

**0A CONTRACT BETWEEN**

**TRANSNET LIMITED**

(REGISTRATION No. 1990/00900/06)

**TRADING AS TRANSNET FREIGHT RAIL**

**AND**

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**FOR: CLEANING OF CULVERTS**

**KIMBERLEY SOUTH DEPOT AREA**

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## Contract Data

The Employer is

Name	Transnet Limited Trading as Transnet Freight Rail	
Address	Property Management Building, Austen Street, Beaconsfield	
Telephone	(053) 838	Fax No. (053) 838
Cell		
E-mail	<a href="mailto:Christopher.Williams@transnet.net">Christopher.Williams@transnet.net</a>	

The works are: Cleaning of culverts on the Kimberley South Depot

The site is De Aar – Beaufort West ; De Aar - Upington, (***Kimberley South Depot Area***)

The starting date is **01 July 2022**

The completion date is **30 November 2022**

The reply period is **2 (Two)**..... week(s)

The defect correction (Remedial work) period is **4(Four)**.....weeks after completion

The defect correction period is **2 (Two)**..... weeks

The delay damages are **0.5% of contract value**... per day

The retention is **0**.....%

The Adjudicator is

Name	To be advised if disputes arise.....	
Address	.....	
Telephone	.....	Fax No. ....
E-mail	.....	

## Contract Data

The interest rate on late payment is.....% per complete week of delay

The Contractor is not liable to the Employer for loss of or damage to the Employer's property in excess of..... For any one event

The *Employer* provides this insurance      Transnet Principal Control Insurance

The minimum amount of cover for the third insurance stated in the Insurance Table is      >  
**R25,000.00 (Limited to R10,000,000.00. for any one event)**

The minimum amount of cover for the fourth insurance stated in the Insurance Table is

**Not applicable**.....

The adjudicator nominating body is      **The Chairman of the Association of Arbitrators (Southern Africa)**

The tribunal is      **Arbitration**.....

If the tribunal is arbitration,

the arbitration procedure is      **The rules for the Conduct of Arbitrators of the Association of Arbitrators (Southern Africa)**.....

The *conditions of contract* are the NEC3 Engineering and Construction Short Contract (June 2005) and the following additional conditions:

1. The Contractor shall ensure that a safety representative is at site at all times.
2. The Contractor shall, in particular, comply with the following Acts and Transnet Specifications:-
  - i. The Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993. The Contractor shall produce proof of his registration and good standing with the Compensation Commissioner in terms of the Act.
  - ii. The Occupational Health and Safety Act (Act 85 of 1993).
  - iii. The explosive Act No. 26 of 1956 (as amended). The Contractor shall, when applicable, furnish the Project Manager / Supervisor with copies of the permits authorising him or his employees, to establish an explosives magazine on or near the site and to undertake blasting operations in compliance with the Act.
  - iv. The Contractor shall comply with the current Transnet Specification E.4E, Safety Arrangements and Procedural Compliance with the Occupational Health and Safety Act, Act 85 of 1993 and Regulations and shall before commencement with the execution of the contract, which shall include site establishment and delivery of plant, equipment or materials, submit to the Project Manager / Supervisor.

## Contract Data

- v. The Contractor shall comply with the current Specification for Works On, Over, Under or Adjacent to Railway Lines and near High Voltage Equipment – E7/1, if applicable, and shall take particular care of the safety of his employees on or in close proximity to a railway line during track occupations as well as under normal operational conditions.
3. The Contractor's Health and Safety Programme shall be subject to agreement by the Project Manager / Supervisor, who may, in consultation with the Contractor, order supplementary and/or additional safety arrangements and/or different safe working methods to ensure full compliance by the Contractor with his obligations as an employer in terms of the Act
4. In addition to compliance with clause 2. Hereof, the Contractor shall report all incidents in writing to the Project Manager / Supervisor. Any incident resulting in the death of or injury to any person on the works shall be reported within 24 hours of its occurrence and any other incident shall be reported within 48 hours of its occurrence
5. The Contractor shall make necessary arrangements for **sanitation, water** and electricity at these relevant sites during the installation of the equipment
6. The Contractor shall supply a **site diary** (with triplicate pages). This book shall be used to record any unusual events during the period of the work. Any delays to the work shall also be recorded such as delays caused by poor weather conditions, delays caused by permits being cancelled etc. The appointed Project Manager or Supervisor must countersign such delays. Other delays such as non-availability of equipment from 3<sup>rd</sup> party suppliers must be communicated to the Project Manager or Supervisor in writing
7. The Contractor shall supply a **site instruction book** (with triplicate pages). This book shall be used to record any instructions to the Contractor regarding problems encountered on site – for example the quality of work or the placement of equipment. This book shall be filled in by the Project Manager or Supervisor and must be countersigned by the Contractor.
8. Both books mentioned in 6 and 7 shall be the property of Transnet Freight Rail and shall be handed over to the Project Manager or Supervisor on the day of energising or handing over.
9. The Contractor will remain liable for contractual delivery dates irrespective of deficiencies discovered during workshop inspections
10. The contractor must have a complete **Safety file** with all relevant documents before commencing with the work.

