.2.8 Availability of housing and other relevant social and urban infrastructure; and
- 9.2.9 Any and all pertinent, relevant or related matters and conditions.
- 9.3 Contractor acknowledges and agrees that:
- 9.3.1 all appropriate allowances for the matters and conditions referred to in Clause 9.2 and those pertaining to the Works or this Contract generally have been taken in calculating the Contract Price, determining the Time Schedule and the other terms and conditions of this Contract.

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- 9.3.2 Contractor's failure to acquaint itself and consider any applicable condition, situation, requirement or other matter referred to in Clause 9.2 and those pertaining to the work or to this Contract generally, will neither relieve it from the responsibility for successfully performing this Contract, nor entitle the Contractor to a Change Order adjustment of Contract Price or Time Schedule for reasons relatable to such failure.
- 9.3.3 except otherwise expressly stated in this Contract:
- a) Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Work;
  - b) Contractor accepts total responsibility for having foreseen all difficulties and costs and expenses of successfully completing the Works; and
  - c) No increase in the Contract Price, or extension of the Time Schedule based in whole or in part up on any discrepancy between the actual conditions encountered by Contractor and those which Contractor anticipated, or any unforeseen difficulties or costs generally, shall be considered by the Employer or effected except as provided expressly under the Contract.
- 9.3.4 all engineering data and information and data and information relating to hydrological, geo-technical and sub-surface and marine conditions at the Site made available to the Contractor by the Employer in the Contract, information made available to the Bidders during Bid process, generally or otherwise, directly or indirectly, are all solely for the convenience of the Contractor. The verification and interpretation of the same shall be at the sole risk and responsibility of the Contractor.
- 9.3.5 the Employer shall have no liability for the adequacy, correctness, accuracy or completeness of such data and information. The Employer makes no representation or warranty, express or implied, as to the adequacy, accuracy, correctness or completeness of any such data or information.
- 9.3.6 it shall protect, indemnify and hold Employer harmless from and against any and all losses or damage arising directly or indirectly from or incurred by reason of use of any such data and information by any person to whom Contractor has supplied such data and information or any portion thereof including the Contractor himself, his / its subcontractors and suppliers, and their respective employees, agents, personnel and consultants.
- 9.3.7 specifically and without limitation, it shall independently and fully verify, check and establish the adequacy, correctness,

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accuracy and completeness of all data and information which it may require for any purposes related directly or indirectly to this Contract, its obligations hereunder or for any other reasons, at its sole risk and cost.

- 9.4 The Contractor shall acquire and pay for all permits, approvals and/or licenses from all local, state or national government authorities or public service undertakings in the country where the Site is located which such authorities or undertakings require the Contractor to obtain in its name and which are necessary for the performance of the Contract, including, without limitation, visas for the Contractor's and Subcontractor's personnel and entry permits for all imported Contractor's Equipment. The Contractor shall acquire all other permits, approvals and/or licenses that are not the responsibility of the Employer under GCC Sub-Clause 10.3 hereof and that are necessary for the performance of the Contract.
- 9.5 The Contractor shall comply with all laws in force in the country where the Facilities are to be implemented. The laws will include all local, state, national or other laws that affect the performance of the Contract and bind upon the Contractor. The Contractor shall indemnify and hold harmless the Employer from and against any and all liabilities, damages, claims, fines, penalties and expenses of whatever nature arising or resulting from the violation of such laws by the Contractor or its personnel, including the Subcontractors and their personnel, but without prejudice to GCC Sub-Clause 10.1 hereof.
- 9.6 Any plant and services that will be incorporated in or be required for the Facilities and other supplies shall have their origin as specified under GCC Clause 1 (Country of Origin). Any subcontractors retained by the Contractor shall be from a country as specified in GCC Clause 1 (Country of Origin).
- 9.7 If the Contractor is a joint venture or consortium of two or more *persons*, all such *persons* shall be jointly and severally bound to the Employer for the fulfillment of the provisions of the Contract and shall designate one of such *persons* to act as a leader with authority to bind the joint venture or consortium. The composition or the constitution of the joint venture or consortium shall not be altered without the prior consent of the Employer.

#### **10. Employer's Responsibilities**

- 10.1 All information and/or data to be supplied by the Employer as described in the Appendix (Scope of Works and Supply by the Employer) to the Contract Agreement shall be deemed to be accurate, except when the Employer expressly states otherwise.
- 10.2 The Employer shall be responsible for acquiring and providing legal and physical possession of the Site and access thereto, and for providing possession of and access to all other areas reasonably required for the proper execution of the Contract, including all requisite rights of way, as specified in the Appendix (Scope of Works and Supply by the Employer) to the Contract Agreement. The Employer shall give full possession of and accord all rights of access thereto on or before the date(s) specified in that Appendix.

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- 10.3 The Employer shall acquire and pay for all permits, approvals and/or licenses from all local, state or national government authorities or public service undertakings in the country where the Site is located which (a) such authorities or undertakings require the Employer to obtain in the Employer's name, (b) are necessary for the execution of the Contract, including those required for the performance by both the Contractor and the Employer of their respective obligations under the Contract, and (c) are specified in the Appendix (Scope of Works and Supply by the Employer) to the Contract Agreement.
- 10.4 If requested by the Contractor, the Employer shall use its best endeavors to assist the Contractor in obtaining in a timely and expeditious manner all permits, approvals and/or licenses necessary for the execution of the Contract from all local, state or national government authorities or public service undertakings that such authorities or undertakings require the Contractor or Subcontractors or the personnel of the Contractor or Subcontractors, as the case may be, to obtain.
- 10.5 Unless otherwise specified in the Contract or agreed upon by the Employer and the Contractor, the Employer shall provide sufficient, properly qualified operating and maintenance personnel to properly carry out Precommissioning, Commissioning, Guarantee Tests and Reliability Run under the Contractor's supervision, all in accordance with the provisions of the Appendix (Scope of Works and Supply by the Employer) to the Contract Agreement at or before the time specified in the program furnished by the Contractor under GCC Sub-Clause 18.2 hereof and in the manner thereupon specified or as otherwise agreed upon by the Employer and the Contractor.
- 10.6 The Employer shall be responsible for the continued operation of the Facilities after Operational Acceptance, in accordance with GCC Sub-Clause 24.8, and shall be responsible for facilitating the Guarantee Test(s) for the Facilities, in accordance with GCC Sub-Clause 25.2.
- 10.7 All costs and expenses involved in the performance of the obligations under this GCC Clause 10 shall be the responsibility of the Employer, except those incurred by the Contractor with respect to the performance of Guarantee Tests, in accordance with GCC Sub-Clause 25.2.
- 10.8 In the event that the Employer shall be in breach of any of his obligations imposed by the Contract, then the additional cost reasonably incurred by the Contractor in consequence thereof shall be added to the Contract Price.

### **C. Payment**

#### **11. Contract Price**

- 11.1 The Contract Price shall be as specified in Article 2 (Contract Price and Terms of Payment) of the Contract Agreement.
- 11.2 Unless an escalation clause is provided for in the SCC, the

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Contract Price shall be a firm lump sum not subject to any alteration, except in the event of a Change in the Facilities or as otherwise provided in the Contract.

11.3 Subject to GCC Sub-Clauses 9.2, 10.1 and 35 hereof, the Contractor shall be deemed to have satisfied itself as to the correctness and sufficiency of the Contract Price, which shall, except as otherwise provided for in the Contract, cover all its obligations under the Contract.

## 12. Terms of Payment

12.1 The Contract Price shall be paid as specified in Article 2 (Contract Price and Terms of Payment) of the Contract Agreement and in the Appendix (Terms and Procedures of Payment) to the Contract Agreement, which also outlines the procedures to be followed in making application for and processing payments.

12.2 Contractor's Investment shall be used to pay only for foreign currency payments. Payments due to the Contractor in BDT will be paid by the Employer as per Appendix (Terms and Procedures of Payment) of Contract Agreement.

12.3 No payment made by the Employer herein shall be deemed to constitute acceptance by the Employer of the Facilities or any part(s) thereof.

12.4 In the event that the Employer fails to make any payment by its respective due date or within the period set forth in the Contract, the Employer shall pay to the Contractor interest on the amount of such delayed payment at the rate(s) shown in the Appendix (Terms and Procedures of Payment) to the Contract Agreement for the period of delay until payment has been made in full, whether before or after judgment or arbitrage award.

12.5 The currency or currencies in which payments are made to the Contractor under this Contract shall be specified in the Appendix (Terms and Procedures of Payment) to the Contract Agreement, subject to the general principle that payments will be made in the currency or currencies in which the Contract Price has been stated in the Contractor's bid.

## 13. Securities

### 13.1 Issuance of Securities

The Contractor shall provide the securities specified below in favor of the Employer at the times, and in the amount, manner and form specified below.

### 13.2 Advance Payment Security

13.2.1 The Contractor shall, within 28 days of the notification of contract award, provide a security in an amount equal to the advance payment calculated in accordance with the Appendix (Terms and Procedures of Payment) to the Contract Agreement, and in the same currency or currencies.

13.2.2 The security shall be in the form provided in the bidding documents or in another form acceptable to the Employer. The amount of the security shall be reduced in proportion to

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the value of the Facilities executed by and paid to the Contractor from time to time, and shall automatically become null and void when the full amount of the advance payment has been recovered by the Employer. The security shall be returned to the Contractor immediately after its expiration.

### 13.3 Performance Security

13.3.1 The Contractor shall, within 28 days of the notification of contract award, provide a security for the due performance of the Contract in the amount specified in the SCC.

13.3.2 The security shall be denominated in the currency or currencies of the Contract, or in a freely convertible currency acceptable to the Employer, and shall be in one of the forms of *bank guarantees* provided in the bidding documents, as stipulated by the Employer in the SCC, or in another form acceptable to the Employer.

13.3.3 Unless otherwise specified in the SCC, the security shall be reduced by half on the date of the Operational Acceptance of the whole of Facilities including Unit 2. The Security shall become null and void 365 days after Operational Acceptance of the whole of the Facilities including Unit 2; provided, however, that if the Defects Liability Period has been extended on any part of the Facilities pursuant to GCC Sub-Clause 27.8 hereof, the Contractor shall issue an additional security in an amount proportionate to the Contract Price of that part. The security shall be returned to the Contractor immediately after its expiration, provided, however, that if the Contractor, pursuant to GCC Sub-Clause 27.10, is liable for an extended defect liability obligation, the performance security shall be extended for the period and up to the amount specified in the SCC.

## 14. Taxes and Duties

14.1 Except as otherwise specifically provided in the Contract, the Contractor shall bear and pay all taxes, duties, levies and charges assessed on the Contractor, its Subcontractors or their employees by all municipal, state or national government authorities in connection with the Facilities in and outside of the country where the Site is located.

14.2 Notwithstanding GCC Sub-Clause 14.1 above, the Employer shall bear and promptly pay all customs and import duties as well as other local taxes like, e.g., a value added tax (VAT), imposed by the law of the country where the Site is located on the Plant specified in Price Schedule No. 1 and that are to be incorporated into the Facilities.

14.3 If any tax exemptions, reductions, allowances or privileges may be available to the Contractor in the country where the Site is located, the Employer shall use its best endeavors to enable the Contractor to benefit from any such tax savings to the maximum allowable extent.

14.4 For the purpose of the Contract, it is agreed that the Contract Price specified in Article 2 (Contract Price and Terms of Payment) of the

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Contract Agreement is based on the taxes, duties, levies and charges prevailing at the date 28 days prior to the date of bid submission in the country where the Site is located (hereinafter called "Tax" in this GCC Sub-Clause 14.4). If any rates of Tax are increased or decreased, a new Tax is introduced, an existing Tax is abolished, or any change in interpretation or application of any Tax occurs in the course of the performance of Contract, which was or will be assessed on the Contractor, Subcontractors or their employees in connection with performance of the Contract, an equitable adjustment of the Contract Price shall be made to fully take into account any such change by addition to the Contract Price or deduction therefrom, as the case may be, in accordance with GCC Clause 36 hereof.

#### **D. Intellectual Property**

##### **15. License/Use of Technical Information**

- 15.1 For the operation and maintenance of the Plant, the Contractor hereby grants a non-exclusive and non-transferable license (without the right to sub-license) to the Employer under the patents, utility models or other industrial property rights owned by the Contractor or by a third party from whom the Contractor has received the right to grant licenses thereunder, and shall also grant to the Employer a non-exclusive and non-transferable right (without the right to sub-license) to use the know-how and other technical information disclosed to the Employer under the Contract. Nothing contained herein shall be construed as transferring ownership of any patent, utility model, trademark, design, copyright, know-how or other intellectual property right from the Contractor or any third party to the Employer.
- 15.2 The copyright in all drawings, documents and other materials containing data and information furnished to the Employer by the Contractor herein shall remain vested in the Contractor or, if they are furnished to the Employer directly or through the Contractor by any third party, including suppliers of materials, the copyright in such materials shall remain vested in such third party.

##### **16. Confidential Information**

- 16.1 The Employer and the Contractor shall keep confidential and shall not, without the written consent of the other party hereto, divulge to any third party any documents, data or other information furnished directly or indirectly by the other party hereto in connection with the Contract, whether such information has been furnished prior to, during or following termination of the Contract. Notwithstanding the above, the Contractor may furnish to its Subcontractor(s) such documents, data and other information it receives from the Employer to the extent required for the Subcontractor(s) to perform its work under the Contract, in which event the Contractor shall obtain from such Subcontractor(s) an undertaking of confidentiality similar to that imposed on the Contractor under this GCC Clause 16.
- 16.2 The Employer shall not use such documents, data and other



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information received from the Contractor for any purpose other than the operation and maintenance of the Facilities. Similarly, the Contractor shall not use such documents, data and other information received from the Employer for any purpose other than the design, procurement of Plant, construction or such other work and services as are required for the performance of the Contract.

- 16.3 The obligation of a party under GCC Sub-Clauses 16.1 and 16.2 above, however, shall not apply to that information which
- (a) now or hereafter enters the public domain through no fault of that party
  - (b) can be proven to have been possessed by that party at the time of disclosure and which was not previously obtained, directly or indirectly, from the other party hereto
  - (c) otherwise lawfully becomes available to that party from a third party that has no obligation of confidentiality.
- 16.4 The above provisions of this GCC Clause 16 shall not in any way modify any undertaking of confidentiality given by either of the parties hereto prior to the date of the Contract in respect of the Facilities or any part thereof.
- 16.5 The provisions of this GCC Clause 16 shall survive termination, for whatever reason, of the Contract.

## **E. Execution of the Facilities**

### **17. Representatives**

#### **17.1 Project Manager**

If the Project Manager is not named in the Contract, then within 14 days of the Effective Start Date, the Employer shall appoint and notify the Contractor in writing of the name of the Project Manager. The Employer may from time to time appoint some other person as the Project Manager in place of the person previously so appointed, and shall give a notice of the name of such other person to the Contractor without delay. No such appointment shall be made at such a time or in such a manner as to impede the progress of work on the Facilities. Such appointment shall only take effect upon receipt of such notice by the Contractor. The Project Manager shall represent and act for the Employer at all times during the performance of the Contract. All notices, instructions, orders, certificates, approvals and all other communications under the Contract shall be given by the Project Manager, except as herein otherwise provided.

All notices, instructions, information and other communications given by the Contractor to the Employer under the Contract shall be given to the Project Manager, except as herein otherwise provided.

#### **17.2 Contractor's Representative & Construction Manager**

17.2.1 If the Contractor's Representative is not named in the Contract, then within 14 days of the Effective Start Date, the Contractor shall appoint the Contractor's Representative and

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shall request the Employer in writing to approve the person so appointed. If the Employer makes no objection to the appointment within 14 days, the Contractor's Representative shall be deemed to have been approved. If the Employer objects to the appointment within 14 days giving the reason therefor, then the Contractor shall appoint a replacement within 14 days of such objection, and the foregoing provisions of this GCC Sub-Clause 17.2.1 shall apply thereto.

17.2.2 The Contractor's Representative shall represent and act for the Contractor at all times during the performance of the Contract and shall give to the Project Manager all the Contractor's notices, instructions, information and all other communications under the Contract.

All notices, instructions, information and all other communications given by the Employer or the Project Manager to the Contractor under the Contract shall be given to the Contractor's Representative or, in its absence, its deputy, except as herein otherwise provided.

The Contractor shall not revoke the appointment of the Contractor's Representative without the Employer's prior written consent, which shall not be unreasonably withheld. If the Employer consents thereto, the Contractor shall appoint some other person as the Contractor's Representative, pursuant to the procedure set out in GCC Sub-Clause 17.2.1.

17.2.3 The Contractor's Representative may, subject to the approval of the Employer which shall not be unreasonably withheld, at any time delegate to any person any of the powers, functions and authorities vested in him or her. Any such delegation may be revoked at any time. Any such delegation or revocation shall be subject to a prior notice signed by the Contractor's Representative, and shall specify the powers, functions and authorities thereby delegated or revoked. No such delegation or revocation shall take effect unless and until a copy thereof has been delivered to the Employer and the Project Manager.

Any act or exercise by any person of powers, functions and authorities so delegated to him or her in accordance with this GCC Sub-Clause 17.2.3 shall be deemed to be an act or exercise by the Contractor's Representative.

17.2.4 From the commencement of installation of the Facilities at the Site until Operational Acceptance, the Contractor's Representative shall appoint a suitable person as the Construction Manager. The Construction Manager shall supervise all work done at the Site by the Contractor and shall be present at the Site throughout normal working hours except when on leave, sick or absent for reasons connected with the proper performance of the Contract. Whenever the Construction Manager is absent from the Site, the

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Contractor's Representative or the Construction Manager shall appoint a suitable person to act as the Construction Manager's deputy.

17.2.5 The Employer may by notice to the Contractor object to any representative or person employed by the Contractor in the execution of the Contract who, in the reasonable opinion of the Employer, may behave inappropriately, may be incompetent or negligent, or may commit a serious breach of the Site regulations provided under GCC Sub-Clause 22.4. The Employer shall provide evidence of the same, whereupon the Contractor shall remove such person from the Facilities.

17.2.6 If any representative or person employed by the Contractor is removed in accordance with GCC Sub-Clause 17.2.5, the Contractor shall, where required, promptly appoint a replacement.

## **18. Work Program**

### **18.1 Contractor's Organization**

The Contractor shall supply to the Employer and the Project Manager a chart showing the proposed organization to be established by the Contractor for carrying out work on the Facilities within 21 days of the Effective Start Date. The chart shall include the identities of the key personnel and the curricula vitae of such key personnel to be employed shall be supplied together with the chart. The Contractor shall promptly inform the Employer and the Project Manager in writing of any revision or alteration of such an organization chart.

### **18.2 Program of Performance**

Within 28 days after the Effective Start Date, the Contractor shall submit to the Project Manager a detailed program of performance of the Contract, made in a form acceptable to the Project Manager and showing the sequence in which it proposes to design, manufacture, transport, assemble, install and pre-commission the Facilities, as well as the date by which the Contractor reasonably requires that the Employer shall have fulfilled its obligations under the Contract so as to enable the Contractor to execute the Contract in accordance with the program and to achieve Commissioning, Guarantee Test, Operational Acceptance and Reliability Run of the Facilities in accordance with the Contract. The program so submitted by the Contractor shall accord with the Time Schedule included in the Appendix (Time Schedule) to the Contract Agreement and any other dates and periods specified in the Contract. The Contractor shall update and revise the program as and when appropriate or when required by the Project Manager, but without modification in the Times for Operational Acceptance given in the SCC and any extension granted in accordance with GCC Clause 40, and shall submit all such revisions to the Project Manager.

### **18.3 Progress Report**

The Contractor shall monitor progress of all the activities specified

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in the program referred to in GCC Sub-Clause 18.2 above, and supply a progress report to the Project Manager every month.

The progress report shall be in a form acceptable to the Project Manager and shall indicate: (a) percentage completion achieved compared with the planned percentage completion for each activity; and (b) where any activity is behind the program, giving comments and likely consequences and stating the corrective action being taken.

#### 18.4 Progress of Performance

If at any time the Contractor's actual progress falls behind the program referred to in GCC Sub-Clause 18.2, or it becomes apparent that it will so fall behind, the Contractor shall, at the request of the Employer or the Project Manager, prepare and submit to the Project Manager a revised program, taking into account the prevailing circumstances, and shall notify the Project Manager of the steps being taken to expedite progress so as to attain Operational Acceptance of the Facilities within the Time for Operational Acceptance under GCC Sub-Clause 8.2, any extension thereof entitled under GCC Sub-Clause 40.1, or any extended period as may otherwise be agreed upon between the Employer and the Contractor.

#### 18.5 Procedures

The Contract shall be executed in accordance with the Contract Documents including the procedures given in the Forms and Procedures of the Employer's Requirements.

The Contractor may execute the Contract in accordance with its own standard project execution plans and procedures to the extent that they do not conflict with the provisions contained in the Contract.

### **19. Subcontracting**

19.1 The Appendix 5 (List of Major Items of Supply and Services and List of Approved Subcontractors) to the Contract Agreement specifies major items of supply or services and a list of approved Subcontractors against each item, including manufacturers. Insofar as no Subcontractors are listed against any such item, the Contractor shall prepare a list of Subcontractors for such item for inclusion in such list. The Contractor may from time to time propose any addition to or deletion from any such list. The Contractor shall submit any such list or any modification thereto to the Employer for its approval in sufficient time so as not to impede the progress of work on the Facilities. Such approval by the Employer for any of the Subcontractors shall not relieve the Contractor from any of its obligations, duties or responsibilities under the Contract.

