

SCHEDULE 1 - CONDITIONS OF CONTRACT**TABLE OF CONTENTS**

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1 GENERAL PROVISIONS

1.1 Definitions

In this Contract the following words and expressions shall have the meaning stated. Words indicating persons or parties include corporations and other legal entities, except where the context requires otherwise.

1.1.1 **"Abandon", "Abandoned" or "Abandonment"** means prior to the Commercial Operation Date, the Contractor:

1.1.1.1 ceasing to perform its obligations under this Contract as a consequence of which it will not be possible for the Commercial Operation Date to be achieved on or before the EPC Last COD; and

1.1.1.2 failing to resume performance (which involves the commencement of adequate works and action that would enable the achievement of the Commercial Operation Date on or before such EPC Last COD) within 7 days of written notice by the Employer.

1.1.2 **"Achieved Capacity"** means the Capacity of the Facility as determined: (i) following the Commissioning Tests, and (ii) once the Facility Completion Form and Facility Completion Notice are issued, as specified in Schedule 8 (*Tests*).

1.1.3 **"Act of Insolvency"** in relation to a Party or a Contractor Member means any of the following:

1.1.3.1 that person is or is deemed for the purposes of any applicable Law to be insolvent or is unable to pay its debts as they fall due; or that person admits in writing to its insolvency or its inability to pay its debts as they fall due or suspends making payments on any of its debts or announces an intention to do so or, by reason of actual or anticipated financial difficulties, or commences negotiations with one or more of its creditors with a view to the rescheduling, restructuring or compromise of any of its indebtedness;

1.1.3.2 that person is or is deemed for the purposes of any applicable law to be Financially Distressed (as defined in the Companies Act, 2008);

1.1.3.3 the value of the total assets of the person is less than its total liabilities;

1.1.3.4 a moratorium is declared, instituted or takes effect in respect of any of the indebtedness of a person;

1.1.3.5 any corporate action, legal proceedings or other procedure or step (including an application to court, proposal or convening of a meeting) is taken with a view to:

- 1.1.3.5.1 the suspension of payments, a moratorium of any indebtedness, liquidation, winding-up, dissolution, business rescue or reorganisation (by way of voluntary arrangement, scheme of arrangement or otherwise) of that person;
- 1.1.3.5.2 a composition, compromise, assignment or arrangement with any creditor of the Employer, or with creditors holding at least 15% of the claims against a person;
- 1.1.3.5.3 the appointment of a liquidator, receiver, administrative receiver, administrator, compulsory manager, judicial manager, business rescue practitioner or other similar officer in respect of a person, or any of their respective assets; or
- 1.1.3.5.4 enforcement of any security over any assets of that person other than in respect of CNWE and NWEPI, where the aggregate value of those assets is less than 5% of its total tangible assets less its total liabilities, as determined in accordance with the relevant entity's latest audited financial statements (indexed or its equivalent in another currency or currencies) (in any financial year),

or any analogous procedure or step is taken in any jurisdiction unless such procedure or step is being contested in good faith and with due diligence and is discharged or set aside within 14 days;
- 1.1.3.6 a meeting is proposed or convened by the directors of a person that is a company, a resolution is proposed or passed, application is made and not opposed or an order is applied for or granted, to authorise the entry of that person into business rescue (or any similar proceedings), or any analogous procedure or step is taken in any jurisdiction; and
- 1.1.3.7 any expropriation, attachment, sequestration, implementation of any business rescue plan, distress or execution affects any asset or assets of that person, other than in respect of CNWE and NWEPI where the aggregate value of those assets is less than 5% of its total tangible assets less its total liabilities, as determined in accordance with the relevant entity's latest audited financial statements (indexed or its equivalent in another currency or currencies) (in any financial year), and, in each case, that expropriation, attachment, sequestration, implementation of any business rescue plan, distress or execution is being contested in good faith and with due diligence and is discharged or set aside within 30 days.

- 1.1.4 **"Advance Payment"** means the advance payment in the amount set out in Schedule 3 (*Contract Price and Payment Schedule*) to be made by the Employer to the Contractor in terms of Clause 14.2 (*Advance Payment*).
- 1.1.5 **"Advance Payment Guarantee"** means the advance payment guarantee to be issued by an Approved Provider for and on behalf of the Contractor in favour of the Employer in terms of this Contract, as security by the Contractor to the Employer in respect of the Advance Payment in the form set out in Schedule 11 (*Forms of Security*).
- 1.1.6 **"Affiliate"** means with respect to a Party, (i) any entity Controlled, directly or indirectly, by that Party, (ii) any entity that controls, directly or indirectly that Party, or (iii) any entity directly or indirectly under the common Control of a Party.
- 1.1.7 **"Anti Corruption Laws"** means:
- 1.1.7.1 the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 ("**OECD Convention**");
- 1.1.7.2 the Foreign Corrupt Practices Act ("**FCPA**") of 1977 of the United States of America (as amended by the Foreign Corrupt Practices Act Amendments of 1988 and 1998);
- 1.1.7.3 the UK Bribery Act of 2010 ("**UK Bribery Act**");
- 1.1.7.4 the United Nations Convention against Corruption adopted in 2003;
- 1.1.7.5 the South African Prevention and Combating of Corrupt Activities Act, 2004;
- 1.1.7.6 any other applicable law (including: (i) statute, ordinance, rule or regulations; (ii) order of any court, tribunal or any other judicial body; and (iii) rule regulation, guideline or order of any public body, or any other administrative requirement) which:
- 1.1.7.6.1 prohibits the offering of any gift, payment or other benefit to any person or any officer, employee, agent or adviser of such person; and/or
- 1.1.7.6.2 is broadly equivalent to the FCPA and/or the UK Bribery Act, or was intended to enact the provisions of the OECD Convention, or which has as its objective the prevention of corruption and which is applicable in the jurisdiction in which the Parties are registered, conduct business and/or in which any aspect of this Contract is to be performed,
- (each an "**Anti Corruption Law**").

- 1.1.8 **"Approved Provider"** means (as the context requires):
- 1.1.8.1 Absa Bank Limited, Investec Bank Limited, FirstRand Bank Limited, Nedbank Limited or the Standard Bank of South Africa Limited (each an **"Acceptable Bank"**); or
- 1.1.8.2 any bank, financial institution, corporate or other entity, which is approved in writing by the Employer and the Lenders.
- 1.1.9 **"Artefact"** means minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the Site, including but not limited to the discovery of resources under the National Heritage Resources Act, 1999.
- 1.1.10 **"Authorisation"** means any approval, consent, licence, permit, authorisation, resolution, certificate or other permission granted or to be granted by a Government Authority required under any applicable Law for the enforcement of rights or performance of obligations under this Agreement, including the authorisations listed in Schedule 4 (*Authorisations*).
- 1.1.11 **"Auxiliaries Night-Time Power Consumption Liquidated Damages"** has the meaning given to it in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*).
- 1.1.12 **"Budget Quote"** means the Network Operator's budget quote issued to the Employer for the construction of the Self Build Works associated with the Facility and the connection of the Facility to the Network, accepted by the Employer pursuant to a *"Notice of Acceptance"* (as defined in the Budget Quote) delivered to the Network Operator, as amended.
- 1.1.13 **"Business Day"** means any day other than a Saturday, Sunday, or an official public holiday in the Republic of South Africa.
- 1.1.14 **"Buyers"** means the "Buyer", "Discovery Green" or "NOA" under the respective Power Purchase Agreements.
- 1.1.15 **"Buyer Risk Event"** means a "Discovery Green Risk Event" as defined in the DG PPA and/or a "NOA Risk Event" as defined in the NOA PPA and/or the equivalent Buyer related risk event under the Unallocated PPAs.
- 1.1.16 **"Capacity"** means in respect of the Facility, at any time and from time to time, the capability (expressed in AC power capacity in MW) of the Facility to generate and deliver Energy to the Delivery Point.

- 1.1.17 **"Change in Control"** means, after the Signature Date, any person or group of persons who exercises Control over a person as at the Signature Date, ceasing to have direct or indirect Control over that person.
- 1.1.18 **"Change in Costs Event"** has the meaning given to it in the Power Purchase Agreements.
- 1.1.19 **"Change in Law"** means the occurrence of any of the following events after the Signature Date:
- 1.1.19.1 the introduction, adoption, enactment or promulgation of any new applicable Law by any Government Authority or any change in the interpretation or application of any applicable Law, save for:
- 1.1.19.1.1 any of the aforementioned resulting in an increase in taxes of general application which does not discriminate against any party or against the party and other parties undertaking projects similar to the Project; and
- 1.1.19.1.2 any Law which, at the Signature Date, has been published in a bill or draft statutory instrument and is available for public scrutiny, to the extent such law is enacted in the form so published;
- 1.1.19.2 the change or repeal of any applicable Law, save for any of the aforementioned resulting in an increase in taxes of general application which does not discriminate against any party or against the party and other parties undertaking projects similar to the Project;
- 1.1.19.3 the introduction, adoption, or change of any Authorisation or any material condition in connection with the issuance, renewal or modification of any Authorisation;
- 1.1.19.4 any change to the terms and conditions or to the interpretation or application of any Authorisation or addition of new terms and conditions after granting said Authorisation; or
- 1.1.19.5 the revocation, repeal or cessation of effectiveness of any Authorisation prior to the expiration date of such Authorisation, provided that the relevant Party is in compliance with the material requirements and conditions established therein or if any Authorisation was granted for a limited period its non-renewal (or its renewal in terms or subject to conditions less favourable to the relevant Party), provided that such Party has observed all the requirements applicable to the grant of that renewal,

provided that the occurrence of such event in Clauses 1.1.19.1 to 1.1.19.5 above (as applicable):

- 1.1.19.6 renders it unlawful to give effect to this Contract; or
- 1.1.19.7 has a material adverse financial impact on the Project or materially and adversely affects the overall balance of reward and risk agreed to by the Parties in this Contract; and
- 1.1.19.8 is an event in respect of which any Party is not entitled to any other relief pursuant to any other provisions of this Contract or any other agreement concluded with the other Party; and
- 1.1.19.9 was not reasonably foreseen by any Party on or before the Signature Date or it was foreseen, the impact on the Project was not reasonably foreseen provided that the introduction, adoption, enactment or promulgation of new or increased import and/or custom duties on solar PV generating equipment shall not be considered, determined, held or deemed to be reasonably foreseeable; or
- 1.1.19.10 could not reasonably have been foreseen by any person in the position of any Party on or before the Signature Date or if it could reasonably have been foreseen, the impact on the Project could not reasonably have been foreseen provided that the introduction, adoption, enactment or promulgation of new or increased import and/or custom duties on solar PV generating equipment shall not be considered, determined, held or deemed to be reasonably foreseeable.
- 1.1.20 **"Change in Law Threshold"** has the meaning given to it in the Power Purchase Agreements.
- 1.1.21 **"Commencement Date"** has the meaning given to it in clause 4 of the Contract Agreement.
- 1.1.22 **"Commercial Operation Date"** or **"COD"** means the date upon which the Facility has achieved the Minimum Acceptance Capacity, and the Facility has successfully passed the Commissioning Tests, certified by the Employer, the Buyers, the Independent Engineer, and the Lender's Technical Advisor.
- 1.1.23 **"Commissioning Tests"** means the tests described in Schedule 8 (*Tests*).
- 1.1.24 **"Common Issue"** means an issue or dispute whether of fact or law, which has arisen between:
 - 1.1.24.1 the Employer and any Related Document counterparty, and which relates to or concerns the Contractor, the Works or the Contract; or

- 1.1.24.2 the Employer and the Contractor, and which relates to or concerns the Buyers, the Network Operator or any of the Related Documents.
- 1.1.25 "**Community Unrest**" mean unlawful action taken by an organised group, which due to (i) an imminent threat to the lives of the personnel of the Employer, Contractor Subcontractors or third parties attending the Site, and/or (ii) an imminent threat to the Facility, the property of the Employer and/or Contractor and/or a Subcontractor and/or any third parties located at the Site, directly results in the Employer or the Contractor or a Subcontractor being unable to perform its obligations under this Contract.
- 1.1.26 "**Connection Works**" has the meaning given to it in the CUOSA.
- 1.1.27 "**Contestable Works**" has the meaning given to it in the Tx Self Build Agreement.
- 1.1.28 "**Contestable Works Completion Certificate**" has the meaning given to it in the Tx Self Build Agreement.
- 1.1.29 "**Contract**" means the Contract Agreement, these conditions of contract, the Schedules, and further documents (if any) which are listed in clause 2 of the Contract Agreement.
- 1.1.30 "**Contract Agreement**" means the contract agreement referred to in Clause 1.6 (*Contract Agreement*).
- 1.1.31 "**Contract Price**" means the agreed amount stated in the Contract Agreement for the design, execution and completion of the Works and the remedying of any defects, and shall include adjustments (if any) in accordance with the Contract.
- 1.1.32 "**Contract Price (ZAR – FC)**" means the Contract Price stated in South African Rand, as confirmed in writing by the Employer on the date of Financial Close, which shall be calculated using the foreign exchange rates adopted in the foreign exchange hedging arrangements concluded at or about Financial Close.
- 1.1.33 "**Contract Price (ZAR – T)**" means the Contract Price stated in South African Rand calculated using foreign exchange rates applicable at a future point in time in accordance with Clause 14.15.1.4.
- 1.1.34 "**Contract Works**" has the meaning given to it in the Dx Self Build Agreement.
- 1.1.35 "**Contracted Capacity**" means 475 MW (AC) in respect of the design Capacity of the Facility.
- 1.1.36 "**Contractor**" means the unincorporated joint venture named as contractor in the Contract Agreement and the legal successors in title to this person.

- 1.1.37 **"Contractor Authorisations"** has the meaning given to it under Clause 1.12.1.3.
- 1.1.38 **"Contractor Background IP"** means all intellectual property owned or used by or licensed to the Contractor or any other person engaged by the Contractor to perform the Works (including know-how and technical information) which:
- 1.1.38.1 exists prior to the Signature Date or is developed or acquired by the Contractor independently of this Contract;
 - 1.1.38.2 does not relate specifically to the Works (including the Contractor's Documents comprised in the Works); and
 - 1.1.38.3 was not created or developed in performing the Works,
- which is used by the Contractor in the performance of the Works or otherwise made available to the Employer under or in connection with this Contract, but does not include the Project IP.
- 1.1.39 **"Contractor Member"** has the meaning given to it in Clause 24 (*Joint and Several Liability*).
- 1.1.40 **"Contractor's Documents"** means the calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature supplied by the Contractor under the Contract, including the documents referred to in Clause 5.2 (*Contractor's Documents*).
- 1.1.41 **"Contractor's Economic Development Obligations"** means those obligations which the Contractor has undertaken to perform in order to ensure that the Employer achieves the Economic Development Obligations, as set out in Schedule 15 (*Contractor's Economic Development Obligations*).
- 1.1.42 **"Contractor's Equipment"** means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects.
- 1.1.43 **"Contractor's Personnel"** means the Contractor's Representative and all personnel whom the Contractor utilises on Site, who may include the staff, labour and other employees of the Contractor and of each Subcontractor; and any other personnel assisting the Contractor in the execution of the Works.
- 1.1.44 **"Contractor's Representative"** means the person appointed from time to time by the Contractor under Clause 4.6 (*Contractor's Representative*), who acts on behalf of the Contractor.

- 1.1.45 **"Control"** means the power, directly or indirectly, to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities or any interest carrying voting rights, or to appoint or remove or cause the appointment or removal of any directors (or equivalent officials) or those of its directors (or equivalent officials) holding the majority of the voting rights on its board of directors (or equivalent body), whether by contract or otherwise.
- 1.1.46 **"Controlled"** means where an individual, company, entity or organisation is subject to the Control of another individual, company, entity or organisation and "Controlling" has a corresponding meaning.
- 1.1.47 **"Co-operation Agreement"** means the agreement entered into by the Contractor and the Operator on or about the Signature Date of this Contract, substantially in the form of the Co-operation Agreement contained in Schedule 21 (*Co-operation Agreement*).
- 1.1.48 **"Corrupt Act"** means an offence in respect of corruption or corrupt activities contemplated in the Anti-Corruption Laws, as amended from time to time.
- 1.1.49 **"Cost"** means all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overheads and similar charges, but does not include Profit.
- 1.1.50 **"Critical Component"** means trackers (including tracker motors and control systems), inverter stations comprising inverters, inverter transformers and MV switch gear, photovoltaic modules, point of connection works comprising utility transformers, MV switch gear, HV switch gear and related protection and metering systems, the SCADA system comprising the SCADA server, SCADA workstation, dataloggers, power plant controller, RTU and meters and the lightning protection system as a whole.
- 1.1.51 **"CUOSA"** means the transmission or distribution, supply and connection and use of system agreement entered into, or to be entered into, between the Employer and the Network Operator which will regulate, *inter alia*, the use and connection of the Facility to the Network, as amended from time to time, and which will reference the points of consumption under the Electricity Supply Agreements.
- 1.1.52 **"Day"** or **"day"** means a calendar day and **"year"** means 365 days.
- 1.1.53 **"Defects Notification Period"** means the period of 24 months for notifying defects in the Works under Clause 11.1 (*Completion of Outstanding Works and Remedying Defects*), calculated from the date on which the Works are completed as certified under Clause 10.2 (*Employer's Taking-Over of the Works*), and any extension of such period under Clause 11.3 (*Extension of Defects Notification Period*).

- 1.1.54 **"Delay Liquidated Damages"** means the liquidated damages for delay provided for in Clause 8.6 (*Delay Liquidated Damages*) and Schedule 9 (*Delay Liquidated Damages*).
- 1.1.55 **"Delay Liquidated Damages Cap"** has the meaning given to it in Clause 8.6.2.
- 1.1.56 **"Delivery Point"** means the physical point, situated on the high voltage side of the Facility MV/HV substation, where the Facility connects to the Network (whether or not such point is situated on or off the Site), and where the Energy is to be delivered by the Employer (as the Seller) to the Buyers, as described in the Employer's Requirements and the Power Purchase Agreements.
- 1.1.57 **"DG PPA"** means the power purchase agreement between the Employer (acting as the seller) and Discovery Green Proprietary Limited in relation to the Project.
- 1.1.58 **"Dx Self Build Agreement"** means the distribution self-build agreement between the Employer and Eskom in relation to the Project.
- 1.1.59 **"Early Operating Energy"** means the Net Energy Output delivered to the Delivery Point, measured during the Early Operating Period.
- 1.1.60 **"Early Operating Energy Payment"** means the payment of the amounts that are due and payable by the Buyers to the Employer for Early Operating Energy under the Power Purchase Agreements in accordance with Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*).
- 1.1.61 **"Early Operating Period"** has the meaning given to it in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*).
- 1.1.62 **"Early Works"** means those portions of the Works which the Contractor performed or shall perform prior to the Commencement Date pursuant to the LNTP Agreement, the scope of which is more fully described in the LNTP Agreement.
- 1.1.63 **"Economic Development Obligations"** means the economic development obligations undertaken by the Employer to the Buyers in terms of the Power Purchase Agreements.
- 1.1.64 **"Electricity Supply Agreement"** means the electricity supply agreement between the Buyers (or their customers) and Network Operator, and all amendments and addendums thereto.
- 1.1.65 **"Employer"** means the person named as employer in the Contract Agreement and the legal successors in title to this person.

- 1.1.66 **"Employer Authorisations"** has the meaning given to it under Clause 1.12.4.
- 1.1.67 **"Employer Background IP"** means the intellectual property of the Employer relating to the Project to the extent necessary to execute the Works, specifically including any data or know-how, and as may be made available to the Contractor at any time for such purpose.
- 1.1.68 **"Employer Development Costs"** means all fees, costs, expenses and other charges incurred by or on behalf of the Employer in the development of the Project, including (but not limited to):
- 1.1.68.1 all fees, costs, expenses and other charges incurred by or on behalf of the Employer relating to the arrangement of finance with the Lenders and the costs of the Lender's advisors in the arrangement of and giving effect to the financing of the Project;
- 1.1.68.2 all fees, costs, expenses and other charges incurred by or on behalf of the Employer in achieving Financial Close in respect of the Project (including any fees paid to the Network Operator before, on or after Financial Close); and
- 1.1.68.3 all fees, costs, expenses and other charges incurred by or on behalf of the Employer in the implementation of the Project after Financial Close has been achieved.
- 1.1.69 **"Employer's Personnel"** means the Employer's Representative, the assistants referred to in Clause 3.2 (*Other Employer's Personnel*), the Owner's Engineer and all other staff, labour and other employees of the Employer and the Employer's Representative; and any other personnel notified to the Contractor, by the Employer or the Employer's Representative, as the Employer's Personnel.
- 1.1.70 **"Employer's Representative"** means the person who may be appointed from time to time by the Employer under Clause 3.1 (*The Employer's Representative*), who acts on behalf of the Employer.
- 1.1.71 **"Employer's Requirements"** means the document entitled "Employer's Requirements", as contained in Schedule 2 (*Employer's Requirements*), including any additions and modifications to such document in accordance with the Contract. Such document specifies the purpose, scope, and/or design criteria and/or other technical criteria, for the Works.
- 1.1.72 **"Energy"** means electrical energy (measured in kWh) produced by the Facility and Exported to the Network at the Delivery Point as measured by the Metering Installation.

- 1.1.73 **"Environment"** has the meaning given to it in NEMA.
- 1.1.74 **"Environmental Authorisation"** means any Authorisations granted or to be granted by an Environmental Authority in respect of the Project under Environmental Law.
- 1.1.75 **"Environmental Authority"** means any legal person or body of persons (including any Government Authority) having jurisdiction to determine (whether by delegation or otherwise) any matter arising under Environmental Law and/or relating to the Environment.
- 1.1.76 **"Environmental Impact Assessment"** or **"EIA"** means the report noting the results following and assessment as to the likely impact the development of the Facility will have on the environment, concluded in accordance with the Environmental Impact Assessment Regulations, 2014 (as published in Government Gazette number 38282 on 4 December 2014), promulgated under the National Environmental Management Act 107 1998.
- 1.1.77 **"Environmental Laws"** means all applicable South African laws, comprising:
- 1.1.77.1 common law duties and rules, national, provincial and municipal legislation (including regulations and other subsidiary legislation) that are concerned with the protection or rehabilitation of the Environment, the use of natural resources (including land), and the maintenance of an Environment conducive to human health and well-being;
- 1.1.77.2 directives, notices, orders or other instructions lawfully given by an Environmental Authority; and
- 1.1.77.3 Environmental Authorisations and exemptions issued or approved thereunder.
- 1.1.78 **"Environmental Management Plan"** or **"EMP"** means the "Project EMP" as approved by the Department of Forestry, Fisheries and the Environment and which may be amended from time to time, attached hereto in Schedule 4 (*Authorisations*).
- 1.1.79 **"EPC Bonds"** means the Performance Bonds and the Advance Payment Guarantee.
- 1.1.80 **"EPC Last COD"** means the date which occurs 6 months after the Time for Completion.
- 1.1.81 **"Equator Principles"** means those principles set out in the paper entitled "A financial industry benchmark for determining, assessing and managing environmental and social risk in projects" dated July 2020 by the member banks and various other financial institutions (as published on www.equator-principles.com), as applicable as

at the Signature Date or varied, amended or supplemented from time to time (and available, at the date of this Contract, at <http://www.equator-principles.com>).

- 1.1.82 **"ES Action Plan"** means the plan or plans developed by the Contractor setting out the specific environmental and social measures to be undertaken by the Contractor to enable the Works to be constructed, equipped and operated in compliance with the ES Requirements.

- 1.1.83 **"ES Management System"** means the IFC compliant Environmental and social management system (ESMS) providing the framework to enable Environmental and social (including health and safety) risks to be identified and assessed throughout construction and operations and mitigation measures to be developed, implemented and appropriately managed enabling compliance with relevant legal requirements and corporate standards in accordance with the ES Requirements.

- 1.1.84 **"ES Requirements and IFC EHS guidelines"** means the Environmental and social obligations to be undertaken by the Contractor to ensure compliance with the ESG Guidelines.

- 1.1.85 **"ESG Guidelines"** means the applicable Equator Principles, IFC environmental and social sustainability performance standards, IFC EHS guidelines and Schedule 20 (*Project Company ESG Guideline*) as applicable as at Financial Close and as varied, amended or supplemented from time to time.

- 1.1.86 **"ESG Performance Report"** means the report prepared by the Contractor evidencing its compliance with the ES Action Plan, ES Management System and ES Requirements and IFC EHS guidelines.

- 1.1.87 **"Eskom"** means Eskom Holdings SOC Limited or any of its Affiliates, as the case may be.

- 1.1.88 **"Facility"** means the solar photovoltaic power generation plant and any ancillary or related facilities, including the Metering Installation and the substation works, to be constructed, owned, operated, maintained and managed by the Employer on the Site as more specifically described in the Employer's Requirements, and, for the avoidance of doubt, excluding the Network.

- 1.1.89 **"Facility Acceptance Tests"** means acceptance tests for the Facility to be satisfied under the Grid Codes and the Related Documents as a precondition to the achievement of the Commercial Operation Date as set out in the Power Purchase Agreements.

- 1.1.90 **"Facility Agent"** has the meaning given to it in the Lender Direct Agreement.

- 1.1.91 **"Facility Completion Form"** has the meaning given to it in the Power Purchase Agreements.

- 1.1.92 **"Facility Completion Notice"** has the meaning given to it in the Power Purchase Agreements.

- 1.1.93 **"Final Statement"** means the statement defined in Clause 14.12 (*Application for Final Payment Certificate*).

- 1.1.94 **"Financial Close"** means that the Employer has entered into Financing Agreements in terms of which it shall borrow an amount which it considers sufficient for the purpose of financing its payment obligations under the Contract and all conditions to such Financing Agreements (other than any conditions which are required to be fulfilled in respect of each and every advance, withdrawal or drawdown under such Finance Agreements) have either been fulfilled or waived within the time period set out therein for such fulfilment or waiver.

- 1.1.95 **"Financing Agreements"** means any loan agreements, preference share subscription agreements in respect of the Lenders to the Project, notes, indentures, security agreements, guarantees and other agreements, documents and instruments, including any hedging transactions entered into by the Employer, in connection with the third-party financing of the project debt, and excludes any shareholder loans.

- 1.1.96 **"First Evaluation Period"** has the meaning given to it in Schedule 7 (*Tests*).

- 1.1.97 **"Force Majeure"** has the meaning given to it in Clause 19 (*Force Majeure*).

- 1.1.98 **"Foreign Currency"** means a currency in which part of the Contract Price is payable, but not the Local Currency.

- 1.1.99 **"Goods"** means Contractor's Equipment, Materials, Plant and temporary works, or any of them as appropriate.

- 1.1.100 **"Government Authority"** means any South African ministry or department, any South African minister, any South African organ of state, any South African official in the public administration or any other South African governmental or regulatory department, commission, institution, entity, service utility (e.g. Eskom and/or the NTCSA and any successor thereof), board, agency, instrumentality or authority (in each case whether national, provincial, or municipal) or any South African court, each having jurisdiction over the matter in question and **"Government Authorities"** shall have a cognate meaning.

- 1.1.101 **"Grid Codes"** means, as applicable, any code in respect of electricity generation, distribution or transmission, trading, network connections and tariffs as published by NERSA or its equivalent or any Government Authority from time to time.
- 1.1.102 **"Guaranteed Performance Ratio"** has the meaning given to it in Schedule 7 (*Performance Guarantees*).
- 1.1.103 **"Hand-Over Date"** has the meaning given to it in the Dx Self Build Agreement.
- 1.1.104 **"IFC Environmental and Social Performance Standards"** means the standards set out in the paper entitled "Performance Standards on Environmental and Social Sustainability" dated 1 January 2012 by the International Finance Corporation (as published on www.ifc.org), as applicable as at Financial Close or varied, amended or supplemented from time to time.
- 1.1.105 **"Independent Engineer"** has the meaning given to it in the Power Purchase Agreements.
- 1.1.106 **"Independent Third Party Expert"** has the meaning given to it in Clause 11.1.2.5.
- 1.1.107 **"Intellectual Property"** means all intellectual property rights conferred by Laws, at law and subsisting anywhere in the world, including:
- 1.1.107.1 copyright;
- 1.1.107.2 inventions (including patents, innovation patents and utility models);
- 1.1.107.3 confidential information, trade secrets, technical data and know-how, whether or not confidential and in whatever form held, including formulae, design specifications, drawings, data, manuals and instructions;
- 1.1.107.4 designs;
- 1.1.107.5 trademarks and service marks;
- 1.1.107.6 circuit layout designs, topography rights and rights in databases, whether or not any of these is registered, registrable or patentable;
- 1.1.107.7 any similar rights resulting from intellectual activity in the industrial, commercial, scientific, literary or artistic fields which subsist now or in the future;
- 1.1.107.8 any applications and the right to apply for registration of any of the above; and

- 1.1.107.9 any rights or action against any third party in connection with the intellectual property rights included in Clauses 1.1.107.1 to 1.1.107.8, whether arising before, on or after the Signature Date.
- 1.1.108 **"Interconnection Facilities"** means the electrical connection infrastructure required to connect the Facility to the Network as further detailed in the Contestable Works and Contract Works.
- 1.1.109 **"Key Personnel"** mean the key personnel, including the Contractor's Representative, project manager, construction manager, environmental officer, community liaison manager and H&S manager engaged under Clause 6.10 (*Key Personnel*) in the positions and regarding the duties specified in Schedule 14 (*Key Personnel*).
- 1.1.110 **"Land Agreements"** means the lease agreement(s) and servitudes in respect of the Site (or access thereto) (including the land associated with the Network connection and all exhibits and annexures thereto entered into between the Employer and/or the Network Operator and the owner(s) of the Site (or each piece thereof or access thereto) (including the land associated with the grid connection), copies of which have been provided to the Contractor, and any amendment thereof made and communicated to the Contractor, as contained in Schedule 19 (*Land Agreements*).
- 1.1.111 **"Latent Defect"** means a defect in the Works (fair wear and tear excepted) which was not, and would not have been discovered on reasonable inspection, by the Employer during the Defects Notification Period (without requiring any inspection not ordinarily carried out by the Employer during that period).
- 1.1.112 **"Latent Defects Commencement Date"** means:
- 1.1.112.1 the first day after the expiry of the original Defects Notification Period of 2 years; and
- 1.1.112.2 where the original Defects Notification Period of 2 years is extended for any Critical Component pursuant to Clause 11.3, the Latent Defects Commencement Date will, in each case, be the first day after the expiry of the extended Defects Notification Period for such Critical Component.
- 1.1.113 **"Latent Defects Notification Period"** means the period commencing on the Latent Defects Commencement Date and ending:
- 1.1.113.1 in respect of all civil and structural work, on the 7th anniversary of the first day of the Defects Notification Period; and

- 1.1.113.2 in respect of the balance of the Works, on the 6th anniversary of the first day of the Defects Notification Period.
- 1.1.114 **"Laws"** means:
- 1.1.114.1 the Grid Codes, any constitution, statute, ordinance, treaty, decree, proclamation or subordinated legislation or other legislative measure, including all national and provincial statutes and legislation and all municipal by-laws, as well as the common law and customary law and any judgment, decision, order or rule of any court or tribunal with relevant jurisdiction, in each case having the force of law in South Africa; and
- 1.1.114.2 in the case of any directive, requirement, instruction, request, order, regulation, condition of or limitation in any necessary approval, permission, permit, approval, consent, licence, authorisation, registration, grant, acknowledgement, exemption or agreement, policy or rule of a Government Authority which is legally binding,
- for the avoidance of doubt, including any Environmental Laws and Environmental Authorisations.
- 1.1.115 **"Lender(s)"** means any person, company, bank, multilateral organization or other financial institution at any time providing finance or funding in connection with the Works and, where the context so admits, prospective Lenders; and shall include the Facility Agent, any agent or trustee for other Lenders.
- 1.1.116 **"Lender Direct Agreement"** means the direct agreement between the Contractor, the Employer and the Lender entered into, or to be entered into, in substantially the same form as set out in Schedule 22 (*Form of Lender Direct Agreement*).
- 1.1.117 **"Lender's Technical Advisor"** means the person appointed as such by the Lender from time to time.
- 1.1.118 **"Lien"** means any mortgage, lien, pledge, claim, charge, lease, easement, security, interest, right of retention or encumbrance of any kind.
- 1.1.119 **"LNTP Agreement"** means the limited notice to proceed agreement attached herein as Schedule 25 (*LNTP Agreement*) that has been entered into by the Employer and the consortium comprising of NWEPI, China Energy Engineering South Africa Proprietary Limited and Davha Energy Proprietary Limited prior to the Signature Date for the performance of the Early Works, dated on or about 23 October 2025 and ceded to the Contractor on or about 18 December 2025.

- 1.1.120 **"LNTP Consideration"** means the consideration, forming part of the Contract Price, to be paid or paid to the Contractor in accordance with the LNTP Agreement.

- 1.1.121 **"Local Currency"** means ZAR.

- 1.1.122 **"Maintain"** and **"Maintenance"** means to maintain in good working order and condition and, as necessary, to inspect, refurbish, repair, replace, modify, reinstate, overhaul and test so that the Plant, machinery, equipment or Facility concerned may be Operated at all material times as required under this Contract and the O&M Agreement.

- 1.1.123 **"Material Change in Law"** has the meaning given to it in the Power Purchase Agreements.

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

- 1.1.125 **"Metering Installation"** means the Employer's metering installation (including a main and check meter) used to check and verify the measurement and recording of metered Energy and input at the Delivery Point in terms of the Power Purchase Agreements, and all equipment associated therewith.

- 1.1.126 **"Milestone Schedule"** means the schedule contained in Schedule 6 (*Programme and Milestone Schedule*), which contains, *inter alia*, the dates of starting and completion of all phases of the Works.

- 1.1.127 **"Minimum Acceptance Capacity"** means a Capacity of the Facility which is equal to 95% of the Contracted Capacity of the Facility.

- 1.1.128 **"Minimum Performance Ratio"** has the meaning given to it in Schedule 7 (*Performance Guarantees*).

- 1.1.129 **"NEMA"** means the National Environmental Management Act, 1998, as amended, including any regulations and notices promulgated under NEMA, which may be applicable to the Project and Site.

- 1.1.130 **"NERSA"** means the National Energy Regulator of South Africa.

- 1.1.131 **"NERSA Registration Certificate"** means the registration certificate to be issued by NERSA to the Employer in respect of the Facility under the provisions of the Electricity Regulation Act, 2006.

- 1.1.132 **"Net Energy Output"** means the sum of Energy generated by the Facility and delivered to the Delivery Point, as recorded by the Metering Installation.
- 1.1.133 **"Network"** means, as applicable, the transmission and distribution system of the Network Operator consisting of all lines and substation equipment which operate at a nominal voltage of 132 kV or below and the national transmission system of the Network Operator, consisting of all lines and substation equipment which operate at a nominal voltage above 132 kV, as that system may be refurbished, modified, extended or developed from time to time (but, for the avoidance of doubt, not including any private network used by the Facility or customers of the Network Operator).
- 1.1.134 **"Network Event"** means:
- 1.1.134.1 any constraint, unavailability, interruption, breakdown, inoperability, failure of the Network to which the Facility is connected or intended to be connected, or disconnection of the Facility from the Network;
- 1.1.134.2 a force majeure event affecting the Network Operator; or
- 1.1.134.3 any action by the Network Operator or instruction from the Network Operator or any other Government Authority that results in the Facility limiting its power generation, including curtailment as a result of the GCCA Rules (as defined in the Power Purchase Agreements).
- 1.1.135 **"Network Operator"** means Eskom (as a licensed distributor) or the NTCSA and/or its successors or assigns (as applicable) and shall to the extent applicable and/or required, include an applicable municipal distributor to the extent that any Customer Point of Connection (as defined in the CUOSA) is supplied energy by such municipal distributor.
- 1.1.136 **"NOA PPA"** the generator power purchase agreement between the Employer (acting as the generator) and Noa Group Trading Proprietary Limited in relation to the Project.
- 1.1.137 **"Notice to Proceed"** has the meaning given to it in clause 4 of the Contract Agreement.
- 1.1.138 **"Notifiable Subcontract"** means a subcontract entered into or to be entered into between the Contractor and a Notifiable Subcontractor.
- 1.1.139

- 1.1.140 **"NTCSA"** means the National Transmission Company South Africa SOC Limited with registration number 2021/539129/30.
- 1.1.141 **"O&M Agreement"** means the agreement entered into between the Employer and the Operator relating to the Operation and Maintenance of the Facility, on or about the Signature Date of this Contract.
- 1.1.142 **"Operate"** and **"Operation"** means to operate the Facility, dispatch Energy and deliver such Energy to the Delivery Point.
- 1.1.143 **"Operation and Maintenance Manuals"** means the manuals to be provided in accordance with Clause 5.7 (*Operation and Maintenance Manuals*) and the Employer's Requirements.
- 1.1.144 **"Operator"** means the person named as operator under the O&M Agreement.
- 1.1.145 **Owner's Engineer** means the person appointed as such by the Employer as owner's engineer from time to time in relation to the Project.
- 1.1.146 **"Party"** means the Employer, the Contractor or the Contractor Members, as the context requires and **"Parties"** refers to both of them.
- 1.1.147 **"Payment Milestone"** means those milestones listed in the Schedule of Payments attached as Schedule 3 (*Contract Price and Payment Schedule*).
- 1.1.148 **"Performance Bond"** means each of the on demand, unconditional and irrevocable bank guarantees to be issued by an Approved Provider on behalf of the Contractor in favour of the Employer in terms of Clause 4.4 (*Performance Security*).
- 1.1.149 **"Performance Certificate"** means the certificate issued under Clause 11.9 (*Performance Certificate*).
- 1.1.150 **"Performance Guarantees"** means the Pre Take-Over Guarantees and Post Take-Over Guarantees, in each case as set forth and defined in Schedule 7 (*Performance Guarantees*).

- 1.1.152 **"Performance Liquidated Damages"** means the liquidated damages for underperformance specified in Clause 12.4 (*Failure to Pass Tests after Completion and meet Performance Guarantees*) and Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*), including the Performance Ratio Liquidated Damages and Auxiliaries Night-Time Power Consumption Liquidated Damages (as respectively defined in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*)).
- 1.1.153 **"Performance Liquidated Damages Cap"** means the cap in respect of Performance Liquidated Damages as set out in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*).
- 1.1.154 **"Performance Ratio"** or **"PR"** has the meaning given to it in Schedule 8 (*Tests*).
- 1.1.155 **"Performance Ratio Liquidated Damages"** has the meaning given to it in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*).
- 1.1.156 **"Performance Security"** means the security (or securities, if any) under Clause 4.4 (*Performance Security*).
- 1.1.157 **"Plant"** means the apparatus, machinery and vehicles intended to form or forming part of the Works.
- 1.1.158 **"Post Take-Over Guarantees"** means the performance and other guarantees identified in Schedule 7 (*Performance Guarantees*) as the Post Take-Over Guarantees.
- 1.1.159 **"Power Purchase Agreements"** or **"PPAs"** means collectively the DG PPA, the NOA PPA and the Unallocated PPAs.
- 1.1.160 **"Pre-existing Contamination"** means a condition of land, air, soil or water on, in or above the Site, including groundwater, resulting from pollution:
- 1.1.160.1 which occurred prior to the Signature Date;
- 1.1.160.2 which shares any or all of the characteristics of pollution;
- 1.1.160.3 the effects of which impact on the Works; and
- 1.1.160.4 in respect of which a legal obligation exists for the Contractor and/or the Employer to remedy or mitigate its effects.

- 1.1.161 **"Pre Take-Over Guarantees"** means the performance and other guarantees identified in Schedule 7 (*Performance Guarantees*) as the Pre Take-Over Guarantees.
- 1.1.162 **"Prime Interest Rate"** means the publicly quoted basic rate of interest (percent, per annum, compounded monthly in arrears and calculated on a 365 day year (irrespective of whether the year is a leap year or not)) from time to time published by Nedbank Limited (or its successor in title) as being its prime overdraft rate as certified by any manager, whose appointment need not be proved.
- 1.1.163
- 1.1.164 **"Programme"** means the programme contained in Schedule 6 (*Programme and Milestone Schedule*) as updated in accordance with agreements and determinations pursuant to Clause 3.5 (*Determinations*).
- 1.1.165 **"Project"** means the development, design, construction, ownership, operation, maintenance, financing, installation and management of the Facility, insurance of said activities and of assets and income associated thereto, the generation of Energy by the Facility, the sale and purchase of the Net Energy Output, the supply of electricity, the handover of the Self Build Works and the provision of incidental services and all related activities associated with the Facility.
- 1.1.166 **"Project Event"** means each and any of the events comprising Force Majeure, Network Event, Buyer Risk Event, Change in Costs Event and a Change in Law.
- 1.1.167 **"Project IP"** means all Intellectual Property arising out of, created or developed by the Contractor or a Subcontractor in performing the Works and its other obligations under this Contract, including Intellectual Property subsisting in or regarding:
- 1.1.167.1 the Facility, the Works and the equipment; and
- 1.1.167.2 the Contractor's Documents,
- but does not include Contractor Background IP.
- 1.1.168 **"Punch List"** has the meaning given to it in Clause 10.2.3.1.
- 1.1.169 **"Reasonable and Prudent Operator"** means a person seeking in good faith to perform its contractual obligations and, in so doing and in the general conduct of its undertaking, exercising that degree of skill, diligence, prudence, responsibility and foresight which would reasonably and ordinarily be expected from a skilled and appropriately experienced contractor or operator internationally, who is complying with

all applicable Laws, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions, and any references herein to the "**standards of a Reasonable and Prudent Operator**" shall be construed accordingly.

