



DESIGN AND CONSTRUCTION AGREEMENT

ENTERED INTO BETWEEN

Gauteng Department of Education

AND

[CONTRACTOR]

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SCHEDULES

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¹ **Note:** Schedule 1 will be divided into the following parts - Part 1 will comprise of the Employer's Requirements, which will include, amongst others, the Design and Construction Requirements and Part 2 will comprise of the Contractor's Proposal to Part 1. Part 1 of this schedule will be developed by technical and Part 2 will be developed by the Contractor.

² **Note:** This schedule will be provided by the Bidder.

³ **Note:** To be provided by the Bidders and to be agreed with the Employer.

⁴ **Note:** This schedule will be prepared based on the structure of the Bidder.

⁵ **Note:** This schedule will be developed by the insurance advisor.

⁶ **Note:** This schedule will be provided by GIFA and should provide the title deeds.

⁷ **Note:** This schedule will be provided by the Bidder.

⁸ **Note:** To be agreed between the Parties prior to signature of the Agreement.

⁹ **Drafting Note:** This Schedule is to be prepared by the Finance Team, after (1) agreed the Contract Price; and (2) Schedule 10 (Schedule of Milestones) has been finalised.

SCHOOLS AND STAGING YARD AGREEMENT

THIS AGREEMENT is made the day of 2023

BETWEEN:

- (1) Gauteng Department of Education (the "Employer"); and
- (2) (•) (the "Contractor").

NOW IT IS HEREBY AGREED AS FOLLOWS:

1 GENERAL CONDITIONS

1.1 Background Information

- 1.1.1 The Employer has provided the Background Information prior to the Effective Date. The Employer provides this Background Information in good faith and on the basis that the Contractor and/or its members or consultants are responsible for interpreting such Background Information and have conducted their own due diligence and/or each one of them has taken their own advice with respect to the Background Information.
- 1.1.2 Notwithstanding Clause 1.1.1 above and subject to the express provisions of this Agreement, the Employer does not give any warranty or undertaking as to the completeness, accuracy or fitness for any purpose of any of the Background Information.
- 1.1.3 Subject to the express provisions of this Agreement neither the Employer nor any of its agents, employees, consultants or contractors shall be liable to the Contractor, in contract, delict (including negligence or breach of statutory duty), or otherwise as a result of:
 - (a) any inaccuracy, omission, unfitness for any purpose or inadequacy of any kind whatsoever in the Background Information;
 - (b) any failure to make available to the Contractor any materials, documents, drawings, plans, Employer Policies or other information relating to the Project other than materials, documents, drawings, plans or other information that are specifically required in terms of this Agreement to be provided to the Contractor by the Employer; or
 - (c) any unlawfulness of any Background Information where such unlawfulness is or ought reasonably to be known to the Contractor as at the date of this Agreement through the conduct of a due diligence investigation or otherwise.

1.2 Definitions

This Agreement shall be interpreted according to the provisions of this Clause 1.2.

"Additional Expenditure" **Material** means material expenditure that would not have been incurred but for the Compensation Events in

Clause 25 (*Compensation Events*) and Relief Event in Clause 26 (*Relief Events*)

"Advance Guarantee"	Payment	shall have the meaning ascribed to it in Clause Error! Reference source not found. (<i>Advance Payment</i>);
"AFSA"		means Arbitration Foundation of South Africa;
"Agreed Form"		means in relation to any document not executed simultaneously with this Agreement, the terms and conditions of that document have been agreed by the Parties and initialled by each of them for identification purposes on or before the Effective Date;
"Agreement"		means this Design and Construction Agreement, and the Schedules hereto;
"Approved Purposes"		has a meaning ascribed to it in Clause 31.1.1;
"Associated Contract"		means for purposes of Associated Contract Disputes, any of the Material Subcontracts or Special Equipment Supply and Installation Agreement;
"Background Information"		means all and any documents, drawings, plans, tests or other information relating in any way to the Project made available by the Employer and/or its agents in connection with the procurement of the bidders in relation to this Project, negotiation, preparation and execution of this Agreement;
"Baseline Programme"		means any programme for the construction and completion of the Works attached to this Agreement as Schedule 4 (<i>The Programme</i>) ¹⁰ ;
"Business Day"		means any day except a Saturday, Sunday or public holiday in South Africa;
"Change in Control"		means any change whatsoever in Control whether effected directly or indirectly;
"Claiming Party"		has a meaning ascribed to it in Clause 23.2.4;
"Cluster"		means
"Compensation Event"		has a meaning ascribed to it in Clause 25.1;
"Completion Statement"		has a meaning ascribed to it in Clause 20.6.1;

¹⁰ **Drafting Note:** The Bidder to propose the Programme.