19.2 The Contractor shall select and employ its Subcontractors for such major items from those listed in the lists referred to in GCC Sub-Clause 19.1.

19.3 For items or parts of the Facilities not specified in the Appendix

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(List of Major Items of Supply and Services and List of Approved Subcontractors for Major Items) to the Contract Agreement, the Contractor may employ such Subcontractors as it may select, at its discretion.

- 19.4 Each sub-contract shall include provisions which would entitle the Employer to require the sub-contract to be assigned to the Employer under GCC 19.5 (if and when applicable), or in event of termination by the Employer under GCC 42.2.
- 19.5 If a sub-contractor's obligations extend beyond the expiry date of the relevant Defects Liability Period and the Project Manager, prior to that date, instructs the Contractor to assign the benefits of such obligations to the Employer, then the Contractor shall do so.

## **20. Design and Engineering**

### **20.1 Specifications and Drawings**

20.1.1 The Contractor shall execute the basic and detailed design and the engineering work in compliance with the provisions of the Contract, or where not so specified, in accordance with good engineering practice.

The Contractor shall be responsible for any discrepancies, errors or omissions in the specifications, drawings and other technical documents that it has prepared, whether such specifications, drawings and other documents have been approved by the Project Manager or not, provided that such discrepancies, errors or omissions are not because of inaccurate information furnished in writing to the Contractor by or on behalf of the Employer.

20.1.2 The Contractor shall be entitled to disclaim responsibility for any design, data, drawing, specification or other document, or any modification thereof provided or designated by or on behalf of the Employer, by giving a notice of such disclaimer to the Project Manager.

### **20.2 Codes and Standards**

Wherever references are made in the Contract to codes and standards in accordance with which the Contract shall be executed, the edition or the revised version of such codes and standards current at the date 28 days prior to date of bid submission shall apply unless otherwise specified. During Contract execution, any changes in such codes and standards shall be applied subject to approval by the Employer and shall be treated in accordance with GCC Clause 39.

### **20.3 Approval/Review of Technical Documents by Project Manager**

20.3.1 The Contractor shall prepare or cause its Subcontractors to prepare, and furnish to the Project Manager the documents listed in the Appendix (List of Documents for Approval or Review) to the Contract Agreement for its approval or review as specified and in accordance with the requirements of GCC Sub-Clause 18.2 (Program of Performance).

Any part of the Facilities covered by or related to the

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documents to be approved by the Project Manager shall be executed only after the Project Manager's approval thereof.

GCC Sub-Clauses 20.3.2 through 20.3.7 shall apply to those documents requiring the Project Manager's approval, but not to those furnished to the Project Manager for its review only.

20.3.2 Within 14 days after receipt by the Project Manager of any document requiring the Project Manager's approval in accordance with GCC Sub-Clause 20.3.1, the Project Manager shall either return one copy thereof to the Contractor with its approval endorsed thereon or shall notify the Contractor in writing of its disapproval thereof and the reasons therefor and the modifications that the Project Manager proposes.

If the Project Manager fails to take such action within the said 14 days, then the said document shall be deemed to have been approved by the Project Manager.

20.3.3 The Project Manager shall not disapprove any document, except on the grounds that the document does not comply with the Contract or that it is contrary to good engineering practice. If the Project Manager disapproves a document, he shall specify the reasons for his decision.

20.3.4 If the Project Manager disapproves the document, the Contractor shall modify the document and resubmit it for the Project Manager's approval in accordance with GCC Sub-Clause 20.3.2. If the Project Manager approves the document subject to modification(s), the Contractor shall make the required modification(s), whereupon the document shall be deemed to have been approved.

20.3.5 If any dispute or difference occurs between the Employer and the Contractor in connection with or arising out of the disapproval by the Project Manager of any document and/or any modification(s) thereto that cannot be settled between the parties within a reasonable period, then such dispute or difference may be referred to an Dispute Board for determination in accordance with GCC Sub-Clause 45.3 hereof. If such dispute or difference is referred to an Dispute Board, the Project Manager shall give instructions as to whether and if so, how, performance of the Contract is to proceed. The Contractor shall proceed with the Contract in accordance with the Project Manager's instructions, provided that if the Dispute Board upholds the Contractor's view on the dispute and if the Employer has not given notice under Sub-Clause 45.3 hereof, then the Contractor shall be reimbursed by the Employer for any additional costs incurred by reason of such instructions and shall be relieved of such responsibility or liability in connection with the dispute and the execution of the instructions as the Dispute Board shall decide, and the Time for Operational Acceptance shall be extended accordingly.

20.3.6 The Project Manager's approval, with or without modification of the document furnished by the Contractor, shall not relieve the Contractor of any responsibility or liability imposed upon it by any provisions of the Contract except to the extent that any subsequent failure results from modifications required by the Project Manager.

20.3.7 The Contractor shall not depart from any approved document unless the Contractor has first submitted to the Project Manager an amended document and obtained the Project Manager's approval thereof, pursuant to the provisions of this GCC Sub-Clause 20.3.

If the Project Manager requests any change in any already approved document and/or in any document based thereon, the provisions of GCC Clause 39 shall apply to such request.

## **21. Procurement**

### **21.1 Materials**

Subject to GCC Sub-Clause 14.2, the Contractor shall procure and transport all materials in an expeditious and orderly manner to the Site.

### **21.2 Employer-Supplied Materials**

If the Appendix (Scope of Works and Supply by the Employer) to the Contract Agreement provides that the Employer shall furnish any specific items to the Contractor, the following provisions shall apply:

21.2.1 The Employer shall, at its own risk and expense, transport each item to the place on or near the Site as agreed upon by the parties and make such item available to the Contractor at the time specified in the program furnished by the Contractor, pursuant to GCC Sub-Clause 18.2, unless otherwise mutually agreed.

21.2.2 Upon receipt of such item, the Contractor shall inspect the same visually and notify the Project Manager of any detected shortage, defect or default. The Employer shall immediately remedy any shortage, defect or default, or the Contractor shall, if practicable and possible, at the request of the Employer, remedy such shortage, defect or default at the Employer's cost and expense. After inspection, such item shall fall under the care, custody and control of the Contractor. The provision of this GCC Sub-Clause 21.2.2 shall apply to any item supplied to remedy any such shortage or default or to substitute for any defective item, or shall apply to defective items that have been repaired.

21.2.3 The foregoing responsibilities of the Contractor and its obligations of care, custody and control shall not relieve the Employer of liability for any undetected shortage, defect or default, nor place the Contractor under any liability for any such shortage, defect or default whether under GCC Clause 27 or under any other provision of Contract.

### 21.3 Transportation

21.3.1 The Contractor shall at its own risk and expense transport all the materials and the Contractor's Equipment to the Site by the mode of transport that the Contractor judges most suitable under all the circumstances.

21.3.2 Unless otherwise provided in the Contract, the Contractor shall be entitled to select any safe mode of transport operated by any person to carry the materials and the Contractor's Equipment.

21.3.3 Upon dispatch of each shipment of materials and the Contractor's Equipment, the Contractor shall notify the Employer by telex, cable, facsimile or electronic means, of the description of the materials and of the Contractor's Equipment, the point and means of dispatch, and the estimated time and point of arrival in the country where the Site is located, if applicable, and at the Site. The Contractor shall furnish the Employer with relevant shipping documents to be agreed upon between the parties.

21.3.4 The Contractor shall be responsible for obtaining, if necessary, approvals from the authorities for transportation of the materials and the Contractor's Equipment to the Site. The Employer shall use its best endeavors in a timely and expeditious manner to assist the Contractor in obtaining such approvals, if requested by the Contractor. The Contractor shall indemnify and hold harmless the Employer from and against any claim for damage to roads, bridges or any other traffic facilities that may be caused by the transport of the materials and the Contractor's Equipment to the Site.

### 21.4 Customs Clearance

The Contractor shall, at its own expense, handle all imported materials and Contractor's Equipment at the point(s) of import and shall handle any formalities for customs clearance, subject to the Employer's obligations under GCC Sub-Clause 14.2, provided that if applicable laws or regulations require any application or act to be made by or in the name of the Employer, the Employer shall take all necessary steps to comply with such laws or regulations. In the event of delays in customs clearance that are not the fault of the Contractor, the Contractor shall be entitled to an extension in the Time for Operational Acceptance, pursuant to GCC Clause 40.

### 21.5 Import Permit

21.5.1 In order for the Employer to obtain the necessary import permits and satisfy the requirements of the customs authorities the following documentations are required:

Within 60 days of the signing of the Contract the Contractor shall submit a detailed delivery schedule of Plant he is to provide under the Contract indicating the type of equipment and the name of the manufacturer and equipment/tools (for



construction use only) which he intends to import. Six copies of the schedule are to be submitted to the Employer.

On behalf of the Government of Bangladesh the Ministry of Commerce annually issue a schedule of import protected items. The Contractor shall be responsible for advising the Project Manager of any plant he intends to ship under the Contract which is import protected. This advice is to be received by the Project Manager at least four months before the plant reaches Bangladesh in order to permit the Employer to obtain the necessary import permissions.

On shipment of Plant the following shipping documents are to be submitted to the Project Manager:

1 original plus 10 copies of invoices endorsed by the Contractor.

1 negotiable plus 10 copies of Bill of Lading endorsed by the Contractor

1 original plus 10 copies of Insurance Certificate

10 copies of packing lists

10 copies of Freight Memo

1 original plus 10 copies of Certificate of Origin

10 copies of insurance invoice

10 copies of Application for Payment

10 copies of Preshipment Inspection Certificate or Waiver thereof

21.5.2 Import license and permits for the Plant shall be obtained by the Employer at no cost to the Contractor. No import and export customs duties levied on food of any sort or equipment/tools (for construction use only) or personal effects imported for consumption by the Contractor's imported personnel shall be paid by the Employer.

21.5.3 If after payment of customs and import duties, goods are found to be in badly damaged condition and needs replacement, the Contractor shall be responsible for payment of all customs and import duties levied on the replacement plant.

## 22. Installation

### 22.1 Setting Out/Supervision

#### 22.1.1 Bench Mark

- (a) The Contractor shall be responsible for the true and proper setting-out of the Facilities in relation to bench marks, reference marks and lines provided to it in writing by *or on behalf of* the Employer.
- (b) If, at any time during the progress of installation of the Facilities, any error shall appear in the position, level or alignment of the Facilities, the Contractor shall forthwith notify the Project Manager of such error and,

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at its own expense, immediately rectify such error to the reasonable satisfaction of the Project Manager. If such error is based on incorrect data provided in writing by *or on behalf of* the Employer, the expense of rectifying the same shall be borne by the Employer.

#### 22.1.2 Contractor's Supervision

The Contractor shall give or provide all necessary superintendence during the installation of the Facilities, and the Construction Manager or its deputy shall be constantly on the Site to provide full-time superintendence of the installation. The Contractor shall provide and employ only technical personnel who are skilled and experienced in their respective callings and supervisory staff who are competent to adequately supervise the work at hand.

### 22.2 Labor

#### 22.2.1 Engagement of Staff and Labor

- (a) Except as otherwise stated in the Specification, the Contractor shall make arrangements for the engagement of all staff and labor, local or otherwise, and for their payment, housing, feeding and transport.
- (b) The Contractor shall provide and employ on the Site in the installation of the Facilities such skilled, semi-skilled and unskilled labor as is necessary for the proper and timely execution of the Contract. The Contractor is encouraged to use local labor that has the necessary skills.
- (c) The Contractor shall be responsible for obtaining all necessary permit(s) and/or visa(s) from the appropriate authorities for the entry of all labor and personnel to be employed on the Site into the country where the Site is located. The Employer will, if requested by the Contractor, use his best endeavors in a timely and expeditious manner to assist the Contractor in obtaining any local, state, national or government permission required for bringing in the Contractor's personnel.
- (d) The Contractor shall at its own expense provide the means of repatriation to all of its and its Subcontractor's personnel employed on the Contract at the Site to the place where they were recruited or to their domicile. It shall also provide suitable temporary maintenance of all such persons from the cessation of their employment on the Contract to the date programmed for their departure. In the event that the Contractor defaults in providing such means of transportation and temporary maintenance, the Employer may provide the same to such personnel and recover the cost of doing so from the Contractor.

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#### 22.2.2 Persons in the Service of Employer

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

#### 22.2.3 Labor Laws

- (a) The Contractor shall comply with all the relevant labor Laws applicable to the Contractor's Personnel, including Laws relating to their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights.
- (b) The Contractor shall at all times during the progress of the Contract use its best endeavors to prevent any unlawful, riotous or disorderly conduct or behavior by or amongst its employees and the labor of its Subcontractors.
- (c) The Contractor shall, in all dealings with its labor and the labor of its Subcontractors currently employed on or connected with the Contract, pay due regard to all recognized festivals, official holidays, religious or other customs and all local laws and regulations pertaining to the employment of labor.

#### 22.2.4 Rates of Wages and Conditions of Labor

- (a) The Contractor shall pay rates of wages, and observe conditions of labor, which are not lower than those established for the trade or industry where the work is carried out. If no established rates or conditions are applicable, the Contractor shall pay rates of wages and observe conditions which are not lower than the general level of wages and conditions observed locally by employers whose trade or industry is similar to that of the Contractor.
- (b) The Contractor shall inform the Contractor's Personnel about their liability to pay personal income taxes in the Country in respect of such of their salaries, wages and allowances as are chargeable under the Laws for the time being in force, and the Contractor shall perform such duties in regard to such deductions thereof as may be imposed on him by such Laws.

#### 22.2.5 Working Hours

- (a) No work shall be carried out on the Site on locally recognized days of rest, or outside the normal working hours stated in the SCC, unless:
  - (i) otherwise stated in the Contract,
  - (ii) the Project Manager gives consent, or
  - (iii) the work is unavoidable, or necessary for the protection of life or property or for the safety of

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the Works, in which case the Contractor shall immediately advise the Project Manager.

- (b) If and when the Contractor considers it necessary to carry out work at night or on public holidays so as to meet the Time for Operational Acceptance and requests the Project Manager's consent thereto, the Project Manager shall not unreasonably withhold such consent.
- (c) This Sub-Clause shall not apply to any work which is customarily carried out by rotary or double-shifts.

#### 22.2.6 Facilities for Staff and Labor

- (a) Except as otherwise stated in the Specification, the Contractor shall provide and maintain all necessary accommodation and welfare facilities for the Contractor's Personnel. The Contractor shall also provide facilities for the Employer's Personnel as stated in the Specification.
- (b) The Contractor shall not permit any of the Contractor's Personnel to maintain any temporary or permanent living quarters within the structures forming part of the Permanent Works.

#### 22.2.7 Health and Safety

- (a) The Contractor shall at all times take all reasonable precautions to maintain the health and safety of the Contractor's Personnel. In collaboration with local health authorities, the Contractor shall ensure that medical staff, first aid facilities, sick bay and ambulance service are available at all times at the Site and at any accommodation for Contractor's and Employer's Personnel, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics.
- (b) The Contractor shall appoint an accident prevention officer at the Site, responsible for maintaining safety and protection against accidents. This person shall be qualified for this responsibility, and shall have the authority to issue instructions and take protective measures to prevent accidents. Throughout the performance of the Contract, the Contractor shall provide whatever is required by this person to exercise this responsibility and authority.
- (c) The Contractor shall send, to the Project Manager, details of any accident as soon as practicable after its occurrence. The Contractor shall maintain records and make reports concerning health, safety and welfare of persons, and damage to property, as the Project Manager may reasonably require.

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#### 22.2.8 Funeral Arrangements

In the event of the death of any of the Contractor's personnel or accompanying members of their families, the Contractor shall be responsible for making the appropriate arrangements for their return or burial, unless otherwise specified in the SCC.

#### 22.2.9 Records of Contractor's Personnel

The Contractor shall keep accurate records of the Contractor's personnel, including the number of each class of Contractor's Personnel on the Site and the names, ages, genders, hours worked and wages paid to all workers. These records shall be summarized on a monthly basis in a form approved by the Project Manager and shall be available for inspection by the Project Manager. until the Contractor has completed all work.

#### 22.2.10 Supply of Foodstuffs

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

#### 22.2.11 Supply of Water

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

#### 22.2.12 Measures against Insect and Pest Nuisance

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

#### 22.2.13 Alcoholic Liquor or Drugs

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

#### 22.2.14 Arms and Ammunition

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

#### 22.2.15 Prohibition of All Forms of Forced or Compulsory Labor

The contractor shall not employ "forced or compulsory labor" in any form. "Forced or compulsory labor" consists

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of all work or service, not voluntarily performed, that is extracted from an individual under threat of force or penalty.

#### 22.2.16 Prohibition of Harmful Child Labor

The Contractor shall not employ any child to perform any work that is economically exploitative, or is likely to be hazardous to, or to interfere with, the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development.

### 22.3 Contractor's Equipment

22.3.1 All Contractor's Equipment brought by the Contractor onto the Site shall be deemed to be intended to be used exclusively for the execution of the Contract. The Contractor shall not remove the same from the Site without the Project Manager's consent that such Contractor's Equipment is no longer required for the execution of the Contract.

22.3.2 Unless otherwise specified in the Contract, upon Operational Acceptance of the Facilities, the Contractor shall remove from the Site all Equipment brought by the Contractor onto the Site and any surplus materials remaining thereon.

22.3.3 The Employer will, if requested, use its best endeavors to assist the Contractor in obtaining any local, state or national government permission required by the Contractor for the export of the Contractor's Equipment imported by the Contractor for use in the execution of the Contract that is no longer required for the execution of the Contract.

### 22.4 Site Regulations and Safety

The Employer and the Contractor shall establish Site regulations setting out the rules to be observed in the execution of the Contract at the Site and shall comply therewith. The Contractor shall prepare and submit to the Employer, with a copy to the Project Manager, proposed Site regulations for the Employer's approval, which approval shall not be unreasonably withheld.

Such Site regulations shall include, but shall not be limited to, rules in respect of security, safety of the Facilities, gate control, sanitation, medical care, and fire prevention.

### 22.5 Opportunities for Other Contractors

22.5.1 The Contractor shall, upon written request from the Employer or the Project Manager, give all reasonable opportunities for carrying out the work to any other contractors employed by the Employer on or near the Site.

22.5.2 If the Contractor, upon written request from the Employer or the Project Manager, makes available to other contractors any roads or ways the maintenance for which the Contractor is responsible, permits the use by such

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other contractors of the Contractor's Equipment, or provides any other service of whatsoever nature for such other contractors, the Employer shall fully compensate the Contractor for any loss or damage caused or occasioned by such other contractors in respect of any such use or service, and shall pay to the Contractor reasonable remuneration for the use of such equipment or the provision of such services.

22.5.3 The Contractor shall also so arrange to perform its work as to minimize, to the extent possible, interference with the work of other contractors. The Project Manager shall determine the resolution of any difference or conflict that may arise between the Contractor and other contractors and the workers of the Employer in regard to their work.

22.5.4 The Contractor shall notify the Project Manager promptly of any defects in the other contractors' work that come to its notice, and that could affect the Contractor's work. The Project Manager shall determine the corrective measures, if any, required to rectify the situation after inspection of the Facilities. Decisions made by the Project Manager shall be binding on the Contractor.

## 22.6 Emergency Work

If, by reason of an emergency arising in connection with and during the execution of the Contract, any protective or remedial work is necessary as a matter of urgency to prevent damage to the Facilities, the Contractor shall immediately carry out such work.

If the Contractor is unable or unwilling to do such work immediately, the Employer may do or cause such work to be done as the Employer may determine is necessary in order to prevent damage to the Facilities. In such event the Employer shall, as soon as practicable after the occurrence of any such emergency, notify the Contractor in writing of such emergency, the work done and the reasons therefor. If the work done or caused to be done by the Employer is work that the Contractor was liable to do at its own expense under the Contract, the reasonable costs incurred by the Employer in connection therewith shall be paid by the Contractor to the Employer. Otherwise, the cost of such remedial work shall be borne by the Employer.

## 22.7 Site Clearance

### 22.7.1 Site Clearance in Course of Performance

In the course of carrying out the Contract, the Contractor shall keep the Site reasonably free from all unnecessary obstruction, store or remove any surplus materials, clear away any wreckage, rubbish or temporary works from the Site, and remove any Contractor's Equipment no longer required for execution of the Contract.

### 22.7.2 Clearance of Site after Operational Acceptance

After Operational Acceptance of all parts of the Facilities,

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the Contractor shall clear away and remove all wreckage, rubbish and debris of any kind from the Site, and shall leave the Site and Facilities in a clean and safe condition.

#### 22.8 Watching and Lighting

The Contractor shall provide and maintain at its own expense all lighting, fencing, and watching when and where necessary for the proper execution and the protection of the Facilities, or for the safety of the owners and occupiers of adjacent property and for the safety of the public.

### **23. Test and Inspection**

23.1 The Contractor shall at its own expense carry out at the place of manufacture and/or on the Site all such tests and/or inspections of the Plant and any part of the Facilities as are specified in the Contract.

23.2 The Employer and the Project Manager or their designated representatives shall be entitled to attend the aforesaid test and/or inspection, and as stated in the Employer's Requirements the Contractor shall bear all costs and expenses incurred in connection with such attendance including all travel and boarding and lodging expenses, provided that the persons who attend the afore mentioned test and/or inspection are limited to the persons who are directly involved in the supervising the Facilities.

23.3 Whenever the Contractor is ready to carry out any such test and/or inspection, the Contractor shall give a reasonable advance notice of such test and/or inspection and of the place and time thereof to the Project Manager. The Contractor shall obtain from any relevant third party or manufacturer any necessary permission or consent to enable the Employer and the Project Manager or their designated representatives to attend the test and/or inspection.