- 1.1.170 "**Related Document Notice Obligations**" means the notice obligations of the Employer under the Related Documents, to the extent relevant to the Works for which the Contractor is responsible under this Contract, and without derogating from the generality of the foregoing, those notice obligations listed in Schedule 23 (*Related Document Obligations*), which notice obligations listed in Schedule 23 (*Related Document Obligations*) are for the avoidance of doubt a non-exhaustive list.
- 1.1.171 "**Related Document Obligations**" means each and every obligation under any Related Document that imposes an obligation on the Employer and that pertains to the Works or the obligations to be fulfilled by the Contractor under this Contract and, without derogating from the generality of the foregoing, those notice obligations listed in Schedule 23 (*Related Document Obligations*), which notice obligations listed in Schedule 23 (*Related Document Obligations*) are for the avoidance of doubt a non-exhaustive list.
- 1.1.172 "**Related Documents**" means the Power Purchase Agreements, the CUOSA, Land Agreements, the Budget Quote, the Self Build Agreements, the NERSA Registration Certificate, entered into by, or provided to, the Employer in connection with the Project and copies of such Related Documents are annexed to Schedule 23 (*Related Document Obligations*).
- 1.1.173 "**RETEC**" means the Renewable Energy Technical Evaluation Committee, as established by NERSA.
- 1.1.174 "**Sanctioned Entity**" means:
- 1.1.174.1 a person or entity listed on a Sanctions List or is subject to Sanctions; and/or
- 1.1.174.2 a person who or entity which is ordinarily resident, organised or operating in a country or territory which is listed on a Sanctions List or is subject to Sanctions.
- 1.1.175 "**Sanctioning Body**" means:
- 1.1.175.1 the United Nations;
- 1.1.175.2 the European Union;
- 1.1.175.3 the Council of Europe (founded under the Treaty of London, 1946);
- 1.1.175.4 the government of South Africa;

- 1.1.175.5 the government of the United States of America;
- 1.1.175.6 the government of the United Kingdom;
- 1.1.175.7 the government of the Republic of France; and
- 1.1.175.8 any of their governmental authorities and agencies, including, without limitation, the Office of Foreign Assets Control for the US Department of Treasury (OFAC), the US Department of Commerce, the US State Department or the US Department of the Treasury, His Majesty's Treasury (HMT) of the United Kingdom, the United Kingdom Foreign, Commonwealth and Development Office and the French Ministry of Finance.

- 1.1.176 **"Sanctions"** means the economic sanctions, trade controls, anti-boycott laws, regulations or restrictive measures administered or enforced by the United States, United Kingdom, United Nations Security Council, European Union or its Member States, Australia, Canada or any other relevant government.

- 1.1.177 **"Sanctions List"** means any of the lists of specifically designated nationals or designated persons or entities (or equivalent) held by a Sanctioning Body, including the Specially Designated Nationals and Blocked Persons List maintained by the Office of Foreign Assets Control for the U.S department of Treasury, the "Consolidated List of Financial Sanctions Targets and the Investment Ban List" maintained by the Office of Financial Sanctions Implementation of HMT (the OFSI List which list will be retired on 28 January 2026) and the "UK Sanctions List" published by the Foreign, Commonwealth and Development Office on behalf of the United Kingdom Government.

- 1.1.178 **"Schedule of Payments"** means the schedule of payments attached hereto as Schedule 3 (*Contract Price and Payment Schedule*).

- 1.1.179 **"Second Evaluation Period"** has the meaning given to it in Schedule 8 (*Tests*).

- 1.1.180 **"Self Build Agreements"** means the Dx Self Build Agreement and the Tx Self Build Agreement.

- 1.1.181 **"Self Build Works"** has the same meaning as that given to the term "Contract Works" under the Dx Self Build Agreement and "Contestable Works" in the Tx Self Build Agreement which shall be handed over to the Network Operator.

- 1.1.182 **"Seller" or "Generator"** has the meaning given to in the Power Purchase Agreements.

1.1.183 **"Serial Defect"** means, on the basis of a root cause analysis, the same defect, failure or fault, whether occurring simultaneously or at different times, in respect of:

1.1.183.1 5% or more of the modules installed in the Facility, or 5% or more of the modules installed in the Contractor's worldwide fleet;

1.1.183.2 7.5% or more of the inverters installed in the Facility, or 7.5% or more of the inverters installed in the Contractor's worldwide fleet;

1.1.183.3 10% or more of the trackers installed in the Facility, or 10% or more of the trackers installed in the Contractor's worldwide fleet; or

1.1.183.4 15% or more of any other components (by the same component provider) installed in the Facility, or 15% or more of any other components (by the same component provider) installed in the Contractor's worldwide fleet,

in each case, notified prior to the expiry of the Defects Notification Period, provided that where the calculation to determine the number of defective units or components, as a percentage of the total number of such units or components installed on the Site, results in a fraction as opposed to a whole number, then it shall be rounded down to the nearest whole number where the calculation results in a number with a decimal of 0.5 or below (or in the case of inverters and transformers, at all times) and it shall be rounded up to the nearest whole number where the calculation results in a number with a decimal above 0.5.

1.1.184 **"Signature Date"** means the date on which this Contract is signed by the Party signing it last.

1.1.185 **"Site"** means the places where the Works are to be executed and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site.

1.1.186 **"Site Conditions"** means the site conditions regarding the Site including:

1.1.186.1 the general and local conditions for Environment, meteorological, seismic activity and climatic conditions;

1.1.186.2 transportation, access, waste disposal, handling and storage of materials;

1.1.186.3 availability and quality of all necessary utilities and availability and condition of roads;

1.1.186.4 availability of labour resources;

- 1.1.186.5 physical conditions where the Works are to be performed and the surrounding area as a whole;
- 1.1.186.6 topography and ground surface conditions, subsurface geology and conditions, nature and quantity of surface and subsurface materials to be encountered, location of underground utilities and the condition of existing structures; and
- 1.1.186.7 paleontological and archaeological conditions (including the discovery of any heritage resources as defined in the National Heritage Resources Act, 1999).
- 1.1.187 **"Spare Parts"** means the spare parts specified in Schedule 12 (*Spare Parts*) to be provided by the Contractor under this Contract which may constitute Plant and/or Materials as the case may be.
- 1.1.188 **"Social and Environmental Principles"** means the Equator Principles and/or the IFC Environmental and Social Performance Standards, IFC performance standards, ES Requirements and IFC EHS guidelines, as applicable.
- 1.1.189 **"Social and Environmental Principles Related Requirements"** has the meaning given to it in Clause 4.25.1 (*Social and Environmental Obligations Requirements*).
- 1.1.190 **"South Africa"** means the Republic of South Africa.
- 1.1.191 **"Standards"** has the meaning given to it in Clause 5.4.1 (*Technical Standards and Regulations*).
- 1.1.192 **"Statement"** means a statement submitted by the Contractor as part of an application, under Clause 14 (*Contract Price and Payment*), for a payment certificate.
- 1.1.193 **"Subcontractor"** means any person named in the Contract as a subcontractor, or any person appointed or engaged as a subcontractor by the Contractor, for a part of the Works; and the legal successors in title to each of these persons.
- 1.1.194 **"Subcontractor Side Agreement"** means the Subcontractor Side Agreement in the form specified in Schedule 11 (*Forms of Security*) required under Clause 4.7 (*Subcontractors*).
- 1.1.195 **"System Event"** has the meaning given to it in the Power Purchase Agreements.
- 1.1.196 **"Take-Over Requirements"** means:
- 1.1.196.1 that the Works have been completed in accordance with the Contract;
- 1.1.196.2 the "Contestable Works Completion Certificate" has been issued under the Tx Self Build Agreement.

- 1.1.196.3 the "Hand-over Date" has occurred under the Dx Self Build Agreement;
- 1.1.196.4 the Facility Completion Form and the Facility Completion Notice have been issued under the respective Power Purchase Agreements;
- 1.1.196.5 Commercial Operation Date under the Power Purchase Agreements have been achieved;
- 1.1.196.6 written confirmation has been received from Eskom, RETEC and/or NERSA that Grid Code compliance has been unconditionally achieved or achieved in respect of the Facility subject only to conditions of a temporary nature imposed by Eskom, RETEC and/or NERSA which relate to factors which cannot be resolved until after Take-Over ("**Temporary Conditions**");
- 1.1.196.7 the Contractor has completed and handed over the Self Build Works to the Network Operator in accordance with the provisions of the Self Build Agreements;
- 1.1.196.8 the Contractor has provided the Spare Parts required to be provided by the Time for Completion and has complied with the requirements of Clause 4.33.5;
- 1.1.196.9 the Contractor has provided the Second Performance Bond as provided for in Clause 4.4.1.2.2;
- 1.1.196.10 the Contractor has procured and provided to the Employer the relevant performance bond in accordance with the O&M Agreement;
- 1.1.196.11 the Tests on Completion and all Pre Take-Over Guarantees in respect of the Facility have been passed;
- 1.1.196.12 where applicable, the Contractor has paid the applicable reductions in the Contract Price as contemplated in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*) and the Performance Ratio Liquidated Damages to cover the assumed energy loss during the First Evaluation Period, as determined in accordance with Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*);
- 1.1.196.13 the Contractor has paid the Employer all Delay Liquidated Damages that are due to the Employer (if any);
- 1.1.196.14 the Facility is capable of being operated safely under all anticipated or likely operational conditions without voiding any warranties;

- 1.1.196.15 the Facility is in a condition which allows the Employer to comply with all Laws relating to its operation;
- 1.1.196.16 the Contractor has provided the final draft of the Operation and Maintenance Manuals as required pursuant to Clause 5.7 (*Operation and Maintenance Manuals*);
- 1.1.196.17 the Contractor has provided the as-built documents as required pursuant to Clause 5.6 (*As-Built Documents*);
- 1.1.196.18 the Contractor has provided all the training pursuant to Clause 5.5 (*Training*);
- 1.1.196.19 the Contractor has provided written confirmation that all current warranties provided by suppliers, manufacturers and Subcontractors are valid, enforceable and are capable of being ceded to the Employer;
- 1.1.196.20 the Punch List has been agreed; and
- 1.1.196.21 all Authorisations to be obtained by the Contractor under this Contract and which are necessary to Operate the Facility, and to the full extent permitted by Laws, have been transferred (to the extent necessary and/or permitted at Laws) to the Employer or the Employer's nominee.
- 1.1.197 "**Taking-Over**" means that the Taking-Over Certificate has been issued under Clause 10.2 (*Employer's Taking-Over of the Works*) and "**Take-Over**" shall be construed accordingly.
- 1.1.198 "**Taking-Over Certificate**" means the certificate issued under Clause 10.2 (*Employer's Taking-Over of the Works*).
- 1.1.199 "**Tests after Completion**" means the tests which are specified in Schedule 7 (*Tests*) and which are carried out under Clause 12 (*Tests after Completion*) after the Works are taken over by the Employer.
- 1.1.200 "**Tests on Completion**" means the tests which are specified in Schedule 7 (*Tests*), including the Facility Acceptance Tests, which are carried out under Clause 9 (*Tests on Completion*) before the Works are taken over by the Employer.
- 1.1.201 "**Time for Completion**" means the time for completing the Works under Clause 8.2 (*Time for Completion*), which shall be no later than 26 months after the Commencement Date, subject to any extension under Clause 8.4 (*Extension of Time for Completion*) of this Contract.

- 1.1.202 **"Tx Self Build Agreement"** means the transmission self-build agreement between the Employer and NTCSA in relation to the Project.
- 1.1.203 **"Unallocated PPAs"** means the power purchase agreements to be negotiated and concluded by the Employer and prospective buyers on terms and conditions in respect of Project Events no more onerous to the Contractor than the Power Purchase Agreements that have been executed at Financial Close.
- 1.1.204 **"USD"** means the United States Dollar.
- 1.1.205 **"Variation"** means any change to the Employer's Requirements or the Works, which is instructed or approved as a variation under Clause 13 (*Variations and Adjustments*).
- 1.1.206 **"Variation Pricing Methodology"** means the variation pricing methodology in the document so named and appended to the Contract as Schedule 16 (*Variation Pricing Methodology*).
- 1.1.207 **"VAT"** means Value Added Tax as provided for in the South African Value Added Tax Act 89 of 1991.
- 1.1.208 **"VAT Invoice"** has the same meaning as in the South African Value Added Tax Act 89 of 1991.
- 1.1.209 **"Works"** means all works as further described in the Employer's Requirements required for the completion of the Facility, to be designed, engineered, procured and constructed by the Contractor under the Contract including the Interconnection Facilities and handover of the Self Build Works.
- 1.1.210 **"ZAR"** means South African Rand.

Except where the context requires otherwise capitalised words not defined elsewhere in the Contract shall have the meaning attributed to them in the Power Purchase Agreements, the CUOSA, or the Self Build Agreements. However, capitalised terms defined in the Contract have priority over the same capitalised terms which are also defined in the Power Purchase Agreements, the CUOSA and Self Build Agreements.

1.2 **Interpretation**

- 1.2.1 In the Contract, except where the context requires otherwise:
- 1.2.1.1 words indicating one gender include all genders;
- 1.2.1.2 words indicating the singular also include the plural and words indicating the plural also include the singular;

- 1.2.1.3 provisions including the word "**agree**", "**agreed**" or "**agreement**" require the agreement to be recorded in writing;
- 1.2.1.4 "**written**" or "**in writing**" means hand-written, type-written, printed or electronically made, and resulting in a permanent record;
- 1.2.1.5 the terms "**issue or dispute**" shall be interpreted in the widest sense in the same manner that the term "**dispute**" is defined in Clause 20 (*Claims, Disputes and Arbitration*);
- 1.2.1.6 any reference to a person includes any individual, body corporate, unincorporated association, firm, company, corporation, government, state or agency of a state or any trust, association or partnership (whether or not having separate legal personality) or two or more of the foregoing or other entity recognised under any law as having a separate legal existence or personality;
- 1.2.1.7 any word or expression defined in any Clause in this Contract shall, unless the application of the word or expression is specifically limited to the Clause in question, bear the meaning ascribed to the word or expression throughout the Contract;
- 1.2.1.8 if any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it appears only in an interpretation Clause, effect shall be given to it as if it were a substantive provision of the Contract;
- 1.2.1.9 references to a statutory provision include any subordinate legislation (including regulations) made from time to time under that provision and references to a statutory provision include that provision as from time to time modified or re-enacted as far as such modification or re-enactment applies, or is capable of applying, to the Contract;
- 1.2.1.10 in the event that the day for payment of any amount due by the Employer in terms of the Contract should fall on a non-Business Day, the relevant day for payment shall be the next Business Day;
- 1.2.1.11 save to the extent expressly provided for, all references to dates and times are to dates and times in South Africa;
- 1.2.1.12 save to the extent expressly otherwise stated in the Contract or the Lender Direct Agreement, no provision of the Contract constitutes a stipulation for the benefit of any person (including any Subcontractor) who is not a Party;

- 1.2.1.13 the use of the word "including" followed by a specific example/s shall not be construed as limiting the meaning of the general wording preceding it and the *eiusdem generis* rule shall not be applied in the interpretation of such general wording or such specific example/s;
- 1.2.1.14 if any provision of the Contract is rendered void, illegal or unenforceable in any respect under any law, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and the Parties shall endeavour to agree an alternative provision to the void, illegal or unenforceable provision;
- 1.2.1.15 termination of the Contract for any cause shall not release a Party from any liability which at the time of termination has already accrued to such Party or which thereafter may accrue in respect of any act or omission prior to such termination. Similarly, the termination of the Contract shall not release a Party from any obligation which, by its nature, is intended to survive such termination;
- 1.2.1.16 the use of any expression in the Contract covering a process available under South African law (for example liquidation) shall, if any of the Parties to the Contract is subject to the law of any other jurisdiction, be construed as including any equivalent or analogous proceedings under the law of such other jurisdiction;
- 1.2.1.17
- 1.2.1.18 the terms of this Contract shall not, in the event of any ambiguity, be interpreted or construed to the disadvantage of a Party because that Party was responsible for or participated in the preparation of the Contract (or any part of it);
- 1.2.1.19 references to the "**Contract**" (or any part thereof) shall be construed as a reference to the Contract (or the relevant part) as amended, varied, restated, novated or substituted by the Parties in accordance with the Contract from time to time;
- 1.2.1.20 even where not expressly provided for, all provisions conferring rights of access, attendance and/or inspection for the Employer shall likewise apply for the

Employer's Personnel, the Lender's Technical Advisor, the Independent Engineer and other appointed representatives of the Buyers, the appointed representatives of Eskom / the NTCSA and the appointed representatives of any other Government Authority;

1.2.1.21 any act or omission of the Contractor includes any act or omission of the Contractor itself, any Subcontractor or the Contractor's Personnel or any persons for whom they are respectively responsible;

1.2.1.22 any act or omission of the Operator referred to in this Contract, includes any act or omission of the Operator itself or the Operator's Personnel (as defined in the O&M Agreement) or any persons for whom they are respectively responsible.

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

1.3 **Communications**

1.3.1 Wherever this Contract provides for the giving or issuing of approvals, certificates, consents, determinations, notices and requests, these communications ("**Notice**") shall be in writing and delivered by hand or courier or transmitted email to the address for the recipient's communications as stated below:

1.3.1.1

1.3.1.2

1.3.1.3

1.3.1.4

1.3.2 Any Notice takes effect when received by the recipient (or on any later date specified in the Notice) and, unless the contrary is proved, is deemed to be received:

1.3.2.1 on the day of delivery, if delivered by hand to a responsible person at the recipient's physical address in Clause 1.3.1. If delivery is not on a Business Day, or is after ordinary business hours on a Business Day, the Notice is deemed to be received on the Business Day after the date of delivery; and

1.3.2.2 if sent by email to the recipient's email address in Clause 1.3.1, in accordance with Clause 1.3.4.

1.3.3 Despite anything to the contrary in this Contract, a Notice actually received by a Party is effective even though it was not sent, or delivered, or sent and delivered to its address in Clause 1.3.1.

1.3.4 If communications are transmitted by electronic ("e") mail, upon receipt by the sender of a return email from recipient in which the sender's communication is acknowledged (it being the responsibility of the sender to obtain such acknowledgement).

1.3.5 Each Party chooses its physical address referred to in Clause 1.3.1 as its address at which legal process and other documents in legal proceedings in connection with this Contract may be served (*domicilium citandi et executandi*).

1.3.6 Any Party may by Notice to the other Party change its address at which legal process and other documents in legal proceedings in connection with this Contract may be served to another physical address in South Africa.

1.3.7 Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed.

1.4 **Law and Language**

1.4.1 The Contract shall be governed and interpreted in accordance with the law of South Africa, both in respect of substantive and procedural law and notwithstanding any conflict of law principles that apply.

1.4.2 Subject to Clause 11.1.2.5 (*Independent Third Party Expert Determination*) and Clause 20 (*Claims, Disputes and Arbitration*), the South African High Courts shall have exclusive jurisdiction over all matters pertaining to this Contract.

1.4.3 The language of this Contract shall be English and if there are versions of any part of this Contract which are written in more than one language, the version which is in English shall prevail.

1.4.4 The language for written and oral communications under this Contract shall be English, save where required otherwise by any Laws. Where any document is produced in a language other than English, the Party producing it shall also provide a certified translation in English (and for the purposes of this Contract such English translation shall prevail).

1.5 **Priority of Documents**

1.5.1 For the purposes of interpretation, the priority of documents forming the Contract shall be as stated in clause 2 of the Contract Agreement.

1.5.2 If the Contractor finds any discrepancy, ambiguity or inconsistency in or between any of the documents forming the Contract, the Contractor shall immediately notify the Employer giving details of such discrepancy, ambiguity or inconsistency, and shall comply with the Employer's instructions in relation thereto.

1.5.3 If the Employer finds any discrepancy, ambiguity or inconsistency in or between any of the documents forming this Contract, the Contractor shall comply with the Employer's instructions in relation thereto.

1.5.4 The Contractor shall not be entitled to any additional time or Cost as a result of complying with any instructions issued by the Employer pursuant to this Clause 1.5 (*Priority of Documents*).

1.5.5 Notwithstanding the foregoing, in the event that additional details or more stringent requirements are contained in a lower level document, such additional details or more stringent requirements will take precedence unless otherwise determined by the Employer in terms of Clause 3.5 (*Determinations*).

1.6 **Contract Agreement**

The Contract shall come into full force and effect on the date on which all of the Conditions Precedent have been satisfied and/or waived (as the case may be) in accordance with clause 3 of the Contract Agreement. The costs of stamp duties and similar charges (if any) imposed by law in connection with entry into the Contract Agreement shall be borne by the Employer.

1.7 **Assignment and Change in Control**

1.7.1 The Contractor and the Contractor Members shall not assign the whole or any part of the Contract or cede or delegate any right or obligation in or under the Contract without the prior written consent of the Employer and the Lenders and, notwithstanding any provision to the contrary in this Contract, the Employer and Lenders may grant such consent in its sole and absolute discretion subject to the Lender approval.

1.7.2 Any purported assignment, cession or delegation by the Contractor and Contractor Members without such prior written consent shall be null and void.

1.7.3 The Contractor acknowledges that the Employer may:

1.7.3.1 cede, assign, charge or otherwise encumber the Contract, the Performance Security (subject to the terms and conditions of such Performance Security) or any rights, benefit or interest under the Contract or the Performance Security in favour of any Lender or a security special purpose vehicle, including for the creation, transfer and/or enforcement of security (including as provided for in the Lender Direct Agreement); and/or

1.7.3.2 assign the whole of the Contract (comprising the cession of all of its rights and the delegation of all of its obligations under the Contract) to (i) any Affiliate of the Employer without the consent or approval of the Contractor, or (ii) any person succeeding to substantially all of the Employer's interests in the Project with the consent of the Contractor which consent shall not be unreasonably withheld and may in such event also cede its rights under the Performance

Security to that Affiliate or other person (subject to the terms and conditions of such Performance Security).

1.7.4 If the Employer cedes and delegates its rights and its obligations as contemplated in Clause 1.7.3 and the Performance Security and/or any other security in connection with the Contract do not permit the cession and delegation of the Employer's rights (and obligations if any) thereunder to such successor in title, the Contractor shall procure, within 28 days of written request from the Employer, (i) that a substitute security is delivered to the Employer's successor in title on mutatis mutandis the same terms against the return of the existing security; or (ii) that the Employer's rights (and obligations if any) under the existing security are fully and effectively ceded (and delegated, as applicable) to the Employer's successor in title.

1.7.5 The Contractor and Contractor Members may not effect any Change in Control without the prior written approval of the Employer and the Lenders, which approval shall not be unreasonably withheld or delayed. The Contractor and Contractor Members may not effect any Change in Control that will render the Contractor and/or the Employer non-compliant with the Contractor's Economic Development Obligations as set out in Schedule 15 (*Contractor's Economic Development Obligations*).

1.8 **Care and Supply of Documents**

1.8.1 Each of the Contractor's Documents shall be in the custody and care of the Contractor, unless and until taken over by the Employer. The Contractor shall supply to the Employer 2 soft copies and 2 hard copies of each of the Contractor's Documents.

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

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

1.9 **Employer's Use of Contractor's Documents**

1.9.1 As between the Parties, the Contractor shall retain the copyright and other Intellectual Property rights in the Contractor's Documents and other design documents made by (or on behalf of) the Contractor. The Contractor warrants and undertakes to the Employer that the copyright and other Intellectual Property rights in the Contractor's Documents are vested or will vest in the Contractor (or where appropriate the

Contractor has or will obtain the benefit of a license in respect of such Intellectual Property rights).

1.9.2 The Contractor shall be deemed (by signing the Contract) to give to the Employer a non-terminable, perpetual, transferable, non-exclusive, royalty-free licence to copy, use and communicate the Contractor's Documents, including making and using modifications of them, and disclosing these to any counterparty to a Related Document and the Lenders. This licence shall:

1.9.2.1 apply throughout the actual or intended working life (whichever is longer) of the relevant parts of the Works;

1.9.2.2 entitle any person in proper possession of the relevant part of the Works to copy, use and communicate the Contractor's Documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing and demolishing the Works; and

1.9.2.3 in the case of Contractor's Documents which are in the form of computer programs and other software, permit their use on any computer on the Site, the Employer's offices and other places as envisaged by the Contract, including replacements of any computers supplied by the Contractor.

1.9.3 Without derogating from the warranty and undertaking in Clause 1.9.1, the Contractor shall ensure that each Subcontractor executes all and any further documents and takes all and any other actions as may be required to give effect to the license provided for in this Clause 1.9 (*Employer's use of Contractor's Documents*).

1.9.4 The Contractor's Documents and other design documents made by (or on behalf of) the Contractor shall not, without the Contractor's consent, be used, copied or communicated to a third party by (or on behalf of) the Employer for purposes other than those permitted under this Clause 1.9 (*Employer's use of Contractor's Documents*).

1.10 **Contractor's Use of Employer's Documents**

As between the Parties, the Employer shall retain the copyright and other Intellectual Property rights in the Employer's Requirements and other documents made by (or on behalf of) the Employer. The Contractor may, at its cost, copy and use these documents for the purposes of the Contract. They shall not, without the Employer's consent, be copied, used or communicated to a third party by the Contractor, except as necessary for the purposes of the Contract.

1.11 Confidential Details

- 1.11.1 Both Parties shall treat the details of the Contract as private and confidential, except to the extent such information:
- 1.11.1.1 is necessary to carry out obligations under it or to comply with applicable Laws;
 - 1.11.1.2 is publicly available or becomes publicly available through no act or default of either Party;
 - 1.11.1.3 was in the possession of a Party prior to its disclosure otherwise than as a result of any breach by that Party of any obligation of confidentiality owed to any other person whether pursuant to this Contract or otherwise;
 - 1.11.1.4 is disclosed to a Party by a person, which person did not acquire the information under an obligation of confidentiality;
 - 1.11.1.5 is disclosed to a third party with the prior written consent of the other Party; or
 - 1.11.1.6 is independently acquired by a Party as a result of work carried out by a person to whom no disclosure of such information has been made.
- 1.11.2 The Contractor shall not publish, permit to be published, or disclose any particulars of the Works in any trade or technical paper or elsewhere without the previous agreement of the Employer.
- 1.11.3 The Contractor shall disclose all information which the Employer may reasonably require in order to verify compliance with the Contract, or which is required in connection with the Related Documents; provided that the Contractor shall not be obliged to disclose information in its possession, which is subject to legal professional privilege.
- 1.11.4 The Contractor shall keep confidential and not disclose or make available to any third party any information in connection with the Contract (including information concerning the Project and any Related Documents) made available for or obtained by the Contractor in the course of the execution of the Works and shall use such information only for the purpose of executing and completing the Works. This undertaking does not, however, apply to information which at the time of disclosure or thereafter, without default on the part of the Contractor, enters the public domain or information which was already in the possession of the Contractor at the time of disclosure (evidenced by written (including electronic) records in existence at that time).

- 1.11.5 The Contractor's undertaking does not apply to information which is acquired independently of a third party who represented that it has the right to disseminate such information at the time. Nor does it apply to information which has been independently developed by the Contractor, its holding company, Affiliates, or subsidiaries without access to any information contained in, or provided under, the Contract.
- 1.11.6 If the Contractor is uncertain about whether any information is to be regarded as confidential, it shall be regarded as such until written clarification is obtained from the Employer.
- 1.11.7 Where the Contractor is required to disclose any confidential information to any Contractor's Personnel, Government Authority, shareholders (direct or indirect), agents, consultants, contractors, advisers, financiers, potential financiers, investors, potential purchasers of the interests of a shareholder (direct or indirect) and insurers for the purpose of enabling the Contractor to comply with its obligations, the Contractor shall only do so on the basis that:
 - 1.11.7.1 the Contractor notifies the recipient at or about the time of such disclosure that the information is confidential and should not be disclosed by the recipient to third parties; and
 - 1.11.7.2 the Contractor shall be responsible for ensuring that the recipient keeps the information confidential and shall accordingly be responsible for any failure of the recipient to do so.
- 1.11.8 Save as provided for below, the Employer shall not disclose, or otherwise make available to any third party any information regarding the Contractor's trade secrets and/or other proprietary information which is furnished by the Contractor to the Employer in connection with the Contract, and shall use such information only for the purpose of the Project. This undertaking does not, however:
 - 1.11.8.1 apply to information which at the time of disclosure or thereafter, without default on the part of the Employer, enters the public domain or information which was already in the possession of the Employer at the time of disclosure (evidenced by written (including electronic) records in existence at that time);
 - 1.11.8.2 apply to information that the Employer is required or permitted to disclose to any party under the Related Documents or is otherwise required or permitted to disclose to Lenders; nor
 - 1.11.8.3 restrict or otherwise derogate from the Employer's rights to use or disclose any information or data furnished by the Contractor, including the Contractor's Documents, as may be provided for elsewhere in the Contract.

- 1.11.9 In addition either Party is entitled to disclose information as may be required by the regulations of any recognised securities exchange upon which the share capital of the Party (or any shareholder (direct or indirect) in the Party) is or is proposed to be from time to time listed or dealt in, and the Party making such disclosure shall, if reasonably practicable prior to making the disclosure and in any event as soon as reasonably practicable thereafter, supply the other Party with a copy of such disclosure and statement and detailed of the persons to whom the information has been disclosed.
- 1.11.10 In the event that a Party (the "**Receiving Party**") is, at any time, required by Laws or regulation to disclose any information of the other Party (the "**Disclosing Party**") which is required to be kept confidential by the Receiving Party in terms of this Clause 1.11.10, the Receiving Party, to the extent permitted by Law prior to disclosure, shall notify the Disclosing Party so that an appropriate protection order and/or any other action can be taken if possible, prior to any disclosure. In the event that such protective order is not, or cannot, be obtained, then the Receiving Party may disclose that portion of the information which it is required to disclose by law and shall use reasonable efforts to obtain assurances that confidential treatment will be afforded to the information so disclosed.
- 1.11.11 The taking of images (whether photographs, video footage or otherwise) of the Works or any portion thereof and the publication of any matter related to or in connection with the Works or the Project requires the prior written authorisation of the Employer save where required for the sole purpose of complying with Clause 4.28 (*Progress Reports*). Where the Contractor takes images and/or publishes any matter as permitted under this Clause 1.11.11, it shall be done in accordance with the requirements of the Related Documents.
- 1.12 **Compliance with Laws and Responsibility for Authorisations**
- 1.12.1 The Contractor shall:
- 1.12.1.1 comply with:
- 1.12.1.1.1 all Authorisations, the Land Agreements and all applicable Laws relevant to the performance of the Works, the Facility, the Project and this Contract;
- 1.12.1.1.2 all requirements of Government Authorities relevant to the performance of the Works, the Facility, the Project and/or this Contract; and
- 1.12.1.1.3 all requirements not to engage in Corrupt Acts in compliance with the Anti-Corruption Laws;

- 1.12.1.2 give all notices, pay all taxes, duties and fees in relation to the design, execution and completion of the Works and the remedying of any defects; and
- 1.12.1.3 obtain (other than the Employer Authorisations under Clause 1.12.4) and maintain all Authorisations, as required by the Laws in relation to the design, execution and completion of the Works and the remedying of any defects and the performance of all its other obligations under the Contract (the "**Contractor Authorisations**"); and
- 1.12.1.4 upon the Employer's request and as otherwise required by this Contract, provide the Employer with evidence of its compliance with Clause 1.12.1.3 (including original approvals and other documents).
- 1.12.2 Except to the extent caused by the Employer's failure to comply with its other obligations under this Contract, the Contractor indemnifies and holds harmless the Employer against and from all claims, damages, losses and expenses (including legal fees and expenses) of whatever nature arising out of or resulting from any failure by the Contractor to comply with Clauses 1.12.1.1 and/or 1.12.1.2, including any failure caused by one or more Subcontractors and their personnel.
- 1.12.3 If the Employer incurs (or will incur) any additional cost as a result of the Contractor's default or delay which is not attributable to the Employer in obtaining and maintaining any Authorisation for which the Contractor is responsible under this Clause 1.12, the Contractor shall, subject to Clause 2.4 (*Employer's Claims*), pay these costs to the Employer.
- 1.12.4 The Employer shall only obtain those Authorisations listed in Schedule 4 (*Authorisations*) as being the responsibility of the Employer to obtain (the "**Employer Authorisations**"). The Contractor shall provide such information, advice and assistance as the Employer may reasonably require to obtain such Authorisations.
- 1.12.5 If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of the Employer's default or delay in obtaining any Authorisation for which the Employer is responsible under this Clause 1.12, the Contractor shall give notice to the Employer and shall be entitled, subject to Clause 20.1 (*Contractor's Claims*) (and subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*) only where the default or delay in obtaining the Authorisation is due to a Project Event) to:
 - 1.12.5.1 an extension of time for any such delay, if completion is or will be delayed, under Clause 8.4 (*Extension of Time for Completion*); and

1.12.5.2 payment of any such additional Cost and Profit through an adjustment to the Contract Price.

1.12.6 After receiving a notice under Clause 1.12.5, the Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine these matters.

1.13 **General Pass Through**

1.13.1 The Parties record and acknowledge that the Contractor assumes all risks under the Related Documents relevant to the Works and which are imposed upon the Employer, but always subject to any limitations set out in this Contract.

1.13.2 Accordingly:

1.13.2.1 the Contractor expressly acknowledges that it has reviewed the terms of the Related Documents and, subject to any specific limitations to be agreed in this Contract, assumes those risks relevant to the Works which are assumed by the Employer under the Related Documents;

1.13.2.2 the Contractor will carry out its obligations under this Contract, in such manner as to allow the Employer to comply with its obligations under the Related Documents regarding completion of the Facility, and will not do anything to prevent or interfere with the Employer's performance of its corresponding obligations under the Related Documents;

1.13.2.3 all notices required to be provided by the Employer under the Related Documents in respect of the Works shall be prepared and provided by the Contractor to the Employer with sufficient time for the Employer to review, discuss and, where needed, update such notices, before submitting such notices to the respective counterparties under the Related Documents; and

1.13.2.4 all relevant deadlines in this Contract shall be aligned with all appropriate deadlines in the Related Documents with appropriate buffers provided for to such an extent to ensure that the Contractor is obliged to give its notices in sufficient time in order for the Employer to not be in breach of its notice obligations under the Related Documents, provided that this Clause 1.13 shall not have the effect of reducing any deadline or other obligation of the Contractor under this Contract.

1.13.3 Overarching obligations of the Contractor

The Contractor shall, unless specifically agreed otherwise in this Contract:

1.13.3.1 without limiting Clauses 1.13.5 and 1.13.6, perform its obligations under this Contract in such a manner so as to allow the Employer to fulfil its obligations in respect of the construction of the Facility under the Related Documents in relation to the Works for which the Contractor is responsible under this Contract; and

1.13.3.2 in performing its obligations under this Contract, not do anything or fail to do something to prevent or interfere with the Employer's performance of its obligations in respect of the construction of the Facility under the Related Documents.

1.13.4 Contractor shall provide all necessary information

In fulfilling its obligations under Clauses 1.13.5 and 1.13.6, the Contractor shall provide to the Employer all documents, technical materials, certificates, consents, tests, designs and other things reasonably required for the Employer to fulfil its obligations under the Related Documents in relation to the Works, and so that all such documentation and the like conforms with the requirements of the Related Documents.

1.13.5 Contractor shall comply with the Related Document Obligations

1.13.5.1 the Contractor shall comply with the Related Document Obligations as set forth in Schedule 23 (*Related Document Obligations*); and

1.13.5.2 the Contractor shall, in relation to any obligation required to be performed by the Contractor under the Related Document Obligations:

1.13.5.2.1 assume and perform, subject to and in accordance with the Related Document Notice Obligations, all the Employer's liabilities and obligations to any third party under the Related Document as if they were separate and independent equivalent obligations or liabilities of the Contractor to the Employer;

1.13.5.2.2 extend to, and for the benefit of, the Employer and its Affiliates all releases, exclusions of liability and relief from obligations and all indemnities extended by the Employer to the party under the Related Document (as the context requires) on equivalent terms; and

- 1.13.5.2.3 give to and for the benefit of the Employer the representations, warranties, acknowledgements and agreements given by the Employer to the party under the Related Document (as the context requires) on equivalent terms.
- 1.13.6 The Contractor shall comply with the Related Document Notice Obligations. Where there is any conflict or differences between the Related Document Obligations and the Contractor's obligations under this Contract or as between the Related Document Obligations themselves, the Contractor shall comply with whichever is the most onerous of such obligations.
- 1.13.7 Timing of Communications under the Related Document Notice Obligations
- 1.13.7.1 Where the Employer is required or permitted to meet, consult or liaise with or give any notice, request, advice, document, claim, certificate or information to a third party under the Related Document Notice Obligations within a time period after the performance of a step or the occurrence of an event ("**Communication**"), to the extent that the Communication relates to the Contractor's obligations under this Contract, the Contractor:
- 1.13.7.1.1 shall prepare the Communication in a form which complies with the Related Document;
- 1.13.7.1.2 shall not give that Communication directly to a third party unless specifically requested to do so in writing by the Employer;
- 1.13.7.1.3 shall give that Communication to the Employer within 70% of the time period available to the Employer under the Related Document before the Employer is required to or may give that Communication to the third party under the Related Document (rounded down to the nearest whole number of days), provided that:
- 1.13.7.1.3.1 the Communication shall always be given to the Employer at least 2 days before the due date under the Related Document; and
- 1.13.7.1.3.2 if any provision of this Contract contains a more onerous obligation on the Contractor than is set out in this Clause 1.13.7.1.3, the more onerous obligation shall prevail; and
- 1.13.7.1.4 shall provide all additional information the Employer may reasonably require in relation to that Communication in order to perform its obligations under the Related Documents.

1.13.7.2 If the relevant Related Document stipulates a notice period before the performance of a step or the occurrence of an event, the notice period required under this Contract shall be 120% of the time period required under the Related Document (rounded up to the nearest whole number of days), provided the notice period under this Contract shall always be at least 2 days longer than the notice period required under the Related Document.

1.13.8 Covering letter to any Communication

Any Communication and/or information and data provided by the Contractor to the Employer under the Related Document Notice Obligations shall include a covering letter which states:

1.13.8.1 the clause of the relevant Related Document the Communication is required to be provided under;

1.13.8.2 the additional data, information or details that the Contractor believes is missing from the Communication necessary for it to meet the requirements of the relevant Related Document in Clause 1.13.8.1; and

1.13.8.3 the additional data, information or details that the Contractor believes the Employer or a named third party may need to add to the Communication necessary for it to meet the requirements of the Related Document in Clause 1.13.8.1.

1.13.9 Parties to provide each other with Communications

1.13.9.1 The Contractor shall give to the Employer a copy of any Communication it gives to or receives from a third party under the Related Documents at the same time as it gives or receives the Communication.

1.13.9.2 Where the Employer receives any Communication from a third party under the Related Documents which is relevant to the Works or the Contractor, or will require the Contractor to provide a Communication to that third party or undertake any other course of action in accordance with this Clause 1.13 (*General Pass Through*), the Employer shall promptly provide the Contractor with a copy of that Communication so as to allow the Contractor sufficient time to comply with all of its obligations under this Contract, and in any event within 2 days after receipt of the Communication.

1.13.10 Relief dependent upon content of Communications

The Contractor acknowledges and agrees that its entitlement to claim relief under this Contract relating to any Project Event is dependent upon, among other things, the form, content, quality and timeliness of such Communications and other information it provides to the Employer under the Related Document Notice Obligations, as this will allow the Employer to successfully claim corresponding relief under the Related Documents for substantially the same Project Event.

1.13.11 Consent required to exercise Employer's rights

Nothing in this Clause 1.13 (*General Pass Through*) or otherwise in this Contract entitles the Contractor to exercise any of the Employer's rights under the Related Documents without the Employer's prior written consent.

1.13.12 No Amendment

1.13.12.1 The Employer shall not make or permit any amendment to be made to the Related Documents, other than unilateral changes made by a counterparty to the Related Documents, which may have an adverse effect on the Contractor (such as an increase in its liability or a material reduction in its rights) other than in accordance with this Clause 1.13.12.

1.13.12.2 As soon as possible after such amendment is made to any Related Document, the Employer shall provide the Contractor with a copy of the amended Related Document. Notwithstanding anything to the contrary contained in this Contract:

1.13.12.2.1 should any amendment be made to a Related Document in breach of this Clause 1.13.12; or

1.13.12.2.2 for as long as the Employer fails to provide a copy of an amended Related Document to the Contractor,

the relevant amendments to the Related Document shall not be binding on the Contractor and the Contractor shall not be obliged to comply with the provisions of such amendments. In circumstances where the material elements of any amendment to the Related Documents have been communicated to the Contractor or where compliance with such amendments is required by Law, the Contractor shall be entitled to submit to the Employer a written proposal in compliance with the provisions of Clause 13.3 (*Variation Procedure*) to the extent the Contractor considers that such amendments to the Related Documents constitutes a Variation under the Contract.

1.14 **Pass Through Claims**

- 1.14.1 Subject to the principles set out in this Clause 1.14 (*Pass Through Claims*), all entitlements which the Contractor has against the Employer under this Contract, where the Employer has corresponding entitlements against any of the counterparties under the Related Documents, will be pass through claims, including in relation to a Project Event ("**Pass Through Claims**").
- 1.14.2 Where Pass Through Claims arise, the Employer has certain entitlements with respect to those counterparties under the Related Documents. The purpose of this Clause 1.14 (*Pass Through Claims*) is to provide the Contractor with comparable entitlements in respect of Pass Through Claims and to limit the Contractor's rights against the Employer in respect of Pass Through Claims by reference to the Employer's entitlements under the Related Documents.
- 1.14.3 In respect of a Pass Through Claim, in the event that relief is granted to the Employer in respect of common issues under the Power Purchase Agreements and the Unallocated PPAs, whether in the form of any extension of time or monetary compensation, such common issues in relation to Pass Through Claims and the relief entitlements shall be dealt with as follows:
- 1.14.3.1 the Employer shall use its reasonable endeavours to ensure that the Project Event related provisions in terms of the Unallocated PPAs will be no more onerous than those in the Power Purchase Agreements executed at Financial Close;
- 1.14.3.2 if the Buyers under the Power Purchase Agreements and the Unallocated PPAs grant relief for a common issue in the form of an extension of time and the durations of such extensions differ, the Contractor shall only be entitled to the lesser form of time relief (being the more stringent or onerous) of those extensions under the Power Purchase Agreements and the Unallocated PPAs;
- 1.14.3.3 where an extension of time is granted under certain Power Purchase Agreements or the Unallocated PPAs and not under all the Power Purchase Agreements and the Unallocated PPAs, the Employer shall make a proportionate adjustment to any Delay Liquidated Damages for which the Contractor would otherwise be liable for under Clause 8.6 (*Delay Liquidated Damages*) in order that the Contractor's liability for Delay Liquidated Damages is proportionately reduced to reflect the proportionate relief for the extension of time granted to the Employer under the relevant Power Purchase Agreements and/or the Unallocated PPAs; and/or

- 1.14.3.4 where the relief for the common issue is granted to the Employer under the Power Purchase Agreements and the Unallocated PPAs in monetary compensation form, the Contractor's entitlement to such relief shall be limited to the portion of the monetary relief actually received by the Employer in respect of the event giving rise to the Contractor's Pass Through Claim. Notwithstanding the requirement to apply the more stringent or onerous relief, if monetary relief is only granted under certain Power Purchase Agreements or the Unallocated PPAs and not under all the Power Purchase Agreements and the Unallocated PPAs, the Contractor shall nevertheless be entitled to receive the monetary relief granted under the applicable Power Purchase Agreements and/or the Unallocated PPAs, subject always to the limitation that the Contractor may only recover the applicable portion of the sums which the Employer actually has recovered under the Power Purchase Agreements and the Unallocated PPAs.
- 1.14.4 The Contractor agrees that where a Pass Through Claim is instituted which relates to a common issue under more than one Related Document, it shall only receive relief or satisfaction of its Pass Through Claim in terms of this Clause 1.14 (*Pass Through Claims*) other than its proportionate share of the monetary relief, once the related Pass Through Claims are finally accepted or resolved under all the applicable Related Documents. Pending resolution of any dispute in connection with the Pass Through Claim or in the event of one or more of the Buyers or prospective buyers under the Unallocated PPAs, refusing an extension of time claim, then the Delay Liquidated Damages shall be due to the Employer and will be calculated in accordance with Schedule 9 (*Delay Liquidated Damages*).
- 1.14.5 Subject to the provisions of this Contract, whenever the Contractor submits a claim under this Contract that is submitted by the Employer for consideration under the Power Purchase Agreements and the Unallocated PPAs in accordance with Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*), any relief to which the Contractor may become entitled shall be limited to the relief actually granted to the Employer under the Power Purchase Agreements and the Unallocated PPAs. In the event that the Employer obtains relief in respect of such claim under certain but not all the Power Purchase Agreements and the Unallocated PPAs (and not the other the Power Purchase Agreements and the Unallocated PPAs), the Employer shall make a proportionate adjustment to any Delay Liquidated Damages for which the Contractor would otherwise be liable, so that the Contractor's liability for Delay Liquidated Damages is proportionately reduced to reflect the relief granted to the Employer under the relevant Power Purchase Agreements and the Unallocated PPAs. Nothing in this clause shall limit the Employer's rights and

remedies against the Contractor under this Contract to recover the proportionally reduced Delay Liquidated Damages.