## Contract Data

### The *Contractor's* Offer

The Contractor is

Name .....

Address .....

Telephone ..... Fax No. ....

E-mail .....

The percentage for overheads and profit added to the Defined Cost for people is.....%.

The percentage for overheads and profit added to other Defined Cost is..... %.

The *Contractor* offers to provide the Works in accordance with the *conditions of contract* for an amount to be determined in accordance with the *conditions of contract*.

The offered total of the

Prices is .....

Signed on behalf of the Contractor

Name .....

Position .....

Signature ..... Date .....

### 1. The *Employer's* Acceptance

The *Employer* accepts the *Contractor's* Offer to Provide the Works

Signed on behalf of the *Employer*

Name .....

Position .....

Signature ..... Date .....

**Contract Data**
**2. Price List**

## PRICE LIST - KIMBERLEY SOUTH

Railway Sections	Area to be cleaned (m <sup>2</sup> )	Number of Culverts	Distance on track (km)	Unit Price per m <sup>2</sup> (Rands)	Grand Total (Rands)
Beaconsfield – De Aar	20821.900	150	86.193		
De Aar - Beaufort West	14556.480	150	71.821		
P and G's	-	-	-		
Risk and Safety	-	-	-		
<b>Total</b>					
			<b>Total (excl. VAT)</b>		
			<b>VAT</b>		
			<b>Total (Incl. VAT)</b>		

**NOTE:**

The estimated requirement for these services above is to obtain a market related tender price.

The actual requirement will vary based on the on-site conditions in the areas to be worked.

## Contract Data

## Works Information

### 1 Description of the works

- 1.1 This contract makes provision for the cleaning of storm water drainage culverts that are located within the geographical areas controlled by the Depot Engineer, Infrastructure, Kimberley South by means of the manual removal of vegetation, soil deposits, and other wastes within the culverts.
- 1.2 The storm water culverts consist of either pipe culverts with a diameter that ranges from Ø 200 mm to 1000 mm or box culverts with a width/breadth/span that ranges from 350 mm to 6000 mm.
- 1.3 As shown on the price list, there are **300 culverts** on fixed contract: Cleaning is compulsory on these culverts.
- 1.4 The Contractor must be familiar with the procedures and techniques of civil maintenance works of this type and to comply with the required standards.
- 1.5 The culverts are to be cleaned in such a way as to permit the free-flow of water through the culverts to their maximum capacity.
- 1.6 Gradients must be in such a way that allows water to flow free without it (the water) damming inside the culvert.
- 1.7 The tenderer must clearly state in his tender the method to be used to clean the culverts. {Preferably: use of shovels, and a bobcat (when needed)}
- 1.8 All solid wastes, soil deposits or other materials (including vegetation) that prevents the water from flowing through the culverts must be removed with the proper equipment as needed to complete the works under this Contract as indicated on drawings.
- 1.9 All materials removed from the culvert must be transported to a designated area as indicated by the Technical Officer or his/her Deputy.

### 2 Sufficiency of contract and time to complete the works

A Site Inspection Certificate signed by the Technical Officer (compulsory) must be submitted with the quotation, and the submission thereof will be deemed to indicate the Contractor's acquaintance with the occurrence and extent of the works that need to be performed.

The contractor shall indicate the duration in months that they will require to complete the works, but this shall not be longer than four (4) months.

The contractor shall be required to complete the works and have it approved in this period. This period shall be inclusive of weekends, and public holidays. Working hours for the contractor will be from 7:00 until 16:30 on weekdays.

### **3 Site establishment**

Site establishment costs must be spread over and included in the prices given for other items of work in the price list.

### **4 The site**

Access to the sites will be via the Transnet service roads. The key for gates in the service road can be obtained from the Technical Officer, but it must be handed back on completion of the contract. Gates have to be kept closed at all times. No vehicle will be allowed to cross the railway line at any place except at level crossings.

No Transnet property like sleepers, rails, fencing, cables and ballast stone are to be removed from the site.

The repairs of any damages to the Transnet fencing/railway lines, Eskom power lines and Telkom will be for the Contractors account. The Contractor must arrange for the damage to be repaired within one day. Alternatively these costs will be deducted from the tendered amount, and Transnet will arrange for the repair of the damage.

### **5 To be supplied/provided by the contractor**

- 5.1 The Contractor shall provide sufficient personnel, material, plant and equipment to clean the culvert as identified according to the specification to complete the work successfully.
- 5.2 The Contractor is responsible to supply his own equipment, transport and labour to clean the culvert as identified according to the specification to complete the work successfully.
- 5.3 The Contractor must provide appointed persons (equipped with a whistle and white flags) to warn people on the site against approaching trains by blowing a whistle.
- 5.4 The contractor is responsible to use protective clothing and adhere to the safety rules and regulations of Act 85.
- 5.5 A bobcat will be required from on an As and When basis to assist in the manual removal of the silt and other debris.
- 5.6 No accommodation or camping site will be provided by Transnet or be allowed on Transnet property.