23.4 The Contractor shall provide the Project Manager with a certified report of the results of any such test and/or inspection.

If the Employer or Project Manager or their designated representatives fails to attend the test and/or inspection, or if it is agreed between the parties that such persons shall not do so, then the Contractor may proceed with the test and/or inspection in the absence of such persons, and may provide the Project Manager with a certified report of the results thereof.

23.5 The Project Manager may require the Contractor to carry out any test and/or inspection not required by the Contract, provided that the Contractor's reasonable costs and expenses incurred in the carrying out of such test and/or inspection shall be added to the Contract Price. Further, if such test and/or inspection impedes the progress of work on the Facilities and/or the Contractor's performance of its other obligations under the Contract, due allowance will be made in respect of the Time for Operational Acceptance and the other obligations so affected.

23.6 If any Plant or any part of the Facilities fails to pass any test and/or inspection, the Contractor shall either rectify or replace such Plant or part of the Facilities and shall repeat the test and/or inspection



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upon giving a notice under GCC Sub-Clause 23.3.

- 23.7 If any dispute or difference of opinion shall arise between the parties in connection with or arising out of the test and/or inspection of the Plant or part of the Facilities that cannot be settled between the parties within a reasonable period of time, it may be referred to an Dispute Board for determination in accordance with GCC Sub-Clause 45.3.
- 23.8 The Contractor shall afford the Employer and the Project Manager, access at any reasonable time to any place where the Plant are being manufactured or the Facilities are being installed, in order to inspect the progress and the manner of manufacture or installation, provided that the Project Manager shall give the Contractor a reasonable prior notice. As stated in the Employer's Requirements the Contractor shall bear all costs and expenses incurred in connection with such attendance including all travel and boarding and lodging expenses, provided that the persons who attend the afore mentioned test and/or inspection are limited to the persons who are directly involved in the supervising the Facilities.
- 23.9 The Contractor agrees that neither the execution of a test and/or inspection of Plant or any part of the Facilities, nor the attendance by the Employer or the Project Manager, nor the issue of any test certificate pursuant to GCC Sub-Clause 23.4, shall release the Contractor from any other responsibilities under the Contract.
- 23.10 No part of the Facilities or foundations shall be covered up on the Site without the Contractor carrying out any test and/or inspection required under the Contract. The Contractor shall give a reasonable notice to the Project Manager whenever any such parts of the Facilities or foundations are ready or about to be ready for test and/or inspection; such test and/or inspection and notice thereof shall be subject to the requirements of the Contract.
- 23.11 The Contractor shall uncover any part of the Facilities or foundations, or shall make openings in or through the same as the Project Manager may from time to time require at the Site, and shall reinstate and make good such part or parts.

If any parts of the Facilities or foundations have been covered up at the Site after compliance with the requirement of GCC Sub-Clause 23.10 and are found to be executed in accordance with the Contract, the expenses of uncovering, making openings in or through, reinstating, and making good the same shall be borne by the Employer, and the Time for Operational Acceptance shall be reasonably adjusted to the extent that the Contractor has thereby been delayed or impeded in the performance of any of its obligations under the Contract.

**24. Mechanical  
Completion of the  
Facilities**

- 24.1 As soon as the Facilities or any part thereof has, in the opinion of the Contractor, been completed structurally and mechanically and put in a tight and clean condition as specified in the Employer's Requirements, excluding minor items not materially affecting the operation or safety of the Facilities, the Contractor shall so notify the Employer in writing.

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- 24.2 Within 7 days after receipt of the notice from the Contractor under GCC Sub-Clause 24.1, the Employer shall supply the operating and maintenance personnel to work under the Contractor's supervision as specified in the Appendix (Scope of Works and Supply by the Employer) to the Contract Agreement for Pre-commissioning of the Facilities or any part thereof.

With exception of coal, ignition fuel, raw water (river water and underground water) and electricity after back-energizing that will be supplied and paid by the Employer, the Contractor shall provide, within the said seven (7) day period, all raw materials, utilities, lubricants, filters, chemicals, catalysts, facilities, services and other matters required for Pre-commissioning of the Facilities or any part thereof.

- 24.3 As soon as reasonably practicable the Contractor shall commence Precommissioning of the Facilities or the relevant part thereof in preparation for Commissioning, subject to GCC Sub-Clause 25.6.

- 24.4 As soon as all works in respect of Precommissioning are completed and, in the opinion of the Contractor, the Facilities or any part thereof is ready for Commissioning, the Contractor shall so notify the Project Manager in writing.

- 24.5 The Project Manager shall, within 14 days after receipt of the Contractor's notice under GCC Sub-Clause 24.4, either issue a Mechanical Completion Certificate in the form specified in the Employer's Requirements (Forms and Procedures), stating that the Facilities or that part thereof have reached Mechanical Completion as of the date of the Contractor's notice under GCC Sub-Clause 24.4, or notify the Contractor in writing of any defects and/or deficiencies.

If the Project Manager notifies the Contractor of any defects and/or deficiencies, the Contractor shall then correct such defects and/or deficiencies, and shall repeat the procedure described in GCC Sub-Clause 24.4.

If the Project Manager is satisfied that the Facilities or that part thereof have reached Mechanical Completion, the Project Manager shall, within 7 days after receipt of the Contractor's repeated notice, issue a Mechanical Completion Certificate stating that the Facilities or that part thereof have reached Mechanical Completion as of the date of the Contractor's repeated notice.

If the Project Manager is not so satisfied, then it shall notify the Contractor in writing of any defects and/or deficiencies within 7 days after receipt of the Contractor's repeated notice, and the above procedure shall be repeated.

- 24.6 If the Project Manager fails to issue the Mechanical Completion Certificate and fails to inform the Contractor of any defects and/or deficiencies within 14 days after receipt of the Contractor's notice under GCC Sub-Clause 24.4 or within 7 days after receipt of the Contractor's repeated notice under GCC Sub-Clause 24.5, or if the Employer makes use of the Facilities or part thereof, then the Facilities or that part thereof shall be deemed to have reached

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Mechanical Completion as of the date of the Contractor's notice or repeated notice, or as of the Employer's use of the Facilities, as the case may be.

24.7 As soon as possible after Mechanical Completion, the Contractor shall complete all outstanding minor items so that the Facilities are fully in accordance with the requirements of the Contract, failing which the Employer will undertake such completion and deduct the costs thereof from any monies owing to the Contractor.

## **25. Commissioning and Operational Acceptance**

### **25.1 Commissioning**

25.1.1 Commissioning of the Facilities or any part thereof shall be commenced by the Contractor immediately after issue of the Mechanical Completion Certificate by the Project Manager, pursuant to GCC Sub-Clause 24.5, or immediately after the date of the deemed Mechanical Completion, under GCC Sub-Clause 24.6.

25.1.2 The Employer shall supply the operating and maintenance personnel to work under the Contractor's supervision as specified in the Appendix to the Contract Agreement titled Scope of Works and Supply by the Employer. With exception of the natural gas, HSD, raw water (river water and underground water) and electricity after back-energizing that will be supplied and paid for by the Employer for Commissioning, Guarantee Test and Reliability Run, all raw materials, utilities, lubricants, filters, chemicals, catalysts, facilities, services and other matters required for Commissioning, Guarantee Test and Reliability Run shall be supplied by the Contractor.

25.1.3 In accordance with the requirements of the Contract, the Contractor's and Project Manager's advisory personnel shall attend the Commissioning, including the Guarantee Test and Reliability Run, and shall advise and assist the Employer.

### **25.2 Guarantee Test**

25.2.1 Subject to GCC Sub-Clause 25.6, the Guarantee Test and repeats thereof shall be conducted by the Contractor during Commissioning of the Facilities or the relevant part thereof to ascertain whether the Facilities or the relevant part can attain the Performance Guarantees specified in the Appendix (Performance Guarantees) to the Contract Agreement. The Employer shall promptly provide the Contractor with such information as the Contractor may reasonably require in relation to the conduct and results of the Guarantee Test and any repeats thereof.

25.2.2 After the Mechanical Completion, if for reasons not attributable to the Contractor, the completion of Guarantee Test of the Facilities was delayed more than six (6) months from the contractual latest completion date of Guarantee Test, the Employer and the Contractor mutually agree with the counter measure for preservation and degradation of the

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Plants. The Contractor's extra cost shall be fairly compensated in addition to the approval of extension of Time for Operational Acceptance.

### 25.3 Reliability Run

25.3.1 The Contractor shall start Reliability Run immediately after the successful or deemed completion of Guarantee Test as defined in GCC Sub-Clause 25.2.1.

25.3.2 After the successful completion of Reliability Run, the Contractor may give a notice to the Project Manager requesting the issue of a Reliability Run Certificate in the form provided in the Employer's Requirements (Forms and Procedures) in respect of the Facilities or the part thereof specified in such notice as of the date of such notice.

25.3.3 The Project Manager shall, after consultation with the Employer, and within seven (7) days after receipt of the Contractor's notice, issue a Reliability Run Certificate.

25.3.4 If within fourteen (14) days after receipt of the Contractor's notice, the Project Manager fails to issue the Reliability Run Certificate or fails to inform the Contractor in writing of the justifiable reasons why the Project Manager has not issued the Reliability Certificate, the Facilities or the relevant part thereof shall be deemed to have passed the test of Reliability Run as of the date of the Contractor's said notice.

### 25.4 Operational Acceptance

25.4.1 Subject to GCC Sub-Clause 25.5 below, Operational Acceptance shall occur in respect of the Facilities or any part thereof when

- (a) the Guarantee Test has been successfully completed and the Performance Guarantees are met; or
- (b) the Guarantee Test has not been successfully completed or has not been carried out for reasons not attributable to the Contractor within the period from the date of Mechanical Completion specified in the SCC or any other agreed upon period as specified in GCC Sub-Clause 25.2.2 above; or
- (c) the Contractor has paid the liquidated damages specified in GCC Sub-Clause 28.3 hereof; and
- (d) the Reliability Run has been successfully completed; or
- (e) the Reliability Run has not been successfully completed or has not been carried out for reasons not attributable to the Contractor; and
- (f) any minor items mentioned in GCC Sub-Clause 24.7 hereof relevant to the Facilities or that part thereof have been completed and all required documents specified in the Contract, except the test report of Reliability Run, have been submitted and approved by

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the Employer/Project Manager.

25.4.2 At any time after any of the events set out in GCC Sub-Clause 25.4.1 have occurred, the Contractor may give a notice to the Project Manager requesting the issue of an Operational Acceptance Certificate in the form provided in the Employer's Requirements (Forms and Procedures) in respect of the Facilities or the part thereof specified in such notice as of the date of such notice.

25.4.3 The Project Manager shall, after consultation with the Employer, and within 7 days after receipt of the Contractor's notice, issue an Operational Acceptance Certificate.

25.4.4 If within 7 days after receipt of the Contractor's notice, the Project Manager fails to issue the Operational Acceptance Certificate or fails to inform the Contractor in writing of the justifiable reasons why the Project Manager has not issued the Operational Acceptance Certificate, the Facilities or the relevant part thereof shall be deemed to have been accepted as of the date of the Contractor's said notice.

#### 25.5 Partial Acceptance

25.5.1 If the Contract specifies that Mechanical Completion and Commissioning shall be carried out in respect of parts of the Facilities, the provisions relating to Mechanical Completion and Commissioning including the Guarantee Test shall apply to each such part of the Facilities individually, and the Operational Acceptance Certificate shall be issued accordingly for each such part of the Facilities.

25.5.2 If a part of the Facilities comprises facilities such as buildings, for which no Commissioning or Guarantee Test is required, then the Project Manager shall issue the Operational Acceptance Certificate for such facility when it attains Mechanical Completion, provided that the Contractor shall thereafter complete any outstanding minor items that are listed in the Operational Acceptance Certificate.

#### 25.6 Delayed Precommissioning and/or Guarantee Test

25.6.1 In the event that the Contractor is unable to proceed with the Precommissioning of the Facilities pursuant to Sub-Clause 24.3, or with the Guarantee Test pursuant to Sub-Clause 25.2, for reasons attributable to the Employer either on account of non availability of other facilities under the responsibilities of other contractor(s), or for reasons beyond the Employer's control, the provisions leading to "deemed" completion of activities such as Mechanical Completion, pursuant to GCC Sub-Clause 24.6, and Operational Acceptance, pursuant to GCC Sub-Clause 25.4.4, and Contractor's obligations regarding Defect Liability Period, pursuant to GCC Sub-Clause 27.2, Performance Guarantee, pursuant to GCC Clause 28, and Care of Facilities, pursuant to GCC Clause 32, and GCC Clause 41.1, Suspension, shall not apply. In this case, the following provisions shall

apply.

25.6.2 When the Contractor is notified by the Project Manager that he will be unable to proceed with the activities and obligations pursuant to above Sub-Clause 25.6.1, the Contractor shall be entitled to the following:

- (a) the Time of Operational Acceptance shall be extended for the period of suspension without imposition of liquidated damages pursuant to GCC Sub-Clause 26.2;
- (b) payments due to the Contractor in accordance with the provision specified in the Appendix (Terms and Procedures of Payment) to the Contract Agreement, which would not have been payable in normal circumstances due to non-completion of the subject activities, shall be released to the Contractor against submission of a security in the form of a bank guarantee of equivalent amount acceptable to the Employer, and which shall become null and void when the Contractor will have complied with its obligations regarding those payments, subject to the provision of Sub-Clause 25.6.3 below;
- (c) the expenses towards the above security and extension of other securities under the contract, of which validity needs to be extended, shall be reimbursed to the Contractor by the Employer;
- (d) the additional charges towards the care of the Facilities pursuant to GCC Sub-Clause 32.1 shall be reimbursed to the Contractor by the Employer for the period between the notification mentioned above and the notification mentioned in Sub-Clause 25.6.4 below. The provision of GCC Sub-Clause 33.2 shall apply to the Facilities during the same period.

25.6.3 In the event that the period of suspension under above Sub-Clause 25.6.1 actually exceeds 180 days, the Employer and Contractor shall mutually agree to any additional compensation payable to the Contractor.

25.6.4 When the Contractor is notified by the Project Manager that the plant is ready for Precommissioning, the Contractor shall proceed without delay in performing all the specified activities and obligations under the contract.

## **F. Guarantees and Liabilities**

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| <b>26. Completion Time Guarantee</b> | 26.1 The Contractor guarantees that it shall attain Operational Acceptance of the Facilities (or a part for which a separate time for Operational Acceptance is specified) within the Time for Operational Acceptance specified in the SCC pursuant to GCC Sub-Clause 8.2, or within such extended time to which the |
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Contractor shall be entitled under GCC Clause 40 hereof.

- 26.2 If the Contractor fails to attain Operational Acceptance of the Facilities or any part thereof within the Time for Operational Acceptance or any extension thereof under GCC Clause 40, the Contractor shall pay to the Employer liquidated damages in the amount specified in the SCC as a percentage rate of the Contract Price or the relevant part thereof. The aggregate amount of such liquidated damages shall in no event exceed the amount specified as "Maximum" in the SCC as a percentage rate of the Contract Price. Once the "Maximum" is reached, the Employer may consider termination of the Contract, pursuant to GCC Sub-Clause 42.2.2.

Such payment shall completely satisfy the Contractor's obligation to attain Operational Acceptance of the Facilities or the relevant part thereof within the Time for Operational Acceptance or any extension thereof under GCC Clause 40. The Contractor shall have no further liability whatsoever to the Employer in respect thereof.

However, the payment of liquidated damages shall not in any way relieve the Contractor from any of its obligations to complete the Facilities or from any other obligations and liabilities of the Contractor under the Contract.

Save for liquidated damages payable under this GCC Sub-Clause 26.2, the failure by the Contractor to attain any milestone or other act, matter or thing by any date specified in the Appendix (Time Schedule) to the Contract Agreement and/or other program of work prepared pursuant to GCC Sub-Clause 18.2 shall not render the Contractor liable for any loss or damage thereby suffered by the Employer.

- 26.3 If the Contractor attains Operational Acceptance of the Facilities or any part thereof before the Time for Operational Acceptance or any extension thereof under GCC Clause 40, the Employer shall pay to the Contractor a bonus in the amount specified in the SCC. The aggregate amount of such bonus shall in no event exceed the amount specified as "Maximum" in the SCC.

## **27. Defect Liability**

- 27.1 The Contractor warrants that the Facilities or any part thereof shall be free from defects in the design, engineering, materials and workmanship of the Plant supplied and of the work executed.

- 27.2 The Defect Liability Period shall be twenty four (24) months from the date of Operational Acceptance of the Facilities (or any part thereof) and, subject to GCC Sub-Clause 27.8, unless specified otherwise in the SCC pursuant to GCC Sub-Clause 27.10.

If during the Defect Liability Period any defect should be found in the design, engineering, materials and workmanship of the Plant supplied or of the work executed by the Contractor, the Contractor shall promptly, in consultation and agreement with the Employer regarding appropriate remedying of the defects, and at its cost, repair, replace or otherwise make good as the Contractor shall determine at its discretion, such defect as well as any damage to the Facilities caused by such defect. The Contractor shall not be

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responsible for the repair, replacement or making good of any defect or of any damage to the Facilities arising out of or resulting from any of the following causes:

- (a) improper operation or maintenance of the Facilities by the Employer;
- (b) operation of the Facilities outside specifications provided in the Contract; or
- (c) normal wear and tear.

27.3 The Contractor's obligations under this GCC Clause 27 shall not apply to:

- (a) any materials that are supplied by the Employer under GCC Sub-Clause 21.2, are normally consumed in operation, or have a normal life shorter than the Defect Liability Period stated herein;
- (b) any designs, specifications or other data designed, supplied or specified by or on behalf of the Employer other than those covered by GCC 10.1 or any matters for which the Contractor has disclaimed responsibility herein; or
- (c) any other materials supplied or any other work executed by or on behalf of the Employer, except for the work executed by the Employer under GCC Sub-Clause 27.7.

27.4 The Employer shall give the Contractor a notice stating the nature of any such defect together with all available evidence thereof, promptly following the discovery thereof. The Employer shall afford all reasonable opportunity for the Contractor to inspect any such defect.

27.5 The Employer shall afford the Contractor all necessary access to the Facilities and the Site to enable the Contractor to perform its obligations under this GCC Clause 27.

The Contractor may, with the consent of the Employer, remove from the Site any Plant or any part of the Facilities that are defective if the nature of the defect, and/or any damage to the Facilities caused by the defect, is such that repairs cannot be expeditiously carried out at the Site.

27.6 If the repair, replacement or making good is of such a character that it may affect the efficiency of the Facilities or any part thereof, the Employer may give to the Contractor a notice requiring that tests of the defective part of the Facilities shall be made by the Contractor immediately upon completion of such remedial work, whereupon the Contractor shall carry out such tests.

If such part fails the tests, the Contractor shall carry out further repair, replacement or making good, as the case may be, until that part of the Facilities passes such tests. The tests shall be agreed upon by the Employer and the Contractor.

27.7 If the Contractor fails to commence the work necessary to remedy such defect or any damage to the Facilities caused by such defect



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within a reasonable time (which shall in no event be considered to be less than 15 days), the Employer may, following notice to the Contractor, proceed to do such work, and the reasonable costs incurred by the Employer in connection therewith shall be paid to the Employer by the Contractor or may be deducted by the Employer from any monies due the Contractor or claimed under the Performance Security.

- 27.8 If the Facilities or any part thereof cannot be used by reason of such defect and/or making good of such defect, the Defect Liability Period of the Facilities or such part, as the case may be, shall be extended by a period equal to the period during which the Facilities or such part cannot be used by the Employer because of any of the aforesaid reasons.
- 27.9 Except as provided in GCC Clauses 27 and 33, the Contractor shall be under no liability under the Contract, in respect of defects in the Facilities or any part thereof, the Plant, design or engineering or work executed that appear after Operational Acceptance of the Facilities or any part thereof, except where such defects are the result of the gross negligence, fraud, criminal or willful action of the Contractor.
- 27.10 In addition, any such component of the Facilities and during the period of time as may be specified in the SCC shall be subject to an extended Defect Liability Period. Such obligation of the Contractor shall be in addition to the Defect Liability Period specified under GCC Sub-Clause 27.2.
- 27.11 When it is necessary to dismantle piping, ducts, machinery, equipment or other works furnished or performed by the Contractor in order to carry out remedial works, the cost of all such dismantling and re-assembling will be paid by the Contractor.

The Employer will be permitted to make repairs or replacements of equipment without affecting the warranty or at least prior verbal notice to the Contractor so long as the repairs or replacements involve the correct installation or spare parts. The Employer shall also be permitted to adjust or test equipment as outlined in instruction manuals provided by the Contractor or as directed by the Contractor's verbal instruction to the Employer.

In the event of an emergency where in the judgment of the Employer the delay resulting from giving formal notice would cause serious loss or damage which could be prevented by immediate action, defects may be corrected by the Employer or a third party chosen by the Employer without giving prior notice to the Contractor and the cost of the corrections shall be paid by the Contractor. In the event such action is taken by the Employer, the Contractor will be notified promptly and shall assist wherever possible in making the necessary correction.

During the Defect Liability Period of 24 months the Contractor shall provide service engineers as specified at the project site to assist the Employer with the operation and maintenance of the Plant and any on-going training that may be required. In case of an

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emergency and receiving a request from the Employer, the Contractor shall take prompt action to remedy the cause.

During the Defect Liability Period of 24 months, the Contractor shall perform 1 (one) combustion inspection including provision of spare parts.