- 1.14.6 In respect of all Pass Through Claims:
- 1.14.6.1 the Employer shall, in a timely manner and subject to its obligations under the Related Documents, give the Contractor copies of all relevant documents and other information, and allow the Contractor (at the Contractor's cost) an opportunity to attend relevant meetings and expert hearings and make submissions to the Employer, where permitted by the Related Documents;
 - 1.14.6.2 the Contractor shall co-operate with the Employer and comply with all reasonable requests for assistance in the negotiation and/or dispute resolution process, including providing all information and assistance in a timely manner as may be necessary to enable the Employer to pursue the Pass Through Claim under the Related Documents and preparing any necessary claim documents. Where the Contractor has not requested the Employer to pursue the Pass Through Claim and the request for assistance made by the Employer is for material assistance in relation to the pursuit of the Pass Through Claim, the Employer shall pay the reasonable costs incurred by the Contractor in complying with the request for such assistance under this Clause 1.14.6.2;
 - 1.14.6.3 any settlement or final determination of a Pass Through Claim under the Related Documents will be binding on the Contractor, provided that the Employer shall not settle, waive or compromise a Pass Through Claim (to the extent it affects the rights and obligations of the Contractor) without the prior written consent of the Contractor, which consent shall not be unreasonably withheld or delayed;
 - 1.14.6.4 the Employer's liability to the Contractor in respect of a Pass Through Claim will be satisfied by the Employer conferring on the Contractor the corresponding entitlement which has been agreed in accordance with Clause 1.14.6.3, or determined under the Related Documents;
 - 1.14.6.5 the Employer's liability to the Contractor in respect of a Pass Through Claim will not be satisfied if the Employer fails to comply with the notice and other requirements of the Related Documents or if the Employer fails to claim relief under the Related Documents or if the Employer fails to comply with its obligations in Clause 1.14.10 (except to the extent such failure by the Employer is caused by a failure of the Contractor to comply with its obligations under this Contract); and

- 1.14.6.6 subject to Clause 1.14.6.2, each Party shall bear its own costs of and incidental to the pursuit of any Pass Through Claim.
- 1.14.7 Subject to the further provisions of this Clause 1.14 (*Pass Through Claims*), the Contractor agrees to accept in full and final satisfaction of any Pass Through Claim, the relief or amount agreed or determined as payable under the Related Documents and/or the extension of time agreed or determined as due under the Related Documents (or the relevant proportion thereof).
- 1.14.8 The Contractor agrees that where a Pass Through Claim is instituted which relates to a common issue under more than one Related Document, it shall receive relief or satisfaction of its Pass Through Claim in terms of Clause 1.14.4 other than its proportionate share of the monetary relief, once the related Pass Through Claims are finally resolved under the other applicable Related Documents.
- 1.14.9 To the extent that the Contractor separately recovers compensation under this Contract, the Contractor will not be entitled to the same compensation in respect of the relevant event or circumstance by way of a Pass Through Claim.
- 1.14.10 The Employer shall:
 - 1.14.10.1 exercise all rights and remedies reasonably available to it under the Related Documents in respect of any bona fide Pass Through Claim;
 - 1.14.10.2 diligently pursue any *bona fide* Pass Through Claim under the Related Documents; and
 - 1.14.10.3 regularly, and at all material times, notify the Contractor of the status of any Pass Through Claim and all steps taken in connection with the Pass Through Claim.
- 1.14.11 The Employer and the Contractor shall co-ordinate and co-operate with one another in the preparation and pursuit of any Pass Through Claim, including in relation to required responses, discussions, joint or separate obtaining of legal advice and generally on the strategy for optimising the likelihood of a favourable outcome of any Pass Through Claim.

2 THE EMPLOYER

2.1 Right of Access to the Site

- 2.1.1 The Employer shall give the Contractor right of access to, and possession of, those portions of the Site required for the performance of the Works with effect from the Commencement Date. The right and possession may not be exclusive to the Contractor. After having received access and possession from the Employer the

Contractor shall be responsible for maintaining its right of access to and possession of those portions of the Site.

2.1.2 Subject to Clause 2.1.4, if the Contractor suffers delay and/or incurs Costs as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Employer and shall be entitled subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and be entitled in terms of Clause 20.1 (*Contractor's Claims*) to:

2.1.2.1 an extension of time for any such delay, if completion is or will be delayed, under Clause 8.4 (*Extension of Time for Completion*); and

2.1.2.2 payment of any such additional Cost plus Profit through an adjustment to the Contract Price.

2.1.3 After receiving a notice under Clause 2.1.2, the Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine these matters.

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

2.2 **Employer's Reasonable Assistance for Authorisations**

2.2.1 The Employer shall (where it is in a position to do so) provide reasonable assistance to the Contractor at the request of the Contractor for the Contractor's applications for any Authorisations:

2.2.1.1 which the Contractor is required to obtain under Clause 1.12 (*Compliance with Laws*);

2.2.1.2 for the delivery of Goods, including clearance through customs; and

2.2.1.3 for the export of Contractor's Equipment when it is removed from the Site.

2.2.2 The provision of such assistance by the Employer, shall in no way diminish or relieve the Contractor from its obligations and responsibilities under the Contract (whether under Clause 1.12 (*Compliance with Laws and Responsibility for Authorisations*) or otherwise).

2.3 **Employer's Personnel**

The Employer shall be responsible for ensuring that the Employer's Personnel:

- 2.3.1 comply with:
 - 2.3.1.1 all Authorisations, and all applicable Laws relevant to the Employer's obligations under this Contract;
 - 2.3.1.2 all requirements not to engage in Corrupt Acts; and
 - 2.3.1.3 the Contractor's Site regulations and the Contractor's instructions on Site;
- 2.3.2 take account of the Contractor's efforts under Clause 4.9 (*Co-operation*) and cooperate with the Contractor accordingly; and
- 2.3.3 shall not obstruct or impede the carrying out of the Works by the Contractor.

2.4 **Employer's Claims**

- 2.4.1 If the Employer considers itself to be entitled to any payment under any Clause of the Contract or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer shall give notice and particulars to the Contractor as soon as reasonably practical as determined by the Employer. However, notice is not required for payments due under Clause 4.27 (*Electricity, Water and Utilities*), or Clause 8.6 (*Delay Liquidated Damages*), or Clause 12.4 (*Failure to Pass Tests after Completion and meet Performance Guarantees*), or Clause 15.4 (*Payment after Termination*) as notice requirements are separately prescribed in such Clauses, or for other services requested by the Contractor.
- 2.4.2 The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.
- 2.4.3 The notice shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers itself to be entitled in connection with the Contract. The Employer shall then proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Clause 11.3 (*Extension of Defects Notification Period*).
- 2.4.4 The Employer may deduct this amount from any moneys due, or to become due, to the Contractor.

3 THE EMPLOYER'S ADMINISTRATION

3.1 The Employer's Representative

3.1.1 The Employer shall appoint an Employer's Representative to act on its behalf under the Contract. The Employer shall appoint an Employer's Representative, the Employer shall give notice to the Contractor of the name, address, duties and authority of the Employer's Representative so appointed. Following receipt by the Contractor of a notice informing the Contractor that an Employer's Representative has been appointed, all notices, instructions, information and other communications to be given by the Contractor or the Contractor's Representative to the Employer under this Contract shall be given to the Employer's Representative, except where expressly stated otherwise.

3.1.2 The Employer's Representative shall carry out the duties assigned to him, and shall exercise the authority delegated to him by the Employer. Unless and until the Employer notifies the Contractor otherwise (in writing), the Employer's Representative shall be deemed to have the full authority of the Employer other than in relation to the following matters where the Employer's Representative shall have no authority:

3.1.2.1 to authorise any amendments to the Contract;

3.1.2.2 relieving the Contractor of any duties, obligations or responsibilities under the Contract (including responsibility for errors, omissions, discrepancies and non-compliances); and

3.1.2.3 in respect of Clause 15 (*Termination by Employer*).

3.1.3 If the Employer wishes to replace any person appointed as Employer's Representative, the Employer shall give the Contractor not less than 14 days' notice of the replacement's name, address, duties and authority, and of the date of appointment.

3.2 Other Employer's Personnel

3.2.1 The Employer or the Employer's Representative may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include a resident and/or Owner's Engineer, Environmental, health and safety representative and/or independent inspectors appointed to inspect and/or test items of Plant and/or Materials and/or the Works. The assignment, delegation or revocation of duties and authorities of Employer's Representative shall not take effect until a copy of it has been received by the Contractor.

- 3.2.2 Assistants shall be suitably qualified persons, who are competent to carry out these duties and exercise this authority, and who are fluent in English.

3.3 **Delegated Persons**

- 3.3.1 All these persons, including the Employer's Representative and assistants and other Employer's Personnel, to whom duties have been assigned or authority has been delegated, shall only be authorised to issue instructions to the Contractor to the extent defined by the delegation. Any approvals, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by a delegated person, in accordance with the delegation, shall have the same effect as though the act had been an act of the Employer. However:

- 3.3.1.1 it shall not relieve the Contractor from any responsibility the Contractor has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances;
- 3.3.1.2 any failure to disapprove any work, Plant or Materials or the Works shall not constitute approval, and shall therefore not prejudice the right of the Employer to reject the work, Plant or Materials or the Works; and
- 3.3.1.3 if the Contractor questions any determination or instruction of the delegated person, the Contractor may refer the matter to the Employer, who shall promptly confirm, reverse or vary the determination or instruction.

3.4 **Instructions**

- 3.4.1 The Employer or Employer's Representative may issue to the Contractor instructions which may be necessary for the Contractor to perform its obligations under the Contract. Each instruction shall be given in writing in accordance with Clause 1.3 (*Communications*). If any such instruction constitutes a Variation, Clause 13 (*Variations and Adjustments*) shall apply.
- 3.4.2 The Contractor shall take instructions from the Employer, or from the Employer's Representative or an assistant to whom the appropriate authority has been delegated accordance with Clause 3.3 (*Delegated Persons*).
- 3.4.3 Except where this Contract expressly provides otherwise, in cases of urgency or emergency, a direction, order or instruction may be given orally, in which event the Employer's Representative shall, within 24 hours, confirm the direction, order or instruction in writing. Minutes of meetings, including Site meetings, shall not constitute such written confirmation. The Contractor is obliged to comply forthwith with any such lawful direction, order or instruction of the Employer. If the Employer does not confirm

such direction, order or instruction in writing within 24 hours of giving it, the Contractor shall provide within a further period of 24 hours a written record of the instruction received.

3.5 **Determinations**

3.5.1 Whenever this Contract provides that the Employer shall proceed in accordance with this Clause 3.5 (*Determinations*) to agree or determine any matter, the Employer shall consult with the Contractor in an endeavour to reach agreement. If agreement is not achieved, the Employer shall, as soon as reasonably practical, make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

3.5.2 The Employer shall give notice to the Contractor of each agreement or determination, with supporting particulars. Subject to the further provisions of this Clause 3.5.2 and to Clause 3.5.4, each Party shall give effect to each agreement or determination. If the Contractor provides written confirmation of its dissatisfaction with a determination within 14 days of receiving it, either Party may then refer the dispute for resolution in accordance with Clause 20 (*Claims, Disputes and Arbitration*). Execution of the relevant determination shall be suspended only for the 7 Business Day period stipulated in Clause 20.2 (*Amicable Settlement*) (and any agreement by the Parties to extend such 7 Business Day period under Clause 20.2.4 shall be ignored for this purpose) and unless overturned in accordance with Clause 20.2 (*Amicable Settlement*), the Parties shall thereafter give effect to such determination, notwithstanding any dispute, until the dispute is resolved or determined in accordance with Clause 20.3 (*Arbitration*).

3.5.3 Any cost, delay or other consequences arising directly from any delay in the Works as a result of the 7 Business Day period of suspension referred to in Clause 3.5.2 shall, in the first instance, be at the Contractor's risk and cost. If the dispute is finally resolved or determined in accordance with Clause 20 (*Claims, Disputes and Arbitration*):

3.5.3.1 in the Contractor's favour, such cost, delay or other consequences shall be the Employer's responsibility;

3.5.3.2 in the Employer's favour, such cost, delay or other consequences shall remain the Contractor's responsibility; or

3.5.3.3 partly in favour of the Contractor and partly in favour of the Employer, such cost, delay or other consequences shall be apportioned between the Parties in accordance with the written agreement of the CEO Committee under

Clause 20.2 (*Amicable Settlement*) or in accordance with the arbitrators' decision pursuant to Clause 20.3 (*Arbitration*).

- 3.5.4 If the Employer's determination in respect of a Serial Defect is disputed by the Contractor, the matter shall be resolved by an Independent Third Party Expert in accordance with Clauses 11.1.2.5 and 11.1.2.6.

4 THE CONTRACTOR

4.1 Prior Works

- 4.1.1 Where the Employer has carried out any design, services, supplies or works related to the Works, and the Contractor has made or makes use of such design, services, supplies or works related to the Works, the Contractor does so entirely at its own risk and takes full responsibility therefor.

- 4.1.2 Where the Contractor has carried out any design, services, supplies or works intended to form part of the Works prior to the Commencement Date including but not limited to the Early Works, then with effect from the Commencement Date such activities shall be deemed to have been carried out under the Contract and the requirements, warranties and undertakings set out in the Contract shall apply to such activities and the amount paid for such design, services, supplies or work shall form part of the Contract Price, including but not limited to the LNTP Consideration.

4.2 Contractor's General Obligations

- 4.2.1 The Contractor shall design, execute and complete the Works:
- 4.2.1.1 in a professional, proper workmanlike, timely, safe and environmentally responsible manner and at all times in accordance with the standards of a Reasonable and Prudent Operator;
- 4.2.1.2 in accordance with this Contract, including Schedule 2 (*Employer's Requirements*), all Authorisations, all applicable Laws, the Grid Codes, Schedule 24 (*Contractor's Technical Offer*), the Programme, the Contractor's Economic Development Obligations and the Related Documents; and
- 4.2.1.3 such that the Facility once completed complies in all respects with the requirements of this Contract (including the Performance Guarantees).
- 4.2.2 The Contractor shall perform the whole of the Works required for the development, design, engineering, procurement, Construction, installation, commissioning, testing, delivery, completion, and rectification of defects in the Facility such that the Facility,

once completed is fit for the purpose specified in the Employer's Requirements and complies with:

- 4.2.2.1 the Employer's Requirements;
- 4.2.2.2 the Performance Guarantees;
- 4.2.2.3 the Standards;
- 4.2.2.4 all Laws, Authorisations, Variations and binding requirements of Government Authorities;
- 4.2.2.5 all relevant manufacturers' guidelines and instructions including but not limited to any conditions and/or requirements for the validity of guarantees or warranties supplied by such manufacturers;
- 4.2.2.6 the Related Documents;
- 4.2.2.7 the Land Agreements;
- 4.2.2.8 the Grid Codes; and
- 4.2.2.9 the other requirements of this Contract.
- 4.2.3 The Contractor shall provide the Contractor's Documents specified in the Contract, and all Contractor's Personnel, Goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for this design, execution, completion of the Works and remedying of defects.
- 4.2.4 The description of the Facility and the Works specified in Schedule 2 (*Employer's Requirements*) represents the Employer's best efforts to define, in consultation with the Contractor, the technical information and tasks necessary for performance of the Works. However, the Contractor shall perform all work that is not specifically mentioned in this Contract but which would be reasonably inferred from the Contract and the Related Documents as being required for the proper performance of the Works and the completion of the Facility in accordance with this Contract and the standards of a Reasonable and Prudent Operator.
- 4.2.5 The Contractor shall be responsible for the adequacy, stability and safety of all its operations on Site, of all methods of construction and of all the Works.
- 4.2.6 The Contractor shall, whenever required by the Employer, promptly submit details of the arrangements and methods which the Contractor proposes to adopt for the

execution of the Works. No significant alteration to these arrangements and methods shall be made without this having previously been notified to the Employer.

- 4.2.7 Nothing in this Contract shall be construed as creating any partnership or joint venture between the Parties, and the Contractor acknowledges that its appointment hereunder is that of an independent contractor.

4.3 **Records and Accounts and Right to Audit**

- 4.3.1.1 The Contractor shall maintain all data, records and documentation relating to this Contract and keep full and proper records and accounts in connection with the Works (whether contained in documents or in electronic format), during the execution of the Works and for a period of 5 years after the latest of the expiry date of the Defects Notification Period (or the earlier termination of the Contract for any reason whatsoever, as the case may be) and shall ensure that all Subcontractors do likewise.

- 4.3.1.2 The Employer's Personnel and the Employer's other authorised representatives and agents shall be entitled to examine, audit, copy and inspect all data, records and documentations relating to the Contract at all reasonable times during the execution of the Works and during the said 5 year period in order to verify compliance by the Contractor with its obligations, and/or to assess any entitlement or claimed entitlement of the Contractor under the Contract.

- 4.3.1.3 The Contractor shall provide access to such books, records, systems, data and documents of the Contractor and to any premises and personnel of the Contractor needed for this purpose and shall co-operate and render all assistance requested by the Employer's Personnel and the Employer's other authorised representatives and agents.

- 4.3.1.4 The Contractor shall until the issuance of the Performance Certificate provide the Employer with copies of the Contractor's and Contractor Members' audited financial statements for each financial year during the term of this Contract as soon as such financial statements become available, but in any event within 120 days after the end of each financial year in question, or within such longer period as may be agreed upon by the Parties. Should the Contractor's and Contractor Members' financial statements not become available within 120 days after the end of a financial year in question, the Contractor shall immediately notify the Employer thereof indicating the date by which such financial statements will be available, such notification to include supporting evidence from the Contractor's and Contractor Members' auditors. Should the Contractor fail to provide such financial statements by the date as indicated in the

aforementioned notice, the Employer shall be entitled to withhold any further payments under this Contract until such financial statements are provided.

4.3.1.5 The Contractor shall until the issuance of the Performance Certificate procure and provide to the Employer copies of NWEPTI's consolidated income statement, balance sheet and cash flow statement (the "**NWEPTI Financial Statements**"), which shall be as included in the consolidated, audited financial statements of the parent company of NWEPTI (together with a statement from the auditor of NWEPTI confirming and verifying that the copies of the NWEPTI Financial Statements provided to the Contractor are those consolidated in the audited annual report of the parent company of NWEPTI), for each financial year during the term of this Contract as soon as such documents become available (as determined by NWEPTI), but in any event within 90 days after the end of each financial year in question, or within such longer period as may be agreed upon by the Parties. Should such documents not become available within 90 days after the end of a financial year in question, the Contractor shall immediately notify the Employer thereof indicating the date by which such documents will be available, such notification to include supporting evidence from NWEPTI's auditors. Should the Contractor fail to provide such documents by the date as indicated in the aforementioned notice, the Employer shall be entitled to withhold any further payments under this Contract until such documents are provided.

4.3.1.6 If at any time NWEPTI prepares its own annual report containing consolidated, audited financial statements, the Contractor shall procure and provide to the Employer a copy of such audited annual report within 30 days of its official release.

4.4 **Performance Security**

4.4.1 The Contractor shall obtain (at its own cost) and provide to the Employer, the following documents as security for the Contractor's performance of its obligations under this Contract and in accordance with this Clause 4.4 (*Performance Security*):

4.4.1.1 Advance Payment Guarantee in an amount equal to the Advance Payment from an Approved Provider in accordance with Clause 14.2 (*Advance Payment*) in the form set out in Schedule 11 (*Forms of Security*);

4.4.1.2 the following Performance Bonds from an Approved Provider in the form set out in Schedule 11 (*Forms of Security*) or in another form approved in writing by the Employer and the Lenders, for the following amounts in South African Rand:

- 4.4.1.2.1 on and from a date no later than 21 days after the Signature Date until the date specified in Clause 4.4.5.2.1 (and as a condition precedent to the effectiveness of this Contract), a Performance Bond for an amount equal to an amount equal to 15% of the Contract Price (ZAR – T) (the "**First Performance Bond**");
- 4.4.1.2.2 on and from the date of Taking-Over (and as a pre-condition of Taking-Over) has been achieved until the date specified in Clause 4.4.5.2.2, a Performance Bond for an amount equal to 10% of the Contract Price (ZAR – T) determined as at the date falling 30 days prior to the anticipated date of Taking-Over, calculated in accordance with the exchange rate mechanism set out in Clause 14.15.1.4, provided the Contract Price (ZAR – T) calculated at the date of Taking-Over shall not be less than the Contract Price (ZAR – FC) as at Financial Close (the "**Second Performance Bond**"); and
- 4.4.1.2.3 on and from the first anniversary of the date of Taking-Over and provided that the Guaranteed Performance Ratio for the Interim Test Period as defined in Schedule 8 (*Tests*) has been achieved at such date, the Second Performance Bond shall step down to an amount equal to 5% of the Contract Price (ZAR – T) determined as at the date falling 30 days prior to the first anniversary of the date of Taking-Over, calculated in accordance with the exchange rate mechanism set out in Clause 14.15.1.4, provided the Contract Price (ZAR – T) calculated at the first anniversary of the date of Taking-Over shall not be less than the Contract Price (ZAR – FC).
- 4.4.2 The First Performance Bond shall not expire until the Contractor provides the Second Performance Bond.
- 4.4.3 In addition to the requirements of Clause 4.4.1, the Contractor shall provide to the Employer a legal opinion (in a form approved by the Employer and the Lenders) from an external law firm (approved by the Employer and the Lenders) no later than 2 Business Days prior to the anticipated date of Financial Close (as communicated in writing to the Contractor by the Employer), confirming:
- 4.4.3.1 the Contractor's capacity and authority to enter into this Contract; and
- 4.4.3.2 the capacity and authority of NWEPMI to enter into and performance its obligations under this Contract, as well as the enforceability of this Contract from a People's Republic of China law perspective. If an apostilled version of the original Contract is not available by the time of Financial Close, the legal opinion

may be based on a pdf copy of the executed and notarized Contract, with an updated legal opinion based on a pdf copy of the executed, notarized and apostilled Contract being provided no later than 5 Business Days prior to the Commencement Date.

4.4.4 **First Performance Bond**

If 15% of the Contract Price (ZAR – FC) is:

- 4.4.4.1 less than the amount stated in Clause 4.4.1.2.1, the Contractor may elect to issue, within 21 days after Financial Close, a replacement Performance Bond in an amount equal to no less than 15% (fifteen percent) of the Contract Price (ZAR – FC); or
- 4.4.4.2 more than the amount stated in Clause 4.4.1.2.1, the Contractor shall provide, within 21 days after Financial Close, a replacement Performance Bond in an amount equal to 15% (fifteen percent) of the Contract Price (ZAR – FC).

4.4.5 **Claims under the Performance Security**

- 4.4.5.1 The Employer shall be entitled to make a claim under the Performance Security in the event of a default by the Contractor of its obligations under this Contract, including but not limited to:
 - 4.4.5.1.1 failure by the Contractor to provide any of the Performance Bonds, extend the validity of any of the Performance Bonds or replace, increase the value of and/or change the provider of any of the Performance Bonds as required under this Clause 4.4 (*Performance Security*) and Clause 4.4.6 (*EPC Adverse Events*) in which event the Employer may claim the full amount of the relevant Performance Bond and retain the proceeds as cash security until such time as a valid Performance Bond has been delivered to the Employer in accordance with the requirements of this Clause 4.4 (*Performance Security*);
 - 4.4.5.1.2 failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Clause 3.5 (*Determinations*) or as expressly provided in this Contract or as otherwise required pursuant to Clause 20 (*Claims, Disputes and Arbitration*);
 - 4.4.5.1.3 failure by the Contractor to remedy a default within the period of time specified in Clause 15.1 (*Notice to Correct*) after receiving the Employer's notice requiring the default to be remedied;

- 4.4.5.1.4 circumstances which entitle the Employer to termination under Clause 15.2 (*Termination by Employer*), irrespective of whether notice of termination has been given; or
- 4.4.5.1.5 in the circumstances stipulated in the Contract Agreement.
- 4.4.5.2 The Contractor shall ensure that:
 - 4.4.5.2.1 the First Performance Bond is valid and enforceable until the later of (i) the issue of the Taking-Over Certificate, and (ii) the delivery of the Second Performance Bond; and
 - 4.4.5.2.2 the Second Performance Bond shall not step down until the later of (i) the first anniversary of Taking-Over, and (ii) the Guaranteed Performance Ratio for the Interim Test Period as defined in Schedule 8 (*Tests*) has been achieved and shall be valid and enforceable until the issuance of the Performance Certificate.
- 4.4.5.3 In the event that this Contract is terminated in accordance with Clause 15.2 (*Termination by Employer*) or the Works are rejected in terms of Clause 9.4.10 or Clause 11.4.2.3, the Performance Bond in place at that time shall remain in place until the date all liabilities owed by the Contractor to the Employer have been satisfied in accordance with the Contract.
- 4.4.5.4 If the terms of a Performance Bond specify its expiry date, and the Contractor has not become entitled to its return or to receive the Performance Certificate (as the case may be) by the date 28 days prior to the relevant expiry date, the Contractor shall extend the validity of the relevant Performance Bond until such Performance Bond has been replaced in accordance with Clause 4.4.5.2 or until the date of issue of the Performance Certificate (as may be applicable). Where the Employer has exercised its right in Clause 4.4.5.1.1 and a replacement or extended Performance Bond (as applicable) has subsequently been provided in accordance with the requirements of this Clause 4.4 (*Performance Security*), then, subject to the Employer's right to have recourse to the cash security following the Contractor's breach of this Contract, such cash or the balance of such cash shall be repaid to the Contractor immediately upon the Contractor procuring the replacement or extended Performance Bond thereafter.
- 4.4.5.5 If at any time the Contract Price (ZAR – FC) increases (whether because of one increase or multiple increases) by more than 5% by virtue of a Variation(s), the Contractor shall be required to either:
 - 4.4.5.5.1 increase the value of the existing Performance Bond; or

4.4.5.5.2 provide an additional Performance Bond from an Approved Provider *mutatis mutandis* in accordance with the requirements of this Clause 4.4 (*Performance Security*),

for an amount equal to 15% of the amount of the increase.

4.4.5.6 If it is determined that the Employer has made a claim under the Performance Bond that it was not entitled to make, the Employer shall refund the excess amount claimed and pay interest thereon to the Contractor, calculated at the annual rate of 2 percentage points above the Prime Interest Rate from the date on which the amount was paid to the Employer to the date on which it is refunded to the Contractor.

4.4.5.7 Subject to any outstanding calls thereon, the Employer shall return:

4.4.5.7.1 the First Performance Bond to the Contractor on delivery to the Employer of the Second Performance Bond;

4.4.5.7.2 the Second Performance Bond to the Contractor within 21 days of issuance by the Employer of the Performance Certificate;

4.4.5.7.3 in the case of early termination of the Contract by the Employer for convenience in accordance with Clause 15.5 (*Employer's Entitlement to Termination*) or by the Contractor for cause in accordance with Clause 16.2 (*Termination by Contractor*), the relevant Performance Bond within 21 days of the date of termination; or

4.4.5.7.4 in the case of early termination of the Contract for any other reason, the relevant Performance Bond on the date all liabilities owed by the Contractor to the Employer have been satisfied in accordance with the Contract.

4.4.5.8 On or shortly after the first anniversary of Taking-Over, the Contractor shall deliver a written notice to the Employer and the issuer of the Second Performance Bond confirming that the first anniversary of Taking-Over has occurred.

4.4.6 **EPC Adverse Events**

4.4.6.1 Subject to Clause 4.4.6.2 and without prejudice to the Employer's rights under Clause 15 (*Termination by the Employer*), should any event or circumstance occur (including a Change in Control) which results in NWEPMI or the provider of any of the EPC Bonds not being an Investment Grade Entity or which has or

is likely to have a material adverse effect on the ability of NWEPI to comply with its obligations under the Contract (an "**EPC Adverse Event**"), then the Contractor shall, within a period not exceeding 20 Business Days in respect of the Contract or 10 Business Days in respect of the EPC Bonds, after the occurrence of the EPC Adverse Event or after the Employer or the Facility Agent gives written notice to the Contractor of the EPC Adverse Event (whichever is earlier), increase the EPC Bonds in accordance with Clause 4.4.6.3 or replace the provider of the EPC Bonds (as applicable), with a guarantee and/or bond:

- 4.4.6.1.1 from an Acceptable Bank and/or Investment Grade Entity and/or where such entity is not a Rated Investment Grade Entity, an entity which has an equity book value of at least ZAR8,000,000,000; and
- 4.4.6.1.2 in such form as the Employer and the Facility Agent may approve.
- 4.4.6.2 For the purposes of this Clause 4.4.6, "**Investment Grade Entity**" means an entity which has a long term debt securities credit rating of at least BBB- by Standard & Poor's (South Africa) Pty Limited or at least Baa3 by Moody's Investors Service Inc. (a "**Rated Investment Grade Entity**"), or where such entity is not a Rated Investment Grade Entity, an entity which has an equity book equity value of at least ZAR8,000,000,000.
- 4.4.6.3 If the Contractor is unable to meet the requirements of Clauses 4.4.6.1.1 and 4.4.6.1.2, then the Contractor shall procure, as applicable:
 - 4.4.6.3.1 that the value of the First Performance Bond is increased to 20% of the Contract Price (ZAR-T) (and to ensure that the full 20% of the Contract Price (ZAR-T) is made available for the purposes of this Clause 4.4.6.3.1, any amounts previously paid out under the First Performance Bond shall disregarded); and
 - 4.4.6.3.2 that the value of the Second Performance Bond is increased to 12.5% of the Contract Price (ZAR-T) (and to ensure that the full 12.5% of the Contract Price (ZAR-T) is made available for the purposes of this Clause 4.4.6.3.2, any amounts previously paid out under the Second Performance Bond shall disregarded). Without prejudice to the Employer's rights under Clause 15 (*Termination by the Employer*), Clause 4.4.5 (*Claims under the Performance Security*) and Clause 14.2 (*Advance Payment*), if the Contractor fails to comply with Clause 4.4.6.1 or Clause 4.4.6.3, the Employer shall be entitled to withhold further payments until the Contractor has so complied.

4.5 **Direct Agreement**

- 4.5.1 The Contractor, in conjunction with the Employer and the Lenders, shall conclude a Lender Direct Agreement as a condition precedent to Financial Close, in terms of which the Lenders may, under certain circumstances, step into the position of the Employer and, on behalf of the Employer, require fulfilment of the Contract (on, for the avoidance of doubt, the terms of the Contract itself). The Lender Direct Agreement will be substantially in the form set out in Schedule 22 (*Form of Lender Direct Agreement*) or on terms and conditions reasonably acceptable to the Lenders, the Employer and the Contractor.
- 4.5.2 The Contractor shall cooperate with the Employer and the Lenders in respect of, and (as applicable) execute and deliver documents (including certified or notarised copies of documents) required for, Financial Close and provide other information reasonably required from time to time by the Lenders for the purposes of the financing or refinancing of the Projects, including:
- 4.5.2.1 appropriate consents to assignment;
 - 4.5.2.2 copies of the constitutional documents of the Contractor and the Contractor Members;
 - 4.5.2.3 copies of the corporate resolutions of the Contractor and the Contractor Members approving the terms of and entry into the Contract and the Lender Direct Agreement (as the case may be);
 - 4.5.2.4 specimen signatures of authorised signatories of the relevant documents;
 - 4.5.2.5 legal opinions from the Contractor's external legal advisers in a form and substance acceptable to the Lenders with respect to (i) the power and capacity of the Contractor and NWEPI (as the case may be) to enter into the relevant documents and (ii) the enforceability of the Contract from a People's Republic of China law perspective; and
 - 4.5.2.6 acknowledgements by the Contractor of notice from the Employer with respect to the assignment of the Employer's rights under the Contract and the Performance Security subject to the terms and conditions of such Performance Security (as the case may be).
- 4.5.3 The Contractor shall from time to time, for the purpose of refinancing or the further financing of the Works or any part thereof, enter into other agreements in the same form as the Lender Direct Agreement subject to such amendments thereto as the new or replacement Lenders may require and as are agreed by the Employer and the

Contractor. However, the Contractor shall be under no obligation to execute or deliver any other required financing documentation which would be inconsistent with the provisions of this Contract or the Lender Direct Agreement, or which involves the assumption of obligations by the Contractor other than those provided for in this Contract or the Lender Direct Agreement.

4.6 **Contractor's Representative**

4.6.1 The Contractor shall at the Signature Date have appointed the Contractor's Representative and shall give him all authority necessary to act on the Contractor's behalf under the Contract.

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

4.6.3 The Contractor's Representative shall, on behalf of the Contractor, receive instructions under Clause 3.4 (*Instructions*). All notices, instructions, information, and other communications to be given by the Employer or the Employer's Representative to the Contractor under this Contract shall be given to the Contractor's Representative, except as otherwise provided.

4.6.4 The Contractor's Representative shall carry out the duties assigned to him, and shall exercise the authority delegated to him by the Contractor, provided that the Contractor's Representative shall have no authority:

4.6.4.1 to amend the Contract; and

4.6.4.2 to suspend or terminate the Contract.

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

4.6.6 The Contractor's Representative and all these persons shall be fluent in English (both written and verbal).

4.7 **Subcontractors**

4.7.1 The Contractor may subcontract any part of the Works but may not subcontract the whole of the Works and, save in respect of the subcontract concluded with or to be concluded with Northwest Electric Power Engineering Contracting Co. Ltd ("**NEPECC**"), the majority of the Works.

- 4.7.2 The Contractor shall ensure that its Subcontractors comply with and shall procure that NEPECC's subcontractors comply with:
- 4.7.2.1 all applicable Laws and Authorisations;
 - 4.7.2.2 all applicable safety regulations applicable to the Works, in particular (and not restricting the generality of the foregoing) the provisions of the *Occupational Health and Safety Act, 1993* and the regulations thereto, as may be amended from time to time;
 - 4.7.2.3 the Related Documents Obligations and the Land Agreements;
 - 4.7.2.4 Environmental Laws applicable in South Africa and with the Environmental requirements included in the Employer's Requirements and those as established by the Authorisations;
 - 4.7.2.5 all applicable requirements of Government Authorities; and
 - 4.7.2.6 all requirements not to engage in Corrupt Acts or contravene any Anti-Corruption Laws.
- 4.7.3 The Contractor shall be responsible for the acts, omissions and/or defaults of any Subcontractor, its agent or employees, and its Subcontractor's subcontractors as if they were the acts or defaults of the Contractor. The Contractor shall give the Employer not less than 14 days' notice of:
- 4.7.3.1 the intended appointment of the Subcontractor, with detailed particulars which shall include its relevant experience;
 - 4.7.3.2 the intended commencement date of the Subcontractors' work; and
 - 4.7.3.3 the intended commencement date of the Subcontractors' work on the Site.
- 4.7.4 The Contractor shall obtain the Employer's prior written approval before engaging any Notifiable Subcontractors not listed in Schedule 5 (*Approved Subcontractors*).
- 4.7.5 If the Contractor requests approval of a Notifiable Subcontractor, the Contractor shall provide to the Employer and the Lenders with full particulars in writing of:
- 4.7.5.1 the part of the Works to be subcontracted;
 - 4.7.5.2 the name and address of the proposed Notifiable Subcontractor;
 - 4.7.5.3 sufficiently detailed information establishing the financial, technical and personnel capacity (including details of previous experience and safety and

environmental records of the proposed Notifiable Subcontractor) to successfully perform the subcontracted work; and

- 4.7.5.4 any other information requested by the Employer for the purpose of determining whether to approve the Notifiable Subcontractor, including the proposed subcontract document (without prices).
- 4.7.6 The Contractor agrees that any request for approval shall be given to enable the Employer sufficient time to determine whether to approve the Notifiable Subcontractor and failure by the Contractor to do so will entitle the Employer to withhold approval.
- 4.7.7 The Contractor shall:
- 4.7.7.1 ensure that each Notifiable Subcontract includes provisions which enable the Contractor to discharge each of the Contractor's warranties, obligations and liabilities to the Employer under this Contract;
- 4.7.7.2 within 7 Business Days after executing each Notifiable Subcontract, provide the Employer with an unpriced copy of such Notifiable Subcontract and excluding other information which is commercially sensitive to the Contractor and not required by the Employer to reasonably assess the Contractor's compliance with this Clause 4.7 (*Subcontractors*); and
- 4.7.7.3 at the time of executing each Notifiable Subcontract, and as a condition to payment hereunder, duly execute with each Notifiable Subcontractor a Subcontractor Side Agreement substantially in the form set out in Schedule 11 (*Forms of Security*) or in a form approved by the Employer and the Lenders.
- 4.7.8 The Contractor shall ensure (save to the extent actually prevented from doing so by Law), in each subcontract that it enters into, that the Contractor's rights and obligations under the subcontract are capable of being freely ceded and delegated in full, without limitation and/or further consent being required from the relevant counterparty, to the Employer, or any other person nominated in writing by the Employer in the circumstances contemplated in Clause 15.2 (*Termination by Employer*) of this Contract.
- 4.7.9 In the event of a suspension by a Subcontractor as a result of the Contractor's failure to pay such Subcontractor, the Employer may, on no less than 3 Business Days' prior written notice to the Contractor, pay the Subcontractor directly and thereafter recover such payment from the Contractor, provided that the Employer may only pay the Subcontractor directly if:

- 4.7.9.1 the failure by the Contractor to pay is not a result of the failure of the Employer to pay the Contractor; and
- 4.7.9.2 the Contractor does not, within the 3 Business Days, object to the payment of the Subcontractor on the grounds of a dispute.
- 4.7.10 The Contractor shall indemnify the Employer for any claim, loss or damage caused to the Employer as a result of the Contractor's failure to make payment to a Subcontractor.
- 4.7.11 If payment is made by the Employer in respect of a Subcontractor in accordance with Clause 4.7.9, or in compliance with any Law, an arbitral award or court order, the amount will be a debt due by the Contractor to the Employer, which amount the Employer shall be entitled to withhold or set-off from monies payable to the Contractor. The Employer shall also have recourse to the Performance Security.

4.8 **Nominated Subcontractors**

In this Clause 4.8 (*Nominated Subcontractors*), "**nominated Subcontractor**" means a Subcontractor whom the Employer, under Clause 13 (*Variations and Adjustments*), instructs the Contractor to employ as a Subcontractor. The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Employer as soon as practicable, with supporting particulars. After the appointment of a nominated Subcontractor, the provisions of Clauses 4.7.2, 4.7.3 and 4.7.8 shall apply *mutatis mutandis* to such nominated Subcontractor, as if it was appointed pursuant to Clause 4.7 (*Subcontractors*).

4.9 **Co-operation**

- 4.9.1 The Contractor shall liaise, interact and co-operate with:
 - 4.9.1.1 the Employer's Personnel;
 - 4.9.1.2 the Operator;
 - 4.9.1.3 any other service providers or contractors employed by the Employer;
 - 4.9.1.4 the Lender's Technical Advisor, Network Operator, RETEC, NERSA, the Independent Engineer, Government Authorities; and
 - 4.9.1.5 the personnel of or any service providers to any Government Authority,

(the "**Other Persons**") as detailed or envisaged by the Employer's Requirements or the Related Documents or as otherwise instructed, so as to enable the Contractor to comply with its obligations under the Contract.

4.10 The Contractor shall be responsible for its (and its Subcontractors) construction activities on the Site, and shall co-ordinate its own activities with those of the Other Persons to the extent necessitated by the Employer's Requirements and the Related Documents. The Contractor shall not be entitled to an extension of the Time for Completion and/or Cost for such co-operation.

4.11 **Co-operation Required for Related Documents**

4.11.1 In addition to its obligations contained in Clause 4.9 (*Co-operation*) the Contractor shall co-operate with and allow appropriate opportunities for carrying out work to:

4.11.1.1 the Independent Engineer; and

4.11.1.2 the personnel of the Buyers, the Network Operator, NTCSA, RETEC, NERSA, and Eskom,

who may be performing duties in connection with the Project or the Related Documents.

4.11.2 The Contractor shall provide reasonably adequate space (as agreed by the Employer, after consultation with the Contractor, the Network Operator, Eskom or NTCSA) at the Site to accommodate the Network Operator, Eskom or NTCSA's equipment associated with the Connection Equipment.