"Confidential Information"		has a meaning ascribed to it in Clause 32.1.1;
"Consents"		means all permissions, filings, consents, approvals, notifications, certificates, permits, licences, statutory agreements and authorisations, exemptions, registrations or declarations required by Law, and all necessary consents and agreements from any third parties (including, without limitation, any planning permission), needed to carry out the Project Deliverables in accordance with this Agreement;
"Construction Plan"	Quality	means the plan prepared by the Contractor and attached as Appendix (•) to Schedule 1, Part 2 (<i>Specification: Contractor's Proposal</i>) pertaining to the quality control in respect of the construction of the Works;
"Contamination"		means the presence of all or any pollutants or contaminants, including any chemical or industrial, radioactive, dangerous, toxic or hazardous substance, waste or residue (whether in solid, semi solid or liquid form or a gas or vapour);
"Contract Month"		means a calendar month save that: <ul style="list-style-type: none"> (a) the first Contract Month shall be the period from and including the Effective Date up to and including the last day of the month during which the Effective Date occurs; and (b) the final Contract Month shall be the period from and including the first day of the month during which the Expiry Date occurs up to and including the Expiry Date;
"Contract Price"		means the price defined in Clause 20.1, and includes adjustments in accordance with this Agreement;
"Contractor's Accounts"	Bank	means such bank account(s) as is nominated by the Contractor from time to time and notified to the Employer within twenty (20) Business Days' of such nomination and into which all monies payable by the Employer to the Contractor will be paid,
"Contractor Default"	Events of	means the events referred to as such in Clause 28.2.1;
"Contractor's Documents"		means the calculations, computer programs and other software, data, drawings, description, schedules, specifications, plans, samples, patterns, manuals, models, mock-ups, simulations, erection and test data and other documents of a technical nature (if any) including all eye readable

		or computer or other machine readable data supplied by the Contractor under this Agreement;
"Contractor's Equipment"		means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Contractor's Equipment excludes Temporary Works, Employer's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Permanent Works;
"Contractor Party"		means the Contractor's agents;
"Contractor's Personnel"		means the Contractor's Representative and all personnel whom the Contractor utilises , 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;
"Contractor's Proposal"		means the documents in Part 2 of Schedule 1 (<i>Specifications – Contractor Proposal</i>) as amended from time to time in accordance with the terms of this Agreement;
"Contractor's Representative"		means the person identified as such or so appointed in terms of Clause 4.2.1;
"Contractor's Response"	Variation	has a meaning given to it in Clause 24.4.3;
"Control"		means in relation to any entity, the ability directly or indirectly to direct or cause the direction of the votes attaching to the majority of its issued shares or interests 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);
"Corrupt Act"		means any of the acts or events referred to as such in Clause 34.1.1;
"Cost"		means all expenditure reasonably incurred (or to be incurred), whether on or off the Site, including overhead and similar charges, but does not include profit.
"Defects Period"	Notification	Means <ul style="list-style-type: none"> (a) the period commencing on the Taking-Over Certificate and expiring 365 days after the Taking-Over Certificate; or

- (b) in respect of a section taken-over earlier than Time for Completion, a period commencing from Taking-Over Certificate for such section of the Works and ending on expiry date of the Defects Notification Period referred to in sub-Clause (a) above,

for notifying defects in the Works or a section (as the case may be) under sub-Clause 17.1 (*Completion of Outstanding Work and Remedying Defects*) (with any extension under sub-Clause 17.3 (Extension of Defects Notification Period)) calculated from the date on which the Works is completed as certified under Clause 16.1 (*Employer's Taking Over of the Works*).