## **6 Program for the execution of the works**

It is required of the successful Tenderer to commence work two weeks after receiving letter of acceptance. The ending date of contract will be **30<sup>th</sup> November 2022**. It will be expected of the Contractor to inform the Technical Officer about his daily activities. This information is required in order to inform the Train personnel of activities adjacent to railway lines and is important for the safety of the Contractor and his personnel.

## **7 Penalty clause**

Failing to complete of the works within the period as stipulated above or with any shorter period offered by the contenders and accepted by Transnet Freight Rail, the contractor shall pay to Transnet Freight Rail as penalty 0.5% of the contract amount for every day or part thereof during which the works remain incomplete. This will be deducted from the contract payment.

## **8 Insurance of the works**

The Contractor shall take every precaution to protect the Works against damage of any kind and not to cause damage to property or injury to any person as a result of his execution of the works.

The Contractor shall, in his interests, obtain insurance of his own site establishment, materials, plant, equipment and tools, as well as insurance for his motor vehicles and the common law liabilities of the Contractor as an employer. Transnet shall arrange insurance for public liability.

## **9 To be provided by Transnet**

**The following services will be provided free of charge by Transnet Freight Rail where required:**

A Deputy Technical Officer will assist the Technical Officer on site where possible, for supervision of the works in order to monitor the Contractor's performance and ensure quality of the works.

Safety Induction Training to the Contractor and his/her staff.

## 10 Final inspection of the works

Inspection of the work will be done on an ***on-going*** basis. If the work is found to be satisfactory, the Contractor will be allowed to submit a tax invoice together with the job order (if any) depending on the arrangements between the contractor and the Technical Officer.

## 11 Measurement and Payment

Payment will be based on the successful completion of the works as specified in terms of the tender and where the Contractor has successfully achieved the standard of the specifications for the tender within the required time frame.

No payment will be made where the work has not been successfully completed accordance the specifications.

Measurement and payment for work completed will be as follows:

After the completion of the work, the Technical Officer and the Contractor will inspect the work performed.

**If the works is found to be satisfactory and according the specified specifications, the Contractor shall receive his/her payment monthly based on the work completed and according to the tendered price as initially tendered for each specific railway section as indicated on the Schedule of Quantities.**

The Contractor will thereafter receive a final Completion Certificate to certify that the works under the agreement is finalised.

**Penalties of 0.5% of the contract amount for every day or part thereof during which the works remain incomplete will apply.**

## 12 Temporary Camps

No campsites or accommodation will be available to the Contractor on Transnet premises. The Contractor must arrange for all facilities needed and these costs must be included in the tender price. (refer to item 5.6)

## 13 Pollution prevention and environmental awareness

According to the Environmental Management System of the Transnet, pollution must be prevented as far as possible. Where pollution occurs due to the negligence of the Contractor, he/she will be responsible for corrective actions or he/she will be held liable for corrective actions required.

## 14 Performance monitoring and evaluation

Transnet Freight Rail shall inspect the work completed according to the specification compiled by the Technical Officer/Project Manager.

The Contractor shall at all times be responsible for the supervision of the work and for follow-up inspections to monitor the success of control achieved over the area. He /she shall immediately take appropriate remedial action in areas where the specified standards of control are not achieved.

The Technical Officer or the Deputy shall at any time during the contract period carry out inspections of the Contractor's performance methods and procedures.

The Contractor shall carry out remedial work to areas where control has not been achieved, prior to the official inspections. Such remedial work may include: excess solid waste removal to a designated area as indicated by the Technical Officer or the Deputy, cleaning the culverts to the specified requirements, removing the waste material away from the opening of the culvert or any other works as described under the specification of the works for this contract.

## 15 Pricing including exceptions

The contractor should note that **no exception** will be made for any contractor in failing to complete the work on time.

The Contractor shall submit with his/her tender a complete and detailed priced schedule (prepared in ink) for the works.

If the Contractor has omitted to price any items in the schedule, the cost of the work included in such items will be held to be spread over and included in the prices given for other items of work.

Reasonable prices should therefore be inserted for every item as these prices may be considered in adjudication of the quotation.

The contractor must know that the price quoted/submitted will be final and no additional requests will be granted.

## 16 Drawings/diagrams/photos

Drawings for a box and pipe culvert indicating the areas to be cleaned will be supplied by the Technical Officer. A diagram of stations and sidings will also be supplied.

### Contract Data

### Works Information

## 17 Specifications

Title	Date or revision	Tick if publicly available
E7/1 Specification for works on-, over-, under- or adjacent to railway lines and near high voltage equipment	<b>2011</b>	
E.4E Safety arrangements and procedural compliance with the Occupational Health and Safety Act, Act 85 of 1993 and regulations E.4D and E.4B	<b>2011</b>	

## 18 Constraints on how the Contractor Provides the Works as well as Health, Risk and Safety requirements

- 18.1 The Contractor shall comply with Transnet Electrical Safety Instructions
- 18.2 The Contractor shall provide their own protection if needed i.e. Flagman
- 18.3 The Contractor shall provide all necessary equipment and plant to execute the job

Before any work commences the Contractor is to do a risk assessment of each situation and to provide a written safety plan, of which, a copy is to be kept on site with the Site Diary, Site Instruction Book and Calculation Book. In the safety plan the Contractor must clearly state his/her intentions to provide a safe environment for his workers when working in the culverts. This safety plan is to be provided and implemented by the contractor before the work commences.