4.11.3 In addition, the Contractor shall:

4.11.3.1 prepare in accordance with Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*) for submission to the Network Operator, Eskom or NTCSA (as the case may be), such information in connection with the Works as may be required under the Related Documents, as may be necessary under the applicable Laws or the Grid Codes, or as may be usual in accordance with recognised good practice, and if a time period is stated in the Related Document within which the Employer shall submit a notice or information, the Contractor shall, within the time period afforded for submitting such notice or information as provided for in Clause 1.13.7 (*Timing of Communications under the Related Document Notice Obligations*), submit such notice or information to the Employer; and

- 4.11.3.2 collectively discuss (with the Employer, the Buyers and the Network Operator, Eskom or NTCSA), the actions contemplated in Commissioning Tests and the Contractor shall comply with the requests and instructions received from the NTCSA, RETEC or the Network Operator from time to time in accordance with the Grid Codes and the Related Documents.

4.12 **Horizontal Defences**

- 4.12.1 The Parties hereby acknowledge that the Contractor has entered into the Co-operation Agreement with the Operator.

- 4.12.2 The Contractor accordingly waives:

- 4.12.2.1 any and all rights, under contract, delict or otherwise at law, to assert any and all defences which the Contractor may have to a claim by the Employer for the non-performance, inadequate performance or delay in performance under or in connection with this Contract due to any non-performance or inadequate performance or delay in performance by the Operator; and

- 4.12.2.2 any entitlement to pursue any claims whatsoever in respect of any relief, compensation, losses and/or damages (actual or alleged or otherwise) against the Employer arising from any act and/or omission of the Operator).

4.13 **Setting Out**

The Contractor shall set out the Works in relation to original points, lines and levels of reference specified in the Employer's Requirements. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works, as soon as such error is discovered.

4.14 **Safety System**

The Contractor shall:

- 4.14.1 comply with all applicable safety regulations applicable to the Works, in particular (and not restricting the generality of the foregoing) the provisions of the *Occupational Health and Safety Act, 1993* and the regulations thereto, as may be amended from time to time;

- 4.14.2 prepare and submit to the Employer, prior to commencing with work on Site, an occupational health and safety plan which, as a minimum, meets the requirements of Schedule 18 (*Occupational Health and Safety Specification and Risk Assessment*) and the Law (including provisions of the *Occupational Health and Safety Act, 1993*

and the related regulations, as may be amended from time to time), which shall be binding on the Contractor;

- 4.14.3 take care for the safety of all persons entitled to be on the Site;
- 4.14.4 use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger to all persons entitled to be on the Site;
- 4.14.5 provide formal documented access control, fencing, lighting, guarding and watching of the Works until completion and Taking-Over under Clause 10.2 (*Employer's Taking-Over of the Works*); and
- 4.14.6 provide any temporary structures or works (including roadways, footways, guards and fences) which may be necessary, because of the execution of the Works, for the use and protection of the public and of owners and occupiers of adjacent land.

4.15 **Quality Assurance**

- 4.15.1 The Contractor shall institute a quality assurance system to demonstrate compliance with the requirements of the Contract. The system shall, as a minimum, be in accordance with the details stated in the Employer's Requirements. The Employer shall be entitled to audit any aspect of the system.
- 4.15.2 Details of all procedures and compliance documents shall be submitted to the Employer for information before each design and execution stage is commenced. When any document of a technical nature is issued to the Employer, evidence of the prior approval by the Contractor shall be apparent on the document itself.
- 4.15.3 If the Contractor fails to comply with its obligations under this Clause 4.15 (*Quality Assurance*) the Employer may, by written notice, require the Contractor to rectify such failure within a reasonable period nominated in that notice.
- 4.15.4 If the Contractor does not comply with the notice under Clause 4.15.3, the Employer may employ others to rectify the failure outlined in the notice. The direct costs incurred by the Employer under this Clause 4.15.4 are a debt due and payable to the Employer on demand and may be withheld or set-off against any payments otherwise due from the Employer to the Contractor. The Employer shall also have recourse to the Performance Security.
- 4.15.5 Compliance with the quality assurance system shall not relieve the Contractor of any of its duties, obligations or responsibilities under the Contract.

4.16 **Site Data and Site Conditions**

4.16.1 The Employer shall have made available to the Contractor for its information, prior to the Signature Date, all relevant data in the Employer's possession on Site Conditions at the Site. The Employer shall similarly make available to the Contractor all such data which come into the Employer's possession after the Signature Date.

4.16.2 The Contractor shall be responsible for verifying and interpreting all such data and for properly taking into account all Site Conditions in the execution of the Works. The Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data, except as stated in Clause 5.1 (*General Design Obligations*).

4.17 **Sufficiency of the Contract Price**

4.17.1 The Contractor shall be deemed to have satisfied itself as to the correctness and sufficiency of the Contract Price.

4.17.2 Unless and to the extent otherwise stated in the Contract, the Contract Price covers all the Contractor's obligations under the Contract and all things necessary for the proper design, execution and completion of the Works and the remedying of any defects.

4.18 **Unforeseeable Difficulties**

4.18.1 Subject only to Clause 4.32 (*Pre-existing Contamination, Fossils or Artefacts*):

4.18.1.1 the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works;

4.18.1.2 by signing the Contract, the Contractor accepts total responsibility for having foreseen difficulties and costs of successfully completing the Works; and

4.18.1.3 neither the Contract Price nor the Time for Completion shall be adjusted to take account of any unforeseen difficulties or costs.

4.18.2 Subject to any restrictions and/or conditions imposed by the Land Agreements, the Contractor shall be entitled to carry out inspections at the Site, including inspections of the surface and sub-surface conditions, provided reasonable notice of such inspections is given to the Employer together with details of the inspection work to be carried out.

4.19 **Rights of Way and Facilities**

Subject to Clause 2.1 (*Right of Access to the Site*), the Contractor shall be responsible for obtaining and shall bear all costs and charges for special and/or temporary rights-of-way which it may require, including those for access to the Site. The Contractor shall also obtain, at its risk and cost, any additional facilities outside the Site which it may require for the purposes of the Works.

4.20 **Avoidance of Interference**

4.20.1 The Contractor shall not interfere unnecessarily or improperly with:

4.20.1.1 the convenience of the public;

4.20.1.2 the access to and use and occupation of all roads and footpaths, irrespective of whether they are public or in the possession of the Employer or of others; and

4.20.1.3 farming and / or agricultural activities adjacent to or in the vicinity of the Site.

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

4.21 **Access Route**

4.21.1 The Contractor shall be deemed to have been satisfied as to the suitability and availability of access routes to the Site and of its rights to make use of same. Prior to commencing Work on Site, the Contractor shall conduct a survey of the condition of all access roads to the Site. The Contractor shall use reasonable efforts to prevent any road or bridge from being damaged by the Contractor's traffic or by the Contractor's Personnel. These efforts shall include the proper use of appropriate vehicles and routes. Prior to the issue of the Performance Certificate, the Contractor shall remedy all damage caused to any access routes to the Site (including all public infrastructure inside and outside of the Site), to such an extent that such access routes are in the same condition as they were prior to the Commencement Date.

4.21.2 Except as otherwise stated in this Contract:

4.21.2.1 the Contractor shall (as between the Parties) be responsible for any maintenance which may be required for its use of access routes;

4.21.2.2 the Contractor shall provide all necessary signs or directions along access routes, and shall obtain any permission which may be required from any Government Authorities for its use of routes, signs and directions;

- 4.21.2.3 the Employer shall not be responsible for any claims which may arise from the use or otherwise of any access route;
- 4.21.2.4 the Employer does not guarantee the suitability or availability of particular access routes, and
- 4.21.2.5 Costs due to non-suitability or non-availability, for the use required by the Contractor, of access routes shall be borne by the Contractor.

4.22 **Transport of Goods**

Under this Contract:

- 4.22.1 the Contractor shall include, in each standard monthly report, details of the expected date(s) on which any Plant or major items of other Goods will be delivered to the Site;
- 4.22.2 the Contractor shall be responsible for packing, loading, transporting, receiving, unloading, storing and protecting all Goods and other things required for the Works;
- 4.22.3 the Contractor shall indemnify and hold the Employer harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from the transport of Goods, and shall negotiate and pay all claims arising from their transport; and
- 4.22.4 without prejudice to the Contractor's other obligations and liabilities, the Contractor shall adhere to any restrictions and conditions set out in the Land Agreements and any Authorisations in relation to its access to and entry upon the Site, including any applicable restrictions on delivery hours or vehicle movements or gross weight and any applicable traffic management plan.

4.23 **Contractor's Equipment**

The Contractor shall be responsible for all Contractor's Equipment. When brought on to the Site, Contractor's Equipment shall be deemed to be exclusively intended for the execution of the Works.

4.24 **Protection of the Environment**

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

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

4.24.3 The Contractor shall comply with:

4.24.3.1 all Environmental Laws applicable in South Africa;

4.24.3.2 the Environmental Authorisations;

4.24.3.3 the Environmental Impact Assessment;

4.24.3.4 the Environmental Management Plan;

4.24.3.5 the ESG Guidelines;

4.24.3.6 the Social and Environmental Principles Related Obligations; and

4.24.3.7 the environmental requirements included in the Employer's Requirements, those established by the Authorisations and the Related Documents and all other relevant permits and authorisations as issued by competent authorities.

4.24.4 To the extent that there is any conflict between the provisions of Clause 4.24.3 and provisions of Clause 4.25 (*Social and Environmental Obligations Requirements*) in relation to environmental matters, the more onerous requirements shall prevail.

4.25 **Social and Environmental Obligations Requirements**

4.25.1 The Lender subscribes to the Social and Environmental Principles and will impose related obligations on the Employer Equator Principles and other social and Environmental objectives and the requirements in as set out in Clause 4.24 (*Protection of the Environment*) ("**Social and Environmental Principles Related Obligations Requirements**").

4.25.2 The Contractor is responsible for all social, health, safety and Environmental obligations in the course of the design, execution and completion of the Works and the remedying of defects. To this end, without relieving the Contractor from its other responsibilities under the Contract, the Contractor:

4.25.2.1 undertakes, in favour of the Employer, to comply with and to properly and fully perform and fulfil (as the case may be) all of the Social and Environmental Principles Related Obligations Requirements in so far as they relate to social, health, safety and Environmental obligations pertaining to, arising from or

connected with the design, execution and completion of the Works and the remedying of defects;

4.25.2.2 shall not do or omit to do anything which:

4.25.2.2.1 is in breach of the Social and Environmental Principles Related Obligations Requirements; and/or

4.25.2.2.2 unless specifically and expressly otherwise agreed by the Employer in writing, will have the effect of modifying the obligations under the Social and Environmental Principles Related Obligations Requirements.

4.25.3 In complying with its obligations under this Clause 4.25 (*Social and Environmental Obligations Requirements*) the Contractor shall adhere to the ESG Guidelines, World Bank and IFC Environmental, Health and Safety Guidelines, and Environmental Laws.

4.26 **Environmental, Social and Governance Undertaking**

4.26.1 The Contractor shall ensure that it:

4.26.1.1 implements an ES Management System in accordance with the ES Requirements;

4.26.1.2 implements the ES Action Plan, within the stipulated timeframes; and

4.26.1.3 performs the Works in compliance with the applicable provisions of the Equator Principles and the IFC Performance Standards.

4.26.2 The Contractor shall not amend the ES Action Plan in any material respect without the prior written consent of the Employer.

4.26.3 The Contractor will:

4.26.3.1 within 50 days after the end of each quarter of its financial year, deliver completed copies of the ESG Performance Report to the Employer;

4.26.3.2 within 7 Business Days after becoming aware of the occurrence, notify the Employer of any social, labour, health and safety, security or Environmental incident, accident or circumstance that:

4.26.3.2.1 has, or could reasonably be expected to have, any material adverse effect or a material adverse impact on the Works; or

4.26.3.2.2 involves or causes, or is reasonably likely to involve or cause, any material breach of the ES Requirements, and

within 10 Business Days of a request by the Employer, provide such information as is reasonably requested to confirm that the Contractor is in compliance with the ES Requirements.

4.26.4 The Employer may, upon reasonable notice, visit any of the premises where the business of the Contractor is conducted, to have access to management, and to have access to books of account and records, in each case, to:

4.26.4.1 monitor compliance with these the ES Requirements; or

4.26.4.2 assess the legal or reputational risk posed to the Employer or its investors by any incident, accident or circumstance,

provided that the Employer shall exercise such rights in order to cause the minimum interference to the business of the Contractor as possible in the circumstances and shall further comply with any reasonable instructions as may be issued by the Buyers under the Power Purchase Agreements in relation thereto.

4.26.5 If the Employer has reasonably determined that the Contractor is in material breach of any of the ES Requirements it shall require the Contractor to undertake, within a specified time-frame, corrective measures necessary or appropriate to remedy such breach, and keep the Employer regularly informed of the on-going implementation of those measures, such information to be provided at least every 3 months from the date on which the Contractor was informed of such corrective measures.

4.26.6 If the Contractor fails to implement such corrective measures within such time-frames, the Employer will assert and enforce its rights to require the Contractor to comply with such undertakings.

4.26.7 The Contractor (including its Affiliates and Subcontractors) will not finance or participate in any development, project or instruction that relates to or involves, forced labour¹ or child labour² or directly or indirectly any activity, production, use of, trade in, distribution of or involving activities or materials deemed illegal under host country

¹ Forced labour means all work or service, not voluntarily performed, that is extracted from an individual under threat of force or penalty as defined by ILO conventions.

² Persons may only be employed if they are at least 15 years old, as defined in the ILO Fundamental Human Rights Conventions (Minimum Age Convention C138, Art.2), unless local legislation specifies compulsory school attendances or the minimum age for working. In such cases the higher age shall apply.

laws or regulations or international conventions and agreements, or subject to international phase-outs or bans, such as:

- 4.26.7.1 ozone depleting substances, PCB's (Polychlorinated Biphenyl's) and other specific, hazardous pharmaceuticals, pesticides/herbicides or chemicals;
- 4.26.7.2 wildlife or products regulated under the Convention on International Trade in Endangered Species or Wild Fauna and Flora (CITES);
- 4.26.7.3 unsustainable fishing methods (e.g. blast fishing and drift net fishing in the marine Environment using nets in excess of 2.5km in length);
- 4.26.7.4 cross-border trade in waste and waste products, unless compliant to the Basel Convention and the underlying regulations;
- 4.26.7.5 destruction³ of High Conservation Value areas⁴;
- 4.26.7.6 radioactive materials⁵ and unbounded asbestos fibres;
- 4.26.7.7 construction of new and extension of any existing coal fired thermal power plants;
- 4.26.7.8 pornography and/or prostitution;
- 4.26.7.9 racist and/or anti-democratic media;
- 4.26.7.10 any of these following products in the event that they form a substantial part of a project's primary financed business activities:
 - 4.26.7.10.1 alcohol beverages (except beer and wine);
 - 4.26.7.10.2 tobacco;
 - 4.26.7.10.3 commercial logging operations;
 - 4.26.7.10.4 production or trade in wood or other forest products other than from sustainably managed forests;

³ Destruction means the (1) elimination or severe diminution of the integrity of an area caused by a major, long-term change in land or water use or (2) modification of a habitat in such a way that the area's ability to maintain its role is lost.

⁴ High Conservation Value (HCV) areas are defined as natural habitats where these values are considered to be of outstanding significance or critical importance (see <http://www.hcvnetwork.org>).

⁵ This does not apply to the purchase of medical equipment, quality control (measurement) equipment or any other equipment where the radioactive source is understood to be trivial and/or adequately shielded.

4.26.7.10.5 weapons and munitions; or

4.26.7.10.6 gambling, casinos and equivalent enterprises.

4.27 **Electricity, Water and Utilities**

4.27.1 Subject to Clause 4.27.2, the Contractor shall be responsible for the provision of all power, water and other services and utilities it may require.

4.27.2 If it is not possible to obtain water within a radius of 75 kilometres from the Site for reasons unconnected with the Contractor's acts or omissions, then the Employer shall be liable for the extra costs reasonably incurred by the Contractor in obtaining such water from a suitable and cost-effective source.

4.28 **Progress Reports**

4.28.1 Monthly progress reports shall be prepared by the Contractor and submitted to the Employer electronically. The first report shall cover the period up to the end of the first calendar month following the Commencement Date. Reports shall be submitted monthly thereafter, each within 7 days after the last day of the period to which it relates.

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

4.28.3 Each report shall include:

4.28.3.1 the information as required pursuant to the Employer's Requirements;

4.28.3.2 charts and detailed descriptions of progress, including each stage of design, Contractor's Documents, procurement, manufacture, delivery to Site, construction, erection, testing and commissioning;

4.28.3.3 photographs showing the status of manufacture and of progress on the Site;

4.28.3.4 for the manufacture of each main item of Plant and Materials, the name of the Manufacturer, manufacture location, percentage progress, and the actual or expected dates of:

4.28.3.4.1 commencement of manufacture,

4.28.3.4.2 Contractor's inspections,

4.28.3.4.3 tests, and

- 4.28.3.4.4 shipment and arrival at the Site;
- 4.28.3.5 the details described in Clause 6.11 (*Records of Contractor's Personnel and Equipment*);
- 4.28.3.6 copies of quality assurance documents, test results and certificates of Materials;
- 4.28.3.7 list of Variations, notices given under Clause 2.4 (*Employer's Claims*) and notices given under Clause 1.13 (*General Pass Through*), and Clause 20.1 (*Contractor's Claims*);
- 4.28.3.8 safety statistics, including details of any health and safety incidents and activities relating to environmental aspects and public relations;
- 4.28.3.9 comparisons of actual and planned progress, with details of any events or circumstances which may jeopardise the completion in accordance with the Programme and Time for Completion, and the measures being (or to be) adopted to overcome delays; and
- 4.28.3.10 such other information as is required under the Employer's Requirements.

4.29 **Progress Reports for Commissioning of the Facility**

In addition to the Contractor's obligations under this Clause 4.29 (*Progress Reports for Commissioning of the Facility*), the Contractor shall provide the Employer on a weekly basis with relevant information regarding the commissioning and testing of the Works undertaken by the Contractor so as to commission the Works in accordance with the Contract and to procure the issue of the Facility Completion Form and Facility Completion Notice on behalf of the Employer.

4.30 **Security of the Site**

Under this Contract:

- 4.30.1 the Contractor shall be responsible for keeping unauthorised persons off the Site; and
- 4.30.2 authorised persons shall be limited to the Contractor's Personnel, the Employer's Personnel, any personnel notified to the Contractor by (or on behalf of) the Employer as authorised personnel of the Employer's other service providers/contractors on the Site, persons requiring access in terms of the Related Documents as well as the Lender's Technical Advisor and other representatives of the Lenders and the advisers of the Lenders after prior notification of their presence to the Contractor.

4.31 Contractor's Operations on Site

- 4.31.1 The Contractor shall confine its operations to the Site, and to any additional areas which may be obtained by the Contractor and agreed by the Employer as working areas. The Contractor shall take all necessary precautions to keep Contractor's Equipment and Contractor's Personnel within the Site and these additional areas, and to keep them off adjacent land.
- 4.31.2 During the execution of the Works, the Contractor shall keep the Site free from all unnecessary obstruction, and shall store or dispose of any Contractor's Equipment or surplus materials. The Contractor shall clear away and remove from the Site any wreckage, rubbish and temporary works and/or structures which are no longer required.
- 4.31.3 Prior to the issue of a Taking-Over Certificate, the Contractor shall clear away and remove, all Contractor's Equipment, surplus material, wreckage, rubbish and temporary works and/or structures. All laydown areas, yards, office areas, parking areas and borrow pits shall be reinstated and rehabilitated as set out in the Employer's Requirements. The Contractor shall leave the Site and the Works in a clean and safe condition. However, the Contractor may retain on Site, during the Defects Notification Period, such Goods and Equipment as are required for the Contractor to fulfil obligations under the Contract. Similarly, prior to the issue of the Performance Certificate the Contractor shall remove all residual Contractor's Equipment, surplus material, wreckage and rubbish. All residual laydown areas, yards, office areas, parking areas and borrow pits shall be rehabilitated as set out in the Employer's Requirements. The Contractor shall leave the complete Site and the Works in a clean and safe condition.

4.32 Pre-existing Contamination, Fossils or Artefacts

- 4.32.1 Upon becoming aware of any Pre-existing Contamination, Artefact, ammunitions or human remains while performing the Works, the Contractor shall promptly, and where possible before the Pre-existing Contamination, Artefact, ammunition or human remains are disturbed, give the Employer written notice of the general nature of the Pre-existing Contamination, Artefact, ammunition or human remains.
- 4.32.2 In these circumstances, the Contractor shall comply with the requirements of the National Heritage Resources Act 25 of 1999 and shall take precautions to prevent the disturbance of Pre-existing Contamination and/or to prevent loss, damage or removal of the Artefact, ammunitions or human remains.
- 4.32.3 The Contractor shall within 5 Business Days (or such shorter period as is necessary

to ensure compliance with applicable Laws) of the Employer's request give the Employer a written statement of:

- 4.32.3.1 the Pre-existing Contamination, Artefact, ammunitions or human remains encountered and why it should be treated as Pre-existing Contamination or an Artefact or ammunitions or human remains;
- 4.32.3.2 the additional work, resources, time and Cost that the Contractor estimates to be necessary to deal with the Pre-existing Contamination, Artefact, ammunitions or human remains;
- 4.32.3.3 the time the Contractor anticipates will be required to deal with the Pre-existing Contamination, Artefact, ammunitions or human remains and the expected effect on the critical path of the Works and the Time for Completion; and
- 4.32.3.4 other details reasonably required by the Employer.
- 4.32.4 The Employer shall determine forthwith whether the conditions notified by the Contractor under Clause 4.32.3 qualify as Pre-existing Contamination, or an Artefact or, ammunition or human remains. Where such conditions constitute Pre-existing Contamination, Artefacts, ammunition or human remains, the Employer will direct the Contractor as to the method of dealing with the Pre-existing Contamination, Artefact, ammunition or human remains, and the Contractor shall comply with that reasonable and lawful direction.
- 4.32.5 All Pre-existing Contamination, Artefacts, ammunition or human remains otherwise shall be dealt with by the Contractor in accordance with the conditions stipulated under applicable Laws and the instructions of the Employer.
- 4.32.6 If the Contractor suffers delay and/or incurs Cost from complying with the Employer's instructions under Clause 4.32.4, the Contractor shall give a further notice to the Employer and shall be entitled subject to Clause 3.5 (*Determinations*), Clause 4.32.9 and Clause 20.1 (*Contractor's Claims*) to:
 - 4.32.6.1 an extension of time for any such delay, if completion is or will be delayed, under Clause 8.4 (*Extension of Time for Completion*); and
 - 4.32.6.2 payment of any such additional Cost through an adjustment to the Contract Price.
- 4.32.7 The Contractor acknowledges and agrees that if it fails to comply with the notice requirements specified in this Clause 4.32 (*Pre-existing Contamination, Fossils or Artefacts*) it is not entitled to claim any additional Cost or any adjustment to the

Contract Price or to claim any extension to the Time for Completion or to make any claim under any applicable Laws, at law, in equity or otherwise regarding any Pre-existing Contamination, Artefact, ammunitions or human remains under or in connection with this Contract.

4.32.8 To the extent necessary so the Employer (or its nominee) may Operate and Maintain the Facility and as permitted by Laws, the Contractor shall, by no later than the Commercial Operation Date, transfer to the Employer all Authorisations obtained by the Contractor under or in connection with this Clause 4.32 (*Pre existing Contamination, Fossils or Artefacts*) and as are necessary in order for the Employer (or its nominee) to Operate and Maintain the Facility.

4.32.9 Subject to the Contractor's compliance with its obligations under this Clause 4.32 (*Pre existing Contamination, Fossils or Artefacts*) and under the Laws, the Contractor shall:

4.32.9.1 accept a delay in the Programme of up to 2 weeks as a result of complying with the Employer's instructions under Clause 4.32.4, and shall not have any entitlement to an extension of the Time for Completion and/or Cost in respect of such period of delay; and

4.32.9.2 be entitled to claim an extension of the Time for Completion and/or Cost under Clause 4.32.6 in respect of any delay in the Programme in excess of the period referred to in clause 4.32.9.1,

all further provided that:

4.32.9.2.1 the Employer's instructions under Clause 4.32.4 are given within a period of 6 months from the date of "Construction Commencement" as stipulated in the Programme;

4.32.9.2.2 the Employer shall be responsible for any third-party costs which are required to be incurred in order to ensure the Pre-existing Contamination, Artefacts, ammunition or human remains (as applicable) are dealt with in accordance with the conditions stipulated under applicable Laws;

4.32.9.2.3 the Contractor demonstrates to the Employer that there has in fact been a 2 week delay to the Programme, for the purposes of Clause 4.32.9.1; and

4.32.9.2.4 any delay caused by the Contractor complying with the Employer's instructions under Clause 4.32.4 beyond the 2 week period referred to in Clause 4.32.9.1 is demonstrated to be a delay on the critical path of the Programme, as required under Clause 8.4.5.2.

4.33 **Spare Parts**

- 4.33.1 The Contractor shall at its own cost, provide all Spare Parts required for the operation and maintenance of the Facility as set out in Schedule 12 (*Spare Parts*), up to the expiry of the Defects Notification Period (and if there is an extension to the Defects Notification Period pursuant to Clause 11.3.1, such obligation shall apply during the extended period but only to the Spare Parts which relate to the Critical Components to which the extension applies). All such Spare Parts shall be new and unused.
- 4.33.2 The cost of the Spare Parts is included in the Contract Price.
- 4.33.3 The Contractor warrants that the Spare Parts set out in Schedule 12 (*Spare Parts*) are sufficient for the purpose stipulated in Clause 4.33.1. In the event that the Spare Parts are not sufficient (including any additional and/or new spare parts required as a result of defects and/or delay in the Works or due to any other unforeseen events which are the Contractor's risk under this Contract), then the Contractor shall be responsible for procuring any shortfall which shall likewise be deemed included in the Contract Price. The Contractor shall regularly update the details of the Spare Parts set out in Schedule 12 (*Spare Parts*) to take account of any additional and/or new spare parts as and when they are introduced and shall agree such updates with the Employer in writing.
- 4.33.4 In the event any Spare Parts are utilised during commissioning, testing, prior to Taking-Over or during the Early Operating Period, the Contractor shall, at its own cost, replace such utilised Spare Parts.
- 4.33.5 No later than 3 months prior to the Time for Completion, the Contractor shall provide to the Employer a copy of an updated list recording the Spare Parts then in inventory and as a condition precedent to the issue of the Taking-Over Certificate, the Spare Parts shall have been provided and/or replenished (as applicable) by the Contractor and shall be safely stored on Site in accordance with the Employer's Requirements.
- 4.33.6 In the event any Spare Parts are utilised during the Defects Notification Period, the Contractor shall, at its own cost, replace such utilised Spare Parts as soon as possible (and if there is an extension to the Defects Notification Period pursuant to Clause 11.3.1, such obligation shall apply during the extended period but only to the Spare Parts which relate to the Critical Components to which the extension applies). All such replaced Spare Parts shall be new and unused, and delivered by the Contractor at its expense to the Employer's storage facility at the Site as a condition precedent to the issue of the Performance Certificate.

4.33.7 The Contractor warrants the performance of the Spare Parts until the expiry of the Defects Notification Period and if there is an extension to the Defects Notification Period pursuant to Clause 11.3.1, such warranty shall apply during the extended period but only to the Spare Parts which relate to the Critical Components to which the extension applies.

4.33.8 Upon the issue of the Performance Certificate, the Contractor shall transfer the respective manufacturers' warranties in respect of the Spare Parts (including Spare Parts replaced during the Defects Notification Period) to the Employer.

4.34 **Connection Works**

4.34.1 The Interconnection Facilities form part of the Works. Consequently, all undertakings, warranties, obligations and all liabilities under or in connection with this Contract apply equally to the Interconnection Facilities undertaken by the Contractor.

4.34.2 Specifically, as regards the Facility connection to the Network:

4.34.2.1 the Employer shall be responsible for paying the Network Operator the amounts required by the Budget Quote and shall have no further responsibility for the Connection Works;

4.34.2.2 the Contractor shall ensure that the Works connect to, and fully interface with the Self Build Works, including ensuring design compatibility and integration with such works performed by any third parties;

4.34.2.3 the Contractor shall assume and perform the Employer's responsibilities under the Budget Quote and the Self Build Agreements, as are more specifically identified in Schedule 23 (*Related Document Obligations*);

4.34.2.4 the Connection Works and Self Build Works:

4.34.2.4.1 shall be performed in the manner specified in the Budget Quote, the Self Build Agreements, the CUOSA and in accordance with any technical standards and rules of the Network Operator or the relevant system operator (as the case may be); and

4.34.2.4.2 shall be completed on or before the dates specified in the Budget Quote and/or the Self Build Agreements and this Contract.

4.34.3 The Contractor's sole right to claim additional Cost or expense or any adjustment to the Contract Price or to claim any extension to the Time for Completion in relation to any impact on the Works and/or the Contract arising from the Budget Quote, CUOSA,

the Self Build Agreements or the Interconnection Facilities shall be subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*).

4.35 **Early Warning**

4.35.1 In order to mitigate risk, the Employer and the Contractor require open and effective communication and co-operation to deal with events, circumstances or factors which may adversely affect the Works or the progress thereof, including any events, circumstances or factors which may delay the execution of the Works, increase the Contract Price or the Time for Completion or cause the Commercial Operation Date to not be achieved by the Time for Completion ("**Early Warning Event**").

4.35.2 With a view to facilitating this, the Contractor shall give written notice to the Employer of an Early Warning Event as soon as reasonably possible after it has come to its attention. Following such notice the Contractor shall provide:

4.35.2.1 detailed particulars of the event and the potential adverse effects; and

4.35.2.2 proposals for the steps to be taken to mitigate the potential adverse effects thereof.

4.35.3 Either the Employer or the Contractor shall be entitled, by written notice, to require the other of them to attend an early warning meeting in respect of any Early Warning Event (whether or not notified by the Contractor). The purpose of the early warning meeting is to raise and discuss Early Warning Events in a co-operative manner and to jointly make and consider proposals and seek solutions to mitigate the potential adverse effects thereof.

4.35.4 The early warning notice and meetings contemplated in this Clause 4.35 (*Early Warning*) are intended as a risk management tool and open discussion is of paramount importance. To this end:

4.35.4.1 notification in terms of this Clause 4.35 (*Early Warning*) shall not constitute notification of a claim for extension of time or additional cost pursuant to Clause 20.1 (*Contractor's Claims*) or otherwise under the Contract; and

4.35.4.2 unless otherwise specifically agreed in writing by the Employer and the Contractor from time to time nothing raised or agreed at any early warning meeting shall limit or derogate from the rights and obligations of the Employer or Contractor under the Contract.

- 4.35.5 The Employer may require the Contractor to submit a proposal under Clause 13.3 (*Variation Procedure*) in respect of any Early Warning Event (whether or not notified by the Contractor).

4.36 **Community Engagement**

- 4.36.1 The Contractor agrees and undertakes that, as between it and the Employer, it shall be solely responsible for, and shall bear full responsibility for any disturbance to the Works and/or the Facility resulting from events including rebellion, riot, civil commotion, act or campaign of terrorism, or sabotage, protest, blockade or intimidation of the workforce by the surrounding communities, resulting solely from its failure to diligently investigate and engage with the surrounding community in respect of the Works and/or the Facility.
- 4.36.2 Without prejudice to Clause 4.36.1, the Employer undertakes to provide all reasonable assistance and support required by the Contractor and to work with the Contractor in respect of community engagement. Assistance or support provided to the Contractor by the Employer shall not relieve the Contractor from its obligations and responsibilities in respect of community engagement.

5 **DESIGN**

5.1 **General Design Obligations**

- 5.1.1 The Contractor shall be deemed to have scrutinised, prior to the Signature Date, the Employer's Requirements (including design criteria and calculations, if any). The Contractor shall be responsible for the design of the Works and for the accuracy of such Employer's Requirements, (including design criteria and calculations and requirements under the Related Documents).
- 5.1.2 The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information. Any data or information received by the Contractor, from the Employer or otherwise, shall not relieve the Contractor from its responsibility for the design and execution of the Works.

5.2 Contractor's Documents

- 5.2.1 The Contractor's Documents shall include the technical documents specified in the Employer's Requirements, documents required to satisfy all regulatory approvals, and the documents described in Clause 5.6 (*As-Built Documents*) and Clause 5.7 (*Operation and Maintenance Manuals*). The Contractor's Documents shall be written proficiently in English.
- 5.2.2 The Contractor shall prepare all Contractor's Documents, and shall also prepare any other documents necessary to instruct the Contractor's Personnel.
- 5.2.3 If the Employer's Requirements describe the Contractor's Documents which are to be submitted to the Employer for review and/or no objection they shall be submitted to the Employer for review, together with a notice as described below. In the following provisions of this Clause 5.2 (*Contractor's Documents*), (i) "**review period**" means the period required by the Employer for review, and (ii) "**Contractor's Documents**" exclude any documents which are not specified as being required to be submitted for review.
- 5.2.4 Each review period (including any review by the Lenders, the Lender's Technical Advisors and/or the Employer's agents) shall not exceed 14 days, calculated from the date on which the Employer receives a Contractor's Document and the Contractor's notice. This notice shall state that the Contractor's Document is considered ready, both for review in accordance with this Clause 5.2 (*Contractor's Documents*) and for use. The Contractor's Documents shall be regarded by the Employer as complying with the Contract unless specifically otherwise stated in the notice, in which event the extent of non-compliance shall be stated.
- 5.2.5 The Employer may, within the review period, give notice to the Contractor that a Contractor's Document fails (to the extent stated) to comply with the Contract. If a Contractor's Document so fails to comply, it shall be rectified, resubmitted and reviewed in accordance with this Clause 5.2 (*Contractor's Documents*), at the Contractor's cost.
- 5.2.6 For each part of the Works, and except to the extent that the Parties otherwise agree:
- 5.2.6.1 execution of such part of the Works shall not commence prior to the expiry of the review periods for all the Contractor's Documents which are relevant to its design and execution;
- 5.2.6.2 execution of such part of the Works shall be in accordance with the Contractor's Documents, as submitted for review; and

5.2.6.3 if the Contractor wishes to modify any design or document which has previously been submitted for review, the Contractor shall immediately give notice to the Employer. Thereafter, the Contractor shall submit revised documents to the Employer in accordance with the above procedure.

5.2.7 Any such agreement under Clause 5.2.6 or any review under this Clause 5.2 (*Contractor's Documents*) or otherwise shall not relieve the Contractor from any obligations or responsibility.

5.2.8 The Contractor shall take due account of any comments made by the Employer in the Contractor's Documents. The Employer is not, however, bound to check the Contractor's Documents for any errors, omissions, ambiguities, discrepancies or compliance with the requirements of the Contract. The Employer's receipt of, or review of, or comment on, the Contractor's Documents will not relieve the Contractor from its responsibility for the Contractor's errors or omissions or departure from the requirements of the Contract.

5.3 **Contractor's Undertaking**

The Contractor undertakes and warrants that the design, the Contractor's Documents, the execution and the completed Works will be in accordance with:

5.3.1 the Laws; and

5.3.2 the documents forming the Contract, as may be altered or modified by Variations.

5.4 **Technical Standards and Regulations**

5.4.1 The design, the Contractor's Documents, the execution of the Works, the remedying of defects and the completed Works shall comply with the Grid Codes, the Related Documents, South Africa's technical standards, building, construction and Environmental Laws (including the Authorisations), Laws applicable to the product being produced from the Works, the standards of a Reasonable and Prudent Operator and all other standards specified in the Employer's Requirements, applicable to the Works, or defined by the applicable Laws (the "**Standards**").

5.4.2 References in the Contract to published Standards shall be understood to be references to the edition(s) applicable on the Signature Date, as updated from time to time and for the purposes of Take-Over under Clause 10.2 (*Employer's Taking-Over of the Works*), the Works shall, subject to Clause 5.4.3, comply with the Standards which are current at the time of assessing the Take-Over Requirements.

- 5.4.3 If any new or revised Standards are published during the performance of the Works, the Contractor shall give reasonable written notice of same to the Employer. Where such new or revised Standards, or the requirement to comply therewith, form part of the Laws (including Authorisations) or the Grid Codes, the Contractor shall be entitled to proceed in terms of Clause 13.5 (*Change in Law*), subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*).

5.5 **Training**

- 5.5.1 The Contractor shall carry out the training of Employer's Personnel and the Operator in the operation and maintenance of the Works to the extent specified in the Employer's Requirements and/or the Related Documents. If the Contract specifies training which is to be carried out before Taking-Over, the Works shall not be considered to be completed for the purposes of Taking-Over under Clause 10.2 (*Employer's Taking-Over of the Works*) until this training has been completed.
- 5.5.2 The training shall be designed to ensure those personnel will be able to efficiently, prudently, safely and professionally Operate and Maintain the Facility following Take-Over. Training will consist of classroom and on-the-job training to cover the activities described in the Employer's Requirements (supplemented by such further activities as required to ensure compliance with this Clause 5.5 (*Training*)). The persons conducting the training and the training plan shall be approved by the Employer prior to the commencement of any training. The cost of training is to be borne by the Contractor.
- 5.5.3 At least one month prior to Time for Completion (or as otherwise agreed between the Parties in writing), the Contractor shall prepare a training manual to be submitted to the Employer for approval. The Employer in turn will seek the approval of the training manual by the Operator. The Contractor shall revise the training manual to accommodate any comments or concerns of the Employer, which may include comments or concerns raised by the Operator. Each person attending the training shall receive a copy of the approved training manual.

5.6 **As-Built Documents**

- 5.6.1 The Contractor shall prepare, and keep up-to-date, a complete set of "as-built" records of the execution of the Works, showing the exact as-built locations, sizes and details of the work as executed. These records shall be kept on the Site and shall be used exclusively for the purposes of this Clause 5.6 (*As-Built Documents*). Two copies of the then current "as-built" records shall be supplied to the Employer by the Contractor not later than 1 month prior to the commencement of the Tests on Completion.

5.6.2 In addition, and as a condition to Take-Over, the Contractor shall supply to the Employer final drafts of the as-built drawings of the Works showing all Works as executed, and submit them to the Employer for review under Clause 5.2 (*Contractor's Documents*). The Contractor shall obtain the consent of the Employer as to their size, the referencing system, and other relevant details. The Works shall not be considered to be completed for the purpose of Taking-Over under Clause 10.2 (*Employer's Taking-Over of the Works*) until the Employer has received these documents.

5.6.3 The Works shall not be considered to be completed for the purpose of Taking-Over under Clause 10.2 (*Employer's Taking-Over of the Works*) until the Contractor has satisfied (via the Employer, as necessary) the Network Operator's requirements of the Employer in respect of as-built documents and records as required by the Budget Quote and the Self Build Agreements.

5.6.4 The Contractor shall provide the final as-built drawings to the Employer no later than 90 days after the Taking-Over Certificate has been issued. To the extent that the Employer requires any changes or additions to the final as-built drawings, the Contractor shall effect such changes and additions, and issue the amended as-built drawings to the Employer. The issuing of the amended as-built drawings to the Employer shall be a condition for issuing the Performance Certificate.

5.7 **Operation and Maintenance Manuals**

5.7.1 Not later than 1 month prior to commencement of the Tests on Completion, the Contractor shall supply to the Employer provisional Operation and Maintenance Manuals in sufficient detail for the Employer to Operate, Maintain, dismantle, reassemble, adjust and repair the Facility.

5.7.2 The Works shall not be considered to be completed for the purposes of Taking-Over under Clause 10.2 (*Employer's Taking-Over of the Works*) until the Employer has received the final drafts of the Operation and Maintenance Manuals, containing such detail as a Reasonable and Prudent Operator would be expected to include at this stage in the Project, and any other manuals specified in the Employer's Requirements for the purposes of Taking-Over.

5.7.3 To the extent changes and/or additions are required to the Operation and Maintenance Manuals as a result of the finalisation of the as-built drawings after the issue of the Taking-Over Certificate or to the extent the Employer requires any changes and/or additions to the Operation and Maintenance Manuals after the issue of the Taking-Over Certificate, the Contractor shall promptly effect such changes and additions, and issue the amended Operation and Maintenance Manuals to the

Employer. The issuing of the amended Operation and Maintenance Manuals to the Employer (where applicable, in accordance with the Employer's Requirements) shall be a condition precedent to the issue of the Performance Certificate.

5.8 Design Error

If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Employer's Requirements, Contractor's Documents, they and the Works shall be corrected at the Contractor's cost, notwithstanding any consent or approval under this Contract.

6 STAFF AND LABOUR

6.1 Engagement of Staff and Labour

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

6.2 Rates of Wages and Conditions of Labour

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

6.3 Persons in the Service of Others

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

6.4 Labour Laws

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

6.4.2 The Contractor shall require its employees, Subcontractors and others under the Contractor's direction to obey all applicable Laws, including those concerning safety at work pursuant to Clause 6.7 (*Health and Safety*).

6.5 **Working Hours**

No Work shall be carried out on the Site on locally recognised days of rest, or outside the normal working hours unless:

- 6.5.1 the Contractor gives the Employer reasonable notice thereof and there are no restrictions and/or conditions in the Land Agreements or under Law which prohibit the hours of working proposed by the Contractor; or
- 6.5.2 the Work is unavoidable or necessary for the protection of life or property or for the safety of the Works, in which case the Contractor shall immediately advise the Employer.

6.6 **Facilities for Staff and Labour**

- 6.6.1 The Contractor shall provide and maintain all necessary accommodation and welfare facilities for the Contractor's Personnel and shall, in addition, comply with any related requirements as stated in the Employer's Requirements. The Contractor shall also provide facilities for the Employer's Personnel as stated in the Employer's Requirements.
- 6.6.2 The Contractor shall not permit any of the Contractor's Personnel to maintain any temporary or permanent living quarters on the Site or within the structures forming part of the Works.

6.7 **Health and Safety**

The Contractor acknowledges that the Employer places paramount importance on health and safety and the Contractor undertakes to take all reasonable precautions to maintain the health and safety of the Contractor's Personnel and others in and about the execution of the Works and in accordance with applicable Law. Without limitation the Contractor:

- 6.7.1 accepts that the Employer may appoint the Contractor as the "Principal Contractor" as defined and provided for under the Construction Regulations 2014 (promulgated under the *Occupational Health and Safety Act, 1993*) (the "**Construction Regulations**") for the Site;
- 6.7.2 will enter into the occupational health and safety delegation agreement in the form as attached hereto as Schedule 13 (*OHSA Delegation Agreement*) prior to the Contractor commencing any Work on the Site;
- 6.7.3 warrants that the Contract Price includes a sufficient amount for proper compliance with the Construction Regulations, the health and safety rules, guidelines and

procedures provided for in the Contract and generally for the proper maintenance of health and safety in and about the execution of the Works;

6.7.4 warrants that the Contractor's design and construction methods take account of the requirements of Schedule 18 (*Occupational Health and Safety Specification and Risk Assessment*); and

6.7.5 undertakes, in and about the performance of the Works, to comply with the Construction Regulations, the health and safety rules of the Network Operator (as confirmed by Network Operator from time to time, pertaining to any part of the Works or the Site which may be subject thereto including the relevant part of the site containing the Connection Works and Self Build Works) and with all applicable health and safety regulations, rules, guidelines and procedures otherwise provided for under this Contract and the Employer's Requirements, and shall ensure that Subcontractors, employees and others under the Contractor's direction and control, likewise observe and comply with the foregoing.