"Disallowed Costs"

means any cost which:

- (a) is not properly incurred and justified by the Contractor's accounts and records;
- (b) was incurred without the Contractor following the prescribed procedure as stated in Clause **Error! Reference source not found.**;
- (c) falls in the category of cost incurred:
 - (i) to correct defects caused by the Contractor not complying with its contractual requirements,
 - (ii) in respect of Plant and materials not used to relocate or protect the Third Party Utilities (after allowing for reasonable wastage); or
- (d) relates to resources not used to relocate or protect the Third Party Utilities (after allowing for reasonable availability and utilisation) or not taken away from the Site when requested by the Employer;

"Dispute"

means any matter or issue in dispute between the Parties arising out of or connected with the this Agreement, its existence, implementation, performance, interpretation or termination and includes, without limitation, any dispute as to any opinion, instruction, determination in respect of or related to any matter arising from this Agreement;

"Dispute Procedure"

Resolution

means the procedure in Clause 35.2 for resolution of Disputes;

"Effective Date"

means the date on which this Agreement is signed by the Party that is last to sign it;

"Employer's Notice"	Default	has a meaning given to it in Clause 29.3.1;
"Employer Default"	Events of	means the events referred to as such in Clause 29.2.1;
"Employer's Personnel"		means the Engineer, the assistants referred to in Clause 3.2 (<i>Delegation by the Engineer</i>) and all other staff, labour and other employees of the Engineer and of the Employer and Employer's Representative appointed in terms of Clause 2.3 and any other personnel notified to the Contractor, by the Employer, the Employer's Representative or the Engineer as Employer's Personnel.
"Employer Policies"		means the policies of the Employer relevant to the use of Schools or Employer premises, as shall be applicable to other users of the Schools (including without limitation the Employer's Personnel), and made available by the Employer to the Contractor as part of the part of the Background Information and subsequently thereafter from time to time;
"Employer's Rectification Programme"		means a programme for rectification referred to in Clause 29.3.1(b)(ii)(1);
"Employer's Representative"		means the person so appointed by the Employer pursuant to Clause 2.3 (<i>Employer's Representative</i>);
"Employer's Requirements"		means the requirements of the Employer set out or identified in Part 1 of Schedule 1 (<i>Specifications – Employer's Requirements</i>) as amended from time to time in accordance with the terms of this Agreement;
"Employer's Variation"		means a Variation following the Employer's Variation Notice in terms of Clause 24.1.1;
"Employer's Notice"	Variation	means a notice referred to as such in Clause 24.1.1;
"Employer's Confirmation"	Variation	has a meaning ascribed to in Clause 24.7.1(a);
"Engineer"		means the Project Management Unit appointed by the Employer to act as the Engineer for the purposes of the Contract or other persons appointed from time to time by the Employer and notified to the Contractor under Clause 3.4;
"Expiry Date"		means (•) ¹¹ being the date on which this Agreement will terminate by the expiry of the Project Term or where it is terminated earlier than the expiry of the

¹¹ Drafting Note: To be inserted on execution version.

duration or tenure of the Project in terms of the provisions of this Agreement;

"Fast Track Dispute Resolution Procedure"	means a dispute resolution procedure contemplated in Clause 35.2.5(a)(ii)
"Final Payment"	means a payment referred to in Clause 20.8.1
"Final Payment Certificate"	means a certificate referred to in Clause 20.8.1
"Final Statement"	means a statement referred to in Clause 24.4.1
"Force Majeure"	means any of the events referred to as such in Clause 27.1.1;
"Good Industry Practice"	means using standards, practices, methods and procedures conforming to the Law and exercising that degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged in a similar type of undertaking under the same or similar circumstances as those relating to the Works;
"Goods"	means Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate;
"Heritage Resources"	has a meaning attributable to it in terms of the Heritage Resource Act, 1999;
"H&S Conviction"	has a meaning ascribed to it in Clause 28.2.1(e);
"HDI"	means historically disadvantaged individual;
"Indexed"	reference in this Agreement to amounts "Indexed" shall be escalated on the Effective Date and thereafter on the first day of each subsequent Contract Month (unless otherwise stated) in accordance with the following formula:

$$EA = CA \times \frac{(CPI_n)}{(CPI_{BaseDate})}$$

where:

<i>EA</i>	=	the escalated amount
<i>CA</i>	=	the amount specified in this Agreement as Indexed
<i>CPI_n</i>	=	CPI for, in the case of the Effective Date, the third month prior to the Effective Date, and in the case of each subsequent

month, the third month prior to such subsequent month; and

$CPI_{Base\ Date} = CPI \text{ for the third month prior to } (insert\ date) \text{ 2023;}$