#### 27.12 Final Acceptance

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

The Project Manager shall issue the Final Acceptance Certificate within 28 days after the latest of the expiry dates of the Defects Liability Periods, or as soon thereafter as the Contractor has supplied all the documents and completed and tested all the Plant, including remedying any defects. A copy of the Final Acceptance Certificate shall be issued to the Employer.

Only the Final Acceptance Certificate shall be deemed to constitute acceptance of the Facilities.

#### 27.13 Unfulfilled Obligation

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

### **28. Performance Guarantees**

28.1 The Contractor guarantees that during the Guarantee Test, the Facilities and all parts thereof shall attain the Performance Guarantees specified in the Appendix (Performance Guarantees) to the Contract Agreement, subject to and upon the conditions therein specified.

28.2 If, for reasons attributable to the Contractor, the Performance Guarantees specified in the Appendix (Performance Guarantees) to the Contract Agreement are not met either in whole or in part, the Contractor shall at its cost and expense make such changes, modifications and/or additions to the Plant or any part thereof as may be necessary to meet at least such Guarantees. The Contractor shall notify the Employer upon completion of the necessary changes, modifications and/or additions, and shall request the Employer to repeat the Guarantee Test until the Guarantees has been met. If the Contractor eventually fails to meet the Performance Guarantees, the Employer may consider termination of the Contract, pursuant to GCC Sub-Clause 42.2.2.

28.3 If, for reasons attributable to the Contractor, the Performance Guarantees specified in the Appendix (Performance Guarantees) to the Contract Agreement are not attained either in whole or in part, the Contractor shall, at the Contractor's option, either

- (a) make such changes, modifications and/or additions to the Facilities or any part thereof that are necessary to attain the

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Performance Guarantees at its cost and expense, and shall request the Employer to repeat the Guarantee Test or

- (b) pay liquidated damages to the Employer in respect of the failure to meet the Performance Guarantees in accordance with the provisions in the Appendix (Performance Guarantees) to the Contract Agreement.

28.4 The payment of liquidated damages under GCC Sub-Clause 28.3, up to the limitation of liability specified in the Appendix (Performance Guarantees) to the Contract Agreement, shall completely satisfy the Contractor's guarantees under GCC Sub-Clause 28.3, and the Contractor shall have no further liability whatsoever to the Employer in respect thereof. Upon the payment of such liquidated damages by the Contractor, the Project Manager shall issue the Operational Acceptance Certificate for the Facilities or any part thereof in respect of which the liquidated damages have been so paid.

## **29. Patent Indemnity**

29.1 The Contractor shall, subject to the Employer's compliance with GCC Sub-Clause 29.2, indemnify and hold harmless the Employer and its employees and officers from and against any and all suits, actions or administrative proceedings, claims, demands, losses, damages, costs, and expenses of whatsoever nature, including attorney's fees and expenses, which the Employer may suffer as a result of any infringement or alleged infringement of any patent, utility model, registered design, trademark, copyright or other intellectual property right registered or otherwise existing at the date of the Contract by reason of: (a) the installation of the Facilities by the Contractor or the use of the Facilities in the country where the Site is located; and (b) the sale of the products produced by the Facilities in any country.

Such indemnity shall not cover any use of the Facilities or any part thereof other than for the purpose indicated by or to be reasonably inferred from the Contract, any infringement resulting from the use of the Facilities or any part thereof, or any products produced thereby in association or combination with any other equipment, plant or materials not supplied by the Contractor, pursuant to the Contract Agreement.

29.2 If any proceedings are brought or any claim is made against the Employer arising out of the matters referred to in GCC Sub-Clause 29.1, the Employer shall promptly give the Contractor a notice thereof, and the Contractor may at its own expense and in the Employer's name conduct such proceedings or claim and any negotiations for the settlement of any such proceedings or claim.

If the Contractor fails to notify the Employer within 28 days after receipt of such notice that it intends to conduct any such proceedings or claim, then the Employer shall be free to conduct the same on its own behalf. Unless the Contractor has so failed to notify the Employer within the twenty-eight (28) day period, the Employer shall make no admission that may be prejudicial to the defense of any such proceedings or claim.

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The Employer shall, at the Contractor's request, afford all available assistance to the Contractor in conducting such proceedings or claim, and shall be reimbursed by the Contractor for all reasonable expenses incurred in so doing.

29.3 The Employer shall indemnify and hold harmless the Contractor and its employees, officers and Subcontractors from and against any and all suits, actions or administrative proceedings, claims, demands, losses, damages, costs, and expenses of whatsoever nature, including attorney's fees and expenses, which the Contractor may suffer as a result of any infringement or alleged infringement of any patent, utility model, registered design, trademark, copyright or other intellectual property right registered or otherwise existing at the date of the Contract arising out of or in connection with any design, data, drawing, specification, or other documents or materials provided or designed by or on behalf of the Employer.

### **30. Limitation of Liability**

- 30.1 Except in cases of criminal negligence or willful misconduct,
- (a) the Contractor shall not be liable to the Employer, whether in contract, tort, or otherwise, for any indirect or consequential loss or damage, loss of use, loss of production, or loss of profits or interest costs, provided that this exclusion shall not apply to any obligation of the Contractor to pay liquidated damages to the Employer and
  - (b) the aggregate liability of the Contractor to the Employer, whether under the Contract, in tort or otherwise, shall not exceed a multiple of the Contract Price specified in the SCC or, if a multiple is not so specified, the total Contract Price, provided that this limitation shall not apply to the cost of repairing or replacing defective equipment, or to any obligation of the Contractor to indemnify the Employer with respect to patent infringement.

## **G. Risk Distribution**

### **31. Transfer of Ownership**

- 31.1 Ownership of the Plant (including spare parts) to be imported into the country where the Site is located shall be transferred to the Employer upon loading on to the mode of transport to be used to convey the Plant from the country of origin to that country.
- 31.2 Ownership of the Plant (including spare parts) procured in the country where the Site is located shall be transferred to the Employer when the Plant are brought on to the Site.
- 31.3 Ownership of the Contractor's Equipment used by the Contractor and its Subcontractors in connection with the Contract shall remain with the Contractor or its Subcontractors.
- 31.4 Ownership of any Plant in excess of the requirements for the Facilities that has been marked for re-export at the time of importation and on which the Employer has not paid customs duty shall revert to the Contractor upon Operational Acceptance of the

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Facilities or at such earlier time when the Employer and the Contractor agree that the Plant in question are no longer required for the Facilities. Ownership of any Plant in excess of the requirements for the Facilities that has not been marked for re-export at the time of importation and on which the Employer has paid customs duty shall be handed over to the Employer upon the successful completion of Operational Acceptance or at such earlier time when the Employer and the Contractor agree that the Plant in question are no longer required for the Facilities.

31.5 Notwithstanding the transfer of ownership of the Plant, the responsibility for care and custody thereof together with the risk of loss or damage thereto shall remain with the Contractor pursuant to GCC Clause 32 (Care of Facilities) hereof until Operational Acceptance of the Facilities or the part thereof in which such Plant are incorporated.

### **32. Care of Facilities**

32.1 The Contractor shall be responsible for the care and custody of the Facilities or any part thereof until the date of Operational Acceptance of the Facilities pursuant to GCC Clause 24 or, where the Contract provides for Operational Acceptance of the Facilities in parts, until the date of Operational Acceptance of the relevant part, and shall make good at its own cost any loss or damage that may occur to the Facilities or the relevant part thereof from any cause whatsoever during such period. The Contractor shall also be responsible for any loss or damage to the Facilities caused by the Contractor or its Subcontractors in the course of any work carried out, pursuant to GCC Clause 27. Notwithstanding the foregoing, the Contractor shall not be liable for any loss or damage to the Facilities or that part thereof caused by reason of any of the matters specified or referred to in paragraphs (a), (b) and (c) of GCC Sub-Clauses 32.2 and 38.1.

32.2 If any loss or damage occurs to the Facilities or any part thereof or to the Contractor's temporary facilities by reason of

- (a) insofar as they relate to the country where the Site is located, nuclear reaction, nuclear radiation, radioactive contamination, pressure wave caused by aircraft or other aerial objects, or any other occurrences that an experienced contractor could not reasonably foresee, or if reasonably foreseeable could not reasonably make provision for or insure against, insofar as such risks are not normally insurable on the insurance market and are mentioned in the general exclusions of the policy of insurance, including War Risks and Political Risks, taken out under GCC Clause 34 hereof; or
- (b) any use or occupation by the Employer or any third party other than a Subcontractor, authorized by the Employer of any part of the Facilities; or
- (c) any use of or reliance upon any design, data or specification provided or designated by or on behalf of the Employer other than GCC 10.1, or any such matter for which the Contractor has disclaimed responsibility herein,

the Employer shall pay to the Contractor all sums payable in respect of the Facilities executed, notwithstanding that the same be lost, destroyed or damaged, and will pay to the Contractor the replacement value of all temporary facilities and all parts thereof lost, destroyed or damaged. If the Employer requests the Contractor in writing to make good any loss or damage to the Facilities thereby occasioned, the Contractor shall make good the same at the cost of the Employer in accordance with GCC Clause 39. If the Employer does not request the Contractor in writing to make good any loss or damage to the Facilities thereby occasioned, the Employer shall either request a change in accordance with GCC Clause 39, excluding the performance of that part of the Facilities thereby lost, destroyed or damaged, or, where the loss or damage affects a substantial part of the Facilities, the Employer shall terminate the Contract pursuant to GCC Sub-Clause 42.1 hereof.

32.3 The Contractor shall be liable for any loss of or damage to any Contractor's Equipment, or any other property of the Contractor used or intended to be used for purposes of the Facilities, except (i) as mentioned in GCC Sub-Clause 32.2 with respect to the Contractor's temporary facilities, and (ii) where such loss or damage arises by reason of any of the matters specified in GCC Sub-Clauses 32.2 (b) and (c) and 38.1.

32.4 With respect to any loss or damage caused to the Facilities or any part thereof or to the Contractor's Equipment by reason of any of the matters specified in GCC Sub-Clause 38.1, the provisions of GCC Sub-Clause 38.3 shall apply.

**33. Loss of or Damage to Property; Accident or Injury to Workers; Indemnification**

33.1 Subject to GCC Sub-Clause 33.3, the Contractor shall indemnify and hold harmless the Employer and its employees and officers from and against any and all suits, actions or administrative proceedings, claims, demands, losses, damages, costs, and expenses of whatsoever nature, including attorney's fees and expenses, in respect of the death or injury of any person or loss of or damage to any property other than the Facilities whether accepted or not, arising in connection with the supply and installation of the Facilities and by reason of the negligence of the Contractor or its Subcontractors, or their employees, officers or agents, except any injury, death or property damage caused by the negligence of the Employer, its contractors, employees, officers or agents.

33.2 If any proceedings are brought or any claim is made against the Employer that might subject the Contractor to liability under GCC Sub-Clause 33.1, the Employer shall promptly give the Contractor a notice thereof and the Contractor may at its own expense and in the Employer's name conduct such proceedings or claim and any negotiations for the settlement of any such proceedings or claim.

If the Contractor fails to notify the Employer within 28 days after receipt of such notice that it intends to conduct any such proceedings or claim, then the Employer shall be free to conduct the same on its own behalf. Unless the Contractor has so failed to

notify the Employer within the 28 day period, the Employer shall make no admission that may be prejudicial to the defense of any such proceedings or claim.

The Employer shall, at the Contractor's request, afford all available assistance to the Contractor in conducting such proceedings or claim, and shall be reimbursed by the Contractor for all reasonable expenses incurred in so doing.

33.3 The Employer shall indemnify and hold harmless the Contractor and its employees, officers and Subcontractors from any liability for loss of or damage to property of the Employer, other than the Facilities not yet taken over, that is caused by fire, explosion or any other perils, in excess of the amount recoverable from insurances procured under GCC Clause 34, provided that such fire, explosion or other perils were not caused by any act or failure of the Contractor.

33.4 The party entitled to the benefit of an indemnity under this GCC Clause 33 shall take all reasonable measures to mitigate any loss or damage which has occurred. If the party fails to take such measures, the other party's liabilities shall be correspondingly reduced.

#### **34. Insurance**

34.1 To the extent specified in the Appendix (Insurance Requirements) to the Contract Agreement, the Contractor shall at its expense take out and maintain in effect, or cause to be taken out and maintained in effect, during the performance of the Contract, the insurances set forth below in the sums and with the deductibles and other conditions specified in the said Appendix. The identity of the insurers and the form of the policies shall be subject to the approval of the Employer, who should not unreasonably withhold such approval.

(a) Cargo Insurance During Transport

Covering loss or damage occurring while in transit from the Contractor's or Subcontractor's works or stores until arrival at the Site, to the Plant (including spare parts therefor) and to the Contractor's Equipment.

(b) Installation All Risks Insurance

Covering physical loss or damage to the Facilities at the Site, occurring prior to Operational Acceptance of the Facilities, with an extended maintenance coverage for the Contractor's liability in respect of any loss or damage occurring during the Defect Liability Period while the Contractor is on the Site for the purpose of performing its obligations during the Defect Liability Period.

(c) Third Party Liability Insurance

Covering bodily injury or death suffered by third parties including the Employer's personnel, and loss of or damage to property occurring in connection with the supply and installation of the Facilities.

(d) Automobile Liability Insurance

Covering use of all vehicles used by the Contractor or its Subcontractors, whether or not owned by them, in connection with the execution of the Contract.

(e) Workers' Compensation

In accordance with the statutory requirements applicable in any country where the Contract or any part thereof is executed.

(f) Employer's Liability

In accordance with the statutory requirements applicable in any country where the Contract or any part thereof is executed.

(g) Other Insurances

Such other insurances as may be specifically agreed upon by the parties hereto as listed in the Appendix (Insurance Requirements) to the Contract Agreement.

34.2 The Employer shall be named as co-insured under all insurance policies taken out by the Contractor pursuant to GCC Sub-Clause 34.1, except for the Third Party Liability, Workers' Compensation and Employer's Liability Insurances, and the Contractor's Subcontractors shall be named as co-insureds under all insurance policies taken out by the Contractor pursuant to GCC Sub-Clause 34.1 except for the Cargo Insurance During Transport, Workers' Compensation and Employer's Liability Insurances. All insurer's rights of subrogation against such co-insureds for losses or claims arising out of the performance of the Contract shall be waived under such policies.

34.3 The Contractor shall, in accordance with the provisions of the Appendix (Insurance Requirements) to the Contract Agreement, deliver to the Employer certificates of insurance or copies of the insurance policies as evidence that the required policies are in full force and effect. The certificates shall provide that no less than 21 days' notice shall be given to the Employer by insurers prior to cancellation or material modification of a policy.

34.4 The Contractor shall ensure that, where applicable, its Subcontractor(s) shall take out and maintain in effect adequate insurance policies for their personnel and vehicles and for work executed by them under the Contract, unless such Subcontractors are covered by the policies taken out by the Contractor.

34.5 The Employer shall at its expense take out and maintain in effect during the performance of the Contract those insurances specified in the Appendix (Insurance Requirements) to the Contract Agreement, in the sums and with the deductibles and other conditions specified in the said Appendix. The Contractor and the Contractor's Subcontractors shall be named as co-insureds under all such policies. All insurers' rights of subrogation against such co-insureds for losses or claims arising out of the performance of the



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Contract shall be waived under such policies. The Employer shall deliver to the Contractor satisfactory evidence that the required insurances are in full force and effect. The policies shall provide that not less than 21 days' notice shall be given to the Contractor by all insurers prior to any cancellation or material modification of the policies. If so requested by the Contractor, the Employer shall provide copies of the policies taken out by the Employer under this GCC Sub-Clause 34.5.

- 34.6 If the Contractor fails to take out and/or maintain in effect the insurances referred to in GCC Sub-Clause 34.1, the Employer may take out and maintain in effect any such insurances and may from time to time deduct from any amount due the Contractor under the Contract any premium that the Employer shall have paid to the insurer, or may otherwise recover such amount as a debt due from the Contractor. If the Employer fails to take out and/or maintain in effect the insurances referred to in GCC 34.5, the Contractor may take out and maintain in effect any such insurances and may from time to time deduct from any amount due the Employer under the Contract any premium that the Contractor shall have paid to the insurer, or may otherwise recover such amount as a debt due from the Employer. If the Contractor fails to or is unable to take out and maintain in effect any such insurances, the Contractor shall nevertheless have no liability or responsibility towards the Employer, and the Contractor shall have full recourse against the Employer for any and all liabilities of the Employer herein.
- 34.7 Unless otherwise provided in the Contract, the Contractor shall prepare and conduct all and any claims made under the policies effected by it pursuant to this GCC Clause 34, and all monies payable by any insurers shall be paid to the Contractor. The Employer shall give to the Contractor all such reasonable assistance as may be required by the Contractor. With respect to insurance claims in which the Employer's interest is involved, the Contractor shall not give any release or make any compromise with the insurer without the prior written consent of the Employer. With respect to insurance claims in which the Contractor's interest is involved, the Employer shall not give any release or make any compromise with the insurer without the prior written consent of the Contractor.

### **35. Unforeseen Conditions**

- 35.1 If, during the execution of the Contract, the Contractor shall encounter on the Site any physical conditions other than climatic conditions, or artificial obstructions that could not have been reasonably foreseen prior to the date of the Contract Agreement by an experienced contractor on the basis of reasonable examination of the data relating to the Facilities including any data as to boring tests, provided by the Employer, and on the basis of information that it could have obtained from a visual inspection of the Site if access thereto was available, or other data readily available to it relating to the Facilities, and if the Contractor determines that it will in consequence of such conditions or obstructions incur additional cost and expense or require additional time to perform its obligations under the Contract that would not have been required if

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such physical conditions or artificial obstructions had not been encountered, the Contractor shall promptly, and before performing additional work or using additional Plant or Contractor's Equipment, notify the Project Manager in writing of

- (a) the physical conditions or artificial obstructions on the Site that could not have been reasonably foreseen;
- (b) the additional work and/or Plant and/or Contractor's Equipment required, including the steps which the Contractor will or proposes to take to overcome such conditions or obstructions;
- (c) the extent of the anticipated delay; and
- (d) the additional cost and expense that the Contractor is likely to incur.

On receiving any notice from the Contractor under this GCC Sub-Clause 35.1, the Project Manager shall promptly consult with the Employer and Contractor and decide upon the actions to be taken to overcome the physical conditions or artificial obstructions encountered. Following such consultations, the Project Manager shall instruct the Contractor, with a copy to the Employer, of the actions to be taken.

35.2 Any reasonable additional cost and expense incurred by the Contractor in following the instructions from the Project Manager to overcome such physical conditions or artificial obstructions referred to in GCC Sub-Clause 35.1 shall be paid by the Employer to the Contractor as an addition to the Contract Price.

35.3 If the Contractor is delayed or impeded in the performance of the Contract because of any such physical conditions or artificial obstructions referred to in GCC Sub-Clause 35.1, the Time for Operational Acceptance shall be extended in accordance with GCC Clause 40.

**36. Change in Laws and Regulations**

36.1 If, after the date 28 days prior to the date of Bid submission, in the country where the Site is located, any law, regulation, ordinance, order or by-law having the force of law is enacted, promulgated, abrogated or changed which shall be deemed to include any change in interpretation or application by the competent authorities, that subsequently affects the costs and expenses of the Contractor and/or the Time for Operational Acceptance, the Contract Price shall be correspondingly increased or decreased, and/or the Time for Operational Acceptance shall be reasonably adjusted to the extent that the Contractor has thereby been affected in the performance of any of its obligations under the Contract. Notwithstanding the foregoing, such additional or reduced costs shall not be separately paid or credited if the same has already been accounted for in the price adjustment provisions where applicable, in accordance with the SCC, pursuant to GCC Sub-Clause 11.2.

**37. Force Majeure**

37.1 "Force Majeure" shall mean any event beyond the reasonable control of the Employer or of the Contractor, as the case may be,

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and which is unavoidable notwithstanding the reasonable care of the party affected, and shall include, without limitation, the following:

- (a) war, hostilities or warlike operations whether a state of war be declared or not, invasion, act of foreign enemy and civil war
- (b) rebellion, revolution, insurrection, mutiny, usurpation of civil or military government, conspiracy, riot, civil commotion and terrorist acts
- (c) confiscation, nationalization, mobilization, commandeering or requisition by or under the order of any government or de jure or de facto authority or ruler or any other act or failure to act of any local state or national government authority
- (d) strike, sabotage, lockout, embargo, import restriction, port congestion, lack of usual means of public transportation and communication, industrial dispute, shipwreck, shortage or restriction of power supply, epidemics, quarantine and plague
- (e) earthquake, landslide, volcanic activity, fire, flood or inundation, tidal wave, typhoon or cyclone, hurricane, storm, lightning, or other inclement weather condition, nuclear and pressure waves or other natural or physical disaster
- (f) shortage of labor, materials or utilities where caused by circumstances that are themselves Force Majeure.

37.2 If either party is prevented, hindered or delayed from or in performing any of its obligations under the Contract by an event of Force Majeure, then it shall notify the other in writing of the occurrence of such event and the circumstances thereof within 14 days after the occurrence of such event.

37.3 The party who has given such notice shall be excused from the performance or punctual performance of its obligations under the Contract for so long as the relevant event of Force Majeure continues and to the extent that such party's performance is prevented, hindered or delayed. The Time for Operational Acceptance shall be extended in accordance with GCC Clause 40.

37.4 The party or parties affected by the event of Force Majeure shall use reasonable efforts to mitigate the effect thereof upon its or their performance of the Contract and to fulfill its or their obligations under the Contract, but without prejudice to either party's right to terminate the Contract under GCC Sub-Clauses 37.6 and 38.5.