6.8 **Contractor's Superintendence**

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

6.8.2 Superintendence shall be given by a sufficient number of persons having adequate knowledge of English (both written and verbal) and of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents), for the satisfactory and safe execution of the Works.

6.9 **Contractor's Personnel**

6.9.1 The Contractor shall:

6.9.1.1 at all times ensure that sufficient, suitable, competent and appropriately qualified and experienced Contractor's Personnel in their respective trades or occupations will be employed for the Works; and

6.9.1.2 ensure that the Key Personnel as identified to be physically on the Site are located within close proximity of the Site and, to the extent required, comply with the Contractor's Economic Development Obligations.

6.9.2 The Employer may, by way of written notice, require the Contractor to remove (or cause to be removed) any person employed on the Site or Works, including the Contractor's Representative and Key Personnel (if applicable), who in the opinion of the Employer:

6.9.2.1 persists in any misconduct or lack of care;

6.9.2.2 carries out duties incompetently or negligently;

6.9.2.3 fails to conform with any provisions of the Contract;

6.9.2.4 persists in any conduct which is prejudicial to safety, health, or the protection of the environment;

6.9.2.5 commits a Corrupt Act; or

6.9.2.6 is required to be removed from the Site or the execution of the Works by the Buyers, the Network Operator, Eskom or NTCSA pursuant to the terms of any Related Documents or otherwise by any Government Authority.

6.9.3 Upon receipt of the notice referred to in Clause 6.9.2, the Contractor shall remove, or arrange to be removed, such person from the Site and shall not employ that person on the Site or in activities connected with the Works without the Employer's prior approval. The Contractor shall as soon as reasonably possible replace any personnel removed under this Clause 6.9.3 with personnel of equal or greater skills, competency, qualifications and experience.

6.10 **Key Personnel**

6.10.1 The Contractor shall provide the Key Personnel to be set out in the organisational chart in Schedule 14 (*Key Personnel*). The organisational chart shall:

6.10.1.1 show the proposed organisation to be established by the Contractor for performing the Works; and

6.10.1.2 include the identities of the Contractor's proposed Key Personnel, together with the curricula vitae of such proposed Key Personnel to be employed in the Works.

6.10.2 The Contractor shall promptly inform the Employer of any proposed revision or alteration of the organisational chart.

6.10.3 The Key Personnel (if any) shall be engaged in the performance of the Works in the positions and regarding the duties specified in Schedule 14 (*Key Personnel*).

6.10.4 The Contractor shall not be entitled to replace or remove any Key Personnel (including the Contractor's Representative) without the prior written consent of the Employer.

6.10.5 Key Personnel may only be replaced with personnel who have the necessary experience and qualifications, and may only be removed if that person's corresponding position and duties specified in Schedule 14 (*Key Personnel*) are no longer required for the performance of the Works. Written notice of any such intended replacement or removal shall be provided to the Employer, together with the curriculum vitae of the proposed replacement personnel, or sufficient substantiating documentation as to why the position is no longer required for the performance of the Works.

6.10.6 Such notification shall be sent to the Employer 14 days prior to replacement or removal of any Key Personnel, except where critical operational requirements dictate that such notice period is not possible or is impractical. In the event that it is determined that such 14 day notice period is not possible or is impractical, the Contractor shall notify the Employer as soon as is reasonably possible of the replacement or removal of any Key Personnel, but in any event no later than 48 hours prior to such replacement or removal, which notice shall include the reasons for the delay in notification by the Contractor.

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

6.11.1 The Contractor shall keep complete and accurate records of the employment of labour at the Site. The records shall include the names, identity documents, ages, genders, hours worked and wages paid to all workers. These records shall be summarized on a monthly basis and shall be included in the details to be submitted by the Contractor under Clause 6.11.2.

6.11.2 The Contractor shall submit, to the Employer, details showing the number of each class of Contractor's Personnel and of each type of Contractor's Equipment on the Site. Details shall be submitted each calendar month, in a form approved by the Employer, until the Contractor has completed all minor outstanding work and defects as stated in the Punch List.

6.12 **Disorderly Conduct**

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

6.13 **Foreign Personnel**

- 6.13.1 The Contractor may deploy skilled foreign personnel from outside of South Africa who are necessary for the execution of the Works to the extent local recruitment has not been successful despite reasonable efforts, and as allowed by the applicable Laws. The Employer will, if requested by the Contractor, use reasonable endeavours to assist the Contractor in obtaining any local, provincial, or government permission required for the employment of the foreign personnel in respect of the Works.
- 6.13.2 The Contractor shall be responsible for the return of the foreign personnel to the place from where they were recruited or to their domicile. In the event of the death in South Africa of any of these personnel or their dependants, the Contractor shall similarly be responsible for making the appropriate arrangements for their return or burial.

7 **PLANT, MATERIALS AND WORKMANSHIP**

7.1 **Manner of Execution**

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

- 7.1.1 in accordance with the Employer's Requirements;
- 7.1.2 in a proper workmanlike and careful manner, in accordance with recognised good practice;
- 7.1.3 with properly equipped facilities and non-hazardous materials, except as otherwise specified in the Contract; and
- 7.1.4 so as to ensure that the Performance Guarantees can be satisfied.

7.2 **Samples**

The Contractor shall submit samples, as reasonably required by the Employer, for review in accordance with the procedures for Contractor's Documents described in Clause 5.2 (*Contractor's Documents*), as specified in the Contract and at the Contractor's cost. Each sample shall be labelled as to the origin and intended use in the Works.

7.3 **Inspection**

- 7.3.1 Within 30 days of the Commencement Date the Contractor shall submit to the Employer an inspection and testing plan, which shall as a minimum comply with the requirements stipulated in the Employer's Requirements, for the Employer's review and approval.

- 7.3.2 The Employer, the Lender's Technical Advisor, the Independent Engineer and other appointed representatives of the Buyers, the appointed representatives of the Network Operator, Eskom, the NTCSA and the appointed representatives of any other Government Authority shall at all reasonable times, in accordance with Schedule 2 (*Employer's Requirements*):
- 7.3.2.1 have full access to all parts of the Site and to all places from which natural Materials are being obtained; and
- 7.3.2.2 prior to and during production, manufacture and construction (at the Site and elsewhere), be entitled to attend and witness the measuring and testing of the materials and workmanship, and to check the progress of manufacture of Plant and production and manufacture of Materials, including pre-manufacturing assessment and witnessing of packaging, loading and shipping procedures. The entitlement to witness any such measuring and testing expressly includes any measuring and testing envisaged under the Related Documents and the Contractor shall prepare all notices required in respect of the same, in accordance with Clauses 1.13 (*General Pass Through*) and 1.14 (*Pass Through Claims*).
- 7.3.3 The Contractor shall give the Employer's Personnel full opportunity to carry out the aforementioned activities, including providing access, facilities, permissions and safety equipment. The performance of any such activity by the Employer's Personnel shall not relieve the Contractor from any obligation or responsibility.
- 7.3.4 In respect of the work which the Employer's Personnel are entitled to examine, inspect, measure and/or test, the Contractor shall give 2 weeks' prior written notice to the Employer whenever any such work is ready and before it is covered up, put out of sight, or packaged for storage or transport. The Employer shall then either carry out the examination, inspection, measurement or testing without unreasonable delay, or promptly give notice to the Contractor that the Employer does not require the Contractor to do so. If the Contractor fails to give the notice, it shall, if and when required by the Employer, uncover the work and thereafter reinstate and make good, all at the Contractor's cost.
- 7.3.5 **Inspection under the Related Documents**
- The Contractor acknowledges that:
- 7.3.5.1 the Buyers (including its nominees or representatives) is entitled to inspect the Works and to witness any test under the Power Purchase Agreements;

7.3.5.2 the NTCSA (including its nominees or representatives) is entitled to inspect the Works and to witness any test under the Budget Quote, CUOSA and Self Build Agreements;

7.3.5.3 Eskom (including its nominees or representatives) is entitled to examine, inspect, measure and/or test and reject Plant and Materials and works and to witness any test under the Budget Quote, CUOSA and Self Build Agreements; and

7.3.5.4 NERSA (including its nominees or representatives') has rights of inspection and rights to witness tests under the Registration Certificate,

and agrees not to prevent, hinder or obstruct the exercise of such rights. If the Employer receives notice from any of the parties listed in this Clause 7.3.5 (*Inspection under the Related Documents*) of the exercise, or intended exercise, of any such rights, it will notify the Contractor promptly.

7.4 **Testing**

7.4.1 This Clause 7.4 (*Testing*) shall apply to all tests referred to in the Contract, save where expressly provided otherwise.

7.4.2 The Contractor shall provide all apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, labour, materials, and suitably qualified and experienced staff, as are necessary to carry out the specified tests efficiently. The time and place for the specified testing of any Plant, Materials and other parts of the Works, shall be stipulated in the agreed inspection and testing plan submitted in accordance with Clause 7.3.1.

7.4.3 The Contractor shall give the Employer, the Lender's Technical Advisor, the Independent Engineer and other representatives of the Buyers, the representatives of the Network Operator, Eskom, NTCSA and/or NERSA (as applicable) not less than 14 days' notice of the performance of tests.

7.4.4 The Employer and/or the Lender's Technical Advisor shall give the Contractor not less than 24 hours' notice of the Employer's and/or Lender's Technical Advisor's intention to attend the tests. If the Employer and/or the Lender's Technical Advisor does not attend at the time and place agreed, the Contractor may proceed with the tests without the Employer and/or the Lender's Technical Advisor present and shall report the results of the tests in writing to the Employer and the Lender's Technical Advisor within 1 Business Day of the date the tests were undertaken.

7.4.5 Certain tests need to be witnessed and certified by the Independent Engineer and/or other representatives of the Buyers, the representatives of the Network Operator, Eskom, NTCSA and/or NERSA (as applicable) and the Contractor shall procure such witnessing and certification. The Contractor will be responsible for any delays and/or additional costs it incurs in procuring such witnessing and certification.

7.4.6 If these tests show that the tested Plant, Materials or workmanship are not in accordance with the Contract, the Employer may instruct the Contractor to carry out additional tests, for which the associated delay and costs (including the delay and costs arising from the additional tests themselves) shall be borne by the Contractor, notwithstanding any other provisions of the Contract.

7.5 **Rejection**

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

7.5.2 If the Employer requires this Plant, Materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If the rejection and retesting cause the Employer to incur additional costs, the Contractor shall subject to Clause 2.4 (*Employer's Claims*) pay these costs to the Employer.

7.6 **Remedial Work**

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

7.6.1.1 remove from the Site and replace any Plant or Materials which is not in accordance with the Contract;

7.6.1.2 remove and re-execute any other Work which is not in accordance with the Contract; and

7.6.1.3 execute any work which is urgently required for the safety of the Works, whether because of an accident, unforeseeable event or otherwise.

7.6.2 If the Contractor fails to comply with any such instruction, which complies with Clause 3.4 (*Instructions*), the Employer shall be entitled to employ and pay other persons to carry out the work and the Contractor shall be responsible for all work

performed by such persons. The Contractor shall subject to Clause 2.4 (*Employer's Claims*) pay to the Employer all costs arising from this failure.

7.7 **Ownership of Plant and Materials**

7.7.1 Each item of Plant and Materials shall become the property of the Employer, free from all Liens, at whichever is the earlier of the following times:

7.7.1.1 when such Plant and Material is delivered to the Site; or

7.7.1.2 when the Contractor receives payment of the value of such Plant and Materials.

7.7.2 Where the ownership of Plant and Materials is to pass to the Employer prior to their delivery to Site as contemplated in Clause 7.7.1.2, the Contractor shall, as a precondition to the receipt of payment for such Plant and Materials:

7.7.2.1 provide documentary evidence to the Employer's Representative that ownership in the Plant and Materials will, upon payment to the Contractor, vest in the Employer in accordance with the Laws of the country where the Plant and Materials are situated;

7.7.2.2 suitably set aside the Plant and Materials from other goods and indelibly mark them as the property of the Employer, subject only to receipt of payment by the Contractor;

7.7.2.3 send to the Employer's Representative a schedule listing and giving the value of each item of Plant and Materials so set aside and marked and inviting it to inspect the same; and

7.7.2.4 facilitate the bonding of such Plant and Materials (or the procurement of another suitable form of security) as may be required by the Employer and/or the Lenders (and the costs of such bonding or other form of security shall be for the Contractor's account).

7.8 **Royalties**

The Contractor shall pay all royalties, rents and other payments for:

7.8.1 natural Materials obtained from inside and/or outside the Site; and

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

8 COMMENCEMENT, DELAYS AND SUSPENSION

8.1 Commencement of Works

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

8.1.2 Without derogating from the foregoing or relieving the Contractor from any other responsibility under the Contract, the Contractor shall ensure that the execution of the Works has progressed to a sufficient degree and extent so as to ensure compliance by the Employer with the Employer's obligation to the Buyers to "Commence and Continue Construction" as defined in the Power Purchase Agreements, provided that the Contractor will not be in breach of such obligation to the extent the failure is attributable to an act or omission of the Employer.

8.2 Time for Completion

The Contractor shall achieve the Take-Over Requirements by the Time for Completion.

8.3 Programme

8.3.1 The Programme is included in Schedule 6 (*Programme and Milestone Schedule*) and details:

8.3.1.1 the sequence (and the logic used to develop the sequence) and the timing of the Works, as necessary to complete the Works by the Time for Completion;

8.3.1.2 the critical path of the Works and the activities forming part of the critical path;

8.3.1.3 the periods for reviews under Clause 5.2 (*Contractor's Documents*); and

8.3.1.4 the sequence and timing of inspections and tests specified in the Contract.

8.3.2 All proposed updates to the Programme (as permitted in accordance with this Contract) will be accompanied by supporting reports which include:

8.3.2.1 a general description of the methods which the Contractor intends to adopt for the execution of each major stage of the Works; and

8.3.2.2 the approximate number of each class of Contractor's Personnel and of each type of Contractor's Equipment for each major stage.

8.3.3 The Contractor shall submit progress reports in relation to the Programme whenever it is inconsistent with actual progress or with the Contractor's obligations. Progress reports shall contain detailed updates on the progress of the Works (including illustrations and other supporting information as necessary) and shall include details of any probable future events or circumstances which may adversely affect or delay the execution of the Works.

8.3.4 The Contractor shall submit a proposed revised Programme to the Employer's Representative whenever an extension to the Time for Completion is sought, agreed or determined under the Contract.

8.3.5 The Parties acknowledge that:

8.3.5.1 the Programme shall only be adjusted in accordance with agreements and determinations under Clause 3.5 (*Determinations*) and adjustments granted in accordance with Clause 8.4.7; and

8.3.5.2 adjusting or updating the Programme shall not in itself be capable of altering or amending the Time for Completion.

8.3.6 The Employer shall be entitled to rely upon the latest version of the Programme (as contained in Schedule 6 (*Programme and Milestone Schedule*)) and updated in accordance with agreements and determinations pursuant to Clause 3.5 (*Determinations*) and adjustments granted in accordance with Clause 8.4.7) when planning their activities.

8.4 **Extension of Time for Completion**

8.4.1 The Contractor shall be entitled, subject to (i) Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*) (to the extent applicable), (ii) the terms of any Clause of this Contract containing an explicit entitlement to an extension of time, and (iii) Clause 20.1 (*Contractor's Claims*), to an extension of the Time for Completion if and to the extent that the achievement of the Take-Over is or will be delayed by any of the following causes:

8.4.1.1 a Variation (unless pursuant to a Contractor's proposal under Clause 13.3 (*Variation Procedure*) and except for a Variation which is an instruction to accelerate under Clause 8.5.2 or a Variation which does not provide an extension of time entitlement to the Contractor under the Contract);

8.4.1.2 a Project Event;

- 8.4.1.3 a cause of delay giving an explicit entitlement to an extension of time under any other Clause of this Contract;
- 8.4.1.4 an extension of time obtained under the Self Build Agreement to the extent the Employer has the benefit of an equivalent extension of time under the Power Purchase Agreements; or
- 8.4.1.5 delay, impediment or prevention caused by the Employer's breach of the Contract.
- 8.4.2 Without derogating from Clause 8.4.1 or limiting the Employer's rights under Clauses 8.5 (*Rate of Progress*), the Employer may at any time, at its sole discretion, review, grant or increase (but not decrease) extensions of time, whether or not for a reason stated in this Contract.
- 8.4.3 Any extension of time shall be reduced to the extent of any concurrent delay for which the Contractor is responsible.
- 8.4.4 If the Contractor considers itself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Employer in accordance with Clause 20.1 (*Contractor's Claims*). When determining each extension of time under Clause 20.1 (*Contractor's Claims*), the Employer shall consider and reference the latest version of the Programme and shall review previous determinations and may increase, but shall not decrease, the total extension of time.
- 8.4.5 The Contractor's entitlement to an extension of the Time for Completion, is conditional upon the following, and shall apply only when and to the extent:
 - 8.4.5.1 it is entitled to an extension of the Time for Completion in accordance with Clause 8.4 (*Extension of Time for Completion*);
 - 8.4.5.2 the delay involves an activity which is on the critical path of the latest version of the Programme;
 - 8.4.5.3 it has given all the notices in accordance with the provisions of Clause 20.1 (*Contractor's Claims*) and, where applicable, has satisfied any other requirements specified in a Clause of this Contract which contains the entitlement to the relevant extension of time; and
 - 8.4.5.4 it has taken all reasonable and necessary steps expected of a Reasonable and Prudent Operator to avoid and/or minimise the consequence of the cause of delay and the delay itself, taking account of the risks allocated to the Contractor under this Contract.

- 8.4.6 Subject to Clause 8.4.5, the Contractor shall not, in any event, be entitled to an extension of the Time for Completion to the extent that:
- 8.4.6.1 any delay in the progress of the Works or any part thereof is solely due to any breach, default or negligence of the Contractor, any Subcontractor or any other person for whom the Contractor is responsible in accordance with this Contract; and
- 8.4.6.2 work is required to avoid injury or death to persons or damage to property where and to the extent that such injury, death or damage is solely as a result of any act or omission of the Contractor, any Subcontractor or any other person for whom the Contractor is responsible in accordance with this Contract.
- 8.4.7 If the Employer agrees or determines in accordance with Clause 3.5 (*Determinations*) that the Contractor is entitled to an extension of the Time for Completion in accordance with Clause 20.1 (*Contractor's Claims*), the Contractor shall, within 14 days of such determination, submit a proposed revised Programme in accordance with Clause 8.3 (*Programme*) that shows the effect of the approved extension of the Time for Completion on the latest version of the Programme and the Employer shall then proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine the revisions to the Programme to accord with the approved extension of time.
- 8.4.8 To the extent the Contractor is unable to achieve the Take-Over Requirements by the Time for Completion due to any of the events listed in Clause 8.4.1 other than Force Majeure, the Contractor shall be entitled, subject to (i) Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*), (ii) the terms of any Clause of this Contract containing an explicit entitlement to claim Costs arising from an extension of time and (iii) Clause 20.1 (*Contractor's Claims*), to payment of its Costs directly incurred as a consequence of such delay, provided that:
- 8.4.8.1 the Contractor shall take all reasonable and necessary steps to mitigate such Costs;
- 8.4.8.2 the Contractor shall have no entitlement to payment of its Costs to the extent the same arise due to any breach, default or negligence of the Contractor, any Subcontractor or any other person for whom the Contractor is responsible in accordance with the Contract; and
- 8.4.8.3 where Clause 8.4.1.1 applies, the Variation Pricing Methodology will be used to determine the Contractor's entitlement to payment in respect of the relevant Variation.

8.5 **Rate of Progress**

8.5.1 Acceleration due to Contractor's Delay

8.5.1.1 If, at any time:

8.5.1.1.1 actual progress is too slow to complete within the Time for Completion; and/or

8.5.1.1.2 progress has fallen (or will fall) behind the current Programme,

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

8.5.1.2 Unless the Employer notifies otherwise, the Contractor shall adopt these revised methods, which may require increases in the working hours and/or in the numbers of Contractor's Personnel and/or Goods, at the risk and cost of the Contractor. If these revised methods cause the Employer to incur additional costs (including resourcing costs, management costs and disbursements), the Contractor shall, subject to Clause 2.4 (*Employer's Claims*) pay to the Employer all such costs reasonably and properly incurred and arising directly from the revised methods, in addition to Delay Liquidated Damages (if any) under Clause 8.6 (*Delay Liquidated Damages*).

8.5.2 Acceleration in other circumstances

8.5.2.1 If, at any time the Employer wishes to instruct the Contractor to accelerate in circumstances where actual progress is too slow to complete within the Time for Completion as a result of a cause for which the Contractor is not responsible under the terms of this Contract, the Employer shall have the right to issue an instruction in terms of Clause 13.1 (*Right to Vary*) in order to give effect to such acceleration; provided that the Employer shall not, unless otherwise agreed by the Contractor, be entitled to instruct such acceleration:

8.5.2.1.1 so as to achieve completion prior to the Time for Completion (as the Time for Completion is defined at the Commencement Date); and/or

8.5.2.1.2 at a time when it would not be reasonable for a Reasonable and Prudent Operator to achieve the required acceleration given the available remaining period.

8.5.3 The provisions of Clause 8.4.1.1 will not apply in relation to a Variation which is an instruction to accelerate under this Clause 8.5.2 (*Acceleration in other circumstances*).

8.5.4 If the Contractor incurs additional Cost as a result of such acceleration (excluding acceleration as a result of Force Majeure), the Contractor shall give notice to the Employer and shall subject to the Employer's approval of the acceleration plan be entitled subject to Clause 20.1 (*Contractor's Claims*), to payment of any such Cost calculated in accordance with the Variation Pricing Methodology.

8.6 **Delay Liquidated Damages**

8.6.1 If the Contractor fails to achieve the Take-Over Requirements by the Time for Completion, the Contractor shall, pay Delay Liquidated Damages at the applicable rates calculated in accordance with Schedule 9 (*Delay Liquidated Damages*) for every day which elapses between the Time for Completion and the date on which all the Take-Over Requirements have been achieved, as stated in the Taking-Over Certificate.

8.6.2 Where applicable, the amount due under this Clause 8.6 (*Delay Liquidated Damages*) may be reduced in accordance with Schedule 9 (*Delay Liquidated Damages*) ("**Delay Liquidated Damages Cap**").

8.6.3 The total amount due under this Clause 8.6 (*Delay Liquidated Damages*) in respect of Delay Liquidated Damages shall not exceed the maximum amount specified in Schedule 9 (*Delay Liquidated Damages*) ("**Delay Liquidated Damages Cap**"), save to the extent the Contractor continues to incur Delay Liquidated Damages in accordance with the terms of Clause 9.4.2.

8.6.4 These Delay Liquidated Damages shall be the only damages due from the Contractor for such default, other than (i) in the circumstances contemplated in Clause 8.6.5, (ii) in the circumstances contemplated in Clause 9.4.2, and (iii) in the event of termination under Clause 15.2 (*Termination by Employer*) prior to completion of the Works. These damages shall not relieve the Contractor from its obligation to complete the Works, or from any other duties, obligations or responsibilities which it may have under the Contract.

8.6.5 If the obligation to pay Delay Liquidated Damages pursuant to this Clause 8.6 (*Delay Liquidated Damages*) is found for any reason to be void, invalid, unenforceable or otherwise inoperative in any way so as to disentitle the Employer from claiming Delay Liquidated Damages, then the Employer shall be entitled to claim from the Contractor general damages in the ordinary course.

8.6.6 All Delay Liquidated Damages will be invoiced weekly by the Employer (or at such longer intervals determined by the Employer) and payment will be due within 30 days of issue of such VAT Invoice subject to the right of Employer to offset. At the expiration of 30 days the amount invoiced will be a debt due and payable to the Employer on demand and may be deducted from any payments otherwise due from the Employer to the Contractor and/or the Employer shall have recourse to the Performance Security provided under this Contract.

8.7 **Suspension of Work**

8.7.1 The Employer may, subject to prior consent of the Lenders having been obtained, at any time instruct the Contractor to suspend progress of part or all of the Works (including the work on Plant or delivery of Plant and/or Materials). On the receipt of instruction to suspend the Contractor shall use reasonable endeavours to utilise its construction equipment and labour in such a manner as to minimise the costs associated with such suspension and shall, unless the Employer's instruction requires otherwise:

8.7.1.1 discontinue the Work and the erection of Plant on the date and to the extent specified in the notice;

8.7.1.2 place no further orders or Subcontracts for Plant, Materials or construction equipment with respect to suspended Work other than to the extent required in the notice;

8.7.1.3 promptly make every reasonable effort to suspend the Work and erection of Plant under all Subcontracts, to the extent they relate to performance of Work suspended;

8.7.1.4 protect, store and secure such part or the Works against any deterioration, loss or damage; and

8.7.1.5 maintain the Contractor's Personnel and the Contractor's Equipment ready to resume normal working within a reasonable time period on receipt of an instruction from the Employer to proceed.

8.7.2 The Employer shall notify the cause for the suspension.

8.7.3 If and to the extent that the cause for suspension is the responsibility of the Contractor (whether or not notified pursuant to Clause 8.7.2), then Clause 8.8 (*Consequences of Suspension*), Clause 8.9 (*Payment for Plant and Materials in the Event of Suspension*) and Clause 8.10 (*Prolonged Suspension*) shall not apply.

8.8 **Consequences of Suspension**

8.8.1 If the Contractor suffers delay and/or incurs Cost from complying with the Employer's instructions under Clause 8.7 (*Suspension of Work*) and/or from resuming the Work the Contractor shall give notice to the Employer and shall be entitled, subject to Clause 20.1 (*Contractor's Claims*) and Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*), to:

8.8.1.1 an extension of time for any such delay, if completion is or will be delayed, under Clause 8.4 (*Extension of Time for Completion*); and

8.8.1.2 payment of any such additional Cost through an adjustment to the Contract Price.

8.8.2 After receiving a notice under Clause 8.8.1, the Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine these matters.

8.8.3 The Contractor shall not be entitled to an extension to the Time for Completion, or to payment of the Cost incurred in making good, the consequences of the Contractor's faulty design, workmanship or materials, or the Contractor's failure to protect, store or secure in accordance with Clause 8.7 (*Suspension of Work*).

8.9 **Payment for Plant and Materials in Event of Suspension**

In respect of any Plant and/or Materials ordered by the Contractor prior to the date of suspension under Clause 8.7.1, the Contractor shall be entitled to payment of the value of such Plant and/or Materials delivered to Site as specified in Schedule 6 (*Programme and Milestone Schedule*), such payment to be effected on the relevant Payment Milestone date as detailed in Schedule 3 (*Contract Price and Payment Schedule*).

8.10 **Prolonged Suspension**

If the suspension under Clause 8.7 (*Suspension of Work*) was ordered by the Employer other than as a consequence of a Project Event or any breach by the Contractor of its obligations under this Contract and has continued for more than 180 consecutive days, the Contractor may request the Employer's permission to proceed. If the Employer does not give permission within 21 days after being requested to do so and the suspension affects the whole of the Works, the Contractor may, subject to the terms of the Lender Direct Agreement, give notice of termination under Clause 16.2 (*Termination by Contractor*).

8.11 **Resumption of Work**

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

9 **TESTS ON COMPLETION**

9.1 **Conducting, Witnessing and Certifying of Tests on Completion**

9.1.1 The Contractor shall at its sole cost and expense carry out the Tests on Completion in accordance with Clause 7.4 (*Testing*), this Clause 9 (*Tests On Completion*) and Schedule 8 (*Tests*), the Employer's Requirements and the requirements of the Related Documents.

9.1.2 Subject to Clause 9.1.3, the Contractor shall give to the Employer not less than 21 days' notice of the date after which the Contractor will be ready to carry out each of the Tests on Completion. Unless otherwise agreed, the Tests on Completion shall be carried out within 14 days after this date, on such day or days as the Contractor shall propose and the Employer shall approve, acting reasonably.

9.1.3 No later than 1 month prior to commencement of the Tests on Completion, the Contractor shall provide the "as built" documents and provisional Operation and Maintenance Manuals in accordance with Clause 5.6 (*As-Built Documents*) and Clause 5.7 (*Operation and Maintenance Manuals*).

9.1.4 During the commissioning, when the Works are operating under stable conditions and in the Contractor's opinion, are ready for further testing, the Contractor shall give notice to the Employer that the remaining Tests on Completion can be carried out, including performance tests to demonstrate whether the Works conform with the criteria specified in the Employer's Requirements and with the Pre Take-Over Guarantees.

9.1.5 The Contractor shall be responsible for ensuring that all testing of the Works required for the purposes of achieving the Commercial Operation Date (whether such testing is required under any of the Related Documents or the Grid Codes) is undertaken in accordance with the terms of the relevant Related Documents and/or the Grid Codes.

9.1.6 If the Contractor makes any changes to the provisional grid code compliance testing programme, it shall provide the final grid code compliance testing programme, incorporating such changes, no later than 3 months prior to the planned grid connection date as stipulated in the Programme, with reference to the Budget Quote,

CUOSA and the Self Build Agreements. This is in addition to the provisional Grid Code testing programme which is required to be provided to the Employer within 30 days of the Commencement Date.

- 9.1.7 Certain of the Tests on Completion need to be witnessed and certified by the Independent Engineer and/or other representatives of the Buyers, the representatives of the Network Operator, the NTCSA, Eskom and/or NERSA (as applicable). The Contractor shall be responsible for the coordination of such witnessing and the achievement of the certification of the applicable Tests of Completion in co-operation with Employer and the Other Persons in accordance with Clause 4.9 (*Co-operation*).
- 9.1.8 Prior to commissioning the Facility (as required by the Related Documents), the Contractor shall perform tests in accordance with the relevant sections of the CUOSA and thereafter:
 - 9.1.8.1 furnish the Employer and the Network Operator, NTCSA, Eskom and/or NERSA (as applicable) with the required test certificate/s indicating the results of the test/s performed; and
 - 9.1.8.2 obtain written confirmation from the Network Operator, NTCSA, Eskom and/or NERSA (as applicable) of their satisfaction before the Facility may be connected to the Network.
- 9.1.9 The Contractor shall also prepare in accordance with Clause 1.13 (*General Pass Through*) for submission to the Buyers, Network Operator, the NTCSA, Eskom, NERSA and all Government Authorities such notices as may be required under the Related Documents and the Grid Codes in order for the relevant Tests on Completion to be undertaken, including the notice of the date the Contractor anticipates the Works will require connection to the Network.
- 9.1.10 The Employer, the Lender's Technical Advisor, the Independent Engineer and the personnel of the Buyers, Network Operator, the NTCSA, Eskom, NERSA and other Government Authorities shall be entitled to attend the relevant Tests on Completion by their own authorised and designated inspectors.
- 9.1.11 The Tests on Completion shall not be capable of being satisfied unless the requirements of the Related Documents relating to the commissioning and testing of the Facility and all of the requirements relating to the Connection Works have been met.
- 9.1.12 As soon as the Works have passed the Tests on Completion, the Contractor shall submit a certified report of the results of these Tests on Completion to the Employer.

9.2 **Delayed Tests**

- 9.2.1 If the Contractor is prevented, for more than 7 days, from carrying out all or some of the Tests on Completion by a cause for which the Employer is responsible, the Contractor shall carry out the relevant Tests on Completion as soon as is practicable.
- 9.2.2 If the Contractor suffers delay and/or incurs Cost as a result of a delay in carrying out the Tests on Completion for which the Employer is solely responsible, the Contractor shall give notice to the Employer and shall be entitled, subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and Clause 20.1 (*Contractor's Claims*), to:
- 9.2.2.1 an extension to the Time for Completion for any such delay, to the extent completion of the Works is or will be delayed under Clause 8.4 (*Extension of Time for Completion*); and
- 9.2.2.2 payment of any such additional Cost through an adjustment to the Contract Price.
- 9.2.3 After receiving a notice under Clause 9.2.2, the Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine these matters.
- 9.2.4 If the Tests on Completion are being unduly delayed by the Contractor, the Employer may by notice require the Contractor to carry out the Tests on Completion within 7 days after receiving such notice or any such other period as agreed by Parties. The Contractor shall carry out the relevant Tests on Completion on such day or days within that period as the Contractor may elect and of which it shall give notice to the Employer.
- 9.2.5 If the Contractor fails to carry out the Tests on Completion within the 14-day period referred to in Clause 9.2.4, the Employer may proceed with the relevant Tests on Completion at the risk and cost of the Contractor. The Tests on Completion shall then be deemed to have been carried out in the presence of the Contractor and the results of the tests shall be accepted as accurate.
- 9.2.6 The Contractor shall be responsible for any delays and/or additional costs incurred as a result of a delay to the witnessing and certification of the Tests on Completion caused by the Independent Engineer and/or the representatives of the Buyers, Network Operator, the NTCSA, Eskom, NERSA or any other Government Authority, subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*).

9.3 **Retesting**

If the Works fail to pass the Tests on Completion, Clause 7.5 (*Rejection*) shall apply, and the Employer or the Contractor may require the failed tests (including the tests on any related components of the Works), to be repeated in accordance with Clauses 9.1 (*Conducting, Witnessing and Certifying of Tests on Completion*) and 9.2 (*Delayed Tests*), save that the Employer may, as necessary, amend the time periods specified therein for the service of notices and the conducting of tests. Such amended time periods shall be confirmed in writing to the Contractor by the Employer.

9.4 **Failure to Pass Tests on Completion**

9.4.1 If the Works fail to pass the Tests on Completion (including any Tests on Completion repeated under Clause 9.3 (*Retesting*)), the Contractor shall, at its own expense, prior to the EPC Last COD, effect such repairs and replacements to the Works, or any part thereof, as are necessary for the Works to pass the Tests on Completion.

9.4.2 If the Delay Liquidated Damages Cap has been reached but the Contractor has not yet passed the Tests on Completion, the Employer may (at its sole discretion subject to Lenders' approval) permit the Contractor to continue to pay Delay Liquidated Damages, up to the EPC Last COD, in order to pass the Tests on Completion. The Contractor may seek the Employer's approval to such course of action no later than 28 days prior to the date on which the Delay Liquidated Damages Cap will be reached. If the Employer (subject to Lenders approval) confirms its approval (in writing), the Contractor may only continue to pay Delay Liquidated Damages:

9.4.2.1 if all Delay Liquidated Damages up to the date the Delay Liquidated Damages Cap has been reached, have been paid to the Employer in full; and

9.4.2.2 if the Contractor has provided an additional performance bond in a value satisfactory to the Employer and the Lenders, taking account of the remaining period over which Delayed Liquidated Damages are payable up to the EPC Last COD and the extent to which the Employer has already drawn on the First Performance Bond.

9.4.3 If the Contractor does not seek the Employer's approval by the date falling 28 days prior to the date on which the Delay Liquidated Damages Cap will be reached (or the Employer's approval is sought but not given), the Contractor will be deemed to have elected not to continue to pay Delay Liquidated Damages.

9.4.4 Any Delay Liquidated Damages imposed on the Contractor in terms of Clause 8.6 (*Delay Liquidated Damages*), shall continue until the earlier of:

9.4.4.1 the EPC Last COD;

9.4.4.2 the date on which the Taking-Over Certificate is issued in accordance with Clause 10.2 (*Employer's Taking-Over of the Works*);

9.4.4.3 the date on which the Delay Liquidated Damages Cap is reached unless the Employer gives written approval to the Contractor to continue to pay Delay Liquidated Damages in accordance with Clause 9.4.2; and

9.4.4.4 if the Employer gives approval to the Contractor to continue to pay Delay Liquidated Damages in accordance with Clause 9.4.2, the date on which the Contractor subsequently fails to pay such Delay Liquidated Damages.

9.4.5 If:

9.4.5.1 the Delay Liquidated Damages Cap has been reached and the Contractor does not seek or secure the Employer's written approval to continue to pay Delay Liquidated Damages pursuant to Clause 9.4.2 (or does obtain such approval but subsequently fails to pay); or

9.4.5.2 the Contractor fails to achieve the Contracted Capacity and/or the Guaranteed Performance Ratio by the EPC Last COD,

then, if the Works have passed all the Tests on Completion and all the other Take-Over Requirements have been achieved, but:

9.4.5.3 the Achieved Capacity is less than the Contracted Capacity but equal to or more than the Minimum Acceptance Capacity; and/or

9.4.5.4 the achieved Performance Ratio is less than the Guaranteed Performance Ratio but equal to or more than the Minimum Performance Ratio,

the Employer shall, subject to Clause 9.4.6, issue the Taking-Over Certificate to the Contractor.

9.4.6 If the Employer issues the Taking-Over Certificate pursuant to Clause 9.4.5:

9.4.6.1 the Contractor shall proceed in accordance with all other obligations under this Contract; and

- 9.4.6.2 if the Contractor did not meet:
- 9.4.6.2.1 the Contracted Capacity, the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced capacity of the Facility to the Employer, such reduction to be determined in accordance with Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*); and
- 9.4.6.2.2 the Minimum Performance Ratio, the Contractor shall, in addition to the reduction in the Contract Price under Clause 9.4.6.2 (if applicable), pay to the Employer the Performance Liquidated Damages in the amounts specified in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*).
- 9.4.7 Prior to issuance of the Taking-Over Certificate, the Employer shall calculate the reduction in the Contract Price and/or the Performance Liquidated Damages to which it considers itself entitled under and in accordance with Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*) (if any).
- 9.4.8 The Employer shall, as soon as reasonably possible, issue a VAT Invoice to the Contractor for the reduction in the Contract Price and/or the Performance Liquidated Damages calculated to be due by the Contractor to the Employer in accordance with Clause 9.4.7. Payment of all amounts invoiced in accordance with this Clause 9.4.8 shall be a pre-condition to the issuance of the Taking-Over Certificate and shall be due from the Contractor within 30 days of issue of the VAT Invoice. At the expiration of such 30 day period, the amount invoiced will be a debt due and payable to the Employer on demand and may be deducted from any payments otherwise due from the Employer to the Contractor. The Employer shall also have recourse to the Performance Security provided under this Contract.
- 9.4.9 Without derogating from the Employer's other rights under this Contract and subject to the provisions of Clause 9.4.5, the Employer shall not be obliged to issue or procure the issue of the Taking-Over Certificate or the Facility Completion Form or the Facility Completion Notice unless and until the Contracted Capacity has been achieved.
- 9.4.10 If:
- 9.4.10.1 the capacity of the Facility is less than the Minimum Acceptance Capacity on the date the Delay Liquidated Damages Cap is reached and the Employer has not given approval to the Contractor to continue to pay Delay Liquidated

Damages in accordance with Clause 9.4.2 or the Employer has given such approval but the Contractor subsequently fails to pay any such Delay Liquidated Damages; or

9.4.10.2 by the EPC Last COD, the Works have failed to pass the Tests on Completion for the Minimum Acceptance Capacity or the Minimum Performance Ratio, or the Take-Over Requirements have otherwise not been achieved,

then the Employer shall, without prejudice to any other remedy provided for in this Contract, be entitled to terminate the Contract and reject the whole of the Works, in accordance with Clause 15.2.1.10 or Clause 15.2.1.11 (as applicable).

9.4.11 If the Employer terminates the Contract and rejects the Works pursuant to Clause 9.4.10 or Clause 11.4.2.3:

9.4.11.1 the Contractor shall at its own cost, dismantle and remove the Works from the Site, and restore the Site to its original condition; and

9.4.11.2 the Employer shall be entitled, at its election, to recover either:

9.4.11.2.1 the aggregate of the following amounts, as its measure of damages:

9.4.11.2.1.1 an amount equal to the aggregate of all amounts paid by the Employer to the Contractor in respect of the Works;

9.4.11.2.1.2 the Employer Development Costs paid and/or incurred by or on behalf of the Employer;

9.4.11.2.1.3 interest paid and/or incurred by the Employer to the Lenders in terms of the Financing Agreements;

9.4.11.2.1.4 fees, costs, penalties (including all debt raising fees, hedging costs and debt breakage costs) and any other claims under the Financing Agreements, paid and/or incurred by the Employer to the Lenders in terms of such Financing Agreements;

9.4.11.2.1.5 fees, costs, penalties and any other claims paid and/or incurred by the Employer to a counter-party under a Related Document;

9.4.11.2.1.6 if the Contractor fails to comply with Clause 9.4.11.1, the costs the Employer has paid or is required to pay for the dismantling of the Works and the clearing and rehabilitating of the Site;

- 9.4.11.2.1.7 all other direct costs, expenses and losses paid and/or incurred by the Employer as a consequence of the termination of the Contract and the rejection of the Works; or
- 9.4.11.2.2 all of the direct damages, losses, costs and expenses incurred or sustained by the Employer as a consequence of the termination of the Contract and the rejection of the Works.
- 9.4.12 **"Incurred"** in Clause 9.4.11 means reasonably demonstrated by the Employer to the Contractor as having been incurred.

10 EMPLOYER'S TAKING-OVER

10.1 Early Operating Period

- 10.1.1 Despite the Works generating and exporting energy during the Early Operating Period, the Defects Notification Period for the Facility will commence from the date on which the Works are completed as certified under Clause 10.2 (*Employer's Taking-Over of the Works*).
- 10.1.2 The Early Operating Energy Payments made by the Buyers to the Employer for the Early Operating Energy shall be shared between the Contractor and the Employer in the proportions and subject to the provisos set out below in this Clause 10.1 (*Early Operating Period*).
- 10.1.3 The Contractor shall be entitled to 50% of the Early Operating Energy Payments actually received and retained by the Employer from the Buyers (as such payments may be reduced due to the operation of the Financing Agreements) in respect of Early Operating Energy generated during the Early Operating Period.
- 10.1.4 The Contractor shall only be entitled to the Early Operating Energy Payments under this Clause 10.1 (*Early Operating Period*) if and to the extent the Employer actually receives such payments from the Buyers under the Power Purchase Agreements.
- 10.1.5 The Contractor shall remain fully responsible for all costs associated with the Works during the Early Operating Period. The Contractor is, and shall remain, responsible for the Operation and Maintenance of the Works, including providing training to all staff and personnel required to Operate and Maintain the Works during the Early Operating Period. The Employer shall only assume risk and responsibility for the Operation of the Facility from Taking-Over.