"Insurance Account"	Proceeds	means a bank account designated as such and held in the joint names of the Contractor and the Employer provided that the Contractor shall not withdrawal therefrom without the consent of the Employer;
"Insurance Quotation"		means a quotation for the Project Insurances in Schedule 6 (<i>Project Insurance</i>), based on the cover and deductibles for such insurance at the same level as those applying immediately prior to the Insurance Costs Review Date;
"Intellectual Rights"	Property	all intellectual property whatsoever used from time to time in connection with the Works whether capable of registration, registered or not;
"Interim Payment"		has a meaning given to it in Clause 20.3.1;
"Interim Certificate"	Payment	any certificate issued by the Engineer pursuant to Clause 20.3;
"Known Contamination"	Pre-Existing	means any Contamination on the Site, existing prior to the Effective Date and in respect of which the Contractor– <ul style="list-style-type: none"> (a) had knowledge of its existence at the Effective Date; or (b) should reasonably have had knowledge of its existence at the Effective Date, based on the geological tests or surveys or any tests that <ul style="list-style-type: none"> (i) the Employer has carried out and made available the results thereof to the Contractor; or (ii) the Contractor has carried out or ought to have carried out based on Good Industry Practice, or those that it has been given access;
"Known Utilities"	Third Party	means those Third Party Utilities which have been identified and set out in Schedule 1 Part 3 (<i>Specification – Known Third Party Utilities</i>);

"Land"		means those sections of Erf (•) as demarcated in Schedule 7 (<i>The Land</i>) indicating the location of each school;
"Laws"		means: <ul style="list-style-type: none"> (a) any applicable statute or regulation or proclamation or any delegated or subordinate legislation; (b) any applicable guidance, direction or determination with which the Employer and/or the Contractor is bound to comply to the extent that the same are published and publicly available or the existence or contents of them have been notified to the Contractor by the Employer; (c) any applicable judgement of a relevant court of law which is a binding precedent in the Republic of South Africa; and (d) the South African common law as applied and decided upon by a court of law which is binding in the Republic of South Africa, and in each case in force in the Republic of South Africa;
"Licensed Intellectual Property Rights"		all Intellectual Property Rights to be used under licence from any third party;
"Material Insurance"	Damage	means an insurance cover referred to as such in Clause 21.4.1;
"Materials"		means things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under the Agreement;
"Material Subcontracts"		means the following subcontracts (•) Contract, the (•) Contract, the (•) Contract, the (•) Contract, the (•) Contract and the (•) Contract;
"Milestones"		means milestones, in respect of each Cluster, identified as such in Schedule 9 (<i>Schedule of Milestones</i>);
"Notice of Associated Contract Dispute"		A notice referred to as such in Clause 35.3.1;
"Notice of Dispute"		means a written notice given by either the Employer or the Contractor to the other Party notifying the other Party of the existence of a Dispute and requiring such Dispute to be considered in

	accordance with the dispute resolution procedures provided for in Clause 35;
"Notice to Proceed"	means a notice issued by the Employer to the Contractor indicating to the Contractor whether the Employer wishes to proceed with the implementation of the Works;
"Notified Date"	has a meaning ascribed to it in Clause 15.1.2;
"Nominated Subcontractor"	means a Subcontractor whom the Employer instructs the Contractor to employ as a Subcontractor subject to Clause Error! Reference source not found. (<i>Objection to Nomination</i>);
"Occupational Health and Safety Act"	means Occupational Health and Safety Act, 1993 and OHSA shall have the same meaning;
"Outline Proposal"	means an estimated price and provisional timetable arising by virtue of a proposed Variation as referred to in Clause 24.1 and (without prejudice to the Contractor under Clause 24.3 (Contractor's Right to Refuse)) an indication whether or not the Contractor considers that it is entitled to refuse a Variation under Clause 24.3 (<i>Contractor's Right to Refuse</i>);
"Payment Certificate"	means a payment certificate issued under Clause 20;
"Performance Certificate"	means the certificate issued under Clause 17.8;
"Performance Security"	means the security (or securities, if any) under Clause 4.14 (<i>Performance Security</i>).
"Permanent Works"	means the permanent works to be executed by the Contractor under the Agreement;
"Physical Damage Risk"	means the physical loss or damage referred to as such in Clause 21.2.4(d);
"Plant"	means the apparatus, machinery and vehicles intended to form or forming part of the Permanent Works;
"Programme"	has a meaning given to it in Clause 13.2.2;
"Project"	means the design and construction of [insert number] schools, and hand over of the Works in respect of the schools by the Contractor as contemplated by this Agreement;
"Project Assets"	means all assets as required construct, develop, install, test and remedy any defects in the Works for the Project (including any books, manuals and records, any spare parts and tools), as well as the Intellectual Property, but excluding all cash;