37.5 No delay or nonperformance by either party hereto caused by the occurrence of any event of Force Majeure shall

- (a) constitute a default or breach of the Contract, or
- (b) give rise to any claim for damages or additional cost or expense occasioned thereby, subject to GCC Sub-Clauses 32.2, 38.3 and 38.4

if and to the extent that such delay or nonperformance is caused by the occurrence of an event of Force Majeure.

- 37.6 If the performance of the Contract is substantially prevented, hindered or delayed for a single period of more than 60 days or an aggregate period of more than 120 days on account of one or more events of Force Majeure during the currency of the Contract, the parties will attempt to develop a mutually satisfactory solution, failing which either party may terminate the Contract by giving a notice to the other, but without prejudice to either party's right to terminate the Contract under GCC Sub-Clause 38.5.
- 37.7 In the event of termination pursuant to GCC Sub-Clause 37.6, the rights and obligations of the Employer and the Contractor shall be as specified in GCC Sub-Clauses 42.1.2 and 42.1.3.
- 37.8 Notwithstanding GCC Sub-Clause 37.5, Force Majeure shall not apply to any obligation of the Employer to make payments to the Contractor herein.

### **38. War Risks**

- 38.1 "War Risks" shall mean any event specified in paragraphs (a) and (b) of GCC Sub-Clause 37.1 and any explosion or impact of any mine, bomb, shell, grenade or other projectile, missile, munitions or explosive of war, occurring or existing in or near the country (or countries) where the Site is located.
- 38.2 Notwithstanding anything contained in the Contract, the Contractor shall have no liability whatsoever for or with respect to
- (a) destruction of or damage to Facilities, Plant, or any part thereof;
  - (b) destruction of or damage to property of the Employer or any third party; or
  - (c) injury or loss of life
- if such destruction, damage, injury or loss of life is caused by any War Risks, and the Employer shall indemnify and hold the Contractor harmless from and against any and all claims, liabilities, actions, lawsuits, damages, costs, charges or expenses arising in consequence of or in connection with the same.
- 38.3 If the Facilities or any Plant or Contractor's Equipment or any other property of the Contractor used or intended to be used for the purposes of the Facilities shall sustain destruction or damage by reason of any War Risks, the Employer shall pay the Contractor for
- (a) any part of the Facilities or the Plant so destroyed or damaged to the extent not already paid for by the Employer and so far as may be required by the Employer, and as may be necessary for Operational Acceptance of the Facilities
  - (b) replacing or making good any Contractor's Equipment or other property of the Contractor so destroyed or damaged
  - (c) replacing or making good any such destruction or damage to the Facilities or the Plant or any part thereof .

If the Employer does not require the Contractor to replace or make good any such destruction or damage to the Facilities, the Employer shall either request a change in accordance with GCC

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Clause 39, excluding the performance of that part of the Facilities thereby destroyed or damaged or, where the loss, destruction or damage affects a substantial part of the Facilities, shall terminate the Contract, pursuant to GCC Sub-Clause 42.1.

If the Employer requires the Contractor to replace or make good on any such destruction or damage to the Facilities, the Time for Operational Acceptance shall be extended in accordance with GCC 40.

- 38.4 Notwithstanding anything contained in the Contract, the Employer shall pay the Contractor for any increased costs or incidentals to the execution of the Contract that are in any way attributable to, consequent on, resulting from, or in any way connected with any War Risks, provided that the Contractor shall as soon as practicable notify the Employer in writing of any such increased cost.
- 38.5 If during the performance of the Contract any War Risks shall occur that financially or otherwise materially affect the execution of the Contract by the Contractor, the Contractor shall use its reasonable efforts to execute the Contract with due and proper consideration given to the safety of its and its Subcontractors' personnel engaged in the work on the Facilities, provided, however, that if the execution of the work on the Facilities becomes impossible or is substantially prevented for a single period of more than 60 days or an aggregate period of more than 120 days on account of any War Risks, the parties will attempt to develop a mutually satisfactory solution, failing which either party may terminate the Contract by giving a notice to the other.
- 38.6 In the event of termination pursuant to GCC Sub-Clauses 38.3 or 38.5, the rights and obligations of the Employer and the Contractor shall be specified in GCC Sub-Clauses 42.1.2 and 42.1.3.

## **H. Change in Contract Elements**

### **39. Change in the Facilities**

#### **39.1 Introducing a Change**

39.1.1 Subject to GCC Sub-Clauses 39.2.5 and 39.2.7, the Employer shall have the right to propose, and subsequently require, that the Project Manager order the Contractor from time to time during the performance of the Contract to make any change, modification, addition or deletion to, in or from the Facilities hereinafter called "Change", provided that such Change falls within the general scope of the Facilities and does not constitute unrelated work and that it is technically practicable, taking into account both the state of advancement of the Facilities and the technical compatibility of the Change envisaged with the nature of the Facilities as specified in the Contract.

39.1.2 The Contractor may from time to time during its performance of the Contract propose to the Employer with a copy to the Project Manager, any Change that the Contractor considers necessary or desirable to improve the quality, efficiency or

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safety of the Facilities. The Employer may at its discretion approve or reject any Change proposed by the Contractor, provided that the Employer shall approve any Change proposed by the Contractor to ensure the safety of the Facilities.

39.1.3 Notwithstanding GCC Sub-Clauses 39.1.1 and 39.1.2, no change made necessary because of any default of the Contractor in the performance of its obligations under the Contract shall be deemed to be a Change, and such change shall not result in any adjustment of the Contract Price or the Time for Operational Acceptance.

39.1.4 The procedure on how to proceed with and execute Changes is specified in GCC Sub-Clauses 39.2 and 39.3, and further details and forms are provided in the Employer's Requirements (Forms and Procedures).

## 39.2 Changes Originating from Employer

39.2.1 If the Employer proposes a Change pursuant to GCC Sub-Clause 39.1.1, it shall send to the Contractor a "Request for Change Proposal," requiring the Contractor to prepare and furnish to the Project Manager as soon as reasonably practicable a "Change Proposal," which shall include the following:

- (a) brief description of the Change
- (b) effect on the Time for Operational Acceptance
- (c) estimated cost of the Change
- (d) effect on Performance Guarantees (if any)
- (e) effect on the Facilities
- (f) effect on any other provisions of the Contract.

39.2.2 Prior to preparing and submitting the "Change Proposal," the Contractor shall submit to the Project Manager an "Estimate for Change Proposal," which shall be an estimate of the cost of preparing and submitting the Change Proposal.

Upon receipt of the Contractor's Estimate for Change Proposal, the Employer shall do one of the following:

- (a) accept the Contractor's estimate with instructions to the Contractor to proceed with the preparation of the Change Proposal
- (b) advise the Contractor of any part of its Estimate for Change Proposal that is unacceptable and request the Contractor to review its estimate
- (c) advise the Contractor that the Employer does not intend to proceed with the Change.

39.2.3 Upon receipt of the Employer's instruction to proceed under GCC Sub-Clause 39.2.2 (a), the Contractor shall, with proper expedition, proceed with the preparation of the

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Change Proposal, in accordance with GCC Sub-Clause 39.2.1.

39.2.4 The pricing of any Change shall, as far as practicable, be calculated in accordance with the rates and prices included in the Contract. If such rates and prices are inequitable, the parties thereto shall agree on specific rates for the valuation of the Change.

39.2.5 If before or during the preparation of the Change Proposal it becomes apparent that the aggregate effect of compliance therewith and with all other Change Orders that have already become binding upon the Contractor under this GCC Clause 39 would be to increase or decrease the Contract Price as originally set forth in Article 2 (Contract Price) of the Contract Agreement by more than fifteen percent (15%), the Contractor may give a written notice of objection thereto prior to furnishing the Change Proposal as aforesaid. If the Employer accepts the Contractor's objection, the Employer shall withdraw the proposed Change and shall notify the Contractor in writing thereof.

The Contractor's failure to so object shall neither affect its right to object to any subsequent requested Changes or Change Orders herein, nor affect its right to take into account, when making such subsequent objection, the percentage increase or decrease in the Contract Price that any Change not objected to by the Contractor represents.

39.2.6 Upon receipt of the Change Proposal, the Employer and the Contractor shall mutually agree upon all matters therein contained. Within 14 days after such agreement, the Employer shall, if it intends to proceed with the Change, issue the Contractor with a Change Order.

If the Employer is unable to reach a decision within 14 days, it shall notify the Contractor with details of when the Contractor can expect a decision.

If the Employer decides not to proceed with the Change for whatever reason, it shall, within the said period of 14 days, notify the Contractor accordingly. Under such circumstances, the Contractor shall be entitled to reimbursement of all costs reasonably incurred by it in the preparation of the Change Proposal, provided that these do not exceed the amount given by the Contractor in its Estimate for Change Proposal submitted in accordance with GCC Sub-Clause 39.2.2.

39.2.7 If the Employer and the Contractor cannot reach agreement on the price for the Change, an equitable adjustment to the Time for Operational Acceptance, or any other matters identified in the Change Proposal, the Employer may nevertheless instruct the Contractor to proceed with the Change by issue of a "Pending Agreement Change Order."

Upon receipt of a Pending Agreement Change Order, the

Contractor shall immediately proceed with effecting the Changes covered by such Order. The parties shall thereafter attempt to reach agreement on the outstanding issues under the Change Proposal.

If the parties cannot reach agreement within 60 days from the date of issue of the Pending Agreement Change Order, then the matter may be referred to the Dispute Board in accordance with the provisions of GCC Sub-Clause 45.3.

### 39.3 Changes Originating from Contractor

39.3.1 If the Contractor proposes a Change pursuant to GCC Sub-Clause 39.1.2, the Contractor shall submit to the Project Manager a written "Application for Change Proposal," giving reasons for the proposed Change and including the information specified in GCC Sub-Clause 39.2.1.

Upon receipt of the Application for Change Proposal, the parties shall follow the procedures outlined in GCC Sub-Clauses 39.2.6 and 39.2.7. However, should the Employer choose not to proceed, the Contractor shall not be entitled to recover the costs of preparing the Application for Change Proposal.

## 40. **Extension of Time for Operational Acceptance**

40.1 The Time(s) for Operational Acceptance specified in the SCC shall be extended if the Contractor is delayed or impeded in the performance of any of its obligations under the Contract by reason of any of the following:

- (a) any Change in the Facilities as provided in GCC Clause 39
- (b) any occurrence of Force Majeure as provided in GCC Clause 37, unforeseen conditions as provided in GCC Clause 35, or other occurrence of any of the matters specified or referred to in paragraphs (a), (b) and (c) of GCC Sub-Clause 32.2
- (c) any suspension order given by the Employer under GCC Clause 41 hereof or reduction in the rate of progress pursuant to GCC Sub-Clause 41.2 or
- (d) any changes in laws and regulations as provided in GCC Clause 36 or
- (e) any default or breach of the Contract by the Employer, or any activity, act or omission of the Employer, or the Project Manager, or any other contractors employed by the Employer or
- (f) any other matter specifically mentioned in the Contract
- (g) any delay on the part of a sub-contractor, provided such delay is due to a cause for which the Contractor himself would have been entitled to an extension of time under this sub-clause

by such period as shall be fair and reasonable in all the circumstances and as shall fairly reflect the delay or impediment sustained by the Contractor.



40.2 Except where otherwise specifically provided in the Contract, the Contractor shall submit to the Project Manager a notice of a claim for an extension of the Time for Operational Acceptance, together with particulars of the event or circumstance justifying such extension as soon as reasonably practicable after the commencement of such event or circumstance. As soon as reasonably practicable after receipt of such notice and supporting particulars of the claim, the Employer and the Contractor shall agree upon the period of such extension. In the event that the Contractor does not accept the Employer's estimate of a fair and reasonable time extension, the Contractor shall be entitled to refer the matter to a Dispute Board, pursuant to GCC Sub-Clause 45.3.

40.3 The Contractor shall at all times use its reasonable efforts to minimize any delay in the performance of its obligations under the Contract.

In all cases where the Contractor has given a notice of a claim for an extension of time under GCC 40.2, the Contractor shall consult with the Project Manager in order to determine the steps (if any) which can be taken to overcome or minimize the actual or anticipated delay. The Contractor shall there after comply with all reasonable instructions which the Project Manager shall give in order to minimize such delay. If compliance with such instructions shall cause the Contractor to incur extra costs and the Contractor is entitled to an extension of time under GCC 40.1, the amount of such extra costs shall be added to the Contract Price.

#### **41. Suspension**

41.1 The Employer may request the Project Manager, by notice to the Contractor, to order the Contractor to suspend performance of any or all of its obligations under the Contract. Such notice shall specify the obligation of which performance is to be suspended, the effective date of the suspension and the reasons therefor. The Contractor shall thereupon suspend performance of such obligation, except those obligations necessary for the care or preservation of the Facilities, until ordered in writing to resume such performance by the Project Manager.

If, by virtue of a suspension order given by the Project Manager, other than by reason of the Contractor's default or breach of the Contract, the Contractor's performance of any of its obligations is suspended for an aggregate period of more than 90 days, then at any time thereafter and provided that at that time such performance is still suspended, the Contractor may give a notice to the Project Manager requiring that the Employer shall, within 28 days of receipt of the notice, order the resumption of such performance or request and subsequently order a change in accordance with GCC Clause 39, excluding the performance of the suspended obligations from the Contract.

If the Employer fails to do so within such period, the Contractor may, by a further notice to the Project Manager, elect to treat the suspension, where it affects a part only of the Facilities, as a deletion of such part in accordance with GCC Clause 39 or, where it affects the whole of the Facilities, as termination of the Contract

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under GCC Sub-Clause 42.1.

41.2 If

- (a) the Employer has failed to pay the Contractor any sum due under the Contract within the specified period, has failed to approve any invoice or supporting documents without just cause pursuant to the Appendix (Terms and Procedures of Payment) to the Contract Agreement, or commits a substantial breach of the Contract, the Contractor may give a notice to the Employer that requires payment of such sum, with interest thereon as stipulated in GCC Sub-Clause 12.3, requires approval of such invoice or supporting documents, or specifies the breach and requires the Employer to remedy the same, as the case may be. If the Employer fails to pay such sum together with such interest, fails to approve such invoice or supporting documents or give its reasons for withholding such approval, or fails to remedy the breach or take steps to remedy the breach within 14 days after receipt of the Contractor's notice or
- (b) the Contractor is unable to carry out any of its obligations under the Contract for any reason attributable to the Employer, including but not limited to the Employer's failure to provide possession of or access to the Site or other areas in accordance with GCC Sub-Clause 10.2, or failure to obtain any governmental permit necessary for the execution and/or Operational Acceptance of the Facilities or
- (c) within the number of days specified in the SCC after the Financial Closure, the Employer has failed to handover all the approved Payment Certificates along with Statement of Performance for which the Contractor has paid for from Contractor's Investment,

then the Contractor may by 14 days' notice to the Employer suspend performance of all or any of its obligations under the Contract, or reduce the rate of progress.

41.3 If the Contractor's performance of its obligations is suspended or the rate of progress is reduced pursuant to this GCC Clause 41, then the Time for Operational Acceptance shall be extended in accordance with GCC Sub-Clause 40.1, and any and all additional costs or expenses incurred by the Contractor as a result of such suspension or reduction shall be paid by the Employer to the Contractor in addition to the Contract Price, except in the case of suspension order or reduction in the rate of progress by reason of the Contractor's default or breach of the Contract.

41.4 During the period of suspension, the Contractor shall not remove from the Site any Plant, any part of the Facilities or any Contractor's Equipment, without the prior written consent of the Employer.

## 42. Termination

### 42.1 Termination for Employer's Convenience

42.1.1 The Employer may at any time terminate the Contract for any reason by giving the Contractor a notice of termination

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that refers to this GCC Sub-Clause 42.1.

42.1.2 Upon receipt of the notice of termination under GCC Sub-Clause 42.1.1, the Contractor shall either immediately or upon the date specified in the notice of termination

- (a) cease all further work, except for such work as the Employer may specify in the notice of termination for the sole purpose of protecting that part of the Facilities already executed, or any work required to leave the Site in a clean and safe condition
- (b) terminate all subcontracts, except those to be assigned to the Employer pursuant to paragraph (d) (ii) below
- (c) remove all Contractor's Equipment from the Site, repatriate the Contractor's and its Subcontractors' personnel from the Site, remove from the Site any wreckage, rubbish and debris of any kind, and leave the whole of the Site in a clean and safe condition, and
- (d) subject to the payment specified in GCC Sub-Clause 42.1.3,
  - (i) deliver to the Employer the parts of the Facilities executed by the Contractor up to the date of termination
  - (ii) to the extent legally possible, assign to the Employer all right, title and benefit of the Contractor to the Facilities and to the Plant as of the date of termination, and, as may be required by the Employer, in any subcontracts concluded between the Contractor and its Subcontractors; and
  - (iii) deliver to the Employer all non-proprietary drawings, specifications and other documents prepared by the Contractor or its Subcontractors as at the date of termination in connection with the Facilities.

42.1.3 In the event of termination of the Contract under GCC Sub-Clause 42.1.1, the Employer shall pay to the Contractor the following amounts:

- (a) all Certified payments for which Contractor has paid for from Contractor's Investment
- (b) the Contract Price, properly attributable to the parts of the Facilities executed by the Contractor as of the date of termination
- (c) the costs reasonably incurred by the Contractor in the removal of the Contractor's Equipment from the Site and in the repatriation of the Contractor's and its

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Subcontractors' personnel

- (d) any amounts to be paid by the Contractor to its Subcontractors in connection with the termination of any subcontracts, including any cancellation charges after submission of documentary evidence and certification by Engineer
- (e) costs incurred by the Contractor in protecting the Facilities and leaving the Site in a clean and safe condition pursuant to paragraph (a) of GCC Sub-Clause 42.1.2
- (f) the cost of satisfying all other obligations, commitments and claims that the Contractor may in good faith have undertaken with third parties in connection with the Contract and that are not covered by paragraphs (a) through (d) above.

#### 42.2 Termination for Contractor's Default

42.2.1 The Employer, without prejudice to any other rights or remedies it may possess, may terminate the Contract forthwith in the following circumstances by giving a notice of termination and its reasons therefor to the Contractor, referring to this GCC Sub-Clause 42.2:

- (a) if the Contractor becomes bankrupt or insolvent, has a receiving order issued against it, compounds with its creditors, or, if the Contractor is a corporation, a resolution is passed or order is made for its winding up, other than a voluntary liquidation for the purposes of amalgamation or reconstruction, a receiver is appointed over any part of its undertaking or assets, or if the Contractor takes or suffers any other analogous action in consequence of debt
- (b) if the Contractor assigns or transfers the Contract or any right or interest therein in violation of the provision of GCC Clause 43.
- (c) if the Contractor, in the judgment of the Employer has engaged in fraud and corruption, as defined in GCC Clause 6, in competing for or in executing the Contract.

#### 42.2.2 If the Contractor

- (a) has abandoned or repudiated the Contract
- (b) has without valid reason failed to commence work on the Facilities promptly or has suspended, other than pursuant to GCC Sub-Clause 41.2, the progress of Contract performance for more than 28 days after receiving a written instruction from the Employer to proceed or refuses or is unable to provide sufficient materials, services or labor to execute and complete the Facilities in a manner to achieve the Schedule of

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Payment Milestones that are to be paid using the Contractor's Investment.

- (c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause
- (d) refuses or is unable to provide sufficient materials, services or labor to execute and complete the Facilities in the manner specified in the program furnished under GCC Sub-Clause 18.2 at rates of progress that give reasonable assurance to the Employer that the Contractor can attain Operational Acceptance of the Facilities by the Time for Operational Acceptance as extended,

then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the Contractor fails to remedy or to take steps to remedy the same within 14 days of its receipt of such notice, then the Employer may terminate the Contract forthwith by giving a notice of termination to the Contractor that refers to this GCC Sub-Clause 42.2.

42.2.3 Upon receipt of the notice of termination under GCC Sub-Clauses 42.2.1 or 42.2.2, the Contractor shall, either immediately or upon such date as is specified in the notice of termination,

- (a) cease all further work, except for such work as the Employer may specify in the notice of termination for the sole purpose of protecting that part of the Facilities already executed, or any work required to leave the Site in a clean and safe condition
- (b) terminate all subcontracts, except those to be assigned to the Employer pursuant to paragraph (d) below
- (c) deliver to the Employer the parts of the Facilities executed by the Contractor up to the date of termination
- (d) to the extent legally possible, assign to the Employer all right, title and benefit of the Contractor to the Facilities and to the Plant as of the date of termination, and, as may be required by the Employer, in any subcontracts concluded between the Contractor and its Subcontractors
- (e) deliver to the Employer all drawings, specifications and other documents prepared by the Contractor or its Subcontractors as of the date of termination in connection with the Facilities.

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42.2.4 The Employer may enter upon the Site, expel the Contractor, and complete the Facilities itself or by employing any third party. The Employer may, to the exclusion of any right of the Contractor over the same, take over and use with the payment of a fair rental rate to the Contractor, with all the maintenance costs to the account of the Employer and with an indemnification by the Employer for all liability including damage or injury to persons arising out of the Employer's use of such equipment, any Contractor's Equipment owned by the Contractor and on the Site in connection with the Facilities for such reasonable period as the Employer considers expedient for the supply and installation of the Facilities.

Upon Operational Acceptance of the Facilities or at such earlier date as the Employer thinks appropriate, the Employer shall give notice to the Contractor that such Contractor's Equipment will be returned to the Contractor at or near the Site and shall return such Contractor's Equipment to the Contractor in accordance with such notice. The Contractor shall thereafter without delay and at its cost remove or arrange removal of the same from the Site.