Provision must be made in the safety plan for the following risks:

- Working adjacent to passing trains.
- Transporting of material and workers to and from work site.
- Loading and off-loading of equipment and material.
- Working close to Overhead Traction Equipment.
- Electrical shock.
- Uneven surfaces.
- Blue asbestos.
- Level Crossing Awareness of Operators and Drivers.
- No work may be performed within 3 (three) metres of the railway line without adequate Transnet supervision and protection.

The Contractor shall supply all the necessary Personal Protective Equipment to each person working on the site. This will include items such as safety boots, hand gloves, dust masks and other protective clothing needed to protect the workers against all the risks which may be encountered on site.

Before the Contractor commences with any work, the entire team will be required to attend a compulsory 1 hour long Safety Talk given by a designated Transnet Safety Representative. Any new workers that join the team at a later stage will also be required to receive this training.

Before the contractor may start any work, he and his entire team will be required to attend a OHTE awareness training, The Supervisors to do Competency training for 3 days.

Training will be provided by Transnet but traveling and accommodation expenses are for the contractor's account.

The Contractor shall provide at his/her own cost any security/safety measures he/she may deem necessary for safe and effective execution of the work. The Contractor will be fully responsible to provide all Safety measures deemed necessary to safe guard his/her personnel for the safe completion of the work under contract.

This work is to be carried out close to railway lines with trains moving and passing directly next to the work area. No work is to be done within a 3m distance of a railway line without the presence of a flagman and Track Inspector/Master or without notifying the CTC.

The Contractor or his supervisor must have a Safety Talk every morning before work begins to remind the workers to be on the lookout for trains and to make the workers aware of the dangers of working underneath electrified traction lines. Record of what was discussed shall be recorded in the "Site Diary".

All workers shall work as a team in one area in the Transnet Freight Rail's reserve.

The personnel of the Contractor shall at all times while on Transnet property and during the operations wear reflective safety jackets. These reflective jackets must preferably bear the name of

Technical Officer and according to the rules and regulations as stipulated in the **Infrastructure Safety Guidelines**, page 51 to 72.

The **Contractor** shall be liable for costs incurred by Transnet as a result of failure on the part of the **Contractor** or his personnel, to observe any safety and security regulations of Transnet regarding the entry of personnel into all sites. Transnet will determine such costs.

The contractor or his supervisor will be responsible to hold a Safety Talk every morning before work commences. He will also be responsible to notify CTC each morning to inform them where his team will be working on that day.

The contractor is to have available a suitable First Aid Kit on site at all times.

All workers shall work as a team in one area in the Transnet reserve.

The contractor shall provide a cell phone, in good working order and with sufficient airtime, to his team leader to be available on site at all times.

## Contract Data

### Works Information

#### 19 Requirements for the programme

- 19.1 The Contractor shall provide a programme in a form of excel which indicates how many gabions can be installed in a day depending on the site situations
- 19.2 The Contractor shall submit the programme to the Project Manager/Technical Officer a week before the commencement of work
- 19.3 The Contractor shall update the programme at the end of day and give feedback to the Employer's Representative on site

#### 20 Services and other things provided by the Employer

- 20.1 Technical Officer's services from the start of the contract
- 20.2 Site Access from the start of the contract

## Contract Data

### Site Information

1. The ground surfaces on site are uneven, proper precaution should be taken while working and walking on the ballast, the terrain is also not level.
2. On site there can be a movement of on track-machines, proper precautions and protection should be applied
3. The Contractor shall not cross any private property or Transnet tracks without prior written approval from the legal owner of that property. No unauthorised level crossings shall be permitted.

4. Access to the sites will be via the Transnet service roads. The key for gates in the service road can be obtained from the Technical Officer, but it must be handed back on completion of the contract. Gates have to be kept closed at all times. No vehicle will be allowed to cross the railway line at any place except at level crossings.

**First section:** Beaconsfield -De Aar -86.193

**Second section:** De Aar to Beaufort West-71.821

## CONDITIONS OF CONTRACT

### 1 General

#### Actions 10

10.1 The Employer and the Contractor shall act as stated in this contract and in a spirit of mutual trust and co-operation.

#### Identified and defined terms 11

11.1 In the conditions of contract, terms identified in the Contract Data are in italics and defined terms have capital initials.

11.2 (1) Completion is when the Contractor has completed the works in accordance with the Works Information except for correcting notified Defects which do not prevent the Employer from using the works and others from doing their work.

(2) The Completion Date is the completion date unless later changed in accordance with this contract.

(3) A Defect is a part of the works which is not in accordance with the Works Information.

(4) The Defects Certificate is either a list of notified Defects which the Contractor has not corrected by the defects date or a statement that there are no such Defects.

(5) Defined Cost is the amount paid by the Contractor in Providing the Works (excluding any tax which the Contractor can recover) for

- people employed by the Contractor,
- Plant and Materials,
- work subcontracted by the Contractor and
- Equipment.