"Project Data"	<p>means data (including, without limitation, electronic representations of information in any form) which the Contractor, its agents otherwise produce or use in relation to this Agreement and/or the Project, which:</p> <p>(a) due to the personal nature of that data or for any other reason the Employer is obliged to protect pursuant to any Law; and/or</p> <p>(b) is proprietary to the Employer.</p>
"Project Documents"	<p>means the shareholders agreement (to the extent applicable), the Subcontracts and all other contracts described in Schedule 11 (<i>Project Document</i>) relating to the performance of the Project Deliverables, each executed by the parties thereto simultaneously with this Agreement or otherwise in the Agreed Form;</p>
"Project Deliverables"	<p>means the carrying out and completion of the Works, the installation, commissioning of the Project Assets including the repair, renewal or replacement thereof and the exercise and performance of all other rights and obligations of the Contractor under this Agreement from time to time;</p>
"Project Insurances"	<p>means insurances referred to in Clause 21.1.1;</p>
"Project Management Unit"	<p>means the service provider appointed by the Employer to manage the implementation of the Project within the allocated budget and programme, in accordance with technical specifications;</p>
"Project Term"	<p>means the period from the Effective Date to the Expiry Date, or Termination Date if terminated earlier in accordance with the provisions of this Agreement;</p>
"Protected Names"	<p>has a meaning ascribed to it in Clause 31.3.6;</p>
"Provisional Sum"	<p>means, in respect of each Third Party Utility, the total sum of:</p> <p>(a) the amounts provided for by the Contractor in the Contractor's costs of carrying out the Works, in relation to goods, services or materials supplied to the Contractor (which for the avoidance of doubt shall include the costs of any Subcontractor employed by the Contractor in the relocation and/or protection of Third Party Utilities) or charges imposed by the owner of the relevant Known Third Party Utility, for the protection and relocation of the Known Third Party Utilities of the relevant Utility</p>

	Owner, set out in Schedule 1 Part 3 (<i>Specification – Known Third Party Utilities</i>)); and
	(b) a sum provided by the Contractor in respect of each of the Known Third Party Utilities for its overhead charges and profit as specified by the Contractor in Schedule 1 Part 3 (<i>Specification – Known Third Utilities</i>) (" Contractor's Rate ")
"Quality Plans"	means the Construction Quality Plan
"Rand"	means the currency of the Republic of South Africa;
"Reinstatement Plan"	means a plan prepared by the Contractor referred to as such in Clause 21.4.1(b);
"Reinstatement Works"	means the works necessary referred to as such in Clause 21.4.1(b);
"Relevant Event"	means any event in respect of which the Agreement expressly requires either or both of the Parties to be placed in a no better and no worse position in terms of Clause 50 (<i>No Better No Worse Position</i>);
"Relevant Incident"	means a single event (or a series of related events) which does damage to, or causes destruction of, all or a material part of the Works;
"Relevant Proceeds"	has a meaning ascribed to in Clause 21.4.1(c)(iii)
"Relief Event"	means any of the events referred to as such in Clause 26.1;
"Relocation"	the staged physical move and the relevant logistical arrangements of the Employer and the Employer's Personnel from old Schools facilities currently occupied or used by the Employer, in accordance with Schedule 1, Part 1, to the upgraded or new Schools facilities;
"Responsible Authority"	means any ministry, any minister, any organ of state, any official in the public administration or any other governmental or regulatory department, commission, institution, entity, service utility, board, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question, but excluding for all purposes the Employer;
"Retention Money"	means the accumulated retention moneys which the Employer retains under Clause 20.2 (<i>Application for Interim Payment Certificates</i>) and