42.2.5 Subject to GCC Sub-Clause 42.2.6, the Contractor shall be entitled to be paid the Contract Price attributable to the Facilities executed as of the date of termination, the value of any unused or partially used Plant on the Site, and the costs, if any, incurred in protecting the Facilities and in leaving the Site in a clean and safe condition pursuant to paragraph (a) of GCC Sub-Clause 42.2.3. Any sums due the Employer from the Contractor accruing prior to the date of termination shall be deducted from the amount to be paid to the Contractor under this Contract.

42.2.6 If the Employer completes the Facilities, the cost of completing the Facilities by the Employer shall be determined.

If the sum that the Contractor is entitled to be paid, pursuant to GCC Sub-Clause 42.2.5, plus the reasonable costs incurred by the Employer in completing the Facilities, exceeds the Contract Price, the Contractor shall be liable for such excess.

If such excess is greater than the sums due the Contractor under GCC Sub-Clause 42.2.5, the Contractor shall pay the balance to the Employer, and if such excess is less than the sums due the Contractor under GCC Sub-Clause 42.2.5, the Employer shall pay the balance to the Contractor.

The Employer and the Contractor shall agree, in writing, on the computation described above and the manner in which any sums shall be paid.

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### 42.3 Termination by Contractor

#### 42.3.1 If

- (a) the Employer has failed to pay the Contractor any sum due under the Contract within the specified period, has failed to approve any invoice or supporting documents without just cause pursuant to the Appendix (Terms and Procedures of Payment) to the Contract Agreement, or commits a substantial breach of the Contract, the Contractor may give a notice to the Employer that requires payment of such sum, with interest thereon as stipulated in GCC Sub-Clause 12.3, requires approval of such invoice or supporting documents, or specifies the breach and requires the Employer to remedy the same, as the case may be. If the Employer fails to pay such sum together with such interest, fails to approve such invoice or supporting documents or give its reasons for withholding such approval, fails to remedy the breach or take steps to remedy the breach within 14 days after receipt of the Contractor's notice, or
- (b) the Contractor is unable to carry out any of its obligations under the Contract for any reason attributable to the Employer, including but not limited to the Employer's failure to provide possession of or access to the Site or other areas or failure to obtain any governmental permit necessary for the execution and/or Operational Acceptance of the Facilities,

then the Contractor may give a notice to the Employer thereof, and if the Employer has failed to pay the outstanding sum, to approve the invoice or supporting documents, to give its reasons for withholding such approval, or to remedy the breach within 28 days of such notice, or if the Contractor is still unable to carry out any of its obligations under the Contract for any reason attributable to the Employer within 28 days of the said notice, the Contractor may by a further notice to the Employer referring to this GCC Sub-Clause 42.3.1, forthwith terminate the Contract.

42.3.2 The Contractor may terminate the Contract forthwith by giving a notice to the Employer to that effect, referring to this GCC Sub-Clause 42.3.2, if the Employer becomes bankrupt or insolvent, has a receiving order issued against it, compounds with its creditors, or, being a corporation, if a resolution is passed or order is made for its winding up (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), a receiver is appointed over any part of its undertaking or assets, or if the Employer takes or suffers any other analogous action in consequence of debt.

42.3.3 If the Contract is terminated under GCC Sub-Clauses 42.3.1

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or 42.3.2, then the Contractor shall immediately

- (a) cease all further work, except for such work as may be necessary for the purpose of protecting that part of the Facilities already executed, or any work required to leave the Site in a clean and safe condition
- (b) terminate all subcontracts, except those to be assigned to the Employer pursuant to paragraph (d) (ii)
- (c) remove all Contractor's Equipment from the Site and repatriate the Contractor's and its Subcontractors' personnel from the Site, and
- (d) subject to the payment specified in GCC Sub-Clause 42.3.4,
  - (i) deliver to the Employer the parts of the Facilities executed by the Contractor up to the date of termination
  - (ii) to the extent legally possible, assign to the Employer all right, title and benefit of the Contractor to the Facilities and to the Plant as of the date of termination, and, as may be required by the Employer, in any subcontracts concluded between the Contractor and its Subcontractors, and
  - (iii) deliver to the Employer all drawings, specifications and other documents prepared by the Contractor or its Subcontractors as of the date of termination in connection with the Facilities.

42.3.4 If the Contract is terminated under GCC Sub-Clauses 42.3.1 or 42.3.2, the Employer shall pay to the Contractor all payments specified in GCC Sub-Clause 42.1.3 and reasonable compensation for all loss, except for loss of profit, or damage sustained by the Contractor arising out of, in connection with or in consequence of such termination.

42.3.5 Termination by the Contractor pursuant to this GCC Sub-Clause 42.3 is without prejudice to any other rights or remedies of the Contractor that may be exercised in lieu of or in addition to rights conferred by GCC Sub-Clause 42.3.

42.4 In this GCC Clause 42, the expression "Facilities executed" shall include all work executed, Installation Services provided, and all Plant acquired, or subject to a legally binding obligation to purchase, by the Contractor and used or intended to be used for the purpose of the Facilities, up to and including the date of termination.

42.5 In this GCC Clause 42, in calculating any monies due from the Employer to the Contractor, account shall be taken of any sum previously paid by the Employer to the Contractor under the Contract,



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including any certified payments that Contractor has paid for from the Contractor's Investment pursuant to the Appendix (Terms and Procedures of Payment) to the Contract Agreement.

**43. Assignment**

43.1 Neither the Employer nor the Contractor shall, without the express prior written consent of the other party which consent shall not be unreasonably withheld, assign to any third party the Contract or any part thereof, or any right, benefit, obligation or interest therein or thereunder, except that the Contractor shall be entitled to assign either absolutely or by way of charge any monies due and payable to it or that may become due and payable to it under the Contract.

**I. Claims, Disputes and Arbitration****44. Contractor's Claims**

44.1 If the Contractor considers himself to be entitled to any extension of the Time for Operational Acceptance and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall submit a notice to the Project Manager, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

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

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

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

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

(a) this fully detailed claim shall be considered as interim;

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

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

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

The Project Manager shall agree with the Contractor or estimate: (i) the extension (if any) of the Time for Operational Acceptance (before or after its expiry) in accordance with GCC Clause 40, and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

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

In the event that the Contractor and the Employer cannot agree on any matter relating to a claim, either party may refer the matter to the Dispute Board pursuant to GCC 45 hereof.

#### **45. Disputes and Arbitration**

##### **45.1 Appointment of the Dispute Board**

Disputes shall be referred to a DB for decision in accordance with GCC Sub-Clause 45.3. The Parties shall appoint a DB by the date stated in the SCC.

The DB shall comprise, as stated in the SCC, either one or three suitably qualified persons (“the members”), each of whom shall be fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of activities involved in the performance of the Contract and with the interpretation of contractual documents. If the number is not so stated and the Parties do not agree otherwise, the DB shall comprise three persons, one of whom shall serve as chairman.

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If the Parties have not jointly appointed the DB 21 days before the date stated in the SCC and the DB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The first two members shall recommend and the Parties shall agree upon the third member, who shall act as chairman.

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

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

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

If a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause.

The appointment of any member may be terminated by mutual agreement of both Parties, but not by the Employer or the Contractor acting alone. Unless otherwise agreed by both Parties, the appointment of the DB (including each member) shall expire when the Operational Acceptance Certificate has been issued in accordance with GCC Clause 25.4.

#### 45.2 Failure to Agree Dispute Board

If any of the following conditions apply, namely:

- (a) the Parties fail to agree upon the appointment of the sole member of the DB by the date stated in the first paragraph of GCC Sub-Clause 45.1,
- (b) either Party fails to nominate a member (for approval by the other Party) of a DB of three persons by such date,
- (c) the Parties fail to agree upon the appointment of the third member (to act as chairman) of the DB by such date, or
- (d) the Parties fail to agree upon the appointment of a replacement person within 42 days after the date on which the sole member or one of the three members declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing entity or official named in the SCC shall, upon the request of either or both of the Parties and after due consultation with both Parties, appoint this member of the DB. This

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appointment shall be final and conclusive. Each Party shall be responsible for paying one-half of the remuneration of the appointing entity or official.

#### 45.3 Obtaining Dispute Board's Decision

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

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

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

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

If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction and intention to commence arbitration. If the DB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction and intention to commence arbitration.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. Except as stated in GCC Sub-Clauses 45.6 and 45.7, neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause.

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

#### 45.4 Amicable Settlement

Where notice of dissatisfaction has been given under GCC Sub-Clause 45.3 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction and intention to commence arbitration was given, even if no attempt at amicable settlement has been made.

#### 45.5 Arbitration

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

- (a) arbitration proceedings shall be conducted as stated in the Special Conditions,
- (b) if no arbitration proceedings is so stated, the dispute shall be finally settled by institutional arbitration under the Rules of Arbitration of the International Chamber of Commerce,
- (c) the dispute shall be settled by three arbitrators, and
- (d) the arbitration shall be conducted in the language for communications defined in GCC Sub-Clause 5.3.

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

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

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

#### 45.6 Failure to Comply with Dispute Board's Decision

In the event that a Party fails to comply with a DB decision which has become final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under GCC Sub-Clause 45.5. GCC Sub-Clauses 45.3 and 45.4 shall not apply to this reference.

#### 45.7 Expiry of Dispute Board's Appointment

If a dispute arises between the Parties in connection with the performance of the Contract, and there is no DB in place, whether

by reason of the expiry of the DB's appointment or otherwise:

- (a) GCC Sub-Clauses 45.3 and 45.4 shall not apply, and
- (b) the dispute may be referred directly to arbitration under GCC Sub-Clause 45.5

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## APPENDIX A

### General Conditions of Dispute Board Agreement

#### 1 Definitions

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

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

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

#### 2 General Provisions

Unless otherwise stated in the Dispute Board Agreement, it shall take effect on the latest of the following dates:

- (a) the Commencement Date defined in the Contract,
- (b) when the Employer, the Contractor and the Member have each signed the Dispute Board Agreement, or
- (c) when the Employer, the Contractor and each of the Other Members (if any) have respectively each signed a dispute board agreement.

This employment of the Member is a personal appointment. At any time, the Member may give not less than 70 days' notice of resignation to the Employer and to the Contractor, and the Dispute Board Agreement shall terminate upon the expiry of this period.

#### 3 Warranties

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

When appointing the Member, the Employer and the Contractor relied upon the Member's representations that he/she is:

- (a) experienced in the work which the Contractor is to carry out under the Contract,
- (b) experienced in the interpretation of contract documentation, and
- (c) fluent in the language for communications defined in the Contract.

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#### **4 General Obligations of the Member**

The Member shall:

- (a) have no interest financial or otherwise in the Employer, the Contractor or the Project Manager, nor any financial interest in the Contract except for payment under the Dispute Board Agreement;
- (b) not previously have been employed as a consultant or otherwise by the Employer, the Contractor or the Project Manager, except in such circumstances as were disclosed in writing to the Employer and the Contractor before they signed the Dispute Board Agreement;
- (c) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before entering into the Dispute Board Agreement and to his/her best knowledge and recollection, any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Project Manager, and any previous involvement in the overall project of which the Contract forms part;
- (d) not, for the duration of the Dispute Board Agreement, be employed as a consultant or otherwise by the Employer, the Contractor or the Project Manager, except as may be agreed in writing by the Employer, the Contractor and the Other Members (if any);
- (e) comply with the annexed procedural rules and with GCC Sub-Clause 45.3;
- (f) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, other than in accordance with the annexed procedural rules;
- (g) not while a Member enter into discussions or make any agreement with the Employer, the Contractor or the Project Manager regarding employment by any of them, whether as a consultant or otherwise, after ceasing to act under the Dispute Board Agreement;
- (h) ensure his/her availability for all site visits and hearings as are necessary;
- (i) become conversant with the Contract and with the progress of the Facilities (and of any other parts of the project of which the Contract forms part) by studying all documents received which shall be maintained in a current working file;
- (j) treat the details of the Contract and all the DB's activities and hearings as private and confidential, and not publish or disclose them without the prior written consent of the Employer, the Contractor and the Other Members (if any); and
- (k) be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any).

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

The Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the Member regarding the Contract, otherwise than in the normal course of the DB's activities under the Contract and the Dispute Board Agreement. The Employer and the Contractor shall be responsible for compliance with this provision, by the Employer's Personnel and the Contractor's Personnel respectively.

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



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

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

Whenever the Employer or the Contractor refers a dispute to the DB under GCC Sub-Clause 45.3, which will require the Member to make a site visit and attend a hearing, the Employer or the Contractor shall provide appropriate security for a sum equivalent to the reasonable expenses to be incurred by the Member. No account shall be taken of any other payments due or paid to the Member.

## **6 Payment**

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

- (a) a retainer fee per calendar month, which shall be considered as payment in full for:
  - (i) being available on 28 days' notice for all site visits and hearings;
  - (ii) becoming and remaining conversant with all project developments and maintaining relevant files;
  - (iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and
  - (iv) all services performed hereunder except those referred to in sub-paragraphs (b) and (c) of this Clause.

The retainer fee shall be paid with effect from the last day of the calendar month in which the Dispute Board Agreement becomes effective; until the last day of the calendar month in which the Taking-Over Certificate is issued for the whole of the Works.

With effect from the first day of the calendar month following the month in which Taking-Over Certificate is issued for the whole of the Works, the retainer fee shall be reduced by one third. This reduced fee shall be paid until the first day of the calendar month in which the Member resigns or the Dispute Board Agreement is otherwise terminated.

- (b) a daily fee which shall be considered as payment in full for:
  - (i) each day or part of a day up to a maximum of 2 days' travel time in each direction for the journey between the Member's home and the site, or another location of a meeting with the Other Members (if any);
  - (ii) each working day on site visits, hearings or preparing decisions; and
  - (iii) each day spent reading submissions in preparation for a hearing.
- (c) all reasonable expenses including necessary travel expenses (air fare in less than first class, hotel and subsistence and other direct travel expenses) incurred in connection with the Member's duties, as well as the cost of telephone calls, courier charges, faxes

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and telexes: a receipt shall be required for each item in excess of five percent of the daily fee referred to in sub-paragraph (b) of this Clause;

- (d) any taxes properly levied in the Country on payments made to the Member (unless a national or permanent resident of the Country) under this Clause 6.

The retainer and daily fees shall be as specified in the Dispute Board Agreement. Unless it specifies otherwise, these fees shall remain fixed for the first 24 calendar months, and shall thereafter be adjusted by agreement between the Employer, the Contractor and the Member, at each anniversary of the date on which the Dispute Board Agreement became effective.

If the parties fail to agree on the retainer fee or the daily fee the appointing entity or official named in the SCC shall determine the amount of the fees to be used.

The Member shall submit invoices for payment of the monthly retainer and air fares quarterly in advance. Invoices for other expenses and for daily fees shall be submitted following the conclusion of a site visit or hearing. All invoices shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor.

The Contractor shall pay each of the Member's invoices in full within 56 calendar days after receiving each invoice and shall apply to the Employer (in the Statements under the Contract) for reimbursement of one-half of the amounts of these invoices. The Employer shall then pay the Contractor in accordance with the Contract.

If the Contractor fails to pay to the Member the amount to which he/she is entitled under the Dispute Board Agreement, the Employer shall pay the amount due to the Member and any other amount which may be required to maintain the operation of the DB; and without prejudice to the Employer's rights or remedies. In addition to all other rights arising from this default, the Employer shall be entitled to reimbursement of all sums paid in excess of one-half of these payments, plus all costs of recovering these sums and financing charges calculated at the rate specified in accordance with GCC Sub-Clause 12.3.

If the Member does not receive payment of the amount due within 70 days after submitting a valid invoice, the Member may (i) suspend his/her services (without notice) until the payment is received, and/or (ii) resign his/her appointment by giving notice under Clause 7.

## **7 Termination**

At any time: (i) the Employer and the Contractor may jointly terminate the Dispute Board Agreement by giving 42 days' notice to the Member; or (ii) the Member may resign as provided for in Clause 2.

If the Member fails to comply with the Dispute Board Agreement, the Employer and the Contractor may, without prejudice to their other rights, terminate it by notice to the Member. The notice shall take effect when received by the Member.

If the Employer or the Contractor fails to comply with the Dispute Board Agreement, the Member may, without prejudice to his other rights, terminate it by notice to the Employer and the Contractor. The notice shall take effect when received by them both.

Any such notice, resignation and termination shall be final and binding on the Employer, the Contractor and the Member. However, a notice by the Employer or the Contractor, but not by both, shall be of no effect.

**8 Default of the Member**

If the Member fails to comply with any of his obligations under Clause 4 concerning his impartiality or independence in relation to the Employer or the Contractor, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse each of the Employer and the Contractor for any fees and expenses received by the Member and the Other Members (if any), for proceedings or decisions (if any) of the DB which are rendered void or ineffective by the said failure to comply.

**9 Disputes**

Any dispute or claim arising out of or in connection with this Dispute Board Agreement, or the breach, termination or invalidity thereof, shall be finally settled by institutional arbitration. If no other arbitration institute is agreed, the arbitration shall be conducted under the Rules of Arbitration of the International Chamber of Commerce by one arbitrator appointed in accordance with these Rules of Arbitration.

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### **Annex - DISPUTE BOARD GUIDELINES**

1. Unless otherwise agreed by the Employer and the Contractor, the DB shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or the Contractor. Unless otherwise agreed by the Employer, the Contractor and the DB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing as described below.
2. The timing of and agenda for each site visit shall be as agreed jointly by the DB, the Employer and the Contractor, or in the absence of agreement, shall be decided by the DB. The purpose of site visits is to enable the DB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and, as far as reasonable, to prevent potential problems or claims from becoming disputes.
3. Site visits shall be attended by the Employer, the Contractor and the Project Manager and shall be co-ordinated by the Employer in co-operation with the Contractor. The Employer shall ensure the provision of appropriate conference facilities and secretarial and copying services. At the conclusion of each site visit and before leaving the site, the DB shall prepare a report on its activities during the visit and shall send copies to the Employer and the Contractor.
4. The Employer and the Contractor shall furnish to the DB one copy of all documents which the DB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DB and the Employer or the Contractor shall be copied to the other Party. If the DB comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.
5. If any dispute is referred to the DB in accordance with GCC Sub-Clause 45.3, the DB shall proceed in accordance with GCC Sub-Clause 45.3 and these Guidelines. Subject to the time allowed to give notice of a decision and other relevant factors, the DB shall:
  - (a) act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case, and
  - (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense.
6. The DB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing.
7. Except as otherwise agreed in writing by the Employer and the Contractor, the DB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Project Manager, and to proceed in the absence of any party who the DB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.
8. The Employer and the Contractor empower the DB, among other things, to:
  - (a) establish the procedure to be applied in deciding a dispute,
  - (b) decide upon the DB's own jurisdiction, and as to the scope of any dispute referred to it,
  - (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Guidelines,

- (d) take the initiative in ascertaining the facts and matters required for a decision,
  - (e) make use of its own specialist knowledge, if any,
  - (f) decide upon the payment of financing charges in accordance with the Contract,
  - (g) decide upon any provisional relief such as interim or conservatory measures,
  - (h) open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Project Manager, relevant to the dispute, and
  - (i) appoint, should the DB so consider necessary and the Parties agree, a suitable expert at the cost of the Parties to give advice on a specific matter relevant to the dispute.
9. The DB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DB shall make and give its decision in accordance with GCC Sub-Clause 45.3, or as otherwise agreed by the Employer and the Contractor in writing. If the DB comprises three persons:
- (a) it shall convene in private after a hearing, in order to have discussions and prepare its decision;
  - (b) it shall endeavour to reach a unanimous decision: if this proves impossible the applicable decision shall be made by a majority of the Members, who may require the minority Member to prepare a written report for submission to the Employer and the Contractor; and
  - (c) if a Member fails to attend a meeting or hearing, or to fulfil any required function, the other two Members may nevertheless proceed to make a decision, unless:
    - (i) either the Employer or the Contractor does not agree that they do so, or
    - (ii) the absent Member is the chairman and he/she instructs the other Members to not make a decision.

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## Section 7 - Special Conditions of Contract

The following Special Conditions of Contract (SCC) shall supplement the General Conditions of Contract (GCC). Whenever there is a conflict, the provisions herein shall prevail over those in the GCC. The clause number of the SCC is the corresponding clause number of the GCC.

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## 1. Definitions

The Employer is: Bangladesh-China Power Company (Pvt.) Limited (BCPCL)

The Employer's Country is: People's Republic of Bangladesh

The Project Manager is: Project Director, Payra 2 x 660MW Coal Based Power Plant appointed by the Employer

## 5. Law and Language

5.1 The Contract shall be interpreted in accordance with the laws of: People's Republic of Bangladesh

5.2 The ruling language is: English

5.3 The language for communications is: English

## 7. Scope of Facilities

7.3 The Contractor agrees to supply mandatory, essential and consumable spare parts, all raw materials, utilities, lubricants, filters, chemicals, catalysts, other materials and facilities; and shall perform all work and services of whatsoever nature for the operation and maintenance of the Facilities up to the Final Acceptance.

7.4 Add the following new GCC Sub-clause 7.4.

The Contractor agrees to ensure the availability of spare parts for a period of ten (10) years from the Final Acceptance. The Contractor shall execute agreements with his sub-contractors/manufacturers for sufficient inventories to ensure an ex-stock supply of spares parts for the Plant.

## 8. Time for Commencement and Completion

8.1 The Contractor shall commence work on the Facilities immediately from the Effective Start Date for determining Time for Operational Acceptance as specified in the Contract Agreement.