The amount for Equipment includes amounts paid for hired Equipment and an amount for the use of Equipment owned by the Contractor which is the amount the Contractor would have paid if the Equipment had been hired.

(6) Equipment is items provided by the Contractor, used by him to Provide the Works and not included in the works.



(7) The Parties are the Employer and the Contractor.

(8) Plant and Materials are items intended to be included in the works.

(9) The Price for Work Done to Date is the total of

- the Price for each lump sum item in the Price List which the Contractor has completed and
- where a quantity is stated for an item in the Price List, an amount calculated by multiplying the quantity which the Contractor has completed by the rate.

(10) The Prices are the amounts stated in the Price column of the Price List.

Where a quantity is stated for an item in the Price List, the Price is calculated

(11) To Provide the Works means to do the work necessary to complete the works in accordance with this contract and all incidental work, services and actions which this contract requires.

(12) Site Information is information which describes the site and its Surroundings and is in the document called 'Site Information'.

(13) Works Information is information which either

- specifies and describes the works or
- states any constraints on how the Contractor Provides the Works and is either
- in the document called 'Works Information' or
- in an instruction given in accordance with this contract.

## **Law 12**

12.1 This contract is governed by the law of the country where the site is.

12.2 No change to this contract, unless provided for by the conditions of contract, has effect unless it has been agreed, confirmed in writing and signed by the Parties.

12.3 This contract is the entire agreement between the Parties.

## **Communications 13**

13.1 Each communication which this contract requires has effect when it is received in writing at the last address notified by the recipient for receiving communications.

13.2 If this contract requires the Employer or the Contractor to reply to a communication, unless otherwise stated in this contract, he replies within the period for reply.

#### **The Employer's authority and delegation 14**

- 14.1 The Contractor obeys an instruction which is in accordance with this contract and is given to him by the Employer.
- 14.2 The Employer may give an instruction to the Contractor which changes the Works Information.
- 14.3 The Employer's acceptance of a communication from the Contractor or of his work does not change the Contractor's responsibility to Provide the Works or his liability for his design.
- 14.4 The Employer, after notifying the Contractor, may delegate any of the Employer's actions and may cancel any delegation. A reference to an action of the Employer in this contract includes an action by his delegate.

#### **Access to the site and provision of services 15**

- 15.1 The Employer allows access to and use of the site to the Contractor as necessary for the work included in this contract.
- 15.2 The Employer provides services and other things as stated in the Works Information.

#### **Early warning 16**

- 16.1 The Contractor and the Employer give an early warning by notifying the other as soon as either becomes aware of any matter which could
- increase the total of the Prices,
  - delay Completion or
  - impair the performance of the works in use.

The Contractor may give an early warning by notifying the Employer of any other matter which could increase his total cost. Early warning of a matter for which a compensation event has previously been notified is not required.

- 16.2 The Contractor and the Employer co-operate in making and considering proposals for how the effect of each matter which has been notified as an early warning can be avoided or reduced and deciding and recording actions to be taken

## **2 The Contractor's main responsibilities**

### **Providing the Works 20**

- 20.1 The Contractor Provides the Works in accordance with the Works Information.
- 20.2 The Contractor does not start work which the Contractor has designed until the Employer has accepted that the design complies with the Works Information.

### **Subcontracting and people 21**

- 21.1 If the Contractor subcontracts work, he is responsible for Providing the Works as if he had not subcontracted.
- 21.2 This contract applies as if a subcontractor's employees and equipment were the Contractor's.
- 21.3 The Employer may, having stated reasons, instruct the Contractor to remove an employee. The Contractor then arranges that, after one day, the employee has no further connection with the work included in this contract.

### **Access for the Employer 22**

- 22.1 The Contractor provides access for the Employer and others notified by the Employer to work being done for this contract and to stored Plant and Materials.

## **3 Time**

### **Starting and Completion 30**

- 30.1 The Contractor does not start work until the starting date and does the work so that Completion is on or before the Completion Date.
- 30.2 The Contractor submits a forecast of the date of Completion to the Employer each week from the starting date until Completion.
- 30.3 The Employer decides the date of Completion and certifies it to the Contractor within one week of the date.
- 30.4 The Employer may instruct the Contractor to stop or not to start any work and may later instruct him to re-start or start it.

## **The programme 31**

31.1 The Contractor submits programmes to the Employer as stated in the Works Information.

## **4 Defects**

### **Searching for and notifying Defects 40**

40.1 Until the defects date, the Employer may instruct the Contractor to search for a Defect.

40.2 The Employer may notify a Defect to the Contractor at any time before the defects date.

### **Correcting Defects 41**

41.1 The Contractor corrects a Defect whether or not the Employer notifies him of it.

41.2 Before Completion, the Contractor corrects a notified Defect before it would prevent the Employer or others from doing their work.

41.3 After Completion, the Contractor corrects a notified Defect before the end of the defect correction period. This period begins at the later of Completion and when the Defect is notified.

41.4 The Employer issues the Defects Certificate to the Contractor at the later of the defects date and the end of the last defect correction period.

### **Uncorrected Defects 42**

42.1 If the Contractor has not corrected a notified Defect within its defect correction period, the Employer assesses the cost of having the Defect corrected by other people and the Contractor pays this amount.