10.1.6 Following the issuance of the Taking-Over Certificate, the Employer shall reconcile the Delay Liquidated Damages paid and/or payable by the Contractor in accordance with Schedule 9 (*Delay Liquidated Damages*), and shall calculate the associated amount owing, refund and/or credit due to the Contractor. The Employer shall thereafter notify the Contractor of the value of its entitlement under this Clause 10.1.6 (the "**Contractor's Entitlement**"). Following receipt of such notice, the Contractor shall issue a valid VAT Invoice for an amount equal to the Contractor's Entitlement, together with interest thereon calculated from the date of issue of the Taking-Over Certificate, which shall be payable by the Employer to the Contractor in accordance with, and subject to the terms of, the Financing Agreements (and for the avoidance of doubt, the rate of interest payable to the Contractor in these circumstances shall be the same as the rate of interest the Employer actually earns under the Financing Agreements, as applied to the value of the Contractor's Entitlement under this Clause 10.1.6).

10.1.7 As between the Employer and Contractor, the Employer shall be entitled to sell any electricity produced by the Works or part thereof prior to Taking-Over in accordance with Clause 10.2 (*Employer's Taking-Over of the Works*) and nothing in the Contract shall be construed as imposing any restriction on the Employer from doing so.

10.2 **Employer's Taking-Over of the Works**

10.2.1 The Contractor shall advise the Employer and the Lender's Technical Advisor (in writing), no less than 10 days prior to the date on which the Contractor anticipates that all of the Take-Over Requirements will be achieved.

10.2.2 Except as stated in Clause 9.4.5, the Works shall be taken over by the Employer when:

10.2.2.1 the Take-Over Requirements have been achieved; and

10.2.2.2 a Taking-Over Certificate for the Works has been issued.

10.2.3 The Employer shall, within 21 days after receiving the Contractor's notice pursuant to Clause 10.2.1:

10.2.3.1 subject to having obtained the prior written approval of the Lender's Technical Advisor, issue the Taking-Over Certificate to the Contractor, stating the date on which the Works were completed in accordance with the Contract, except for any minor outstanding work and defects listed on a punch list (the "**Punch List**") in terms of Clause 10.4 (*Punch List*) and/or any Temporary Condition under Clause 10.3 (*Temporary Conditions*) which items or conditions will not

substantially affect the use of the Works for their intended purpose (either until or whilst this work is completed and these defects are remedied); or

- 10.2.3.2 reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work before issuing a further notice under Clause 10.2.1.

10.3 **Temporary Conditions**

- 10.3.1 If there are any Temporary Conditions imposed by Eskom, RETEC or NERSA in respect of Grid Code compliance, the Contractor shall, within a period not to exceed 21 days following Take-Over, provide the Employer with a proposed rectification program which shall include a detailed timetable demonstrating the works and activities required to discharge such Temporary Conditions within a reasonable period of time, taking account of the requirements of the relevant Temporary Conditions and ensuring a sufficient time buffer to enable the Employer (or a third party appointed by the Employer) to complete the required works and activities by the deadline specified by Eskom or NERSA or to apply for an extension.
- 10.3.2 For clarity, any Temporary Condition imposed by the Network Operator, RETEC and/or NERSA in respect of Grid Code compliance that has not been discharged to the Network Operator's and/or NERSA's satisfaction (and confirmed in writing) for want of the arising of any fault in the Network that permits the determination of the issue giving rise to the Temporary Condition shall constitute an unfulfilled obligation under this Clause 10.3 (*Temporary Conditions*) and pursuant to Clause 11.10 (*Unfulfilled Obligations*), provided that such obligation shall expire at the end of the Latent Defects Notification Period.
- 10.3.3 Without prejudice to the Contractor's other obligations in this Clause 10.3 (*Temporary Conditions*), to the extent that a Temporary Condition includes an ability for Eskom, RETEC and/or NERSA to monitor the capacity of the Facility to perform in accordance with certain aspects of the Grid Codes, the remedial action may involve the Contractor monitoring the performance of the relevant parts of the Facility rather than incorporating, repairing and/or replacing such parts, provided the Contractor gives prior written notification of this to the Employer. In such circumstances, the proposed timetable for the discharge of such Temporary Condition shall align with the periods granted in accordance with the relevant Temporary Condition.
- 10.3.4 Following receipt of the proposed rectification program, the Employer shall within 10 Business Days provide any comments to the Contractor, failing which the proposed rectification program shall be deemed to have been accepted. Any comments

provided by the Employer within such 10 Business Day period shall be incorporated into the proposed rectification program, provided such comments are reasonable.

10.3.5 The Contractor shall diligently carry out any works and activities required for the discharge of the Temporary Conditions, at its sole risk and cost, in accordance with the rectification program and timetable agreed pursuant to this Clause 10.3 (*Temporary Conditions*).

10.3.6 In the event that the Contractor fails to discharge any of the Temporary Conditions in accordance with the rectification program and timetable, the Employer shall be entitled to appoint a third party contractor to complete such works and activities as may be required to discharge any of the Temporary Conditions, at the Contractor's own risk and cost. The Employer shall also have recourse to the Performance Security.

10.4 **Punch List**

10.4.1 No later than 21 days prior to the Time for Completion, the Contractor shall provide the Employer with a complete list of Punch List items that the Contractor considers to be existing at such date. The Punch List items shall only be items that:

10.4.1.1 do not diminish, prevent or affect the continuity of operation, availability and performance of the Works;

10.4.1.2 do not affect or decrease the safety, reliability, efficiency or stability of the Works;

10.4.1.3 do not prevent the use of the Works for its intended purpose;

10.4.1.4 do not affect the mechanical or electrical integrity of the Works; and

10.4.1.5 do not affect the compliance of the Works with any Laws and/or Authorisations.

10.4.2 Within 14 days of receipt of the Punch List from the Contractor, the Employer shall respond by either agreeing to the Punch List or adding items thereto.

10.4.3 The aggregate value of all items included in the Punch List prepared shall not exceed 1% of the Contract Price.

10.4.4 The Parties shall, as a condition to the issuance of the Taking-Over Certificate, agree on the Punch List.

10.4.5 The Contractor shall provide the Employer with a date for completion of each of the items on the Punch List, which date shall be prior to the issuing of the Performance Certificate (hereinafter referred to as the "**PL Timetable**").

- 10.4.6 The Contractor shall diligently pursue the completion of the items on the Punch List, at the Contractor's sole cost and expense, and all such items shall be completed in accordance with the PL Timetable.
- 10.4.7 The issuing of the Performance Certificate shall be conditional on the completion of all items on the Punch List (as may be updated).
- 10.4.8 The Contractor shall notify the Employer as soon as it has completed the items on the Punch List, and the Employer shall within 7 days of being so notified, either accept or reject the Contractor's claim that the relevant items have been completed. In the event that the Contractor's claim is rejected, the Employer shall furnish reasons for such rejection and the Contractor shall continue to complete the rejected items on the Punch List. This procedure shall be continued until the Employer has accepted completion of all the items on the Punch List in accordance with the provisions of this Contract.
- 10.4.9 If the Contractor fails to complete an item on the Punch List in accordance with the PL Timetable, the Employer may, upon written notice to the Contractor, complete such items on the Punch List itself, or engage another contractor to complete such items, and the Contractor shall be liable for the Costs of so doing. Such Costs may be deducted from any payments otherwise due from the Employer to the Contractor and the Employer shall have recourse to the Performance Security.

11 DEFECTS LIABILITY

11.1 Completion of Outstanding Work and Remedying Defects

11.1.1 Defects

- 11.1.1.1 The Contractor warrants that the Works and Facility shall be free from all defects (fair wear and tear excepted) for the duration of the Defects Notification Period. Notwithstanding the expiry of the Defects Notification Period, the Contractor shall remedy all defects notified at any time prior to the expiry of the Defects Notification Period.
- 11.1.1.2 In order that the Facility and Contractor's Documents, shall be in the condition required by the Contract (fair wear and tear excepted) by the expiry date of the Defects Notification Period or as soon as practicable thereafter, the Contractor shall:
- 11.1.1.2.1 complete any work which is outstanding on the date stated in the Taking-Over Certificate, including but not limited to items on the Punch List in accordance with Clause 10.4 (*Punch List*); and

- 11.1.1.2.2 execute all work required to remedy defects or damage, as may be notified by the Employer on or before the expiry date of the Defects Notification Period, including any damage caused by any defect, including, but not limited to, any damage to the Facility that is caused in order to gain access to any defective or damaged part of the Facility.
- 11.1.1.3 If a defect appears or damage occurs during the Defects Notification Period, the Employer shall promptly notify the Contractor accordingly. In the event that the Contractor detects a defect or damage during the Defects Notification Period, the Contractor shall promptly notify the Employer of the details of the defect or damage to the Works.
- 11.1.1.4 The Contractor shall undertake any repair, replacement and/or making good of any defect notified during the Defects Notification Period at times reasonably approved by the Employer and in a manner that:
- 11.1.1.4.1 causes as little disruption as reasonably possible to the performance of the Works and/or the Operation and Maintenance of the Facility by the Employer, the Operator or any other contractor appointed by the Employer to perform security services or other works and services in connection with the Operation and Maintenance of the Facility at the Site; and
- 11.1.1.4.2 complies with the Employer's Site regulations, safety requirements and access procedures implemented following Take-Over and as notified by the Employer to the Contractor from time to time.
- 11.1.2 **Serial Defects**
- 11.1.2.1 If the Employer suspects that a Serial Defect exists at any time prior to the end of the Defects Notification Period, the Employer may instruct the Contractor to promptly (and in any event within 5 Business Days of the Employer's instruction) perform a preliminary investigation to ascertain whether or not a Serial Defect exists and provide root cause analysis to the Employer on the Contractor's findings ("**Preliminary Investigation**").
- 11.1.2.2 Following receipt of the Preliminary Investigation pursuant to Clause 11.1.2.1, the Employer, in consultation with the Lender's Technical Advisor, shall determine, in accordance with Clause 3.5 (*Determinations*), whether or not a Serial Defect exists. In determining whether or not a Serial Defect exists, the Employer may seek the opinion of an independent specialist (such specialist to be selected jointly by the Parties or if the Parties cannot agree within 5 Business Days, selected in accordance with Clause 11.1.2.5.2)

("Independent Specialist"). The Independent Specialist's terms of engagement shall include a requirement to consult with the Contractor and the Lender's Technical Advisor. The costs of procuring the opinion of the Independent Specialist shall be for the account of the Employer in the event that the Independent Specialist determines, following its investigation, that there is no Serial Defect; however, if the determination of the Independent Specialist is that there is a Serial Defect, then the costs of procuring such opinion from the Independent Specialist shall be for the account of the Contractor.

11.1.2.3 If it is determined by the Employer that a Serial Defect exists, the Employer shall confirm this in writing to the Contractor, following which the Contractor shall, at its sole cost and expense, carry out a full inspection on all parts and components related to the Serial Defect in order to inform the development of a remedial plan for the rectification of the Serial Defect. As soon as reasonably practicable following completion of such inspection work, but in any event within 14 days of completion thereof, the Contractor shall submit a detailed written report to the Employer for its approval, which shall include an explanation of the causes of the Serial Defect, the remedial action that will be required to address the Serial Defect and avoid further defects of a similar nature and the programme for completing those remedial works.

11.1.2.4 If the Employer's determination is disputed by the Contractor or a proposed remedial plan has not been approved by the Employer within 30 days of submission, then either Party shall be entitled to refer the dispute for determination by an Independent Third Party Expert, in accordance with Clause 11.1.2.5.

11.1.2.5 Independent Third Party Expert Determination

11.1.2.5.1 The Parties shall meet within 5 Business Days of referral of the dispute under Clause 11.1.2.4 and endeavour to agree upon a single expert (who will be independent of the Parties and shall have qualifications and experience appropriate to the matter in dispute) to whom the matter will be referred for determination (the "**Independent Third Party Expert**").

11.1.2.5.2 If within 14 days of referral of the dispute under Clause 11.1.2.4, the Parties have not met or fail to agree upon the appointment of an Independent Third Party Expert, the Parties shall request, in the first

instance, the following officials, to nominate the Independent Third Party Expert:

- 11.1.2.5.2.1 if the matter is primarily a mechanical issue, the President of the South African Institution of Mechanical Engineers;
- 11.1.2.5.2.2 if the matter is primarily an electrical issue, the President of the South African Institute of Electrical Engineers; and
- 11.1.2.5.2.3 if the matter is primarily a civils works issue, the President of the South African Institution of Civil Engineers.
- 11.1.2.5.3 No later than 7 days after the Independent Third Party Expert is selected pursuant to Clause 11.1.2.5.1 or Clause 11.1.2.5.2 (as applicable), the Parties shall jointly appoint the Independent Third Party Expert and the costs of such appointment shall be borne by the Parties in accordance with the Independent Third Party Expert's determination. Within 5 Business Days after such appointment, the Independent Third Party Expert shall require the Parties to submit in writing their respective arguments. The Independent Third Party Expert shall, in its absolute discretion, consider whether a hearing is necessary in order to resolve the dispute.
- 11.1.2.5.4 It shall be entirely within the power and competence of the Independent Third Party Expert to decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the Independent Third Party Expert shall direct the Parties accordingly.
- 11.1.2.5.5 The Independent Third Party Expert shall provide both Parties and the Lender's Technical Advisor with its written decision on the dispute, within 10 days of the referral (or such other period as the Parties may agree after the referral). The Independent Third Party Expert shall give its reasons for the award, if so requested by either Party or the Lender's Technical Advisor.
- 11.1.2.5.6 Any process or determination by the Independent Third Party Expert will be made as an expert and not as an arbitrator. The determination of the Independent Third Party Expert shall be final and binding on the Parties save and except for the existence of a manifest error in the process of determination or the determination itself or in the event of fraud or misconduct by the Independent Third Party Expert.

- 11.1.2.6 In the event that the Independent Third Party Expert determines that a Serial Defect exists, the Contractor shall proceed in accordance with the provisions of Clause 11.1.2.3.
- 11.1.2.7 In addition to any other rights that the Employer may have under the Contract, if:
- 11.1.2.7.1 the Contractor's remedial plan is approved in accordance with Clause 11.1.2.3 (or, where applicable, in accordance with Clause 11.1.2.5 (*Independent Third Party Expert Determination*)), the Contractor shall carry out the remedial works in accordance with the approved remedial plan;
- 11.1.2.7.2 the Contractor fails to provide a remedial plan as required in accordance with Clause 11.4.3, the Employer may, subject to Clause 11.1.2.8, instruct the Contractor to either re-design and replace or rectify all components in the Works which are (or are reasonably likely to be) defective by virtue of the relevant Serial Defect or are (or are reasonably likely to be) otherwise adversely affected by the relevant Serial Defect (each a "**Defective Component**"). Failure by the Contractor to comply with such instruction will be a breach of this Contract and shall entitle the Employer (subject to Clause 11.1.2.8 and without limiting the Employer's other rights and remedies under this Contract) to appoint a third party contractor to re-design and replace or rectify all such Defective Components, at the Contractor's risk and cost; or
- 11.1.2.7.3 the Contractor fails to comply with the approved remedial plan in the specified time frame, the Employer may (subject to Clause 11.1.2.8 and without limiting the Employer's other rights and remedies under this Contract) appoint a third party contractor to re-design and replace or rectify all Defective Components, at the Contractor's risk and cost. The Employer shall also have recourse to the Performance Security.
- 11.1.2.8 Defects related to components belonging to a production lot and recognised by the manufacturer of such components as a defective lot, will not be considered a Serial Defect of all identical components beyond that production lot. Such a defect will then be considered a Serial Defect for that production lot only. In such case, the Contractor will be obliged to replace or rectify only components of the specific defective production lot, and not all the identical components in all relevant parts of the Works.

11.1.3 **Latent Defects**

11.1.3.1 The Contractor shall, notwithstanding the issue of the Performance Certificate, at the cost and risk of the Contractor, execute all work required to remedy Latent Defects as may be notified by (or on behalf of) the Employer on or before the expiry date of the Latent Defects Notification Period.

11.1.3.2 The Contractor shall:

11.1.3.2.1 remedy Latent Defects within a reasonable time after it has been given notice thereof, including any damage caused by any Latent Defect, including, but not limited to, any damage to the Facility that is caused in order to gain access to any defective or damaged part of the Facility; and

11.1.3.2.2 shall have the right of access to the Facility and to the records of the Operation and Maintenance of the Facility as may be required for this purpose, except as may be inconsistent with the Employer's reasonable security restrictions or operational requirements.

11.1.3.3 If the Contractor fails to so remedy any notified Latent Defect the provisions of Clause 11.3.2 (*Failure to Remedy Defects*) shall apply *mutatis mutandis*.

11.2 **Cost of Remedying Defects**

11.2.1 All work referred to in Clause 11.1 (*Completion of Outstanding Work and Remedying Defects*) shall be executed at the risk and cost of the Contractor, if and to the extent that the work is attributable to:

11.2.1.1 the design of the Works;

11.2.1.2 Plant, Materials or workmanship not being in accordance with the Contract;

11.2.1.3 improper Operation or Maintenance after the Commercial Operation Date;

11.2.1.4 failure by the Contractor (or the Contractor's Personnel or any other person for whom it is responsible) to comply with any other obligation under the Contract; and/or

11.2.1.5 any other event or circumstance which occurred at the Contractor's risk under and in terms of the Contract.

11.2.2 If and to the extent that such work is attributable to any other cause, the Contractor shall be notified promptly by (or on behalf of) the Employer and Clause 3.5

(*Determinations*) shall apply, but subject in the ordinary course to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claim*).

11.3 **Extension of Defects Notification Period**

11.3.1 The Employer shall be entitled subject to Clause 2.4 (*Employer's Claims*) to an extension of the Defects Notification Period in accordance with Clause 11.3.2 if and to the extent that any of the Works cannot be used for the purposes for which they are intended by reason of a defect, Serial Defect or damage. However, the Defects Notification Period shall only be extended in respect of such Works and shall not be extended by more than 2 years, and shall in any event not exceed 4 years following the date of issue of the Taking-Over Certificate.

11.3.2 The Defects Notification Period in respect of any Works that are repaired, replaced, converted, altered, added to or modified under Clause 11.1 (*Completion of Outstanding Work and Remedying Defects*) shall, subject to Clause 11.3.1 (and subject specifically to the time period limitations stipulated therein), recommence in full in respect of such Works from the date of completion of such work of repair, replacement or correction.

11.4 **Failure to Remedy Defects**

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

11.4.2 If the Contractor fails to remedy the defect or damage by this notified date and this remedial work was to be executed at the cost of the Contractor under Clause 11.2 (*Cost of Remedying Defects*) or if the Contractor fails to remedy any Serial Defect within the timescales agreed in a remedial plan under Clause 11.1.2, the Employer may (at its option):

11.4.2.1 carry out the work itself or by others, in a reasonable manner and at the Contractor's cost, but the Contractor shall have no responsibility for this work and, the Contractor shall subject to Clause 2.4 (*Employer's Claims*), pay to the Employer the costs reasonably incurred by the Employer in remedying the defect or damage;

11.4.2.2 agree or determine a reasonable reduction in the Contract Price in accordance with Clause 3.5 (*Determinations*); or

11.4.2.3 if the defect or damage deprives the Employer of substantially the whole benefit of the Facility or any major part of the Facility, terminate the Contract, in terms of Clause 15.2.2.1, as a whole, or in respect of such major part which cannot be put to the intended use; in this event, without prejudice to any other rights, under the Contract or otherwise, the Employer shall then be entitled to recover the amounts set out or referred to in Clause 9.4.11.

11.4.3 Any amounts determined to be payable by the Contractor pursuant to the provisions of Clause 11.4.2 will be considered a debt due and payable to the Employer on demand. Such amounts may be deducted from any payments otherwise due from the Employer to the Contractor and the Employer shall also have recourse to the Performance Security provided under this Contract.

11.5 **Removal of Defective Work**

If the defect or damage cannot be remedied expeditiously on the Site and the Employer gives consent (acting reasonably), the Contractor may, at its risk and cost, remove from the Site for the purposes of repair such items of Plant as are defective or damaged. This consent may require the Contractor, in the event that the defective or damaged items of Plant removed exceed ZAR15,000,000.00 to increase the amount of the applicable Performance Bond by an amount equal to no more than 100% of the full replacement cost of these items, or to provide cash security to an equivalent value. For the avoidance of doubt, the Contractor shall be responsible for the care and responsibility of such items while off Site.

11.6 **Further Tests**

11.6.1 If the work of remedying of any defect or damage may affect the performance of the Facility, the Employer may require the repetition of any of the tests described in the Contract, including the Tests on Completion and/or Tests after Completion, to the extent such tests relate, directly or indirectly, to the remedial work undertaken or to its actual or potential impact on the performance of the Facility. The requirement shall be made by notice within 28 days after the defect or damage is remedied.

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

11.7 **Right of Access**

From the date the Taking-Over Certificate is issued until expiry of the Latent Defects Notification Period, the Contractor shall have the right of access to all parts of the Facility

and to records of the Operation, Maintenance and performance of the Facility as may be reasonably necessary for the Contractor to perform its obligations under this Clause 11 (*Defects Liability*), except as may be inconsistent with the Employer's reasonable security or operational restrictions.

11.8 **Contractor to Search**

In addition to the Contractor's aforementioned obligations pursuant to this Clause 11 (*Defects Liability*), the Contractor shall, if required by the Employer, search for the cause of any defect, under the direction of the Employer. Unless the defect is to be remedied at the cost of the Contractor under Clause 11.2 (*Cost of Remedying Defects*), the Cost of the search shall be agreed or determined in accordance with Clause 3.5 (*Determinations*) and shall be added to the Contract Price.

11.9 **Performance Certificate**

11.9.1 Subject to Clause 11.9.4 and Clause 11.10 (*Unfulfilled Obligations*), the performance of the Contractor's obligations shall not be considered to have been completed until the Employer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed its obligations under the Contract, including, but not limited to:

11.9.1.1 delivery of the amended as-built drawings to the Employer in accordance with Clause 5.6.4;

11.9.1.2 delivery of the amended Operation and Maintenance Manual to the Employer in accordance with Clause 5.7.3;

11.9.1.3 all the items on the Punch List have been remedied;

11.9.1.4 all amounts due by the Contractor to the Employer have been paid;

11.9.1.5 the Site has been cleared by the Contractor;

11.9.1.6 all Temporary Conditions (if any) imposed by Eskom, RETEC and/or NERSA in respect of Grid Code compliance have been discharged to Eskom's, RETEC's and/or NERSA's satisfaction (and confirmed in writing);

11.9.1.7 all defects have been remedied and the last Defects Notification Period has expired;

11.9.1.8 the replacement of the Spare Parts as provided for in Clause 4.33.6 (if applicable); and

- 11.9.1.9 the Post Take-Over Guarantees have been met or, where applicable, all outstanding Performance Liquidated Damages have been paid in full.
- 11.9.2 Not less than 60 days and no more than 90 days prior to the expiration of the Defects Notification Period, the Employer and the Contractor will jointly inspect the Facility and the Employer shall prepare a list of defects to be corrected by the Contractor and at the Contractor's cost, prior to the issue of the Performance Certificate.
- 11.9.3 The Employer shall, subject to having obtained the prior written approval of the Lender's Technical Advisor, issue the Performance Certificate within 28 days following satisfactory compliance by the Contractor with its obligations under and in accordance with Clauses 11.9.1 and 11.9.2. If the Employer fails to issue the Performance Certificate within such 28 day period:
- 11.9.3.1 the Performance Certificate shall be deemed to have been issued on the date falling 28 days following expiry of the period stipulated in Clause 11.9.3, subject to the Contractor having notified the Employer and the Lenders that the Performance Certificate will be deemed to have been issued in terms of this Clause 11.9.3.1 by no later than 14 days prior to the expiry of the aforesaid 28-day period; and
- 11.9.3.2 Clause 11.11 (*Clearance of the Site*) and Clause 14.14 (*Employer's Liability*) shall be inapplicable.
- 11.9.4 Without prejudice to the Contractor's liability in relation to Latent Defects, only the Performance Certificate shall be deemed to constitute final acceptance of the Works.
- 11.9.5 Upon the issue of the Performance Certificate, the Contractor shall transfer all manufacturers' warranties (including in respect of the Spare Parts) to the Employer.

11.10 **Unfulfilled Obligations**

After the Performance Certificate has been issued, each Party shall remain liable for the fulfilment of any obligation which remains unperformed at that time. The Contract shall continue to be of force and effect in respect of any obligation that remains unperformed at the time of the issuance of the Performance Certificate, notwithstanding the issue of the Performance Certificate.

11.11 **Clearance of Site**

- 11.11.1 As a condition precedent to issuance of the Performance Certificate, the Contractor shall remove any remaining Contractor's Equipment, surplus material, wreckage and rubbish from the Site, and the Contractor shall perform all rehabilitation and

restatement work subsequently required.

- 11.11.2 If the Employer elects to issue the Performance Certificate notwithstanding the existence of unfulfilled obligations under Clause 11.1 (*Completion of Outstanding Works and Remedying Defects*) and such obligations have not been fulfilled within 28 days after the Employer issued the Performance Certificate, the Employer may sell or otherwise dispose of any remaining items and perform (or appoint a third party to perform) any outstanding rehabilitation and restatement work. The Employer shall be entitled to be paid the costs incurred in connection with, or attributable to, such sale or disposal and restoring the Site and leave the Site in a clean and safe condition.
- 11.11.3 The proceeds of the sale of any remaining items shall be used to cover the Employer's costs under Clause 11.11.2, with any excess being paid to the Contractor. If these moneys are less than the Employer's costs, the Contractor shall pay the outstanding balance to the Employer.

12 TESTS AFTER COMPLETION

12.1 Procedure for Tests after Completion

- 12.1.1 In respect of the Tests after Completion:
 - 12.1.1.1 the Employer shall provide all electricity, fuel and materials, and make the Employer's Personnel and if applicable, the Employer's Plant, available;
 - 12.1.1.2 the Contractor shall provide all plant, equipment and suitably qualified and experienced staff, as are necessary to carry out the Tests after Completion efficiently; and
 - 12.1.1.3 the Contractor shall carry out the Tests after Completion in the presence of such Employer's Personnel and/or Contractor's Personnel as either Party may reasonably request, as well as the Lender's Technical Advisor.
- 12.1.2 The procedures in respect of the Tests after Completion are set out in Schedule 8 (*Tests*). The Tests after Completion shall be carried out in accordance with the requirements of Schedule 8 (*Tests*). The Contractor shall give notice to the Employer, which notice shall include the relevant test protocol referred to in Schedule 8 (*Tests*), by no later than 21 days' prior to the date on which the Tests after Completion will be carried out. Unless otherwise agreed, the Tests after Completion shall be carried out within 14 days after the date so notified, on a day or days determined by the Employer.
- 12.1.3 The results of the Tests after Completion shall be compiled and evaluated by the Contractor, who shall prepare a detailed report. Appropriate account shall be taken of the effect of the Employer's prior use of the Works.

12.2 **Delayed Tests**

- 12.2.1 If the Contractor incurs Cost as a result of any unreasonable delay by the Employer to the Tests after Completion, the Contractor shall (i) give notice to the Employer and (ii) be entitled subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and Clause 20.1 (*Contractor's Claims*), to payment of any such Cost plus Profit, which shall be added to the Contract Price.
- 12.2.2 After receiving a notice under Clause 12.2.1, the Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine this Cost.
- 12.2.3 The Contractor shall be responsible for any delays and/or additional costs it incurs if the Tests after Completion are unduly delayed by the Independent Engineer, the representatives of the Buyers, Network Operator, the NTCSA, Eskom, NERSA or any other Government Authority, subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*). If the Contractor confirms in writing to the Employer that it requires the Employer to exercise certain rights available to it under any of the Related Documents in order to support the Contractor in managing and mitigating the risk of such third party interfaces, the Employer shall exercise such rights in accordance with the provisions of Clause 1.14 (*Pass Through Claims*).

12.3 **Retesting**

- 12.3.1 If the Facility fails to pass the Tests after Completion:
- 12.3.1.1 the Contractor shall remedy the Works, and
- 12.3.1.2 either Party may then require the failed Tests after Completion to be repeated under the same terms and conditions.
- 12.3.2 If and to the extent that this failure and retesting are attributable to any of the matters listed in Clause 11.2 (*Cost of Remedying Defects*) and cause the Employer to incur additional costs, the Contractor shall subject to Clause 2.4 (*Employer's Claims*) pay these costs to the Employer.

12.4 **Failure to Pass Tests after Completion and to meet the Performance Guarantees**

- 12.4.1 The Contractor guarantees that the Facility and all component parts will meet the Post Take-Over Guarantees as specified in Schedule 7 (*Performance Guarantees*). If:
- 12.4.1.1 subject to the Lender's consent, the Employer terminates the O&M Agreement for convenience; or

- 12.4.1.2 subject to the Lender Direct Agreement executed in terms of the O&M Agreement, the Operator terminates the O&M Agreement for the Employer's default,
- and a third party is subsequently appointed to replace the Operator, the Post Take-Over Guarantees shall not apply to the extent that the Contractor is able to prove (to the Employer's reasonable satisfaction) that the third party has failed to Operate and Maintain the Facility in accordance with the Operation and Maintenance Manuals provided to the Employer in accordance with Clause 5.7 (*Operation and Maintenance Manuals*).
- 12.4.2 If, after carrying out the Tests after Completion, the Contractor does not meet the Post Take-Over Guarantees in accordance with Schedule 6 (*Performance Guarantees*), the Contractor shall, in addition to any applicable reduction in the Contract Price under Clause 9.4 (*Failure to Pass Tests on Completion*), pay to the Employer the Performance Liquidated Damages in the amounts calculated in accordance with Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*).
- 12.4.3 At the end of both the First Evaluation Period and the Second Evaluation Period (respectively), the Employer shall calculate the Performance Liquidated Damages to which it considers itself entitled under and in accordance with Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price, and Incentives*) (if any).
- 12.4.4 The Employer shall, as soon as reasonably possible following the expiration of the First Evaluation Period or the Second Evaluation Period (as applicable) issue a VAT Invoice to the Contractor for all Performance Liquidated Damages calculated to be due by the Contractor to the Employer in accordance with Clause 12.4.3. Payment of all amounts invoiced in accordance with this Clause 12.4.4 shall be due from the Contractor within 30 days of the date of issue of the VAT Invoice. At the expiration of such 30 day period the amount invoiced will be a debt due and payable to the Employer on demand and may be deducted from any payments otherwise due from the Employer to the Contractor. The Employer shall also have recourse to the Performance Security provided under this Contract.
- 12.4.5 The aggregate liability of the Contractor for Performance Liquidated Damages will not exceed the amount specified in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price and Incentives*). The aggregate liability of the Contractor for both the Delay Liquidated Damages and the Performance Liquidated Damages will not exceed the amount specified in Schedule 10 (*Performance Liquidated Damages, Reductions in Contract Price and Incentives*).

- 12.4.6 If the obligation to pay Performance Liquidated Damages pursuant to this Contract is found for any reason to be void, invalid or unenforceable or otherwise inoperative in any way so as to disentitle the Employer from claiming Performance Liquidated Damages, then the Employer shall be entitled to claim from the Contractor general damages in the ordinary course.
- 12.4.7 Subject to Clause 12.4.8, if the Works fail to pass any of the Tests after Completion, then, in addition to the Contractor's obligation to pay Performance Liquidated Damages, the Contractor shall effect any necessary repairs, adjustments or modifications to the Facility to ensure that the Tests after Completion will be passed. The Contractor may, however, be instructed by (or on behalf of) the Employer that right of access to the Facility cannot be given until a time that is convenient to the Employer. The Contractor shall then remain liable to carry out the repairs, adjustments or modifications and to satisfy the Tests after Completion, within a reasonable period of receiving notice by (or on behalf of) the Employer of the time that is convenient to the Employer. However, if the Contractor does not receive this notice within a year after the expiry of the Defects Notification Period (as may have been extended in accordance with the provisions of this Contract) and the Contractor has paid any applicable Performance Liquidated Damages, the Contractor shall be relieved of this obligation and the Works shall be deemed to have passed the Tests after Completion.
- 12.4.8 The Contractor's obligation in Clause 12.4.7 to effect any necessary repairs, adjustments or modifications to the Facility to ensure that the Tests after Completion will be passed, shall apply:
- 12.4.8.1 in respect of the Function Tests (as such tests are defined in Schedule 8 (*Tests*)), for the duration of the Defects Notification Period; and
- 12.4.8.2 in respect of the Performance Ratio Test (as specified in Schedule 7 (*Performance Guarantees*)), for the duration of the First Evaluation Period.

13 VARIATIONS AND ADJUSTMENTS

13.1 Right to Vary

13.1.1 Variations may be initiated by the Employer at any time prior to issuing the Taking-Over Certificate for the Works (except as otherwise expressly provided in this Contract) or by the Contractor in term of Clause 1.13.12, either by an instruction provided that such instruction does not reduce scope of the Works unless otherwise contemplated in the Contract or by a request for the Contractor to submit a proposal.

13.1.2 The Contractor shall execute and be bound by each Variation, unless the Contractor promptly (but in any event within not more than 15 days unless otherwise agreed by the Employer) gives notice to the Employer stating (with supporting particulars) that:

13.1.2.1 the Contractor cannot readily obtain the Goods or services required for the Variation;

13.1.2.2 it will reduce the safety or suitability of the Works; or

13.1.2.3 it will have an adverse impact on the achievement of the Performance Guarantees.

13.1.3 Upon receiving a notice pursuant to Clause 13.1.2, the Employer shall cancel, confirm or vary the instruction.

13.2 Value Engineering

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

13.2.1.1 accelerate completion;

13.2.1.2 reduce the cost to the Employer of executing, maintaining or operating the Works;

13.2.1.3 improve the efficiency or value to the Employer of the completed Works; or

13.2.1.4 otherwise be of benefit to the Employer.

13.2.2 The proposal shall be prepared at the cost of the Contractor and shall include the items listed in Clause 13.3 (*Variation Procedure*). The proposal shall be considered by the Employer in accordance with Clause 13.3 (*Variation Procedure*).

13.3 **Variation Procedure**

13.3.1 If the Employer requests a proposal or if the Contractor submits a proposal in term of Clause 1.13.12, prior to instructing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why it cannot comply (if this is the case) or by submitting:

13.3.1.1 a description of the proposed design and/or work to be performed and a programme for its execution;

13.3.1.2 the Contractor's proposal for any necessary modifications to the Programme, to the Time for Completion, and to other aspects of the Works or specific provisions of the Contract;

13.3.1.3 any other information requested by the Employer in its request for a proposal; and

13.3.1.4 the Contractor's proposal for adjustment to the Contract Price in accordance with the Variation Pricing Methodology.

13.3.2 The Employer shall, as soon as practicable after receiving such proposal, respond with approval, disapproval or comments. The Contractor shall not delay any of the Works whilst awaiting a response.

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

13.3.4 Upon instructing or approving a Variation, the Employer shall proceed in accordance with the Variation Pricing Methodology to agree or determine, in accordance with the provisions of Clause 3.5 (*Determinations*), adjustments to the Contract Price and the Schedule of Payments. These adjustments shall take account of the Contractor's submissions under Clause 13.2 (*Value Engineering*) if applicable.

13.3.5 Notwithstanding anything else in the Contract, any Variation made necessary due to any default of the Contractor in the performance of its obligations under this Contract shall not result in any additional payment, increase in the Contract Price, extension of time or other relief pursuant to this Clause 13 (*Variations and Adjustments*) or relief

pursuant to any other provision of the Contract. Any additional cost to the Employer caused by a Variation which is attributable to such default of the Contractor shall be borne by the Contractor and may be recovered by the Employer subject to Clause 2.4 (*Employer's Claims*).

13.4 **Payment in Applicable Currencies**

If the Contract provides for payment of the Contract Price in more than 1 currency, then whenever a Variation or an adjustment is agreed, approved or determined as stated above, the amount payable in each of the applicable currencies shall be specified. For this purpose, reference shall be made to the actual or expected currency proportions of the Cost of the varied work, and to the proportions of various currencies specified for payment of the Contract Price.

13.5 **Change in Law**

13.5.1 If a Change in Law occurs after the Signature Date, either Party shall give the other written notice within 15 days of becoming aware of the Change in Law, or such longer period as the Parties may determine, describing the particulars of the Change in Law, a general description of the obligations likely to be affected and a statement of the actions to be taken in order to comply with that Party's obligations under the Contract.

13.5.2 If the Contractor is the affected Party, the Contractor shall provide the Employer with an impact assessment report in respect of the Change of Law and reasonable evidence of the additional Costs resulting from such Change in Law. If the Contractor fails to comply with the deadlines and other requirements referred to in Clause 13.5 (*Change in Law*), then the Contractor shall not be entitled to any extension of time, additional Cost or relief from its obligations under this Contract in respect of the period for which its compliance is delayed. Each Party shall use all reasonable endeavours to minimise and mitigate the effects of any Change in Law.

13.5.3 If the Contractor suffers delay and/or incurs Cost from the Change in Law, the Contractor shall give notice to the Employer and shall be entitled subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and Clause 20.1 (*Contractor's Claims*), to:

13.5.3.1 an extension to the Time for Completion for any such delay, to the extent completion of the Works is or will be delayed under Clause 8.4 (*Extension of Time for Completion*); and

13.5.3.2 payment of any such additional Cost through an adjustment to the Contract Price.

13.5.4 If, after the Signature Date, the Change in Law and/or Material Change in Law results in the rights and obligations under this Contract being unlawful or unenforceable, and these rights and obligations cannot be severed from the remaining rights and obligations under this Contract, then subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*), the Parties shall meet within 10 Business Days of the Party providing the written notice set out in Clause 13.5 to the other Party of the Change in Law. The Parties shall meet to discuss the amendments required to this Contract to overcome the illegality of this Contract, if possible, provided that in the event that the Parties are unable to agree to such amendments within 30 Business Days, either Party may terminate this Contract upon 30 Business Days prior written notice to the other. Neither Party shall be liable to make a termination payment to the other if this Contract is terminated in this instance.

13.5.5 For the avoidance of doubt, in the event that the Cost impact of the Contractor is less than the Change in Law Threshold but the cumulative cost impact for the Employer of a Change in Law exceeds the Change in Law Threshold, the Contractor shall still be entitled to submit a Pass Through Claim and seek relief however such claim will remain subject to Clause 1.13 (*General Pass Through*) and the equivalent relief received pursuant to Clause 1.14 (*Pass Through Claims*) and the resultant allocation to the Contractor shall be determined by the Employer in accordance with Clause 20 (*Claims, Disputes and Arbitration*).

13.6 **Network Events, Buyer Risk Events, Change in Costs Event**

If the Contractor incurs Cost and/or suffers a delay (as a result of which delay completion is or will be delayed under Clause 9.4 (*Failure to Pass Tests on Completion*)) as a result of a Network Event, Buyer Risk Events and/or Change in Costs Event, the Contractor shall give notice to the Employer and shall be entitled, subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and Clause 20.1 (*Contractor's Claims*), to payment of any such Cost and/or an extension of time for any such delay (as the case may be). The Parties agree that such costs and/or extension of time (as the case may be) will only be payable or granted to the Contractor in the case of a successful Pass Through Claim being granted to the Employer under the relevant Related Document.

13.7 **Adjustments for Change in Cost**

The Contract Price is fixed and firm and shall not be adjusted for rises or falls in the cost of labour, Goods and other inputs to the Works, nor for any fluctuation in currencies.

14 CONTRACT PRICE AND PAYMENT

14.1 The Contract Price

- 14.1.1 Payment for the Works shall be made on the basis of the lump sum Contract Price, subject to adjustments in accordance with the Contract.
- 14.1.2 The Contractor shall pay all taxes, duties and fees required to be paid by the Contractor under the Contract, and the Contract Price shall not be adjusted for any of these costs, except as stated in Clause 13.5 (*Change in Law*).
- 14.1.3 The Contractor:
- 14.1.3.1 shall be the importer of record and shall pay any taxes, duties and fees (including the bonded warehouse management fees and custom clearance fees) for any Goods imported by the Contractor into South Africa for incorporation into the Works or otherwise ("**Plant and Material Imports**"); and
- 14.1.3.2 has applied or will apply to the South African Revenue Service ("**SARS**") for the importation of the Plant and Material Imports in "staged consignments" (zero rated duty code) based on the ITAC Customs Tariff Applications List 04/2025 ("**Staged Consignment Application**"), which Staged Consignment Application once approved will result in no import duties being payable on the Plant and Material Imports.
- 14.1.4 The Contractor shall use its best endeavours to ensure that its Staged Consignment Application is approved by SARS.
- 14.1.5 To the extent that SARS does not approve the Staged Consignment Application:
- 14.1.5.1 due to the Contractor's breach of its obligation in terms of Clause 14.1.4, the Contractor shall indemnify the Employer for any additional taxes, customs, duties, fees and/or expenses imposed on or levied against the Employer as a result of the Contractor's failure to receive its approval of the Staged Consignment Application; or
- 14.1.5.2

- 14.1.5.3 in the event that customs duties are levied against the Contractor due to a Change in Law that are over and above the customs tariffs as published by International Trade Administration Commission (ITAC) in the Department of Trade, Industry and Competition's Notice 3142 of 2025 (*Government Gazette No. 52523* dated 17 April 2025) and the Customs Cap has been reached, then subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and Clause 20.1 (*Contractor's Claims*), the Contractor shall be entitled to proceed to claim in terms of Clause 13.5 (*Change in Law*), in respect of the customs duties levied against the Contractor due to such Change in Law and above the Customs Cap.
- 14.1.6 Notwithstanding that actual progress of the Works may be in advance of what the Parties anticipated would be the case in developing Schedule 3 (*Contract Price and Payment Schedule*), the Contractor acknowledges:
- 14.1.6.1 that the anticipated cash flow contemplated in Schedule 3 (*Contract Price and Payment Schedule*) has formed the basis of the Employer's draw-down arrangement with the Lender; and
- 14.1.6.2 that the Employer will not be in a position to draw-down from the Lender, at any time, an aggregate amount greater than what is provided for in Schedule 3 (*Contract Price and Payment Schedule*) at that time.
- 14.1.7 The Contractor shall not be entitled to payment of any Payment Milestone to the extent such payment would result in the aggregate amount paid to the Contractor being greater than what is provided for in Schedule 3 (*Contract Price and Payment Schedule*) as the aggregate amount scheduled to have been paid to the Contractor up to that point in time. The Contractor shall accordingly not be entitled to claim as part of any Payment Milestone any amount which, upon payment thereof, would result in the aggregate amount paid towards the Contract Price exceeding the aggregate amount then provided for in Schedule 3 (*Contract Price and Payment Schedule*).