8.2 The Time for Operational Acceptance for Unit 1 shall be 1126 days and of the whole of the Facilities including Unit 2 shall be 1309 days from the Effective Start Date as described in the Contract Agreement.

## 10. Employer's Responsibilities

10.1 Add the following sentence at the end:

However, the Contractor shall review and check the Employer's Requirements including all information and/or data supplied by the Employer and shall report immediately any discrepancy, ambiguity, error, problems and likes found to the Project Manager. After receipt of the report, the Project Manager shall decide whether GCC 39 (Change in the Facilities) is applicable or not.

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## 11. Contract Price

- 11.2 The Contract Price shall be adjusted in accordance with the provisions of the Appendix 2 (Price Escalation) to the Contract Agreement.

## 13. Securities

- 13.1 Add the following paragraph at the end:  
Security shall be issued by a Scheduled Bank in Bangladesh. In case issued by a foreign bank, it shall be endorsed by a Scheduled Bank of Bangladesh.
- 13.3.1 The amount of performance security, as a percentage of the Contract Price for the Facility, shall be: 10% of the Contract Price
- 13.3.2 The performance security shall be in the form of "Performance Security Form – Bank Guarantee" as per form included in Section 5 (Employer's Requirements, Bank Guarantees and Certificates).
- 13.3.3 Replace 365 days with 730 days.

## 14. Taxes and Duties

- 14.1 Add the following paragraph at the end:  
The Contractor shall get himself acquainted with the relevant Bangladesh laws as well as the import policy of the Government of People's Republic of Bangladesh remaining in force regarding import of banned items, if any, during the execution of the Contract. In case of import of any banned items and/or contraband item, the consequential effect shall rest with the Contractor. Similarly the Contractor shall be responsible for any nonconformance of Bangladesh laws either by his own employees or any of the employees of his Subcontractors during execution of the Contract.
- 14.3 Add the following paragraph at the end:  
The Contractor shall be entirely responsible for all Bangladesh custom and import duties, VAT, taxes and all other levies imposed under applicable law of Bangladesh for importation of the Contractor's construction equipment, tools and materials required for implementation of the Contract in Bangladesh which shall be imported on the condition to be exported after completion of the work, if the same are not exempted from such taxes, VAT & levies. The Employer shall assist to the Contractor to obtain exemption from NBR (National Board of Revenue) or CCIE (Chief Controller of Import & Export) for import of the Contractor's equipment and materials on the basis of re-export.
- 14.5 Add new Clause 14.5  
The Contractor shall be responsible to pay Income Tax & VAT for the local currency portion of the contract price at the prevailing rule of the Government which shall be deducted at source during payment of bills for onward deposition into Government Treasury.  
The Employer shall be responsible to pay Income Tax & VAT for the foreign currency portion of the Contract Price.
- 14.6 Add new Clause 14.6:  
Customs and Import Duties, Levies and all other Charges for permanent materials of



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the Project

The Contractor shall obtain all import permits or licenses required for any part of the work within the times stated in the program or if not so stated, in reasonable time having regard to the time for delivery of the work and the Time for Operational Acceptance. The Employer shall pay all Bangladesh customs duties (CD), Advance Income Tax (AIT), Value Added Tax (VAT) and all other levies arising from the importation of all permanent material and equipment (quoted under Plant to be supplied from abroad (Schedule No. 1)) under the Contract, The Employer shall provide its extreme effort to pay such taxes in a timely manner to avoid any extra cost thereon. The Contractor shall submit to the Employer 5 (five) copies of non-negotiable shipping document ahead of shipment for arranging payment of such charges & clearing of the materials in time.

The Employer shall not bear any expenditure on account of import of normal cement, sand, stones and rebar, if any, by the Contractor. Normally, equipment and materials that will be incorporated in the permanent works shall be transported by vessel.

If the Contractor decides to air freight any items, the excess customs duty to be levied by customs authorities and excess freight on account of air freight shall be borne by the Contractor.

All payment for clearance charge, storage charge, etc. (excluding charge, fees, etc. claimed by Clearing Agents, if any) which are imposed by the relevant agencies of the Government of Bangladesh, relating to the clearance of equipment and materials that will be incorporated in the Permanent Works shall be made by the Employer subject to the Condition that if the Contractor makes delay in submitting necessary shipping documents to the Employer, the demurrage charges by the Port Authority will be borne by the Contractor.

Tools and equipment for use during construction but which are to remain the property of the Contractor and which are to be re-exported by the Contractor from Bangladesh at the completion of the Work shall be carefully documented and specially listed to facilitate both import and export. The Contractor shall determine prior to shipment the customs regulations applicable to this special case as well as normal import rules and regulations applicable.

The Contractor shall also be responsible for inland transport by barge/ truck/train to the Site.

**14.7** Add new Clause 14.7:

The Contractor shall pay all sales, income and other taxes and duties, tariffs and imports that can be lawfully assessed against the Contractor by the any lawful authority of any country other than the People's Republic of Bangladesh which has jurisdiction over the Contractor in connection with this Contract and shall pay for all licenses permits and inspection required for the work including the cost of securing the Project, export licenses and permits for materials, equipment, supplies and personnel exported from that country to Bangladesh.

**20. Design and Engineering****20.3.1** Add the following paragraph at the end:

The Contractor shall submit the document for approval to the Project Manager with notice which says that the document is prepared in accordance with the Contract except the item specifically highlighted as deviated from the Contract.

**21. Procurement****21.4** Add the following at the end:

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The Contractor shall appoint a clearing & forwarding agent. The clearing & forwarding commission is the Contractor's responsibility.

Port demurrage shall be the Contractor's responsibility if delay is due to late submission of clearing documents by the Contractor.

The Contractor shall be responsible for Bangladesh customs clearance of all materials, supplies, equipment, tools and other articles shipped into Bangladesh by the Contractor for the accomplishment of the Contract, including the food and the personal effect of the Contractor's personnel. This customs clearance will take place at the Bangladesh port (Chittagong/Mongla), or at the International Airport at Dhaka. The Employer will, however, pay import duties (custom duties, VAT etc.), excise duty, import permit fees and all other taxes leviable in Bangladesh on only the equipment and materials that will be incorporated in the Plant (as distinct from the Contractor's Equipment, tools, spares, consumables, etc.). The Employer will help the Contractor to obtain necessary import permits and licenses required for customs clearance.

All payment for clearance charge, storage charge, etc. (excluding charge, fees, etc. claimed by clearing agents, if any) which are imposed by the relevant agencies of the Government of Bangladesh, relating to the clearance of equipment and materials that will be incorporated in the Plant shall be made by the Employer subject to the condition that if the Contractor makes delay in submitting necessary shipping documents to the Employer, the demurrage charges by the Port Authority will be borne by the Contractor. Tools and equipment for use during construction but which are to remain the property of the Contractor and which are to be exported by the Contractor from Bangladesh at the completion of the Facilities shall be carefully documented and specially listed to facilitate both import and export. The Contractor shall determine prior to shipment the customs regulations applicable to this special case as well as normal import rules and regulations applicable. The Contractor shall also be responsible for inland transport by barge/ truck/train to the Site.

## **22. Installation**

**22.2.5** Normal working hours are: Sunday to Thursday, 9:00 am to 5:00 pm

## **25. Commissioning and Operational Acceptance**

**25.4.1 (b)** The Guarantee Test of the Facilities shall be successfully completed within six (6) months from the date of Mechanical Completion.

## **26. Completion Time Guarantee**

**26.2** Applicable rate for liquidated damages: 0.1% (one tenth of one percent) of the Contract Price per day

Maximum deduction for liquidated damages: 10% of the Contract Price

**26.3** No bonus will be given for earlier Completion of the Facilities or part thereof.

## **30. Limitation of Liability**

**30.1 (b)** The multiplier of the Contract Price is: 100% of the Contract Price

## **34. Insurance**

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The Employer prefer that all insurance taken out in Bangladesh be with Sadharan Bima Corporation of Bangladesh but the issue will be subject to negotiation during pre-contract discussion.

**34.1 (g)** The Contractor is required to take out professional indemnity insurance, which shall insure the Contractor's liability by reasons of professional negligence in the design of the Facilities.

**34.8** Add new Clause 34.8 as below:

The existing Import Act including Insurance Act and related acts of the Government of Bangladesh shall be followed by the Contractor.

## **39. Change in Facilities**

**39.1.1** Add the following at the end:

In design and drawing execution, the Contractor shall take utmost care with respect to standard codes, normal practice and safety so that change in the Contract is minimized

## **41. Suspension**

**41.2 (c)** The number of days shall be seventy (70) days

## **45. Disputes and Arbitration**

**45.1** The DB shall be appointed within twenty eight (28) days after the Effective Start Date.

The number of DB member shall be mutually agreed considering the nature of disputes.

**45.2** In case of the Contract with an international Contractor, appointment (if not agreed) to be made by the President of FIDIC (International Federation of Consulting Engineer). In case of the Contract with a domestic contractor by the President of the Institutes of Engineers, Bangladesh

**45.5** Rules of procedure for arbitration proceedings:

- (a) Contracts with foreign contractors: if the Contract is with foreign Contractors (or if the lead partner is a foreign Contractor, in case of a JV), international arbitration with proceedings administered by the International Chamber of Commerce (ICC) and conducted under the ICC Rules of Arbitration, by one or more arbitrators appointed in accordance with said arbitration rules.
- (b) Contracts with contractors being nationals of the Employer's country: if the Contract is with domestic Contractors, arbitration with proceedings conducted in accordance with the laws of the Employer's country.

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## Section 8 - Contract Forms

This Section contains the Letter of Acceptance, the Contract Agreement and Appendices to the Contract Agreement which, once completed, will form part of the Contract.

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# Notification of Award

[ Employer's letter head ]

## Letter of Acceptance

[ date ]

To: [ Name and address of the Contractor ]

This is to notify you that your Bid consisting of the Technical and Price Bids dated [date] for execution of the [ name of the Contract and identification number, as given in the Contract Data ] for the Contract Price in the aggregate of [ amounts in numbers and words ] [ name of currency ], as corrected and modified in accordance with the Instructions to Bidders is hereby accepted by our Agency.

You are requested to furnish the Performance Security within 28 days in accordance with the Conditions of Contract, using for that purpose one of the Performance Security Forms included in Section 9 (Contract Forms) of the Bidding Document

[ Authorized Signature ]  
[ Name and Title of Signatory ]  
[ Name of Agency ]

Attachment: Contract Agreement

# Contract Agreement

THIS AGREEMENT made the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_,

BETWEEN

(1) [ *name of Employer* ], a corporation incorporated under the laws of [ *country of Employer* ] and having its principal place of business at [ *address of Employer* ] (hereinafter called "the Employer"), and (2) [ *name of Contractor* ], a corporation incorporated under the laws of [ *country of Contractor* ] and having its principal place of business at [ *address of Contractor* ] (hereinafter called "the Contractor").

WHEREAS the Employer desires to engage the Contractor to design, manufacture, test, deliver, install, complete and commission certain Facilities, viz. [ *list of facilities* ] ("the Facilities") and the Contractor have agreed to such engagement upon and subject to the terms and conditions hereinafter appearing.

NOW IT IS HEREBY AGREED as follows:

## Article 1 Contract Documents

### 1.1 Contract Documents (Reference GCC Clause 2)

The following documents shall constitute the Contract between the Employer and the Contractor, and each shall be read and construed as an integral part of the Contract:

- a) This Contract Agreement and the Appendices hereto
- b) Letter of Price Bid and Price Schedules submitted by the Contractor
- c) Special Conditions of Contract
- d) General Conditions of Contract
- e) Notification of Award (NOA)
- f) Pre-NOA Discussion Notes
- g) Addendums and Clarifications
- h) Technical Specifications and Drawings (Section 5 Employer's Requirements)
- i) Letter of Technical Bid and Technical Proposal submitted by the Contractor
- j) Other completed Bidding Forms submitted with the Letters of Technical and Price Bids
- k) Any other documents shall be added here

### 1.2 Order of Precedence (Reference GCC Clause 2)

In the event of any ambiguity or conflict between the Contract Documents listed above, the order of precedence shall be the order in which the Contract Documents are listed in Article 1.1 (Contract Documents) above.

### 1.3 Definitions (Reference GCC Clause 1)

Capitalized words and phrases used herein shall have the same meanings as are ascribed to them in the General Conditions.

## Article 2 Contract Price and Terms of Payment

### 2.1 Contract Price (Reference GCC Clause 11)

The Employer hereby agrees to pay to the Contractor the Contract Price in consideration of the performance by the Contractor of its obligations hereunder. The Contract Price shall be the aggregate of: [. . . *amounts of foreign currency in words* . . . ], [. . . *amounts in figures*. . . ] as specified in Price Schedule No. 5 (Grand Summary), [. . . *amounts of local currency in words* . . . ], [. . . *amounts in figures*. . . ], or such other sums as may be determined in accordance with the terms and

conditions of the Contract.

**2.2 Terms of Payment** (Reference GCC Clause 12)

The terms and procedures of payment according to which the Employer will reimburse the Contractor are given in the Appendix (Terms and Procedures of Payment) hereto.

Within sixty (60) days after the Financial Closure, the Employer shall instruct its bank to issue an irrevocable documentary credit made available to the Contractor in a bank in the country of the Contractor. Confirmation of the documentary credit, if required by the Contractor, shall be done by the Contractor at his expense. The credit shall be for an amount of [*amount equal to the foreign currency(s) total named in Article 2.1*]; and shall be subject to the Uniform Customs and Practice for Documentary Credits 2007 Revision, ICC Publication No. 600.

In the event that the foreign currency amount payable under Article 2.1 is adjusted in accordance with GCC 11.2 or with any of the other terms of the Contract, the Employer shall arrange for the documentary credit to be amended accordingly

**Article 3  
Effective Start Date**

**3.1 Effective Start Date** (Reference GCC Clause 1)

The Effective Start Date upon which the period until the Time for Completion of the Facilities shall be counted from is the date when all of the following conditions have been fulfilled:

- (a) This Contract Agreement has been duly executed for and on behalf of the Employer and the Contractor;
- (b) The Contractor has submitted to the Employer the performance security;

Each party shall use its best efforts to fulfill the above conditions for which it is responsible as soon as practicable.

- 3.2** If the conditions listed under 3.1 are not fulfilled within 2 months from the date of this Contract notification because of reasons not attributable to the Contractor, the parties shall discuss and agree on an equitable adjustment to the Contract Price and the Time for Completion and/or other relevant conditions of the Contract.

**Article 4  
Communications**

- 4.1** The address of the Employer for notice purposes, pursuant to GCC 4.1 is: [ *Employer's address* ].

- 4.2** The address of the Contractor for notice purposes, pursuant to GCC 4.1 is: [ *Contractor's address* ].

**Article 5.  
Appendices**

- 5.1** The Appendices listed in the attached List of Appendices shall be deemed to form an integral part of this Contract Agreement.

- 5.2** Reference in the Contract to any Appendix shall mean the Appendices attached hereto, and the Contract shall be read and construed accordingly.

IN WITNESS WHEREOF the Employer and the Contractor have caused this Agreement to be duly executed by their duly authorized representatives the day and year first above written.

Signed by, for and on behalf of the Employer

[ *Signature* ]

[ *Title* ]

in the presence of

[ *Signature* ]

[ *Title* ]

Signed by, for and on behalf of the Contractor

[ *Signature* ]

[ *Title* ]

in the presence of

[ *Signature* ]

[ *Title* ]

## **APPENDICES**

- Appendix 1 - Terms and Procedures of Payment
- Appendix 2 - Price Escalation
- Appendix 3 - Insurance Requirements
- Appendix 4 - Time Schedule
- Appendix 5 - List of Major Items of Plant and services and List of Approved Subcontractors
- Appendix 6 - Scope of Works and Supply by the Employer
- Appendix 7 - List of Documents for Approval or Review
- Appendix 8 - Performance Guarantees
- Appendix 9 - Parent Company Guarantee



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## Appendix 1 - Terms and Procedures of Payment

In accordance with the provisions of GCC Clause 12 (Terms of Payment), the Employer shall pay the Contractor in installments on the basis of milestones defined in Schedule of Payment Milestones. Payments will be made in the currencies quoted by the Bidder unless otherwise agreed between the parties.

In the event that the Employer fails to make any payment on its respective due date, the Employer shall pay to the Contractor interest on the amount of such delayed payment at the rate of LIBOR per month for period of delay until payment has been made in full.

### Payment Procedures

The procedures to be followed in applying for certification and making payments shall be as follows:

Foreign currency portion shall be made through Letter of Credit (L/C). The charge for establishment, amendment, prolonging, and payment from L/C within the territory of Bangladesh shall be borne by the Employer and outside Bangladesh shall be borne by the Contractor. However, if the L/C is required to be amended due to causes of the Contractor, the cost of the amendment shall be fully borne by the Contractor.

The Contractor shall not submit any individual claims valued at less than 0.1% of the Contract Price unless approved by the Engineer.

The Contractor shall submit a Statement in two copies to the Engineer, with two copies to the Employer, at the end of each month, in a form approved by the Engineer, showing details of the amounts to which the Contractor considers himself to be entitled, together with supporting documents as stated in Schedule of Payment Milestones, which shall include, unless already submitted, the relevant report on progress in accordance with GCC 18.3.

Thereafter, Engineer shall, within 28 days after receiving a Statement and supporting documents, issue to the Employer and the Contractor a Payment Certificate which shall state the amount which the Engineer fairly determines to be due, with supporting particulars.

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

Within fourteen (14) days, after receipt of each Payment Certificate, Employer shall approve and arrange to make payment as specified below:

Local currency portion will be paid to a Bank Account in Bangladesh.

Payment Certificate for Foreign currency portion will be returned with Statement of Performance to the Contractor for forwarding to the Contractor's bank to request payment from Letter of Credit (L/C).

Payment Certificates for Foreign currency portion, for which the Contractor has paid for from Contractor's Investment, shall be returned with Statement of Performance to the Contractor for forwarding to the Contractor's bank to request for payment from Letter of Credit (L/C) within ten (10) days after establishment of Letter of Credit (L/C).

## Appendix 2 - Price Escalation

Prices payable to the Contractor, in accordance with the Contract, shall be subject to adjustment during performance of the Contract to reflect changes in the cost of labor and material components, in accordance with the following formula:

- a) Steam Turbine and Generator and Auxiliaries (as quoted under Section 4, Schedules of Rates and Prices, Schedule No. 1, Item 1)

$$P_1 = P_0 \times \left( 50\% + 35\% \frac{B_1}{B_0} \times \frac{F1_1}{F1_0} + 15\% \frac{C_1}{C_0} \times \frac{F2_1}{F2_0} \right) - P_0$$

in which:

$P_1$  = adjustment amount payable to the Contractor

$P_0$  = Contract price (base price)

50% = percentage of fixed element in Contract price not subject to Price Escalation

35% = percentage of Steel component in Contract price

15% = percentage of Copper component in Contract price

$B_0, B_1$  = London Metal Exchange (LME) mid day cash settlement prices for Steel on the base date and the date for adjustment, respectively

$F1_0, F1_1$  = number of units of currency of the index which is equivalent to one unit of bid currency based on Exchange Rates published by Bangladesh Bank (Central Bank of Bangladesh) on the base date and the date for adjustment, respectively

$C_0, C_1$  = London Metal Exchange (LME) mid day cash settlement prices for Copper on the base date and the date for adjustment, respectively

$F2_0, F2_1$  = number of units of currency of the index which is equivalent to one unit of bid currency based on Exchange Rates published by Bangladesh Bank (Central Bank of Bangladesh) on the base date and the date for adjustment, respectively

The base date shall be the date thirty (30) days prior to the Bid closing date.

The date of adjustment shall be the date 60 days prior to Shipment Date.

Item	Source of Indices Used	Base Date Indices
Steel	LME	
Copper	LME	

- b) Boiler and Auxiliaries (as quoted under Section 4, Schedules of Rates and Prices, Schedule No. 1, Item 2)

$$P_1 = P_0 \times \left( 45\% + 55\% \frac{B_1}{B_0} \times \frac{F1_1}{F1_0} \right) - P_0$$

in which:

$P_1$  = adjustment amount payable to the Contractor

$P_0$  = Contract price (base price)

45% = percentage of fixed element in Contract price not subject to Price Escalation

55% = percentage of Steel component in Contract price

$B_0, B_1$  = London Metal Exchange (LME) mid day cash settlement prices for Steel on the base date and the date for adjustment, respectively

$F1_0, F1_1$  = number of units of currency of the index which is equivalent to one unit of bid currency based on Exchange Rates published by Bangladesh Bank (Central Bank of Bangladesh) on the base date and the date for adjustment, respectively

The base date shall be the date thirty (30) days prior to the Bid closing date.

The date of adjustment shall be the date 60 days prior to Shipment Date.

Item	Source of Indices Used	Base Date Indices
Steel	LME	

- c) Transformers (as quoted under Section 4, Schedules of Rates and Prices, Schedule No. 1, Item 22)

$$P_1 = P_0 \times \left( 45\% + 15\% \frac{B_1}{B_0} \times \frac{F1_1}{F1_0} + 40\% \frac{C_1}{C_0} \times \frac{F2_1}{F2_0} \right) - P_0$$

in which:

$P_1$  = adjustment amount payable to the Contractor

$P_0$  = Contract price (base price)

45% = percentage of fixed element in Contract price not subject to Price Escalation

15% = percentage of Steel component in Contract price

40% = percentage of Copper component in Contract price

$B_0, B_1$  = London Metal Exchange (LME) mid day cash settlement prices for Steel on the base date and the date for adjustment, respectively

$F1_0, F1_1$  = number of units of currency of the index which is equivalent to one unit of bid currency based on Exchange Rates published by Bangladesh Bank (Central Bank of Bangladesh) on the base date and the date for adjustment, respectively

$C_0, C_1$  = London Metal Exchange (LME) mid day cash settlement prices for Copper on the base date and the date for adjustment, respectively

$F2_0, F2_1$  = number of units of currency of the index which is equivalent to one unit of bid currency based on Exchange Rates published by Bangladesh Bank (Central Bank of Bangladesh) on the base date and the date for adjustment, respectively

The base date shall be the date thirty (30) days prior to the Bid closing date.