### **Repairs 43**

43.1 Until the Defects Certificate has been issued and unless otherwise Instructed by the Employer, the Contractor promptly replaces loss of and repairs damage to the works, Plant and Materials.

## **5 Payment**

## **Assessing the amount due 50**

50.1 The Contractor assesses the amount due and, by each assessment day, applies to the Employer for payment. There is an assessment day in each month from the starting date until the month after the Defects Certificate has been issued.

50.2 The Contractor's application for payment includes details of how the amount has been assessed. The first application for payment is for the amount due. Other applications are for the change in the amount due since the previous payment.

50.3 The amount due is

- the Price for Work Done to Date
- plus other amounts to be paid to the Contractor (including any tax which the law requires the Employer to pay to the Contractor)
- less amounts to be paid by or retained from the Contractor.

50.4 The Employer corrects any wrongly assessed amount due and notifies the Contractor of the correction before paying the Contractor.

50.5 The Contractor pays delay damages for each day from the Completion Date until Completion.

50.6 An amount is retained from the Contractor in the assessment of each amount due until Completion. This amount is the retention applied to the Price for Work Done to Date. The amount retained is halved in the first assessment made after Completion and remains at this amount until the assessment day after the Defects Certificate is issued. No amount is retained in the assessment made after the Defects Certificate has been issued.

50.7 If the Employer requires a programme to be submitted, one quarter of the Price for Work Done to Date is retained in assessments of the amount due until the Contractor has submitted a first programme to the Employer showing the information which the Works Information requires.

## **Payment 51**

51.1 The Employer pays within three weeks after the next assessment day which follows receipt of an application for payment by the Contractor.

51.2 Interest is paid if a payment is late or includes a correction of an earlier payment. Interest is assessed from the date by which the correct payment should have been made until the date when it is paid. Interest is calculated at the rate stated in the Contract Data or, if none is stated, at 0.5% of the delayed amount per complete week of delay.

## **6 Compensation events**

### **Compensation events 60**

60.1 The following are compensation events.

- (1) The Employer gives an instruction changing the Works Information unless the change is in order to make a Defect acceptable.
- (2) The Employer does not allow access to and use of the site to the Contractor as necessary for the work included in this contract.
- (3) The Employer does not provide something which he is to provide by the date for providing it stated in this contract.
- (4) The Employer gives an instruction to stop or not to start any work.
- (5) The Employer does not work within the conditions stated in the Works Information.
- (6) The Employer does not reply to a communication from the Contractor within the period required by this contract.
- (7) The Employer changes a decision which he has previously Communicated to the Contractor.
- (8) The Employer instructs the Contractor to search for a Defect and no Defect is found.
- (9) The Contractor encounters physical conditions which
  - are within the site,
  - are not weather conditions and
  - an experienced contractor would have judged, at the date of the Contractor's Offer, to have such a small

chance of occurring that it would have been unreasonable to have allowed for them. Only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a compensation event.

(10) The Contractor is prevented by weather from carrying out all work on the site for periods of time, each at least one full working day, which are in total more than one seventh of the total number of days between the starting date and the Completion Date. In assessing this event, only the working days which exceed this limit and on which work is prevented by no other cause are taken into account.

(11) The Employer notifies a correction to an assumption which he has stated about a compensation event.

(12) An event which

- stops the Contractor completing the works or
- stops the Contractor completing the works by the Completion Date and which
- neither Party could prevent,
- an experienced contractor would have judged at the date of the Contractor's Offer to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
- is not one of the other compensation events stated in this contract.

(13) A difference between the final total quantity of work done and the quantity stated for an item in the Price List.

(14) A loss of or damage to the works, Plant and Materials which

- is not the fault or responsibility of the Contractor or
- could not have been prevented by any reasonable action of the Contractor.

60.2 In judging the physical conditions for the purposes of assessing any compensation event, the Contractor is assumed to have taken into account

- the Site Information,
- publicly available information referred to in the Site Information,
- information obtainable from a visual inspection of the site and
- other information which an experienced contractor could reasonably be expected to have or to obtain.

### **Notifying compensation events 61**

61.1 The Contractor notifies the Employer of an event which has happened or which he expects to happen as a compensation event if

- the Contractor believes that the event is a compensation event and
- the Employer has not notified the event to the Contractor.

If the Contractor does not notify a compensation event within eight weeks of becoming aware of the event he is not entitled to a change in the Prices or Completion Date unless the event arises from an instruction of the Employer.

61.2 If the Employer decides that an event notified by the Contractor

- arises from a fault of the Contractor,
- has not happened and is not expected to happen,
- has no effect upon the Defined Cost or upon Completion or
- is not one of the compensation events stated in this contract, he notifies the Contractor of his decision that the Prices and the Completion Date are not to be changed.

If the Employer decides otherwise, he instructs the Contractor to submit a quotation for the event. The Employer notifies the decision to the Contractor or instructs the Contractor to submit a quotation within one week of the Contractor's notification to the Employer of the event.

61.3 If the Employer decides that the Contractor did not give an early warning of the event which the Contractor could have given, the Employer notifies that decision to the Contractor when instructing the Contractor to submit a quotation.