14.2 Advance Payment

14.2.1 The Employer shall make the Advance Payment to the Contractor in accordance with Schedule 3 (*Contract Price and Payment Schedule*), which shall not attract interest, after receiving, in each case:

14.2.1.1 the documents required under Schedule 3 (*Contract Price and Payment Schedule*); and

14.2.1.2 an Advance Payment Guarantee for an amount equal to the Advance Payment expressed in South African Rand, calculated using the exchange rates used to determine the Contract Price (ZAR - FC).

14.2.2 Advance Payment Guarantee

14.2.2.1 The Advance Payment Guarantee shall expire upon the payment by the Employer to the Contractor, in accordance with Clause 14.9.1.2, of cumulative amounts (expressed in South African Rand, calculated using the exchange rates used to determine the Contract Price (ZAR – FC)) equal to 3 times the amount of the Advance Payment, following which the Employer will return the Advance Payment Guarantee to the Contractor, and at which stage the Advance Payment shall be deemed to have been repaid to the Employer.

14.2.2.2 The Contractor shall ensure that the Advance Payment Guarantee is valid and enforceable until the Contractor is entitled to its return in accordance with Clause 14.2.2. If the terms of the Advance Payment Guarantee specify its expiry date, and the Contractor has not become entitled to its return in accordance with Clause 14.2.2 by the date 28 days prior to the expiry date, the Contractor shall extend the validity of the Advance Payment Guarantee to a date in the future which falls after the date on which the Contractor is expected to become entitled to its return or replace the Advance Payment Guarantee with an acceptable replacement Advance Payment Guarantee.

14.2.2.3 If the Contractor fails to do so, or fails to extend the validity of an Advance Payment Guarantee as contemplated in Clause 14.2.2.2 or Clause 4.4.6 (*EPC Adverse Events*), the Employer may claim the full amount under the Advance Payment Guarantee and hold the proceeds as cash security.

14.2.2.4 Where a replacement or extended Advance Payment Guarantee (as applicable) has subsequently been provided then such cash or the balance of such cash shall be repaid to the Contractor immediately upon the Contractor procuring the replacement or extended Advance Payment Guarantee thereafter.

- 14.2.2.5 When the amount specified in Clause 14.2.2.1 or 14.2.2.2 (as applicable) has been paid by the Employer to the Contractor in accordance with Clause 14.9.1.2, the Employer shall provide written confirmation of this to the issuer of the Advance Payment Guarantee.

14.3 **Application for Payment Milestone Certificates**

- 14.3.1 The Contractor shall submit a Statement in electronic format to the Employer, in a mutually agreed form, showing in detail the amounts to which the Contractor considers itself to be entitled, together with supporting documents listed in Schedule 3 (*Contract Price and Payment Schedule*) which shall include the relevant report on progress in accordance with Clause 4.28 (*Progress Reports*). Such application for payment of a Payment Milestone shall be submitted in accordance with the milestones listed in Schedule 3 (*Contract Price and Payment Schedule*).

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

- 14.3.2.1 the amount of the relevant Payment Milestone achieved as detailed in Schedule 3 (*Contract Price and Payment Schedule*) (including Variations but excluding items described in Clauses 14.3.2.2 and 14.3.2.3);

- 14.3.2.2 any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 (*Claims, Disputes and Arbitration*);

- 14.3.2.3 the deduction of amounts certified in all previous Payment Milestone certificates issued by the Employer in accordance with Clause 14.7 (*Payment Milestones*); and

- 14.3.2.4 a record of all Payment Milestones achieved and certified to date.

14.4 **Confirmation by Lender's Technical Advisor**

- 14.4.1 The Contractor acknowledges and agrees that the Lender's Technical Advisor has to approve the payment of all Payment Milestones to the Contractor under the Contract, in order for the Employer to draw-down funds from the Lender for the payment of the Contract Price.

- 14.4.2 The Parties acknowledge that the Lender's Technical Advisor shall, in respect of each Statement submitted by the Contractor, confirm such Statement or disagree with such Statement within the 14 day period provided for in Clause 14.7 (*Payment Milestones*)

for the Employer to give notice to the Contractor of any items in the Statement with which the Employer and/or the Lender's Technical Advisor disagrees.

14.4.3 Any payment which the Lender's Technical Advisor in good faith refuses to authorise (whether because of defective or incomplete Work, or because the amount claimed is otherwise not due and payable to the Contractor under the Contract), shall be deferred until it is agreed by the Employer, the Contractor and the Lender's Technical Advisor that the amount is due and payable or, failing agreement, is determined to be due and payable in accordance with Clause 20.3 (*Arbitration*) and/or Clause 20.4 (*Common Issues*). If it is subsequently determined that the deferred payment should have been made earlier, the Contractor shall be entitled to interest thereon as a delayed payment under Clause 14.10 (*Delayed Payment*) (calculated from the day the payment should have been made to the date of payment thereof).

14.4.4 The Employer shall promptly notify the Contractor of the reason why the Lender's Technical Advisor refuses to approve any payment.

14.5 **Schedule of Payments**

14.5.1 In Schedule 3 (*Contract Price and Payment Schedule*), each instalment specified therein shall be a Payment Milestone for the purposes of Clause 14.3 (*Application for Payment Milestone Certificates*), subject to Clause 14.6 (*Plant and Materials intended for the Works*).

14.5.2 Payment of the instalments in Schedule 3 (*Contract Price and Payment Schedule*) will only be made against achievement of the relevant Payment Milestones to which it relates.

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

If the Contractor is entitled, under the Contract, to payment for Plant and Materials which are not yet on the Site other than the payments contemplated in Schedule 3 (*Contract Price and Payment Schedule*), the Contractor shall nevertheless not be entitled to such payments unless:

14.6.1 the relevant Plant and Materials are present in South Africa and have been clearly marked as the Employer's property in accordance with the requirements of Clause 7.7 (*Ownership of Plant and Materials*); or

14.6.2 the Contractor has delivered, to the Employer, evidence of insurance to the extent that such Plant and Materials are not covered by the Employer's insurances and a bank guarantee from an Approved Provider in a form approved by the Employer in the amounts and currencies equal to such payment. This guarantee may be in a similar

form to the form referred to in Clause 14.2 (*Advance Payment*) and shall be valid until the Plant and Materials are properly stored on Site and protected against loss, damage or deterioration.

14.7 **Payment Milestones**

- 14.7.1 No amount will be paid until the Employer has received and approved the Performance Security and all relevant Insurances required of the Contractor have been effected in accordance with the Contract. Thereafter, the Employer shall, subject to Clause 14.7.2, within 28 days after receiving a Statement and supporting documents, issue a Payment Milestone certificate confirming the amount (if any) determined to be payable to the Contractor under this Contract.
- 14.7.2 If there are any items in the Statement with which the Employer disagrees or if further supporting information is reasonably required, the Employer shall within 14 days of receiving the Statement from the Contractor, confirm the items with which the Employer disagrees (with supporting particulars) and/or request such reasonably required further supporting information. Within 5 days of receipt of the foregoing confirmation and/or request from the Employer, the Contractor shall provide such information and within 5 days thereof the Employer shall review such information and issue a Payment Milestone certificate in accordance with Clause 14.7.1.
- 14.7.3 Payment due shall not be withheld, except that if anything supplied or Work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld from any payments which may become due to the Contractor, until rectification or replacement has been completed.
- 14.7.4 The Employer may, by any payment, make any correction or modification that should be made to any amount previously considered due. Payment shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction with the Works.
- 14.7.5 In the event that the Employer does not agree that any amount included in the Contractor's Statement is due, the Employer shall notify the Contractor thereof, including reasons, and the undisputed amount will be paid.

14.8 **Tax Invoice**

- 14.8.1 The Contractor shall immediately following receipt of the Employer's certification pursuant to Clause 10.1.6, Clause 12.4.9, Clause 14.1.5, Clause 14.7 (*Payment Milestones*) or Clause 14.12 (*Application for Final Payment*) issue a VAT Invoice to the Employer for all amounts determined to be payable to the Contractor under the Contract. The Contractor shall issue a *pro forma* invoice for an

Advance Payment immediately following the Contractor's full compliance with the requirements of Clause 14.2.1 in respect of such Advance Payment.

14.8.2 All payments to be made to either Party under this Contract shall be paid in ZAR and USD, as detailed in Schedule 3 (*Contract Price and Payment Schedule*) and shall be paid electronically (by means of wire transfer) in accordance with Clause 14.9 (*Timing of Payments*).

14.8.3 If VAT is payable on any amount certified by the Employer for payment under the Contract, the Contractor shall ensure that its invoice complies with the requirements of a VAT Invoice under the *Value Added Tax Act, 1991* (as amended). No payment shall be made by the Employer on invoices not meeting this requirement and the Employer shall not be liable for interest for such non-payment.

14.9 **Timing of Payments**

14.9.1 Except as otherwise stated in Clause 2.4 (*Employer's Claims*), the Employer shall pay to the Contractor:

14.9.1.1 the Advance Payment within 7 days after the Employer receives the documents in accordance with Clause 14.2 (*Advance Payment*) and a VAT Invoice in accordance with Clause 14.8 (*Tax Invoice*), whichever is later and provided that the Employer receives the *pro forma* invoice at least 7 days prior to the date of the issuance of the VAT Invoice;

14.9.1.2 the amount having been certified in a Payment Milestone Certificate as due in respect of each Statement, other than the Final Statement, within 9 days after receiving the Contractor's VAT Invoice in accordance with Clause 14.8 (*Tax Invoice*);

14.9.1.3 the final amount having been certified as due, within 28 days after receiving the Final Statement, in accordance with Clause 14.12 (*Application for Final Payment*), the written discharge in accordance with Clause 14.13 (*Discharge*) and a VAT Invoice in accordance with Clause 14.8 (*Tax Invoice*), whichever is later;

14.9.1.4 any amounts that are due in terms of Clauses 14.1.5, within 14 days of receiving the Contractor's VAT Invoice in accordance with Clause 14.8 (*Tax Invoice*);

14.9.1.6 the Contractor's share in any Early Operating Energy Payments which are due in accordance with Clause 10.1 (*Early Operating Period*), and payable by the Employer to the Contractor in accordance with, and subject to the terms of, the Financing Agreements.

14.9.2 Payment of the amount due shall be made into the Contractor's nominated bank account(s), as notified by the Contractor to the Employer in writing. The Contractor may from time to time change its nominated bank account(s) on written notice to the Employer; provided that (unless otherwise agreed in writing by the Employer), to be effective:

14.9.2.1 the notice may only require the change to be effective more than 28 days after the date of the notice;

14.9.2.2 the alternative bank account(s) shall be in the relevant currency; and

14.9.2.3 the change shall be accepted by the Employer and Lenders in writing.

14.10 **Delayed Payment**

14.10.1 If the Contractor does not receive payment of an undisputed amount in accordance with Clause 14.9 (*Timing of Payments*), the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay.

14.10.3 The Contractor shall be entitled to the financing charges accrued without formal notice and without prejudice to any other right or remedy.

14.11 **Statement at Completion**

14.11.1 Within 84 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Employer an electronic copy of a Statement at completion with supporting documents ("**Statement at Completion**"), in accordance with Clause 14.3 (*Application for Payment Milestone Certificates*), showing:

14.11.1.1 the Payment Milestones achieved and the instalments specified in Schedule 3 (*Contract Price and Payment Schedule*) which apply to such Payment Milestones, up to the date of the Taking-Over Certificate for the Works;

- 14.11.1.2 any further sums which the Contractor considers to be due; and
- 14.11.1.3 an estimate of any other amounts which the Contractor considers will become due to it under the Contract. Estimated amounts shall be shown separately in this Statement at Completion.
- 14.11.2 The Employer shall then give notice to the Contractor in accordance with Clause 14.7 (*Payment Milestones*) and make payment in accordance with Clause 14.9 (*Timing of Payments*).

14.12 **Application for Final Payment**

- 14.12.1 Within 56 days after receiving the Performance Certificate, the Contractor shall submit, to the Employer, an electronic copy of a draft final statement with supporting documents showing in detail in a form approved by the Employer:
 - 14.12.1.1 the Payment Milestone for all work done in accordance with the Contract; and
 - 14.12.1.2 any further sums which the Contractor considers to be due to it under the Contract at the date of issue of the Performance Certificate.
- 14.12.2 If the Employer disagrees with, or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Employer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Employer the revised final statement as agreed in original and electronic copy. This agreed statement is referred to in this Contract as the "**Final Statement**".
- 14.12.3 However if, following discussions between the Parties, it becomes evident that a dispute exists, the Employer shall pay the agreed parts (if any) of the draft final statement in accordance with Clause 14.7 (*Payment Milestones*) subject to receiving the Contractor's VAT Invoice in accordance with Clause 14.8 (*Tax Invoice*). Thereafter, if the dispute is finally resolved under Clause 20.3 (*Arbitration*), the Contractor shall then prepare and submit to the Employer a Final Statement and any balance owing shall be paid by the Employer in accordance with Clause 14.7 (*Payment Milestones*) subject to receiving the Contractor's VAT Invoice in accordance with Clause 14.8 (*Tax Invoice*).

14.13 **Discharge**

When submitting the Final Statement, the Contractor shall submit a written discharge in the form contained in Schedule 11 (*Forms of Security*) which confirms that the total of the Final Statement represents full and final settlement of all moneys due to the Contractor under or

in connection with the Contract. This discharge may state that it becomes effective when the Contractor has received the Performance Security and the out-standing balance of the Final Statement and a letter of discharge, in which event the discharge will be effective on such date.

14.14 **Employer's Liability**

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

14.14.1.1 in the Final Statement; and

14.14.1.2 (except for matters or things arising after the issue of the Taking-Over Certificate for the Works) in the Statement at Completion described in Clause 14.11 (*Statement at Completion*).

14.14.2 However, this Clause 14.14 (*Employer's Liability*) shall not limit the Employer's liability under its indemnification obligations, or the Employer's liability in any case of fraud, gross negligence or wilful misconduct by the Employer.

14.15 **Currencies of Payment**

14.15.1 The Contract Price is payable in the currencies specified in Schedule 3 (*Contract Price and Payment Schedule*) taking account of the following:

14.15.1.1 the amount of the Local and Foreign Currencies in respect of each Payment Milestone shall be as stated in Schedule 3 (*Contract Price and Payment Schedule*);

14.15.1.2 any adjustments to the Contract Price required under the Contract shall be determined and paid in South African Rand. Where a foreign currency cost forms an input to such adjustment, the offer USD-ZAR spot rate published by Bloomberg FX fixings at 4 pm London Time on the day falling 2 Business Days prior to the date of the determination of the relevant adjustment shall be used, provided that where the adjustment arises from a Project Event, the exchange rate will match the rate adopted under the Related Document for such event;

14.15.1.3 payment of the damages specified in the Contract shall be made in ZAR; and

14.15.1.4 for the purposes of calculating (i) damages; (ii) the Delay Liquidated Damages Cap, (iii) the Performance Liquidated Damages Cap; and (iv) the value of the Second Performance Bond, the Contract Price (ZAR – T) shall be used and in determining the value of the Contract Price (ZAR – T) for these purposes, the

offer USD-ZAR spot rate published by Bloomberg FX fixings at 4 pm London Time:

14.15.1.4.1 on the day falling 10 Business Days prior to the date the relevant Performance Bond is due to be provided in accordance with the Contract; and

14.15.1.4.2 in all other circumstances, on the day falling 2 Business Days prior to the date of the determination,

shall be used and provided that, in each case, the Contract Price (ZAR – T) shall never be less than the Contract Price (ZAR – FC).

14.15.2 Other payments to the Employer by the Contractor shall be made in the currency in which the sum was expended by the Employer, or in such currency as may be agreed by both Parties.

14.15.3 If any amount payable by the Contractor to the Employer in a particular currency exceeds the sum payable by the Employer to the Contractor in that currency, the Employer may recover the balance of this amount from the sums otherwise payable to the Contractor in other currencies.

15 TERMINATION BY EMPLOYER

15.1 Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Employer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time. Following such notice, the Contractor shall promptly provide the Employer with a plan for remedying the failure. The rectification plan shall be of a nature and to a level of detail acceptable to the Employer, taking account of the complexity and severity of the failure and its consequences.

15.2 Termination by Employer

15.2.1 Subject to the Lender Direct Agreement, the Employer shall be entitled to terminate the Contract if the Contractor:

15.2.1.1 fails to provide, replace or extend the Performance Security in accordance with Clause 4.4 (*Performance Security*) or Clause 14.2 (*Advance Payment*);

15.2.1.2 fails to comply with a notice under Clause 15.1 (*Notice to Correct*);

15.2.1.3 Abandons the Works;

- 15.2.1.4 without reasonable excuse fails to proceed with the Works in accordance with Clause 8 (*Commencement, Delays and Suspension*);
- 15.2.1.5 subcontracts the Works otherwise than in accordance with Clause 4.7 (*Subcontractors*);
- 15.2.1.6 commits an Act of Insolvency, or an Act of Insolvency occurs in relation to the Contractor or a Contractor Member;
- 15.2.1.7 has incurred and is liable for Delay Liquidated Damages equal to or in excess of the Delay Liquidated Damages Cap specified in this Contract, and does not obtain the Employer's approval to continue to pay Delay Liquidated Damages pursuant to Clause 9.4.2 (or does obtain such approval but subsequently fails to pay);
- 15.2.1.8 has incurred and is liable for Performance Liquidated Damages equal to or in excess of the maximum liability specified in this Contract;
- 15.2.1.9 has incurred liability in excess of the maximum liability specified in Clause 17.4.2.10;
- 15.2.1.10 fails to achieve the Minimum Acceptance Capacity or the Minimum Performance Ratio by the EPC Last COD;
- 15.2.1.11 fails to achieve issuance of the Taking-Over Certificate by the EPC Last COD;
- 15.2.1.12 commits a Corrupt Act;
- 15.2.1.13 is in breach of any of the warranties given in Clause 21 (*Contractor's Warranties Related to the Works*);
- 15.2.1.14 fails to fulfil the Contractor's Economic Development Obligations in accordance with Clause 23 (*Economic Development Obligations*);
- 15.2.1.15 fails to comply with any Law or obtain and maintain any Authorisation for which the Contractor is responsible under the Contract after receiving 14 days written notice to remedy such breach;
- 15.2.1.16 is in breach of Clause 1.7 (*Assignment and Change in Control*);
- 15.2.1.17 causes a termination of a Related Document by breaching an obligation under this Contract;
- 15.2.1.18 causes the NERSA Registration Certificate to be withdrawn, revoked or cancelled by breaching an obligation under this Contract; or

- 15.2.1.19 fails to procure or keep in force any insurance it is required to procure and maintain under this Contract.
- 15.2.2 The Employer shall furthermore be entitled to terminate the Contract in the following circumstances:
 - 15.2.2.1 under Clause 11.4.2.3 or Clause 9.4.9;
 - 15.2.2.2 if any of the circumstances as provided in the CUOSA occur by reason of any act or default of the Contractor which results in the disconnection of the Facility from the Network and the relevant circumstances remain un-remedied by the Contractor for a period of 3 months calculated from the date of disconnection as notified by the Employer; or
 - 15.2.2.3 in accordance with the termination provisions in the Contract Agreement.
- 15.2.3 In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of Clauses 15.2.1.1, 15.2.1.2, 15.2.1.7, 15.2.1.8, 15.2.1.9, 15.2.1.10, 15.2.1.11, 15.2.1.12, 15.2.1.18, and 15.2.2.1 to 15.2.2.3 the Employer may by notice terminate the Contract immediately.
- 15.2.4 The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.
- 15.2.5 Upon termination the Contractor shall leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for the Contract, to the Employer. The Contractor shall comply immediately with any reasonable instructions included in the Employer's notice:
 - 15.2.5.1 for the assignment of any subcontract and/or warranty; and
 - 15.2.5.2 for the protection of life or property or for the safety of the Works.
- 15.2.6 After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.
- 15.2.7 The Employer shall then give notice to the Contractor that the Contractor's Equipment that is no longer required or which will not be transferred to the Employer pursuant to the provisions of this Contract, will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due

to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

15.3 **Valuation at Date of Termination**

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

15.4 **Payment after Termination**

After a notice of termination under Clause 15.2 (*Termination by Employer*) has taken effect, the Employer may:

- 15.4.1 proceed in accordance with Clause 2.4 (*Employer's Claims*);
- 15.4.2 withhold further payments to the Contractor until the costs of design, execution, completion and remedying of any defects, Delay Liquidated Damages, and Performance Liquidated Damages (if any), and all other costs incurred by the Employer, have been established; and/or
- 15.4.3 subject to Clause 17.4.3, recover from the Contractor any losses and damages incurred by the Employer (as established in accordance with Clause 15.4.1) in completing the Works, after allowing for any sum due to the Contractor under Clause 15.3 (*Valuation at Date of Termination*). After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

Any amount due under Clause 15.4 (*Payment after Termination*) shall be paid by the Contractor to the Employer within 30 days of receiving a VAT Invoice for such amounts together with supporting documentation, failing which the Employer may deduct this amount from any moneys due, or to become due, to the Contractor or shall have recourse to the applicable Performance Bonds to recover such amount.

15.5 **Employer's Entitlement to Termination**

- 15.5.1 The Employer shall, subject to prior written consent of the Lenders having been obtained, be entitled to terminate the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the date on which the Contractor receives this notice.
- 15.5.2 After this termination, the Contractor shall proceed in accordance with Clause 16.3 (*Cessation of Work and Removal of Contractor's Equipment*) and shall be paid in

accordance with Clause 15.6 (*Recovery of Costs following the Employer's Termination for Convenience*).

15.6 **Recovery of Costs following Employer's Termination for Convenience**

Following termination pursuant to Clause 15.5.1, the Employer shall make a determination pursuant to Clause 3.5 (*Determinations*) and pay to the Contractor:

- 15.6.1 the amounts payable for any Work carried out for which a price is stated in the Contract;
- 15.6.2 the Cost plus Profit of Plant and Materials ordered for the Works which have been delivered to the Contractor, or for which the Contractor is liable to accept delivery (such Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal);
- 15.6.3 any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
- 15.6.4 the Cost of removal of any Works of a temporary nature that are not intended to permanently form part of the Works and the Contractor's Equipment from the Site and the return of these items to the Contractor's works in its country (or to any other destination at no greater cost); and
- 15.6.5 the Cost of relocation within South Africa of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

16 **SUSPENSION AND TERMINATION BY CONTRACTOR**

16.1 **Contractor's Entitlement to Suspend Work**

- 16.1.1 If the Employer fails to comply with Clause 14.9 (*Timing of Payments*), the Contractor may, subject to the Lender Direct Agreement, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received payment, as the case may be and as described in the notice. Suspension under this Contract does not prejudice the Contractor's right to terminate this Contract where it is entitled to do so.
- 16.1.2 The Contractor's suspension shall not prejudice its entitlements to financing charges under Clause 14.10 (*Delayed Payment*) and to termination under Clause 16.2 (*Termination by Contractor*).

- 16.1.3 If the Employer subsequently remedies such failure to pay at any time before the Contract terminates pursuant to Clause 16.2 (*Termination by Contractor*), the Contractor shall resume normal working as soon as is reasonably practicable.
- 16.1.4 If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Clause 16.1 (*Contractor's Entitlement to Suspend Work*), the Contractor shall give notice to the Employer and shall be entitled subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and Clause 20.1 (*Contractor's Claims*) to:
- 16.1.4.1 an extension to the Time for Completion for any such delay, if completion is or will be delayed, under Clause 8.4 (*Extension of Time for Completion*); and
- 16.1.4.2 payment of any such additional Cost plus Profit through an adjustment to the Contract Price.
- 16.1.5 After receiving a notice under Clause 16.1.4, the Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine these matters.
- 16.2 **Termination by Contractor**
- 16.2.1 The Contractor shall be entitled to terminate the Contract, subject to the Lender Direct Agreement, if:
- 16.2.1.1 the Employer fails to pay to the Contractor any undisputed amount due under this Contract (excluding deductions in accordance with Clause 2.4 (*Employer's Claims*));
- 16.2.1.2 a prolonged suspension affects the whole of the Works as described in Clause 8.10 (*Prolonged Suspension*);
- 16.2.1.3 a Long Term Force Majeure event occurs as described in Clause 19.5 (*Long Term Force Majeure*); or
- 16.2.1.4 an Act of Insolvency occurs in relation to the Employer.
- 16.2.2 Subject to the provisions of Clause 16.2.3, if the Contractor wishes to terminate for the events or circumstances described in Clause 16.2.1.1, the Contractor may, upon giving 21 days' notice to the Employer, terminate the Contract, but in the case of termination pursuant to Clauses 16.2.1.2 or 16.2.1.3, the Contractor may by notice terminate the Contract immediately.
- 16.2.3 Notwithstanding the provisions in Clause 16.2.2, if an event referred to in Clauses 16.2.1.1 or 16.2.1.2 is caused by a Project Event, without prejudice to the

Contractor's other rights and remedies under the Contract, the Contractor shall not be entitled to terminate the Contract in respect any such events.

- 16.2.4 The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor under the Contract.

16.3 **Cessation of Work and Removal of Contractor's Equipment**

After a notice of termination under Clause 15.5 (*Employer's Entitlement to Termination*) or Clause 16.2 (*Termination by Contractor*) has taken effect, the Contractor shall promptly:

- 16.3.1 cease all further work, except for such work as may have been instructed by the Employer for the protection of life or property or for the safety of the Works;
- 16.3.2 hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and assign the right and benefit therein to the Employer;
- 16.3.3 assign to the Employer all Subcontractor warranties; and
- 16.3.4 remove all other Goods from the Site, except as necessary for safety or as instructed by the Employer, and leave the Site.

16.4 **Payment on Termination**

After a notice of termination under Clause 16.2 (*Termination by Contractor*) has taken effect, the Employer shall promptly:

- 16.4.1 return the Performance Security to the Contractor (unless there are outstanding calls thereon in which event, and if applicable, the Employer shall return the Performance Security promptly after the last of the outstanding calls has been met); and
- 16.4.2 pay the Contractor in accordance with Clause 16.5 (*Recovery of Costs following Contractor's Termination*).

16.5 **Recovery of Costs following Contractor's Termination**

Following termination pursuant to Clause 16.2 (*Termination by Contractor*), the Employer shall pay to the Contractor:

- 16.5.1 the amounts payable for any Work carried out for which a price is stated in the Contract;
- 16.5.2 the Cost plus Profit of Plant and Materials ordered for the Works which have been delivered to the Contractor, or for which the Contractor is liable to accept delivery.

Such Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;

- 16.5.3 any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
- 16.5.4 the Cost of removal of any Works of a temporary nature that are not intended to permanently form part of the Works and the Contractor's Equipment from the Site and the return of these items to the Contractor's works within South Africa; and
- 16.5.5 the Cost of relocation within South Africa of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

17 RISK AND RESPONSIBILITY

17.1 Indemnities

- 17.1.1 The Contractor indemnifies and holds harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:
 - 17.1.1.1 bodily injury, sickness, disease or death, to/of its own, or its Subcontractors' employees, agents, workmen, representatives or Contractor Personnel arising out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents;
 - 17.1.1.2 damage to, or loss of, its own, or its Subcontractors', Subcontractor's employees, agents, workmen, representatives or Contractor Personnel's property, real or personal (other than the Works), to the extent that such damage or loss:
 - 17.1.1.2.1 arises out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects; and
 - 17.1.1.2.2 is not attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, their respective agents, or anyone directly or indirectly employed by any of them;
 - 17.1.1.3 the violation by the Contractor or any Subcontractor, in the course of the execution of the Works, of any Authorisations related to the Works or any

applicable Laws or any indemnities under Clause 1.12 (*Compliance with Laws and Responsibility for Authorisations*);

- 17.1.1.4 breach of a Related Document to the extent caused by the Contractor's breach of this Contract;
- 17.1.1.5 any third party actions, claims and/or demands brought against the Employer arising out of or in connection with any breach of contract, act or omission of the Contractor;
- 17.1.1.6 the violation of Clause 21.2.1 (*Warranty Against Collusive Practices*); and
- 17.1.1.7 as provided for in Clause 17.3 (*Intellectual and Industrial Property Rights*) and Clause 21.2 (*Warranty Against Corrupt Acts and Appointment of Sanctioned Entity*).
- 17.1.2 The Employer indemnifies and holds harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of bodily injury, sickness, disease or death of the Employer or the Employer's Personnel, agents, workmen or representatives which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents.
- 17.1.3 Subject to Clauses 17.1.1 and 17.1.2, liability for any third party claims, proceedings, liabilities, losses, damages, costs (including legal fees and expenses) and expenses whatsoever shall be determined by reference to the Laws. For the purposes of this Clause 17.1.3 "third party" shall mean any party which is not a personnel or member of the Employer, the Contractor, or Subcontractor, or Affiliates of either the Employer, Contractor or Subcontractor.

17.2 **Contractor's Care of the Works**

- 17.2.1 The Contractor shall take full risk and responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued, or earlier termination, when risk and responsibility for the care of the Works shall pass to the Employer.
- 17.2.2 After such risk and responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any Work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding Work has been completed.

17.2.3 If any loss or damage happens to the Works, Goods or Contractor's Documents during the period when the Contractor is responsible for their care the Contractor shall rectify the loss or damage at the Contractor's risk and cost, so that the Works, Goods and Contractor's Documents conform with the Contract.

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

17.3 **Intellectual and Industrial Property Rights**

17.3.1 The Contractor shall at its own cost ensure that it has (where necessary, in the Employer's name) all necessary rights and licences to Intellectual Property subsisting in any matter, thing or process (including documentation, drawings and software) used or to be used by or on behalf of the Contractor in performing the Works or delivered or to be delivered by it to the Employer under this Contract.

17.3.2 The Employer Background IP is and remains the sole property of the Employer. Unless otherwise agreed in writing between the Parties or as expressly provided under Clause 17.3.4, the Contractor will have no rights regarding any of the Employer Background IP.

17.3.3 Upon creation, all Project IP vests in and is the property of the Employer.

17.3.4 The Employer grants to the Contractor a non-exclusive, royalty-free, non-transferable licence (with the right to sub-licence) to use, reproduce, modify and adapt the Employer Background IP and the Project IP to the extent necessary to execute the Works. The licence will endure until the earlier of termination of this Contract or the receipt by the Contractor of the Performance Certificate.

17.3.5 The Contractor grants to the Employer a perpetual, irrevocable, non-exclusive, transferable, royalty-free, worldwide licence (or sub-licence, as the case may be) of the Contractor Background IP to use, reproduce, modify, communicate and adapt the Contractor Background IP to own, complete, repair, operate, maintain, modify, replace, extend, let, advertise, reinstate, demolish and sell the Works and the Project with the right to sub-licence (or sub-sub-licence). This license shall apply to the Project.

17.3.6 The Contractor shall ensure that in the case of Contractor Background IP which are in the form of computer programs and other software, the licence shall permit their

use on any computer on the Site and other places as envisaged by the Contract, including replacements of any computers supplied by the Contractor.

- 17.3.7 The Contractor shall procure that all agreements which the Contractor may enter into with third parties in connection with this Contract will provide for a non-exclusive licence (or sub-licence, as the case may be) to the Contractor of all third party Intellectual Property comprising Contractor Background IP, with the right to sub-licence (or sub-sub-licence) to the Employer on the terms of Clause 17.3.5.
- 17.3.8 The Contractor warrants and represents that:
- 17.3.8.1 it either owns or has the right to use all Intellectual Property which is necessary or desirable for the purposes of performing the Works and remedying any defects in terms of Clause 11 (*Defects Liability*);
- 17.3.8.2 it has, or prior to the commencement of Works will have, all rights and licences necessary to grant the Employer the licences of the Contractor Background IP granted under Clauses 17.3.5 and 17.3.6 which are necessary or desirable for the purposes of performing the Works and it is, or prior to the commencement of the Works will be, entitled to grant the licence (or sub-licence, as applicable); and
- 17.3.8.3 the Contractor Background IP and any use of the Contractor Background IP by or on behalf of the Employer, whether in the operation or maintenance of the Facility or otherwise, will not infringe the Intellectual Property of any third party.
- 17.3.9 The Contractor warrants that the performance of the Works, the provision of the Contractor Background IP to the Employer and the use of the Contractor Background IP by the Employer or its licensees and sub-licensees (including making distortions, additions or alterations to the Contractor Background IP) will not infringe or contravene any moral rights or similar personal rights which by law are not assignable, of any person and all necessary consents to give effect to this warranty have been or will be obtained, and will be effective and irrevocable.
- 17.3.10 The Contractor indemnifies the Employer, the Employer's Representative, and their officers, employees, agents, contractors, successors and assigns from and against all claims, liability, loss, damage, costs and expenses (including but not limited to legal costs on an indemnity basis) arising out of:
- 17.3.10.1 any claim that the Contractor Background IP (including any use by or on behalf of the Employer) infringes the Intellectual Property, or any other rights of any third party or entitles any third party to claim any compensation, royalty fee or other amount; and

- 17.3.10.2 any breach by the Contractor of the warranties in Clause 17.3.8.
- 17.3.11 If, in connection with a claim referred to in Clause 17.3.10.1, the Employer is enjoined, or either the Employer or the Contractor is prevented from operating or using the Works, the Facility or the Contractor Background IP or any part thereof ("**Infringing Matter**"), the Contractor shall at its own expense, in addition to its other obligations under this Contract, take all steps necessary to procure for the Employer the right to operate or use the Infringing Matter for its intended purpose.
- 17.3.12 If the Contractor is unable to procure such rights within such time as the Employer directs, the Contractor shall promptly, at its own expense, comply with any direction by the Employer to:
- 17.3.12.1 modify the Infringing Matter (but not so as to adversely affect its functionality or fitness for the purpose for which it is intended);
- 17.3.12.2 replace the affected part of the Infringing Matter to overcome the infringement;
- 17.3.12.3 remove the affected part of the Infringing Matter and compensate the Employer for any cost, loss, expense or damage incurred by the Employer; or
- 17.3.12.4 acquire a licence for the Employer to use such Infringing Matter.
- 17.3.13 The Contractor represents and warrants that, except for amounts included in the Contract Price, no royalties or other payments are due or payable by the Employer to the Contractor or any other person regarding the use of, or the grant of, a right to use the Contractor Background IP.
- 17.3.14 The obligations in this Clause 17.3 (*Intellectual and Industrial Property Rights*) will not cease on the completion, expiry or termination of this Contract.
- 17.4 **Limitation of Liability**
- 17.4.1 Subject to Clause 17.4.2, neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract.
- 17.4.2 Notwithstanding the aforementioned, nothing in Clause 17.4.1 shall apply to:
- 17.4.2.1 the Contractor's or any of its Subcontractors' fraud, gross negligence or wilful misconduct or illegal/unlawful acts, or Corrupt Acts;
- 17.4.2.2 death, personal injury or third party property damage;

- 17.4.2.3 the indemnities under Clause 1.12 (*Compliance with Laws and Responsibility for Authorisations*);
- 17.4.2.4 any losses or damages covered by the proceeds of any indemnity or payment received under any insurance policy required to be effected and maintained by either of the Parties, or which should have been received, but for any breach by the Contractor of any policy condition or term;
- 17.4.2.5 any matter which, pursuant to the Laws, is not permitted to be limited;
- 17.4.2.6 the amounts set out or referred to in Clause 9.4.11 and Clause 11.4.2.3;
- 17.4.2.7 termination payments under Clause 15 (*Termination by Employer*);
- 17.4.2.8 the indemnities under Clause 17.1 (*Indemnities*);
- 17.4.2.9 Clause 17.3 (*Intellectual and Industrial Property Rights*);
- 17.4.2.10 reductions in the Contract Price under Clause 9.4 (*Failure to Pass Tests on Completion*);
- 17.4.2.11 Delay Liquidated Damages;
- 17.4.2.12 Performance Liquidated Damages under Clause 9.4 (*Failure to Pass Tests on Completion*) and Clause 12.4 (*Failure to Pass Tests after Completion and to meet the Performance Guarantees*); and
- 17.4.2.13 deductions and other amounts due under Schedule 15 (*Contractor's Economic Development Obligations*).
- 17.4.3 Subject to Clause 17.4.4, the total liability of the Contractor to the Employer, under or in connection with the Contract shall not exceed:
 - 17.4.3.1 120% of the Contract Price (ZAR – FC) in the case:
 - 17.4.3.1.1 liability incurred pursuant to the indemnity given by the Contractor to the Employer under Clause 17.1.1.4; and/or
 - 17.4.3.1.2 breach or termination of any of the Related Documents due to a breach by the Contractor of this Contract; or
 - 17.4.3.2 100% of the Contract Price (ZAR – FC) in all other cases.

- 17.4.4 Clause 17.4.3 does not limit the liability of the Contractor, where liability:
- 17.4.4.1 arises from the Contractor, or any of its Subcontractors' fraud, gross negligence or wilful misconduct or illegal/unlawful acts, or Corrupt Acts;
 - 17.4.4.2 is covered by the proceeds of any indemnity or payment received under any insurance policy required to be effected and maintained by either of the Parties, or which should have been received, but for any breach by the Contractor of any policy condition or term or any of its insurance obligations under this Contract;
 - 17.4.4.3 arises from cases of death or personal injury, unless attributable to any negligence, wilful act or breach of this Contract by the Employer, the Employer's Personnel or any of their respective agents;
 - 17.4.4.4 arises from cases of third party property damage save to the extent attributable to any negligence, wilful act or breach of this Contract by the Employer, the Employer's Personnel or any of their respective agents;
 - 17.4.4.5 arises from any breach of the Intellectual Property warranties or confidentiality obligations in this Contract;
 - 17.4.4.6 is incurred pursuant to any indemnity given by the Contractor to the Employer under this Contract other than the indemnity in Clause 17.1.1.4;
 - 17.4.4.7 is incurred for Delay Liquidated Damages in excess of the Delay Liquidated Damages Cap in accordance with Clause 9.4.2 only;
 - 17.4.4.8 may be imposed by applicable Laws and which laws do not permit such limitation; or
 - 17.4.4.9 is incurred pursuant to Clause 21.2 (*Warranty Against Corrupt Acts and Appointment of Sanctioned Entity*).

18 INSURANCE

18.1 General Requirements for Insurances

- 18.1.1 In this Clause 18 (*Insurance*), "**insuring Party**" means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in Schedule 17 (*Insurance*).
- 18.1.2 Wherever the Contractor is the insuring Party, each insurance shall be effected with insurers and on terms approved by the Employer.

- 18.1.3 Wherever the Employer is the insuring Party, each insurance shall be effected with insurers and on terms consistent with the details set forth in in Schedule 17 (*Insurance*).
- 18.1.4 If a policy is required to indemnify joint insured, the cover shall apply separately to each insured as though a separate policy had been issued for each of the joint insured. If a policy indemnifies additional joint insured (i) the Contractor shall act under the policy on behalf of these additional joint insured except that the Employer shall act for Employer's Personnel, (ii) additional joint insured shall not be entitled to receive payments directly from the insurer or to have any other direct dealings with the insurer, and (iii) the insuring Party shall require all additional joint insured to comply with the conditions stipulated in the policy.
- 18.1.5 Where the Employer is the insuring Party, each policy insuring against loss or damage shall provide for payments to be made in South African Rand and any difference between the amount claimed by or on behalf of the Contractor and the amount actually received by the Contractor (including as a result of exchange rate fluctuations), shall be for the account of the Contractor.
- 18.1.6 Where the Contractor is the insuring Party, each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify the loss or damage. Payments received from insurers shall be used for the rectification of the loss or damage.
- 18.1.7 The relevant insuring Party shall, within 14 days (calculated from the Commencement Date), submit to the other Party evidence that the insurances required in in Schedule 17 (*Insurance*) have been effected in accordance with this Clause 18 (*Insurance*) and in Schedule 17 (*Insurance*), including copies of the relevant policies.
- 18.1.8 When each premium is paid, the insuring Party shall submit evidence of payment to the other Party.
- 18.1.9 Each Party shall comply with the conditions stipulated in each of the insurance policies. The insuring Party shall keep the insurers informed of any relevant changes to the execution of the Works and ensure that insurance is maintained in accordance with in Schedule 17 (*Insurance*) and this Clause 18 (*Insurance*). Where the Employer is the insuring Party, the Contractor shall promptly notify the Employer, by way of a notice issued specifically under this Clause 18 (*Insurance*), of any relevant changes to the execution of the Works to enable to the Employer to comply with this requirement.

- 18.1.10 Neither Party shall make any material alteration to the terms of any insurance without the prior approval of the other Party. If an insurer makes (or attempts to make) any alteration, the Party first notified by the insurer shall promptly give notice to the other Party.
- 18.1.11 If the insuring Party fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this Clause 18 (*Insurance*), the other Party may (at its option and without prejudice to any other right or remedy) effect insurance for the relevant coverage and pay the premiums due. The insuring Party shall pay the amount of these premiums to the other Party, and the Contract Price shall be adjusted accordingly.
- 18.1.12 Nothing in this Clause 18 (*Insurance*) limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of the Contract or otherwise. Any amounts not insured (including any deductibles) or not recovered from the insurers shall be borne by the Contractor and/or the Employer in accordance with these obligations, liabilities or responsibilities. However, if the insuring Party fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the Contract, and the other Party neither approves the omission nor effects insurance for the coverage relevant to this default, any moneys which should have been recoverable under this insurance shall be paid by the insuring Party.
- 18.1.13 Payments by one Party to the other Party shall be subject to Clause 2.4 (*Employer's Claims*) or Clause 20.1 (*Contractor's Claims*), as applicable.