The date of adjustment shall be the date 60 days prior to Shipment Date.

Item	Source of Indices Used	Base Date Indices
Steel	LME	
Copper	LME	

- d) 400kV Switchgear (as quoted under Section 4, Schedules of Rates and Prices, Schedule No. 1, Item 24)

$$P_1 = P_0 \times \left( 40\% + 50\% \frac{B_1}{B_0} \times \frac{F1_1}{F1_0} + 10\% \frac{C_1}{C_0} \times \frac{F2_1}{F2_0} \right) - P_0$$

in which:

$P_1$  = adjustment amount payable to the Contractor

$P_0$  = Contract price (base price)

40% = percentage of fixed element in Contract price not subject to Price Escalation

50% = percentage of Steel component in Contract price

10% = percentage of Copper component in Contract price

$B_0, B_1$  = London Metal Exchange (LME) mid day cash settlement prices for Steel on the base date and the date for adjustment, respectively

$F1_0, F1_1$  = number of units of currency of the index which is equivalent to one unit of bid currency based on Exchange Rates published by Bangladesh Bank (Central Bank of Bangladesh) on the base date and the date for adjustment, respectively

$C_0, C_1$  = London Metal Exchange (LME) mid day cash settlement prices for Copper on the base date and the date for adjustment, respectively

$F2_0, F2_1$  = number of units of currency of the index which is equivalent to one unit of bid currency based on Exchange Rates published by Bangladesh Bank (Central

Bank of Bangladesh) on the base date and the date for adjustment, respectively

The base date shall be the date thirty (30) days prior to the Bid closing date.

The date of adjustment shall be the date 60 days prior to Shipment Date.

Item	Source of Indices Used	Base Date Indices
Steel	LME	
Copper	LME	

The following conditions shall apply:

- (a) No price increase will be allowed beyond the original delivery date unless covered by an extension of time awarded by the Employer under the terms of the Contract. No price increase will be allowed for periods of delay for which the Contractor is responsible. The Employer will, however, be entitled to any price decrease occurring during such periods of delay.
- (b) If the currency in which the Contract price,  $P_0$ , is expressed is different from the currency of the country of origin of the labor and/or materials indices, a correction factor will be applied to avoid incorrect adjustments of the Contract price. The correction factor shall correspond to the ratio of exchange rates between the two currencies on the base date and the date for adjustment as defined above.
- (c) The Contractor is obliged through the change order (Section 5 (Employer's Requirements), Chapter 41) to inform the Employer about this Price Adjustment for any price increase / decrease to reflect change in the cost of material components.
- (d) The payment implication due to Price Escalation shall not exceed a total ceiling of fifteen percent (15%) of Respective Contract Prices.

## Appendix 3 - Insurance Requirements

### (A) Insurances To Be Taken Out By The Contractor

In accordance with the provisions of GCC Clause 34, the Contractor shall at its expense take out and maintain in effect, or cause to be taken out and maintained in effect, during the performance of the Contract, the insurances set forth below in the sums and with the deductibles and other conditions specified. The identity of the insurers and the form of the policies shall be subject to the approval of the Employer, such approval not to be unreasonably withheld.

#### (a) Cargo Insurance

Covering loss or damage occurring, while in transit from the supplier's or manufacturer's works or stores until arrival at the Site, to the Facilities (including spare parts therefore) and to the construction equipment to be provided by the Contractor or its Subcontractors.

Amount [in currency(ies)]	Deductible limits [in currency(ies)]	Parties insured [names]	From [place]	To [place]
110% of Value		Contractor Employer	From supplier's or manufacturer 's works or storage	Site

#### (b) Installation All Risks Insurance

Covering physical loss or damage to the Facilities at the Site, occurring prior to completion of the Facilities, with an extended maintenance coverage for the Contractor's liability in respect of any loss or damage occurring during the defect liability period while the Contractor is on the Site for the purpose of performing its obligations during the defect liability period.

Amount [in currency(ies)]	Deductible limits [in currency(ies)]	Parties insured [names]
115% of the Contract Price		Contractor Sub-Contractor Employer

#### (c) Third Party Liability Insurance

Covering bodily injury or death suffered by third parties (including the Employer's personnel) and loss of or damage to property (including the Employer's property and any parts of the Facilities that have been accepted by the Employer) occurring in connection with the supply and installation of the Facilities.

Amount [in currency(ies)]	Deductible limits [in currency(ies)]	Parties insured [names]
USD 5 million		Contractor Sub-Contractor

#### (d) Automobile Liability Insurance

Covering use of all vehicles used by the Contractor or its Subcontractors (whether or not owned by them) in connection with the supply and installation of the Facilities. Comprehensive insurance in accordance with statutory requirements.

#### (e) Workers' Compensation

In accordance with the statutory requirements applicable in any country where the Facilities or any part thereof is executed.

**(f) Employer's Liability**

In accordance with the statutory requirements applicable in any country where the Facilities or any part thereof is executed.

**(g) Other Insurances**

The Contractor is also required to take out and maintain at its own cost the professional indemnity insurance, which shall insure the Contractor's liability by reason of professional negligence in the design of the Facilities.

The Contractor shall use its his best endeavors to maintain such professional indemnity insurance in full force and effect throughout the period of his liability, under the Contract and under the law of Bangladesh. The Contractor undertakes to give the Employer reasonable notice in the event of difficulty (if any) in extending, renewing or reinstating such insurances:

<b>Amount [in currency(ies)]</b>	<b>Deductible limits [in currency(ies)]</b>	<b>Parties insured [names]</b>	<b>From [date]</b>	<b>To [date]</b>
Contract Price		Contractor	Effective Start Date	As per law

The Employer shall be named as co-insured under all insurance policies taken out by the Contractor pursuant to GCC Sub-Clause 34.1, except for the Third Party Liability, Workers' Compensation and Employer's Liability Insurances, and the Contractor's Subcontractors shall be named as co-insurers under all insurance policies taken out by the Contractor pursuant to GCC Sub-Clause 34.1, except for the Cargo, Workers' Compensation and Employer's Liability Insurances. All insurer's rights of subrogation against such co-insurers for losses or claims arising out of the performance of the Contract shall be waived under such policies.

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**(B) Insurances To Be Taken Out By The Employer**

The Employer shall at its expense take out and maintain in effect during the performance of the Contract the following insurances.

Details:

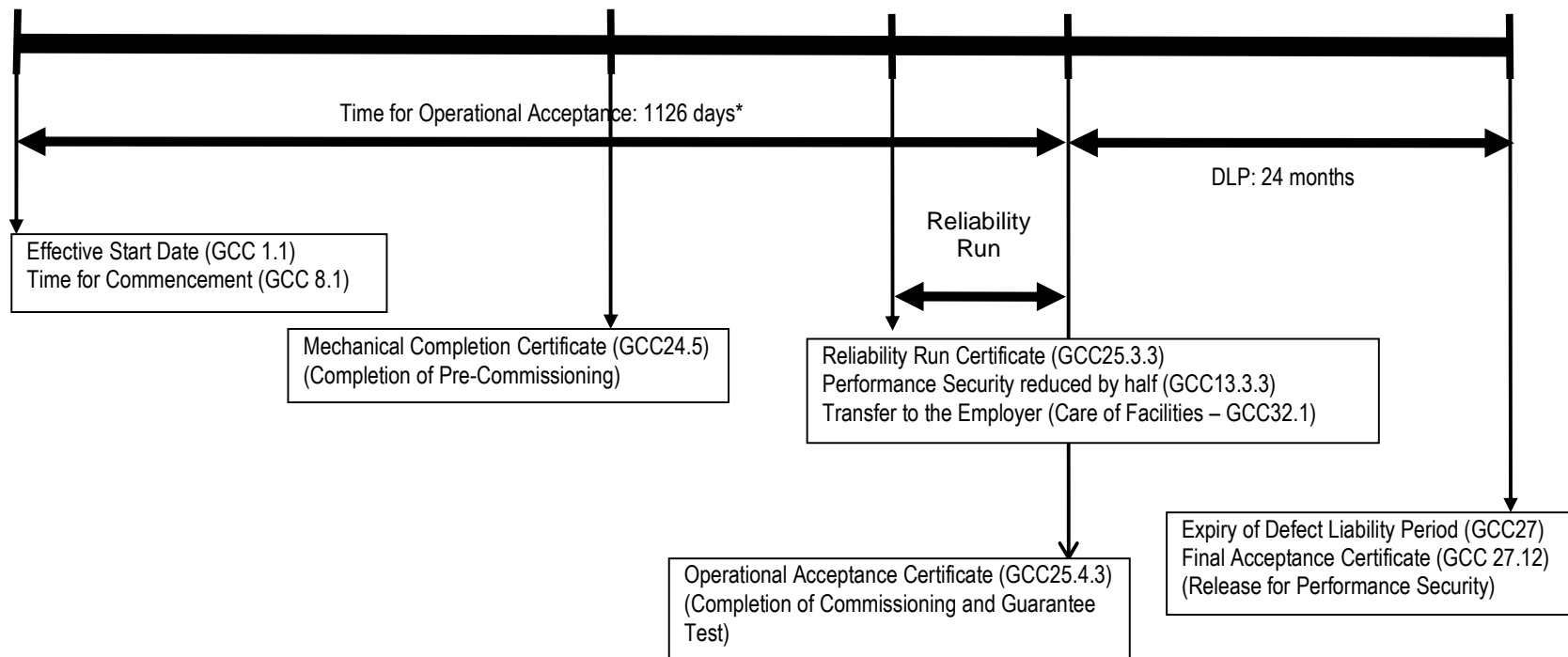
<b>Amount [in currency(ies)]</b>	<b>Deductible limits [in currency(ies)]</b>	<b>Parties insured [names]</b>	<b>From [place]</b>	<b>To [place]</b>
N/A				



### Appendix 4 - Time Schedule

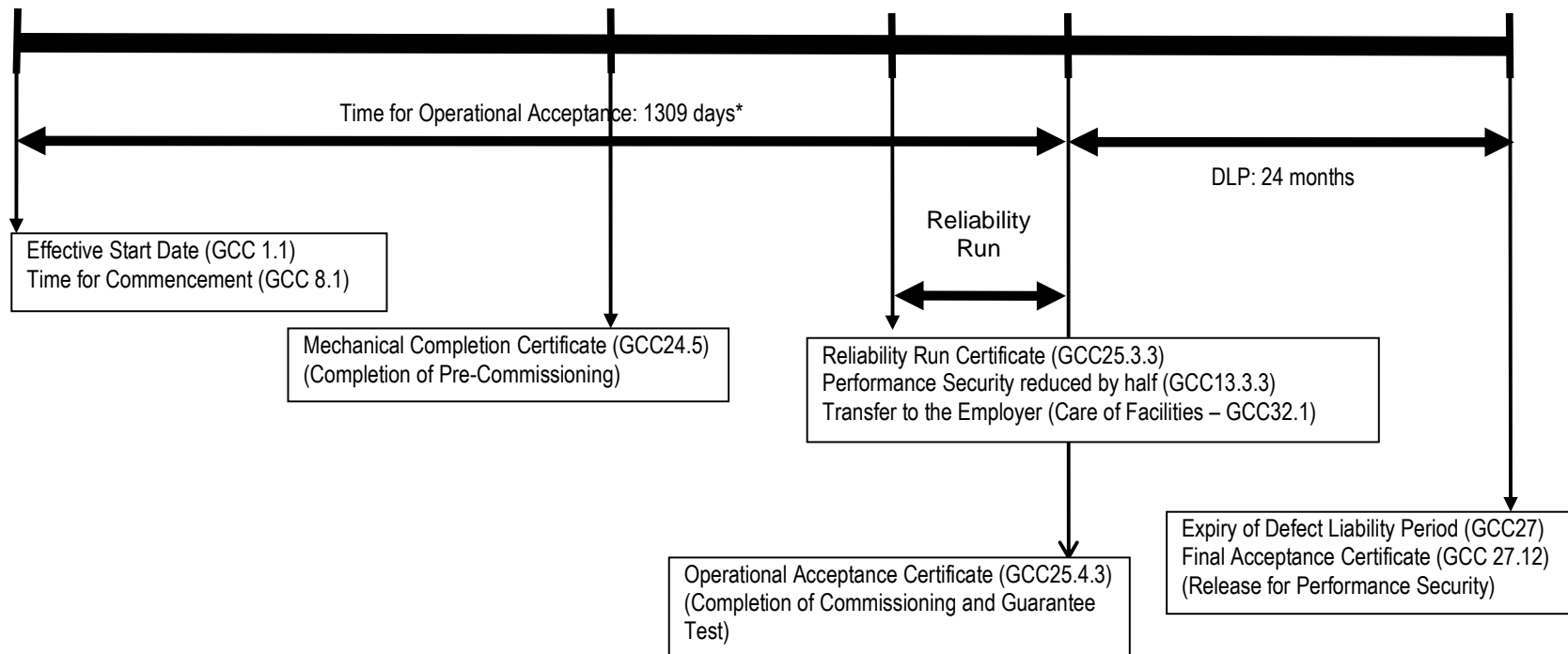
This is a summary of time schedule only. If there are discrepancies between this and other sections of the Bidding Documents, those others prevail.

#### Unit 1



Note: \* subject to the Liquidated Damage (GCC26)

**Whole of the Facilities including Unit 2**



Note: \* subject to the Liquidated Damage (GCC26)

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**Appendix 5 - List of Major Items of Plant and Services and List of Approved Subcontractors**

A list of major items of plant and services is provided below.

The following Subcontractors and/or manufacturers are approved for carrying out the item of the facilities indicated. Where more than one Subcontractor is listed, the Contractor is free to choose between them, but it must notify the Employer of its choice in good time prior to appointing any selected Subcontractor. In accordance with GCC Sub-Clause 19.1, the Contractor is free to submit proposals for Subcontractors for additional items from time to time. No Subcontracts shall be placed with any such Subcontractors for additional items until the Subcontractors have been approved in writing by the Employer and their names have been added to this list of Approved Subcontractors.

Major Items of Plant and Services	Approved Subcontractors/Manufacturers	Nationality
	(To be filled by the Contractor and subject to the Employer's approval)	

## Appendix 6 - Scope of Works and Supply by the Employer

The following personnel, facilities, works and supplies will be provided/supplied by the Employer, and the provisions of GCC Clauses 10, 21 and 24 shall apply as appropriate.

All personnel, facilities, works and supplies will be provided by the Employer in good time so as not to delay the performance of the Contractor, in accordance with the approved Time Schedule and Program of Performance pursuant to GCC Sub-Clause 18.2.

Unless otherwise indicated, all personnel, facilities, works and supplies will be provided free of charge to the Contractor.

Personnel	Charge to Contractor (if any)
a) Operating and maintenance personnel for Pre-Commissioning, Commissioning and Reliability Run and Commissioning under the supervision by the Contractor.	Free of Charge
b) Operation and maintenance personnel during the Defect Liability Period	

Facilities	Charge to Contractor (if any)

Works	Charge to Contractor (if any)
Backfilling & Embankment and Transmission Line after the Switchyard	Free of Charge

Supplies	Charge to Contractor (if any)
Coal, ignition fuel, raw water (river water and underground water) and electricity after back-energizing	Free of Charge

## **Appendix 7 - List of Documents for Approval or Review**

Pursuant to GCC Sub-Clause 20.3.1, the Contractor shall prepare, or cause its Subcontractor to prepare, and present to the Project Manager in accordance with the requirements of GCC Sub-Clause 18.2 (Program of Performance), the following documents for

Detail list for document/drawings shall be submitted for reviewing by the above relevant clauses.

Documents, drawings and materials shall be submitted for approvals and/or reviews are specified in Section 5, Chapter 3.

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## Appendix 8 - Performance Guarantees

### 1. General

The Contractor guarantees the specific performance of the Facilities as stipulated in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)).

### 2. Failure in Guarantees and Liquidated Damages

#### 2.1 Failure to Attain Gross Electrical Power Output at 100% MCR (100% Maximum Continuous Rating) per Unit.

If the Gross Electrical Power Output at 100% MCR (100% Maximum Continuous Rating) of the Unit attained in the guarantee test, pursuant to GCC Sub-Clause 25.2, is less than the guaranteed figure specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), the Contractor elects to pay liquidated damages to the Employer in lieu of making changes, modifications and/or additions to the Facilities, pursuant to GCC Sub-Clause 28.3, then the Contractor shall pay liquidated damages at the rate of USD0.6 million per MW for every complete 1MW of the deficiency in the Gross Electrical Power Output at 100% MCR (100% Maximum Continuous Rating) of the Unit, or at a proportionately reduced rate for any deficiency, or part thereof, of less than a complete 1MW.

In the event that the deficiency is more than 3% of the Performance Guarantee specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), Employer has the right to terminate the Contract pursuant to GCC28.2 and GCC42.2.2.

#### 2.2 Failure to Attain Steam Boiler Capacity at BMCR (Boiler Maximum Continuous Rating) per Unit.

If the Steam Boiler Capacity at BMCR (Boiler Maximum Continuous Rating) of the Unit attained in the guarantee test, pursuant to GCC Sub-Clause 25.2, is less than the guaranteed figure specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), the Contractor elects to pay liquidated damages to the Employer in lieu of making changes, modifications and/or additions to the Facilities, pursuant to GCC Sub-Clause 28.3, then the Contractor shall pay liquidated damages at the rate of USD1.6 million per percent of Super-Heated steam flow deficiency in the Steam Boiler Capacity at BMCR (Boiler Maximum Continuous Rating) per Unit, or at a proportionately reduced rate for any deficiency, or part thereof, of less than a complete 1%.

In the event that the deficiency is more than 2% of the Performance Guarantee specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), Employer has the right to terminate the Contract pursuant to GCC28.2 and GCC42.2.2.

#### 2.3 Failure to Attain Weighted Plant Net Heat Rate per Unit.

Weighted Plant Net Heat Rate will be calculated as follows:

Weighted Plant Net Heat Rate = 75% of Plant Net Heat Rate at 100% MCR +  
15% of Plant Net Heat Rate at 75% MCR +  
10% of Plant Net Heat Rate at 50% MCR

Where MCR is Maximum Continuous Rating

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If the Weighted Plant Net Heat Rate of the Unit attained in the guarantee test, pursuant to GCC Sub-Clause 25.2, is less than the guaranteed figure specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), the Contractor elects to pay liquidated damages to the Employer in lieu of making changes, modifications and/or additions to the Facilities, pursuant to GCC Sub-Clause 28.3, then the Contractor shall pay liquidated damages at the rate of USD0.3 million per kJ/kWh for every complete 1kJ/kWh of the deficiency in the Weighted Plant Net Heat Rate of the Unit, or at a proportionately reduced rate for any deficiency, or part thereof, of less than a complete 1kJ/kWh.

In the event that the deficiency is more than 3% of the Performance Guarantee specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), Employer has the right to terminate the Contract pursuant to GCC28.2 and GCC42.2.2.

#### **2.4 Failure to Attain Auxiliary Power Consumption at MCR (Maximum Continuous Rating) per Unit.**

If the Net Heat Rate at MCR (Maximum Continuous Rating) of the Unit attained in the guarantee test, pursuant to GCC Sub-Clause 25.2, is less than the guaranteed figure specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), the Contractor elects to pay liquidated damages to the Employer in lieu of making changes, modifications and/or additions to the Facilities, pursuant to GCC Sub-Clause 28.3, then the Contractor shall pay liquidated damages at the rate of USD4 million per MW for every complete 1MW of the deficiency in the Auxiliary Power Consumption at MCR (Maximum Continuous Rating) of the Unit, or at a proportionately reduced rate for any deficiency, or part thereof, of less than a complete 1MW.

In the event that the deficiency is more than 10% of the Performance Guarantee specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), Employer has the right to terminate the Contract pursuant to GCC28.2 and GCC42.2.2.

#### **2.5 Failure to Attain Limestone Consumption at MCR (Maximum Continuous Rating) per Unit.**

If the Net Heat Rate at MCR (Maximum Continuous Rating) of the Unit attained in the guarantee test, pursuant to GCC Sub-Clause 25.2, is less than the guaranteed figure specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), the Contractor elects to pay liquidated damages to the Employer in lieu of making changes, modifications and/or additions to the Facilities, pursuant to GCC Sub-Clause 28.3, then the Contractor shall pay liquidated damages at the rate of USD3.7 million per Tons/Hour for every complete 1Tons/Hour of the deficiency in the Limestone Consumption at MCR (Maximum Continuous Rating) of the Unit, or at a proportionately reduced rate for any deficiency, or part thereof, of less than a complete 1Tons/Hour.

In the event that the deficiency is more than 20% of the Performance Guarantee specified in Schedule of Performance Guarantees (Section 5, Attachment A3 (i)), Employer has the right to terminate the Contract pursuant to GCC28.2 and GCC42.2.2.

#### **2.6 Limitation of Liability**

The Contractor's aggregate liability to pay liquidated damages for failure to attain the performance guarantees shall not exceed ten percent (10%) of the Contract price.