61.4 If the Employer decides that the effects of a compensation event are too uncertain to be forecast reasonably, the Employer states



assumptions about the event when instructing the Contractor to submit a quotation. Assessment of the event is based on these assumptions. If any of them is later found to have been wrong, the Employer notifies a correction.

61.5 A compensation event is not notified after the defects date.

## **Quotations for compensation events 62**

62.1 A quotation for a compensation event comprises proposed changes to the Prices or rates and any delay to the Completion Date assessed by the Contractor. The Contractor submits details of his assessment with each quotation. The Contractor submits a quotation within two weeks of being instructed to do so by the Employer or, if no such instruction is received, within two weeks Of the notification of a compensation event.

62.2 The Employer may instruct the Contractor to submit a quotation for a proposed instruction or a proposed changed decision. The Contractor does not put a proposed instruction or a proposed changed decision into effect.

62.3 The Employer replies within two weeks of the Contractor's submission. For a proposed instruction or proposed changed decision, the Employer's reply is

- notification that the proposed instruction will not be given or the proposed changed decision will not be made,
- notification of the instruction or changed decision as a compensation event and acceptance of the quotation or
- notification of the instruction or changed decision as a compensation event and notification that the Employer does not agree with the quotation.

For other compensation events, the Employer's reply is

- acceptance of the quotation or
- notification that the Employer does not agree with the quotation.

62.4 If the Employer does not agree with the quotation, the Contractor may submit a revised quotation within two weeks of the Employer's reply. If the Employer does not agree with the revised quotation or if none is received, the Employer assesses the

compensation event and notifies the assessment.

62.5 After discussing with the Contractor different ways of dealing with the compensation event which are practicable, the Employer may instruct the Contractor to submit alternative quotations for a compensation event.

### **Assessing compensation events 63**

63.1 For a compensation event which only affects the quantities of work shown in the Price List, the change to the Prices is assessed by multiplying the changed quantities of work by the appropriate rates in the Price List.

63.2 For other compensation events, the changes to the Prices are assessed by forecasting the effect of a compensation event upon the Defined Cost or, if the compensation event has already occurred, the assessment is based upon the Defined Cost due to the event which the Contractor has incurred. Effects on Defined Cost are assessed separately for

- people employed by the Contractor,
- Plant and Materials,
- work subcontracted by the Contractor and
- Equipment.

The Contractor shows how each of these effects is built up in each Quotation for a compensation event. The percentages for overheads and profit stated in the Contractor's Offer are applied to the assessed effect of the event on the Defined Cost.

63.3 The effects of compensation events upon the Defined Cost are assessed at open market or competitively tendered prices with deductions for all discounts, rebates and taxes which can be recovered. The following are deducted from the Defined Cost for the assessment of compensation events

- the cost of events for which this contract requires the Contractor to insure and
- other costs paid to the Contractor by insurers.

63.4 A delay to the Completion Date is assessed as the length of time that, due to the compensation event, Completion is forecast to be delayed.

- 63.5 If the Employer has decided and notified the Contractor that the Contractor did not give an early warning of a compensation event which an experienced contractor could have given, the event is assessed as if the Contractor had given early warning.
- 63.6 Assessment of the effect of a compensation event includes risk allowances for cost and time for matters which are at the Contractor's risk under this contract.
- 63.7 Assessments are based on the assumptions that the Contractor reacts competently and promptly to the compensation event and that any additional cost and time due to the event are reasonably incurred.
- 63.8 A compensation event which is an instruction to change the Works Information in order to resolve an ambiguity or inconsistency is assessed as if the Prices and the Completion Date were for the interpretation most favourable to the Party which did not provide the Works Information.
- 63.9 The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong.

## **7 Title**

### **Objects and materials within the site<sup>70</sup>**

- 70.1 The Contractor has no title to an object of value or of historical or other interest within the site. The Contractor does not move such an object unless instructed to do so by the Employer.
- 70.2 The Contractor has title to materials from excavation and demolition only as stated in the Works Information.

## **8 Indemnity, insurance and liability**

### **Limitation of liability <sup>80</sup>**

- 80.1 For any one event, the liability of the Contractor to the Employer for loss of or damage to the Employer's property is limited to the amount stated in the Contract Data. The Contractor is not liable to the Employer for the Employer's indirect or consequential loss except as provided for in the conditions of contract. Exclusion or limitation of liability applies in contract, tort or delict and otherwise and to the maximum extent permitted in law.

### **Indemnities <sup>81</sup>**

- 81.1 The Employer indemnifies the Contractor against claims, proceedings,

compensation and costs payable which are the unavoidable result of the works or of Providing the Works or which arise from

- fault,
- negligence,
- breach of statutory duty,
- infringement of an intellectual property or
- interference with a legal right by the Employer or by a person employed by or contracted to the Employer except the Contractor.

81.2 The Contractor indemnifies the Employer against other

- losses and claims in respect of
- death of or injury to a person and
- loss of and damage to property (other than the works, Plant and Materials) and
- claims, proceedings, compensation and costs payable arising from or in connection with the Contractor's Providing the Works.