19 **FORCE MAJEURE**

19.1 **Definition of Force Majeure**

- 19.1.1 The term "**Force Majeure**" or "**Force Majeure Event**" means an event or circumstance, condition or combination of events or circumstances that is not within the reasonable control directly or indirectly, of the Party affected by the event and that adversely affects the ability of the affected Party to perform any of its obligations under this Contract, but only to the extent that:
- 19.1.1.1 it is not within the reasonable control of the Party affected by the event;
- 19.1.1.2 it is not the result of such Party's negligence or failure to act;

- 19.1.1.3 it is not the direct or indirect result of a breach by the affected Party of any of its obligations under this Contract or any Project Document (as defined in the Power Purchase Agreements);
- 19.1.1.4 it could not be avoided or overcome by the affected Party's use of due diligence in the circumstances;
- 19.1.1.5 it is not substantially attributable to the other Party; and
- 19.1.1.6 prevents, hinders or delays the affected Party in its performance of all (or part) of its obligations under this Contract,

without limiting the generality of the foregoing, Force Majeure includes, but is not limited to, the following events (but only to the extent that such an event, in consideration of the circumstances, satisfies Clauses 19.1.1.1 to 19.1.1.6:

- 19.1.1.7 natural disasters such as drought, earthquake, volcanic eruption, landslide, flood, storm, lightning strike, cyclone, tornado, typhoon, or other natural disasters or act of god;
- 19.1.1.8 fire, explosion, tempest, flood, drought, ionising radiation, riot, and civil commotion;
- 19.1.1.9 Community Unrest;
- 19.1.1.10 any blockade or embargo;
- 19.1.1.11 any pandemic, epidemic or plague and any instruction, regulation, directive legislation or the like issued by a Government Authority in response to such acts, events or circumstances;
- 19.1.1.12 any official or unofficial strike, lockout, go-slow generally affecting the construction and energy industry or a significant sector of it, or other such labour disputes by persons;
- 19.1.1.13 war or civil war (whether declared or undeclared), armed conflicts or terrorism;
- 19.1.1.14 nuclear contamination;
- 19.1.1.15 air crash, shipwreck, train wreck or major failure or stoppage of transportation, objects falling from aircraft or other aerial devices or sonic boom;
- 19.1.1.16 any act, omission or default by any Government Authority in South Africa which adversely affects either Party's rights or obligations under this Contract, including:

- 19.1.1.16.1 expropriation or compulsory acquisition of the Site;
- 19.1.1.16.2 expropriation or compulsory acquisition of any material assets of either Party; or
- 19.1.1.16.3 the inability or delay by the Contractor to obtain, maintain or renew any Authorisation, and for which the Contractor has duly and timeously applied for in accordance with the requirements prescribed by Law, and has diligently pursued in accordance with the standards of a Reasonable and Prudent Operator;
- 19.1.1.17 chemical or biological contamination as a result of any of the events referred to in this Clause 19.1.1;
- 19.1.1.18 System Event;
- 19.1.1.19 cyber-attack, hacking of or third-party interference with information technology systems; or
- 19.1.1.20 a force majeure event under the Self Build Agreements or the CUOSA concluded with the Network Operator.
- 19.1.2 Notwithstanding the foregoing, none of the following constitute Force Majeure:
 - 19.1.2.1 a negligent act or omission, breach or default under this Contract, any other Related Document, or any provision of any applicable Law;
 - 19.1.2.2 failure of any Party to make any payment of money in accordance with its obligations under this Contract, provided that the non-payment is not due to a fault or delay in the payment system used by such Party;
 - 19.1.2.3 late performance by either Party, caused by such Party's equipment suppliers, suppliers or contractors (at any tier), where such delay was not caused by a Force Majeure Event;
 - 19.1.2.4 strikes, lockouts and other industrial action by the employees of the affected party, any of its affiliates or any contractor of the affected party or of any affiliate, unless such action is part of any wider industrial action involving a significant section of the construction industry or the electricity supply sector;
 - 19.1.2.5 the availability or unavailability of solar, as applicable, to operate the Facility;
 - 19.1.2.6 economic hardship, including lack of money;
 - 19.1.2.7 normal wear and tear in materials and equipment;

- 19.1.2.8 failure of a party to take any action, or refrain from taking any action, in accordance with all applicable Authorisations, including any required Environmental mitigation measures;
- 19.1.2.9 any full or partial reduction in the output of the Facility that is caused or contributed to by:
 - 19.1.2.9.1 a failure to maintain the Facility and keep the Facility energised in accordance with the applicable law, Authorisation, and or the CUOSA;
 - 19.1.2.9.2 a mechanical or equipment breakdown at the Facility (except where the breakdown is due to a Force Majeure Event);
 - 19.1.2.9.3 a defect in any design, workmanship, equipment or other component of the Facility;
 - 19.1.2.9.4 conditions attributable to normal wear and tear; or
 - 19.1.2.9.5 intermittency or non-availability of the resource supply to generate Energy from the Facility.

19.2 **Notice of Force Majeure**

- 19.2.1 If either Party (the "**Affected Party**") is rendered wholly or in part unable to perform its obligations under this Contract because of a Force Majeure Event the Affected Party shall, subject to such Party's compliance with the provisions of this Clause 19.2 (*Notice of Force Majeure*), be relieved from the requirement to perform that obligation during the continuance of the Force Majeure Event.
- 19.2.2 If the Contractor suffers delay and/or incurs Cost from the Force Majeure, the Contractor shall give notice to the Employer and shall be entitled subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*) and Clause 20.1 (*Contractor's Claims*), to:
 - 19.2.2.1 an extension to the Time for Completion for any such delay, to the extent completion of the Works is or will be delayed under Clause 8.4 (*Extension of Time for Completion*); and
 - 19.2.2.2 payment of any such additional Cost through an adjustment to the Contract Price.

- 19.2.3 The Affected Party shall:
- 19.2.3.1 use all reasonable endeavours to prevent and reduce to a minimum and mitigate and/or overcome the consequences of the event and to resume performance of its obligations affected by the Force Majeure Event as soon as practicable;
- 19.2.3.2 as soon as possible but no later than 2 Business Days of the occurrence of such Force Majeure Event, written notice, describing the particulars of the event, a general description of the obligations likely to be affected, an estimate of the likely duration of the Force Majeure Event and a statement of the actions to be taken in order to comply with the affected Party's obligations under this Clause 19.2 (*Notice of Force Majeure*) (the "**Force Majeure Notice**");
- 19.2.3.3 within 15 days after the Force Majeure Event, the Party affected by the Force Majeure shall give the other Party a detailed report describing, in detail (to the extent available at that time (and where such information or detail is not available, this period shall apply as soon as such information or detail is available)), the particulars of the event, a general description of the obligations likely to be affected, an estimate of the likely duration of the Force Majeure Event and a statement of the actions to be taken in order to comply with the affected Party's obligations;
- 19.2.3.4 full particulars of the claimed Force Majeure Event;
- 19.2.3.5 the estimated impact of the Force Majeure Event on the ability of the Affected Party to perform its obligations under this Contract and expected relief claimed;
- 19.2.3.6 the steps being taken or intended to be taken by the Affected Party in accordance with Clause 19.2.3.1 to mitigate and/or overcome the adverse consequences of the claimed Force Majeure Event on its performance under this Contract;
- 19.2.3.7 the Affected Party's reasonable estimate of the length of time by which its performance has been and will be affected by such Force Majeure Event;
- 19.2.3.8 the Affected Party's reasonable estimate of the period of time required to overcome the Force Majeure Event (and/or its effects); and
- 19.2.3.9 such documentation (including all initial notices, reports, directives) as evidences the existence, nature, duration, and appropriate mitigation of the claimed Force Majeure Event,

as to enable the other Party to assess the existence of the claimed Force Majeure Event and the relief claimed by the other Party, thereafter provide the other Party with regular reports (at least monthly) on the progress of the removal and mitigation measures it is taking and written notice promptly of the cessation of the effect of such Force Majeure Event, upon it ceasing. Such reports must contain:

- 19.2.3.10 the status of the claimed Force Majeure Event;
- 19.2.3.11 full particulars of the mitigation measures undertaken in accordance with Clause 19.2.3.1 and the impact thereof on the claimed Force Majeure Event;
- 19.2.3.12 updates on the Affected Party's reasonable estimate of the period of time required to overcome the Force Majeure Event (and/or its effects); and
- 19.2.3.13 such further information and documentation (including all notices, reports, assessments, and/or directives) pertaining to the claimed Force Majeure Event as is necessary and/or as may be reasonably required by the other Party to assess the continued existence of the claimed Force Majeure Event and the mitigation thereof in accordance with this Contract.
- 19.2.4 The Affected Party shall have the burden of proving both the existence of any Force Majeure Event and the effect (both as to nature and extent) which any such Force Majeure Event has on the performance by the Affected Party of its obligations under this Contract. The suspension of performance shall be of no greater scope and of no longer duration than is required to remedy the effect of the Force Majeure.
- 19.2.5 If the Affected Party fails to comply with the deadlines and other requirements referred to in this Clause 19 (*Force Majeure*), then the Affected Party shall not be entitled to any extension of time or relief from its obligations under this Contract in respect of the period for which its compliance is delayed.
- 19.3 Subject to Clause 1.13 (*General Pass Through*), Clause 1.14 (*Pass Through Claims*), if the Parties are, on the basis of the Force Majeure Notice and any supporting documentation, unable to agree as to the existence or as to the effect of a Force Majeure Event or the appropriate relief by the date falling 15 Business Days after the receipt by the other Party of the Force Majeure Notice, either Party shall be entitled to refer the matter to dispute resolution in accordance with Clause 20 (*Claims, Disputes and Arbitration*).
- 19.4 When a Force Majeure Event has ceased and/or been overcome, the Affected Party shall promptly resume performance of its obligations under this Contract.

19.5 Long Term Force Majeure

If a Force Majeure Event occurs which prevents a Party from substantially performing its obligations under this Contract for a period exceeding 180 consecutive days ("**Long Term Force Majeure Event**"), then either Party may terminate this Contract for a Long Term Force Majeure Event by giving the other Party 45 days' notice, provided that neither Party shall be entitled to terminate this Contract (i) while the other Party is diligently pursuing a remedy or a workaround in response to the Force Majeure Event in accordance with Clause 19 (*Force Majeure*), or (ii) the Prolonged Force Majeure Event completely ceases to continue during that notice period and/or comes to an end at any point during the notice period, or (iii) either Party has, during that notice period, demonstrated or delivered a remedy or reinstatement plan which undertakes and confirms that the Affected Party will be in a position to resume performing its material obligations under this Contract within a further period of no more than 180 days in which case the Affected Party shall be afforded the period stipulated or set out in the remedy or reinstatement plan agreed by the Parties (or such longer period as the Parties may at any time agree in writing) after the end of such notice period to implement that remedy or reinstatement plan. If either Party fails to comply with the remedy or reinstatement plan (including within any applicable period set out in the remedy or reinstatement plan), then the other Party shall have a right to terminate this Contract. After a notice of termination under this Clause 19.5 (*Long Term Force Majeure*) has taken effect, the Employer shall promptly proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine the amount to be paid to the Contractor for:

- 19.5.1 the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract;
- 19.5.2 the Cost of Plant and Materials ordered for the Works which have been delivered to the Site, or for which the Contractor is liable to accept delivery, ownership of which shall immediately transfer to the Employer upon payment of such Cost; and
- 19.5.3 any other Cost or liability required for the completion of the Works, which in the circumstances was reasonably incurred by the Contractor prior to the occurrence of the Force Majeure Event in the expectation of completing the Works.

19.6 Duty to Minimise Delay

- 19.6.1 Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure.
- 19.6.2 The Parties agree to co-operate in good faith (each at their own cost) to assist the affected Party (to the extent required) in developing and implementing a plan to

remedy the Force Majeure Event and/or reasonable alternative measures to remove or work around the Force Majeure Event.

- 19.6.3 The Affected Party shall give notice to the other Party when it ceases to be affected by the Force Majeure.

19.7 Consequences of Force Majeure

- 19.7.1 Subject to the provisions of this Clause 19 (*Force Majeure*) of this Contract, if the Contractor is prevented from performing any of its obligations under this Contract by Force Majeure of which notice has been given under Clause 19.2 (*Notice of Force Majeure*), and suffers delay by reason of such Force Majeure, the Contractor shall be entitled to an extension of time for any such delay, if completion is or will be delayed, under and subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*).

- 19.7.2 After receiving a notice under Clause 19.7.1, the Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine these matters.

- 19.7.3 The Contractor's sole right to claim any extension to the Time for Completion or any other relief under the Contract in relation to the impact of an event of Force Majeure shall be pursuant to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*).

19.8 Force Majeure Affecting Subcontractor

If any Subcontractor is entitled under any contract or agreement relating to the Works to relief from force majeure on terms additional to or broader than those specified in this Clause 19 (*Force Majeure*), such additional or broader force majeure events or circumstances shall not excuse the Contractor's non-performance or entitle it to relief under this Clause 19 (*Force Majeure*).

20 CLAIMS, DISPUTES AND ARBITRATION

20.1 Contractor's Claims

- 20.1.1 If the Contractor considers itself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of this Contract which expressly entitles the Contractor to claim, the Contractor shall give notice to the Employer, 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.

- 20.1.2 If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the remaining provisions of this Clause 20.1 (*Contractor's Claims*) shall apply.
- 20.1.3 The Contractor shall also submit any other notices which are required by the Contract, and the supporting particulars of the claim, all as relevant to such event or circumstance. Where Clause 1.13 (*General Pass Through*) applies, the Contractor shall comply with the required notice periods set out or referred to therein, including where such notice periods are shorter than those required under this Clause 20.1 (*Contractor's Claims*).
- 20.1.4 Where a claim is a Pass Through Claim it shall be subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*) and such Clauses shall take precedence over any other Clause of the Contract.
- 20.1.5 The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Employer. Without admitting liability, the Employer may, after receiving any notice under this Clause 20.1 (*Contractor's Claims*), monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Employer to inspect all these records, and shall (if instructed) submit copies to the Employer.
- 20.1.6 Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Employer, or within any other period set out or referred to in Clause 1.13 (*General Pass Through*), the Contractor shall send to the Employer 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 Contractor fails to send such fully detailed claim to the Employer within the aforesaid period, the notice given under Clause 20.1.1 shall be deemed to have lapsed and no longer be considered as a valid notice and the Time for Completion 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. If the event or circumstance giving rise to the claim has a continuing effect:
- 20.1.6.1 this fully detailed claim shall be considered as interim;

- 20.1.6.2 the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Employer may reasonably require; and
- 20.1.6.3 the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Employer or within any other period set out or referred to in Clause 1.13 (*General Pass Through*).
- 20.1.7 Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Employer and approved by the Contractor or within any other period set out or referred to in Clause 1.13 (*General Pass Through*), the Employer shall respond with approval, or with disapproval and detailed comments or as otherwise required or permitted under Clause 1.13 (*General Pass Through*). The Employer may also request any necessary further particulars, but shall nevertheless give its response on the principles of the claim within such time.
- 20.1.8 Each Payment Milestone application shall include such amounts for any claim as have been agreed or determined by the Employer as due to the Contractor, in accordance with Clause 3.5 (*Determinations*) and subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*) where applicable. 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 it has been able to substantiate.
- 20.1.9 The Employer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine:
 - 20.1.9.1 the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Clause 8.4 (*Extension of Time for Completion*); and/or
 - 20.1.9.2 the additional payment (if any) to which the Contractor is entitled under the Contract, subject to Clause 1.13 (*General Pass Through*) and Clause 1.14 (*Pass Through Claims*).
- 20.1.10 The requirements of this Clause 20.1 (*Contractor's Claims*) are in addition to those of any other Clause which may apply to a claim but to the extent there are inconsistencies between this Clause 20.1 (*Contractor's Claims*) and Clause 1.13 (*General Pass Through*) and/or Clause 1.14 (*Pass Through Claims*), the latter shall prevail in respect of any claims which are attributable to a Project Event under Clause 1.14 (*Pass Through Claims*). If the Contractor fails to comply with this or

another Clause in relation to a 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 Clause 20.1.2 and/or Clause 20.1.6.

20.1.11 Notwithstanding anything to the contrary, the Contractor shall not be entitled to any extension of time or additional payment or other compensation if and to the extent:

20.1.11.1 the cause, event or circumstance giving rise thereto is attributable to the negligence, error or default of the Contractor and/or any Subcontractor and/or the Operator; and/or

20.1.11.2 the Contractor fails to take the reasonable steps required to mitigate the effects of the cause, event or circumstance giving rise thereto.

20.1.12 Save for the Contractor's rights to claim specific performance of the Employer's obligations under the Contract, the only remedies available to the Contractor in respect of the Contract are those remedies set out in the Contract and accordingly, the Contractor shall have no further right to rescind or terminate the Contract whether for breach of contract or for negligent or innocent misrepresentation or otherwise, other than as provided for in the Contract. This Clause 20.1 (*Contractor's Claims*) shall not, however, exclude any liability which the Employer would otherwise have to the Contractor or any right which the Contractor may have to rescind this Contract in respect of any statements made fraudulently by the Employer prior to the execution of this Contract or any other rights which it may have in respect of fraudulent concealment by the Employer.

20.2 **Amicable Settlement**

20.2.1 Where any disagreement, dispute or deadlock arises, between the Parties (other than a dispute under Clause 11.1.2 (*Serial Defects*) which shall be determined by an Independent Third Party Expert in accordance with Clause 11.1.2.5 (*Independent Third Party Expert Determination*), both Parties shall attempt to resolve the dispute amicably before the commencement of arbitration, per the mechanism set out below.

20.2.2 Any disagreement, dispute, or deadlock between the Parties may, at the instance of either Party, be referred to a committee comprising the Parties' respective chief executive officers or managing directors (as the case may be) (the "**CEO Committee**"), for resolution. Any such referral by a Party to the CEO Committee shall be by notice in writing signed by the appropriate representative of the Party concerned (the Employer's Representative if referred by the Employer, the Contractor's Representative if referred by the Contractor) and shall be

accompanied by a detailed description, background and analysis in writing of the matter being referred for resolution by the CEO Committee.

- 20.2.3 Either Party's representative on the CEO Committee may call for the submission of additional information by either Party's appropriate representative, for the purposes of facilitating the CEO Committee's full understanding of the disagreement, dispute, or deadlock.
- 20.2.4 The CEO Committee shall meet and attempt in good faith to resolve the matter in question within 7 Business Days of the matter being referred to the CEO Committee, or within such further period as the CEO Committee members may agree upon in writing.
- 20.2.5 When meeting, either Party's representative on the CEO Committee may require that Party's appropriate representative to address the CEO Committee on any aspect of the disagreement, dispute, or deadlock.
- 20.2.6 If the CEO Committee resolves the matter in question within the 7 Business Day period referred to in Clause 20.2.4 (or such longer period for resolution as the CEO Committee members may agree upon in writing), such agreement shall be recorded in writing and signed by both members of the CEO Committee, and shall be binding on the Parties.
- 20.2.7 If the CEO Committee is not able to resolve the matter in question within the 7 Business Day period referred to in Clause 20.2.4 (or such longer period for resolution as the CEO Committee members may agree upon in writing), either Party may then refer such matter to arbitration in terms of Clause 20.3 (*Arbitration*).
- 20.2.8 All of the processes undertaken under this Clause 20.2 (*Amicable Settlement*) shall be on a "without prejudice" basis, the Parties recognizing that any referral to the CEO Committee, the information considered by it, and its deliberations, are not in the nature of legal pleadings, submissions, evidence, or proceedings.

20.3 **Arbitration**

- 20.3.1 Disputes between the Parties in connection with, or arising out of, the Contract or in the execution of the Works (other than a dispute under Clause 11.1.2 (*Serial Defects*)) which shall be determined by an Independent Third Party Expert in accordance with Clause 11.1.2.5 (*Independent Third Party Expert Determination*), shall be finally settled by arbitration in accordance with this Clause 20.3 (*Arbitration*). For the purpose hereof the term "dispute" shall be interpreted in the widest sense and shall include any dispute or difference in connection with or in respect of the conclusion or existence of the Contract including any dispute as to any certificate, determination, instruction,

opinion or valuation of the Employer, the carrying into effect of the Contract, the interpretation or application or the provisions of the Contract, the Parties respective rights and/or obligations in terms of and/or arising out of the Contract and/or the validity, enforceability, rectification, termination or cancellation, whether in whole or in part, of the Contract.

20.3.2 Either the Employer or the Contractor (the "**referring Party**") shall be entitled to refer the dispute to a tribunal of 3 arbitrators by notifying the other Party in writing of its intention to do so (the "**Arbitration Notice**"). The Arbitration Notice shall state that it is given in terms of this Clause 20.3 (*Arbitration*).

20.3.3 The arbitrators (who shall have no less than 10 years' relevant experience) shall be appointed by agreement between the Employer and the Contractor. Should the Employer and the Contractor, however, fail to agree to three arbitrators within 14 days of receipt of the Arbitration Notice, either the Employer or the Contractor shall be entitled to the selection of one arbitrator provided this selection is made, accepted by the relevant arbitrator, and notified to the other Party within a further 14 days. Where the Employer or the Contractor selects an arbitrator in accordance with this Clause 20.3 (*Arbitration*), those arbitrators shall jointly select a third arbitrator within a further 14 days. If either or both the Employer and/or the Contractor do not select an arbitrator or a third arbitrator is not jointly selected (in each case, as required under this Clause 20.3 (*Arbitration*)), the arbitrators, or remaining arbitrator(s) (as the case may be) shall be appointed, at the written request of either the Employer and the Contractor (which request shall be copied to the other Party), by the Secretariat for the time being of the Arbitration Foundation of Southern Africa (or its successor).

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

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

20.3.6 Save to the extent otherwise expressly agreed by the Parties in writing:

20.3.6.1 the arbitration proceedings shall be held in Cape Town, Republic of South Africa and shall be conducted under the International Rules of the Arbitration Foundation of Southern Africa (the "**Rules**");

- 20.3.6.2 the arbitrators are empowered to decide upon their own jurisdiction and the scope of any dispute referred to the arbitrators and may decide on provisional or interim relief;
- 20.3.6.3 if the decision of the arbitrators is not unanimous then the decision of the majority of the arbitrators shall be the determination or award, as applicable, of the tribunal; and
- 20.3.6.4 the award of the arbitrators shall be final and binding and not subject to appeal.
- 20.3.7 The provisions of this Clause 20.3 (*Arbitration*) shall prevail to the extent of there being any conflict between the Rules and this Clause 20.3 (*Arbitration*).
- 20.3.8 The provisions of this Clause 20.3 (*Arbitration*):
 - 20.3.8.1 constitute an irrevocable consent by the Parties to the arbitration proceedings contemplated in terms hereof and neither Party shall be entitled to withdraw from the provisions of this Clause 20.3 (*Arbitration*) or claim at any such proceedings that it is not bound by this Clause 20.3 (*Arbitration*) or such proceedings; and
 - 20.3.8.2 are severable from the rest of the Contract and shall remain in effect despite the termination, cancellation, invalidity or alleged invalidity of the Contract for any reason whatsoever.
- 20.3.9 Nothing in this Clause 20.3 (*Arbitration*) shall preclude either Party from seeking urgent or interim relief from a court of competent jurisdiction.

20.4 Common Issues

- 20.4.1 Where there arises:
 - 20.4.1.1 any matter, issue or dispute of whatever nature between the counterparties to the Related Documents and the Employer under or in terms of the Related Documents; or
 - 20.4.1.2 any matter, issue or dispute of whatever nature between the Employer and the Contractor under or in terms of this Contract,
- the Employer shall, howsoever such matter, issue or dispute arises, determine, in its sole discretion, whether or not such matter, issue or dispute is a Common Issue and shall notify the Contractor of such determination in writing.

- 20.4.2 Where the Employer determines that the matter, issue or dispute is a Common Issue:
- 20.4.2.1 all proceedings in relation to the resolution or determination of the Common Issue as between the Employer and the Contractor under or in terms of this Contract, including but not limited to proceedings under or in terms of the remaining Clauses of this Clause 20 (*Claims, Disputes and Arbitration*) shall be suspended for so long as the Common Issue exists and terminate when the Common Issue is resolved;
 - 20.4.2.2 the Common Issue shall be resolved or determined in accordance with the appropriate procedure under or in terms of the relevant Related Document;
 - 20.4.2.3 the Employer shall, except to the extent that the Employer reasonably believes that the submissions of the Contractor would prejudice the Employer's rights under the relevant Related Document in relation to the Common Issue, include as part of its submissions made in the relevant proceedings between the Employer and the counterparties to the Related Documents, all and any submissions made by the Contractor within the time limits required for the Employer to make such submissions in terms of the relevant Related Document and which concern only those matters which relate to the matter, issue or dispute to be resolved between the Employer and the counterparties to the Related Documents under the relevant Related Document;
 - 20.4.2.4 subject to the remaining provisions of this Clause 20 (*Claims, Disputes and Arbitration*), the Contractor shall be kept fully informed as to the progress of the resolution or determination of the Common Issue and shall, to the extent that it is reasonably possible, be given the opportunity to comment on all submissions which are to be put forward by the Employer to the counterparties to the Related Documents in relation to the Common Issue;
 - 20.4.2.5 the Contractor shall, at its own cost, provide to the Employer all and any assistance reasonably required by the Employer in relation to the resolution or determination of the Common Issue, and shall do all things necessary in order for the Employer to comply with its obligations and to exercise its rights under the relevant Related Document in relation to the resolution or determination of the Common Issue;
 - 20.4.2.6 the Employer will not make any compromise of the Common Issue under the relevant Related Document without first consulting with the Contractor and the Employer shall have due and reasonable regard to the interests of the Contractor as well as those of the Employer;

- 20.4.2.7 the resolution or determination of the Common Issue shall be binding on the Contractor as though it was the resolution or determination of the matter or issue between the Employer and the Contractor in terms of this Contract, subject to such changes as the context may require and the Contractor shall do all things necessary to implement that resolution or determination and shall not be entitled to dispute, challenge or appeal any such resolution or determination under or pursuant to this Contract;
- 20.4.2.8 the Contractor shall have no access to any document relevant to any matter, issue or dispute being determined or resolved between the Employer, the counterparties to the Related Documents save where:
- 20.4.2.8.1 the document is relevant also to a Common Issue; and
- 20.4.2.8.2 the Contractor has first delivered to the Employer a written undertaking in terms of which the Contractor undertakes that it shall not use any such document otherwise than for the purposes of the resolution or determination of the Common Issue and that it shall not disclose such documents or any information contained therein to any third party other than to any expert or arbitrator appointed in relation to the Common Issue or any professional adviser engaged by the Contractor to advise in relation to the Common Issue.
- 20.4.3 Without prejudice to the foregoing, the Contractor agrees that any decision or determination made pursuant to the terms of the Power Purchase Agreements shall be binding upon the Contractor to the extent that such decision or determination is binding on the Employer and the Contractor shall not be entitled to dispute, challenge or appeal any such decision or determination under or pursuant to this Contract.

21 CONTRACTOR'S WARRANTIES RELATED TO THE WORKS

21.1 Warranty on Ability to Execute the Works

- 21.1.1 The Contractor warrants that it is experienced, properly qualified, registered, licensed, equipped, organized and financed to perform the Works in terms of the Contract and undertakes, in the execution of the Works, to use a sufficient number of professionals, tradesmen, semi-skilled workers or other individuals who are appropriately qualified and/or suitably skilled and who are competent and experienced in their respective trades or occupations.
- 21.1.2 The Contractor warrants and undertakes that the Goods and the Works shall comply with the Extended Producer Responsibility (EPR) regulations under NEMA: Waste Act 59 of 2008. The Contractor shall, at its own cost, be the importer of record in respect

of all Goods and the Works. The Contractor shall register with the Department of Forestry, Fisheries and the Environment (DFFE) and establish their own take-back systems or join a registered Producer Responsibility Organisation (PRO) in respect of the Works.

21.2 **Warranty Against Corrupt Acts and Appointment of Sanctioned Entity**

21.2.1 The Contractor warrants that:

21.2.1.1 in entering into the Contract it has not committed any offences in contravention of Anti-Corruption Laws and has and shall comply with all applicable Anti-Corruption Laws;

21.2.1.2 is not in breach of any applicable Law in South Africa or otherwise in respect of the Project including relating to the prevention or combatting of corruption;

21.2.1.3 it is not using nor will it use the proceeds of this Contract for any purpose which would breach any Law;

21.2.1.4 it has not committed any act which could result in a breach of this Contract; and

21.2.1.5 it shall conduct its business in compliance with the applicable Laws relating to the prevention or combatting of corruption and maintain policies and procedures designed to promote and achieve compliance with such Laws.

21.2.2 The Contractor warrants and undertakes that:

21.2.2.1 it is not and shall not contravene any Sanctions;

21.2.2.2 has not violated, is not violating and will not violate any applicable Sanctions or Anti-Corruption Laws; and

21.2.2.3 it shall not appoint, attempt to appoint or seek approval for the appointment of, any Subcontractor that has violated or will not violate any applicable Sanctions or Anti-Corruption Laws.

21.2.3 No approval or lack of objection to the appointment of a Subcontractor by the Employer or Lender shall relieve the Contractor from its liability under this warranty and undertaking.

21.2.4 The Contractor shall at its cost conduct regular checks and take all reasonable steps necessary to ensure that no appointed Subcontractor has, subsequent to its appointment, is subject to Sanctions.

21.2.5 The Contractor shall ensure that all Subcontracts contain a warranty from the Subcontractor that it:

21.2.5.1 is not contributing nor shall contribute nor otherwise make available any part of the Subcontract price to any other person for the purpose of financing the activities of any person or entity which is currently subject to Sanctions or currently located (or ordinarily resident) in a in a country or territory which is subject to Sanctions, to the extent such contribution or provision of monies would currently be prohibited by Sanctions or would otherwise cause any person to be in breach of Sanctions;

21.2.5.2 has not been or is not subject to any Sanctions; and

21.2.5.3 has not violated or is not violating any applicable Sanctions.

21.2.6 The Contractor undertakes to notify the Employer immediately upon becoming aware that any of the warranties or undertakings given under this Clause 21.2 (*Warranty Against Corrupt Acts and Appointment of Sanctioned Entity*) are false or have been breached (as the case may be).

21.2.7 The Contractor indemnifies and holds harmless the Employer, the Employer's Personnel and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of any breach of the warranties or undertakings under this Clause 21.2 (*Warranty Against Corrupt Acts and Appointment of Sanctioned Entity*).

21.2.8 Notwithstanding anything to the contrary, and without limiting or derogating from the Employer's other rights under the Contract or in Law, the Employer may, on written notice to the Contractor, terminate the Contractor's employment under the Contract and expel the Contractor from the Site in the event of a breach by the Contractor of the warranty or undertakings under this Clause 21.2 (*Warranty Against Corrupt Acts and Appointment of Sanctioned Entity*). The provisions of Clause 15.2 (*Termination by Employer*) shall apply to such termination as if such expulsion had been made under Clause 15.2 (*Termination by Employer*).

21.3 **Warranty Against Collusive Practices**

The Contractor warrants that neither the Contractor nor any of its Affiliates have engaged, and undertakes that it and its Affiliates will not engage, in any collusive practices or any conduct in connection with the Contract which would amount to an infringement under the *Competition Act, 1998* (as amended).

22 WARRANTIES AS TO CAPACITY

Each Party makes the following representations and warranties to the other Party, each of which is true and correct on the Signature Date:

- 22.1 it has been incorporated as a company under the laws of its jurisdiction, is validly existing under those laws and has the power and authority to carry on its business in the Republic of South Africa;
- 22.2 it has full power to execute, deliver and perform its obligations under the Contract and all necessary corporate and other action has been taken to authorise that execution, delivery and performance;
- 22.3 its obligations under this Contract are valid and binding and are enforceable against it under the terms of this Contract;
- 22.4 it is not in breach of any Laws or obligation affecting it or its assets in a way which may result in a material adverse effect on the business or financial condition of the Employer;
- 22.5 it knows of no reason (having made all reasonable enquiries in this regard) why any Government Authorities would not issue such Authorisations at the time it is required to perform the Works;
- 22.6 no litigation, enforcement proceedings, arbitration, investigation, any expropriation, attachment, sequestration or administrative proceeding is in progress as at the Signature Date or, threatened in writing against it or any of its Subcontractors, which is likely to have a material adverse effect on the ability of the Parties to perform in accordance with the Contract;
- 22.7 no proceedings or any other steps have been taken or, to the best of the knowledge of the Party concerned (having made all reasonable enquiries), threatened in writing for the winding-up or liquidation (whether voluntary or involuntary, provisional or final), business rescue (whether provisional or final), or deregistration, or for the appointment of a liquidator, business rescue practitioner or similar officer over it or over any of its assets;
- 22.8 no conflict of interest exists or is likely to arise in the performance of its obligations under or in connection with this Contract by it or its employees, Subcontractors or agents; and
- 22.9 there are no reasonable grounds to suspect that it is unable to pay its debts as and when they become due and payable.

23 ECONOMIC DEVELOPMENT OBLIGATIONS

- 23.1 The Contractor warrants and undertakes that, for the duration of this Contract, it will have a minimum B-BBEE Contributor Level of at least Level 4 B-BBEE Contributor Level.
- 23.2 The Contractor shall evidence its compliance with its B-BBEE Contributor Level by furnishing to the Employer a B-BBEE verification certificate, together with any other documents verifying such compliance as reasonably requested by the Employer:
- 23.2.1 60 days before the Signature Date; and
- 23.2.2 thereafter, within 60 days after each anniversary of the Signature Date.
- 23.3 The Contractor acknowledges that failure by the Employer to achieve its Economic Development Obligations shall expose the Employer to termination of the Power Purchase Agreements by the Buyers. The Contractor undertakes in the execution and completion of the Works to comply with all of the Contractor's Economic Development Obligations, including but not limited to:
- 23.3.1 monitor, audit and record in an auditable manner its own implementation and compliance with Schedule 15 (*Contractor's Economic Development Obligations*), which records shall be submitted to the Employer no later than 15 days following the expiry of each quarter, or as otherwise agreed by the Parties;
- 23.3.2 providing all necessary reports and information and maintaining and making available all records in connection with the Works required by the Employer to comply with its reporting and other obligations under the Economic Development Obligations;
- 23.3.3 invite, and/or permit the attendance of, the Buyers (or its representative) to any meetings held at which material issues regarding the implementation of the Contractor's Economic Development Obligations will be discussed;
- 23.3.4 provide the Buyers (or its representative) with such information and documentation as it may reasonably request concerning the implementation of the Contractor's Economic Development Obligations, including all information and documentation used to determine compliance with the Economic Development Obligation;
- 23.3.5 grant reasonable access to the independent auditor appointed by the Employer in accordance with the Power Purchase Agreements to any and all records kept by the Contractor relating to the implementation of its Economic Development Obligations; and
- 23.3.6 report on all measures taken to meet the Contractor's general obligations.

- 23.4 Without derogating from the foregoing, the Contractor undertakes:
- 23.4.1 to comply with the Contractor's Economic Development Obligations set out in Schedule 15 (*Contractor's Economic Development Obligations*); and
- 23.4.2 to perform its obligations under this Contract in such manner as to allow the Employer to comply with the Employer's Economic Development Obligations under the Power Purchase Agreements.
- 23.5 The Contractor shall indemnify and hold the Employer harmless against and from the consequences of the Contractor's failure to comply with this Clause 23 (*Economic Development Obligations*).

24 JOINT AND SEVERAL LIABILITY

- 24.1 The Parties record that the Contractor comprises two entities, (whether as a partnership, consortium, joint venture or other unincorporated association), namely CNWE and NWEPTI (referred to hereafter as a "**Joint Venture**", and each such entity a "**Contractor Member**"):
- 24.1.1 each of the Contractor Members shall be jointly and severally liable to the Employer for all of the obligations, liabilities, acts and omissions (including breaches of the Contract) of the Contractor, and of each other Contractor Member, under or in connection with the Contract or the Works. Accordingly, without limiting or prejudicing any other provisions of the Contract, in the event that any one of the Contractor Members ceases to be a member of the Joint Venture ("**defunct Contractor Members**") the surviving Contractor Member must carry out and complete the entirety of the Works in accordance with the Contract on a joint and several basis (including any and all obligations and liabilities of the defunct Contractor Member). In such circumstances, each of the surviving Contractor Member is empowered to use all resources furnished by any person to the Joint Venture (including the defunct Contractor Member) and shall be entitled to have any applicable Subcontracts transferred to them by the defunct Contractor Member;
- 24.1.2 the Contractor shall give notice to the Employer as to which of the Contractor Members (if not each of them) has the authority to bind the Contractor for all the purposes of the Contract (which cannot then be retrospectively changed by the Contractor); and
- 24.1.3 the liability of a Contractor Member under this Clause 24 (*Joint and Several Liability*) shall not be affected by any act, omission, matter or thing that would otherwise operate at Law to reduce or release that Contractor Members from that liability.
- 24.2 The Contractor shall obtain the prior written approval of the Employer and the Lenders, which approval shall not be unreasonably withheld, before making any changes to the Joint Venture, whether in relation to any incorporated entity, its constituent entities or the entities

forming an unincorporated joint venture, including changes in legal status, Act of Insolvency, amalgamation, demerger, merger, deterioration in financial condition, de-ratings, major legal claims and suits and any other matter or circumstance that could reasonably be deemed to be of concern to the Employer.

25 MISCELLANEOUS

25.1 Waiver of Lien

The Contractor shall keep the Works free of all Liens at all times. The Contractor, vis-a-vis the Employer, waives all and any Liens which it may from time to time have, or become entitled to over the Works and any part thereof and shall procure that its Subcontractors similarly, vis-a-vis the Employer, waive all Liens they may have or become entitled to over the Works from time to time. Provided that the Contractor shall not be in breach of this Clause 25.1 (*Waiver of Lien*) in respect of Liens which may arise or exist in favour of the Lender under the Financing Agreements.

25.2 Entire Agreement

25.2.1 The Contract Agreement, this Contract, the Lender Direct Agreement and the Performance Security, reflect the entire agreement between the Parties, and supersedes and extinguishes any prior drafts, agreements, undertakings, representations, warranties, promises, assurances and arrangements of any nature whatsoever, whether or not in writing, between the Parties relating to the subject matter hereof and thereof and the transactions contemplated therein. Except as required by applicable Laws, no terms (including any conditions) shall be implied (whether by custom, usage or otherwise) into the Contract.

25.2.2 Each Party warrants to the other Party that it is not entering into the Contract in reliance upon any antecedent representations, undertakings, warranties, collateral contracts or promises of any nature whatsoever whether express or implied made by or on behalf of the other Party any time prior to the Signature Date that are not incorporated in the Contract, the Lender Direct Agreement or the Performance Security. This provision shall not exclude or limit any remedy available, or liability in respect of, fraud or fraudulent misrepresentation.

25.2.3 The Parties agree and understand that the sole and exclusive rights of termination by either Party under the Contract and the remedies in respect of termination of the Contract are as set out in the Contract and are to the exclusion of any other termination rights or other remedies available by Law.

25.3 **Legal Advice**

25.3.1 Each of the Parties acknowledges that it has been free to secure independent legal and other advice as to the nature and effect of all of the provisions of the Contract and that it has either taken such independent legal and other advice or dispensed with the necessity of doing so.

25.3.2 Neither Party has been induced to enter into the Contract in reliance upon, nor has it been given, any warranty, representation, statement, agreement or undertaking of any nature whatsoever other than as expressly set out in the Contract and, to the extent that either of them have been so induced, the relevant Party unconditionally and irrevocably waives any claims, rights or remedies which it might otherwise have had in relation thereto, save in the case of fraud.

25.4 **Privity**

Except provisions that are for the benefit of third parties (including the Lender and Lender's Technical Advisor) and provisions which expressly give third parties rights under the Contract, no provision of the Contract is intended to and no provision of the Contract confers upon any third party (including any Subcontractor) any implied benefit or right enforceable at the option of the third party against a Party to the Contract.

25.5 **Amendment**

No variation, amendment, or consensual cancellation of the Contract or any provision or term thereof (including 3 Contract signed by or on behalf of the Parties (by duly authorised representatives). The provisions of this Clause 25.5 (*Amendment*) do not, however, limit or derogate from the provisions of Clause 13 (*Variations and Adjustments*).

25.6 **Non-Waiver**

25.6.1 Unless by way of a waiver made in accordance with the requirements of this Clause 25.6 (*Non-Waiver*), no waiver or relaxation of any of the provisions or terms of the Contract (or any agreement or other document issued or executed pursuant to or in terms of the Contract) shall operate as an estoppel against a party in respect of any of its rights in terms of the Contract. No failure by a Party to enforce any provision of the Contract shall constitute a waiver of such provisions or affect in any way such Party's rights to require the performance of such provision at any time in the future, nor shall a waiver of a subsequent breach nullify the effectiveness of the provision itself.

25.6.2 No waiver by either Party of any breach of the Contract shall operate as a waiver of any subsequent or continuing breach of the Contract.

25.6.3 Any waiver of a Party's rights, powers or remedies under the Contract shall be dated and signed by an authorised representative of the Party granting such waiver, and shall specify the right, power or remedy and the extent to which it is being waived.

25.6.4 No approval, expression of satisfaction, representation, vetting, comment, review, test, inspection, payment or certificate made or given (or any failure to make or give or attend the same) by the Employer under the Contract, by the Lenders or the Lender's Technical Advisor or by any of such persons' representatives, shall reduce or relieve the Contractor of any of its undertakings, warranties, obligations, risks or liabilities under the Contract.

25.7 **No Partnership**

25.7.1 In performing its obligations, the Contractor shall operate as and have the status of an independent contractor and shall not operate as or have the status of an agent, employee, joint venture or shareholder of the Employer.

25.7.2 The Contractor shall have no authority to make any statements, representations or commitments of any kind or to take any action which shall be binding on the Employer except as may be consented to by the Employer and nothing in the Contract shall be deemed to constitute a partnership between the Parties.

25.8 **Severability**

If any provision of the Contract, or part thereof, is prohibited or rendered invalid or unenforceable, such prohibition, invalidity or unenforceability shall not affect the validity or enforceability of the rest of that provision and/or any other provisions of the Contract, which shall remain in full force and effect.

25.9 **Survival of Rights**

25.9.1 Termination of the Contract shall not affect any rights or liabilities of either Party accrued at the date of termination.

25.9.2 The:

25.9.2.1 confidentiality obligations in Clause 1.11 (*Confidential Details*);

25.9.2.2 provisions in relation to the Employer's use of the Contractor's Documents in Clause 1.9 (*Employer's Use of Contractor's Documents*);

25.9.2.3 Delay Liquidated Damages incurred prior to at the date of termination of the Contract;

25.9.2.4 provisions in relation to Intellectual Property rights as referred to in Clause 17.3
(*Intellectual and Industrial Property Rights*);

25.9.2.5 provisions of Clause 17.4 (*Limitation of Liability*); and

25.9.2.6 provisions of Clause 20 (*Claims, Disputes and Arbitration*),

and any other provisions expressed, or by their nature intended, to survive termination
shall survive the termination or expiry of the Contract.