81.3 The liability of one Party to indemnify the other is reduced to the extent that events which are the other Party's responsibility contributed to the losses, claims, proceedings, compensation and costs.

## **Insurance cover 82**

82.1 The Contractor provides, in the joint names of the Parties and from the starting date, the insurances stated in the Insurance Table. The Contractor does not provide an insurance which the Employer is to provide as stated in the Contract Data.

## **9 Termination and dispute resolution**

### **Termination and reasons for termination 90**

90.1 If either Party wishes to terminate the Contractor's obligation to Provide the Works, he notifies the other Party giving details of his reason for terminating. The Employer issues a termination certificate promptly if the reason complies with this contract. After a termination certificate has been issued, the Contractor does no further work necessary to Provide the Works.

90.2 Either Party may terminate if the other Party has become insolvent or its equivalent (Reason 1).

90.3 The Employer may terminate if the Employer has notified the Contractor that the Contractor has defaulted in one of the following ways and the Contractor has not stopped defaulting within two weeks of the notification.

- Substantially failed to comply with this contract (Reason 2).
- Substantially hindered the Employer (Reason 3).
- Substantially broken a health or safety regulation (Reason 4).

The Employer may terminate for any other reason (Reason 5).

90.4 The Contractor may terminate if

- the Employer has not made a payment within ten weeks of the assessment day which followed receipt of the Contractor's application for it (Reason 6) or
- the Employer has instructed the Contractor to stop or not to start any substantial work or all work for a reason which is not the Contractor's fault and an instruction allowing the work to re-start or start has not been given within eight weeks (Reason 7).

90.5 The Employer may terminate if an event which the Parties could not reasonably prevent has substantially affected the Contractor's work for a continuous period of more than thirteen weeks (Reason 8).

## **Procedures on termination 91**

91.1 On termination, the Employer may complete the works himself or employ other people to do so. The Contractor leaves the site and removes the Equipment.

## **Payment on termination 92**

92.1 The amount due on termination includes

- an amount due assessed as for normal payments,
- the cost of Plant and Materials provided by the Contractor which are on the site or of which the Contractor has to accept delivery and
- any amounts retained by the Employer.

92.2 If the Employer terminates for Reason 1, 2, 3 or 4, the amount due on termination also includes a deduction of the forecast additional cost to the Employer of completing the works.

92.3 If the Contractor terminates for Reason 1, 6 or 7 or if the Employer terminates for Reason 5, the amount due on termination also includes 5% of any excess of a forecast of the amount due at Completion had there been no termination over the amount due on termination assessed as for normal payments.

## **Dispute resolution 93**

93.1 A dispute arising under or in connection with this contract is referred to and decided by the Adjudicator.

**The Adjudicator** 93.2 (1) The Parties appoint the Adjudicator under the NEC Adjudicator's Contract current at the starting date. The Adjudicator acts impartially and decides the dispute as an independent adjudicator and not as an arbitrator.

(2) If the Adjudicator is not identified in the Contract Data or if the Adjudicator resigns or is unable to act, the Parties choose a new adjudicator jointly. If the Parties have not chosen an adjudicator, either Party may ask the Adjudicator nominating body to choose one. The Adjudicator nominating body chooses an adjudicator within four days of the request. The chosen adjudicator becomes the Adjudicator.

(3) The Adjudicator, his employees and agents are not liable to the Parties for any action or failure to take action in an adjudication unless the action or failure to take action was in bad faith.

**The adjudication** 93.3 (1) A Party may refer a dispute to the Adjudicator if

- the Party notified the other Party of the dispute within four weeks of becoming aware of it and
- between two and four further weeks have passed since the notification.

If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the tribunal.

(2) The Party referring the dispute to the Adjudicator includes with his referral information to be considered by the Adjudicator. Any more information is provided within two weeks of the referral. This period may be extended if the Adjudicator and the Parties agree.

(3) The Adjudicator may take the initiative in ascertaining the facts and the law related to the dispute. He may instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time.

(4) A communication between a Party and the Adjudicator is communicated to the other Party at the same time.

(5) If the Adjudicator's decision includes assessment of additional cost or delay caused to the Contractor, he makes his assessment in the same way as a compensation event is assessed.

(6) The Adjudicator decides the dispute and notifies the Parties of his decision and his reasons within four weeks of the referral. This period may be extended by up to two weeks with

the consent of the referring Party, or by any period agreed by the Parties.

If the Adjudicator does not notify his decision within the time allowed, either Party may act as if the Adjudicator has resigned.

- (7) Unless and until the Adjudicator has notified the Parties of his decision, the Parties proceed as if the matter disputed was not disputed.
- (8) The Adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither Party has notified the other within the times required by this contract that he intends to refer the matter to the tribunal.

**Review by the tribunal** 93.4 A Party may refer a dispute to the tribunal if

- the Party is dissatisfied with the Adjudicator's decision or
- the Adjudicator did not notify a decision within the time allowed and a new adjudicator has not been chosen, except that neither Party may refer a dispute to the tribunal unless they have notified the other Party of their intention to do so not more than four weeks after the end of the time allowed for the Adjudicator's decision.