		pays under Clause 20.5 (<i>Payment of Retention Money</i>).
"Scheduled Completion Date"		means (•) ¹² the time for completing the Works, with any extension under Clause 13.4 (<i>Extension of Time</i>);
"Site"		means the Land together with any other land or sections of property(ies) over which the Contractor carries out Works;
"Site Conditions"		has a meaning given to it in Clause 10.1;
"South African Reserve Bank"		means the central bank of the Republic of South Africa as established by section 9 of the Currency and Banking Act 31 of 1920 and governed by the South African Reserve Bank Act 90 of 1989, as amended;
"Specification"		means the specification relating to the construction, completion, testing and taking over of the Works in the form set out in Schedule 1 (<i>Specifications</i>), and as may be amended from time to time pursuant to this Agreement;
"Statement"		has a meaning ascribed to it in Clause 20.2.1;
"Supplier"		means (•) (Registration number:(•)) referred to as such in the Special Equipment Supply and Installation Agreement and its permitted successors and assigns;
"Taking-Over Certificate"		means a certificate issued under Clause 16;
"Temporary Works"		Means all temporary works of every kind (other than Contractor's Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects;
"Termination Date"		means the date of any early termination of this Agreement prior to its effluxion by the expiry of the Project Term;
"Tests"		means tests to be conducted by the Contractor under this Agreement;
"Tests after Completion"		means the tests which are specified Schedule 1, Part 1 of this Agreement to be carried out under Clause 18 (<i>Tests after Completion</i>) after the Works are taken over by the Employer;

¹² **Drafting Note:** Date to be inserted.

"Tests on Completion"	means the tests to be carried out under Clause 15 (<i>Tests on Completion</i>) before the Works are taken over by the Employer;
"Third Party Liability Risk"	has a meaning given to it in Clause 21.2.4(d)
"Third Party Utilities"	<p>means those services, owned by any person other than the Employer that are located adjacent, over or across or providing connection to the Site and include but are not limited to the services provided by the following service providers or their successors:</p> <ul style="list-style-type: none"> (a) Eskom; (b) Telkom; (c) pipelines (all pipe sizes); and (d) any other providers and/or owners of utilities,
"Time for Completion"	means time for completing the Works or a Section as the case maybe;
"Trial Operation"	has a meaning ascribed to it in Clause 15.1.4;
"Trial Operation Tests"	has a meaning ascribed to it in Clause 15.1.4;
"Unforeseeable Conduct"	has a meaning ascribed to it in Clause 23.1.1;
"Uninsurable Risk"	<p>means a risk against which the Contractor is required to insure by Clause 21 (<i>Insurance</i>) (other than any risks insured under any professional indemnity insurances) and for which:</p> <ul style="list-style-type: none"> (a) insurance is not available to companies conducting business in South Africa within the worldwide insurance market with reputable insurers of good standing in respect of that risk; or (b) even if the insurance is available from reputable insurers of good standing in the worldwide insurance market, the insurance premium payable for insuring that risk has increased (at no fault of the Contractor prior to or during this Agreement) to such a level that the risk is no longer being insured against in the worldwide insurance market; <p>to the extent that the Contractor and other prudent contractors in the same or substantially similar businesses would cease to operate such businesses in order to mitigate or manage the</p>

		effect of that risk becoming uninsured and the Contractor has demonstrated this to the Employer
"Unknown Pre-Existing Contamination"		means any Contamination that is not a Known Pre-Existing Contamination;
"Unknown Third Party Utilities"		means those Third Party Utilities which have not been identified in Schedule 1 Part 3 (<i>Specification – Known Third Party Utilities</i>) and which are encountered by the Contractor in the discharge of its obligations in terms of the Agreement;
"Utility Owner"		means the owner of a Third Party Utility;
"Variation"		means a change to this Agreement or to the Specification;
"Variation Acceleration Saving"		means any reduced financing costs incurred by the Contractor in consequence of the implementation of a Variation;
"Variation Cost"		means the sum of any: <ul style="list-style-type: none"> (a) Variation Construction Price; (b) Variation Delay Cost; and (c) Variation Overhead Cost; less any <ul style="list-style-type: none"> (d) Variation Construction Savings; in each case resulting from the relevant Variation. For the avoidance of doubt where the number is a negative sum then it shall reduce the Price.
"Variation Construction Price"		means the price for the implementation of the Variation;
"Variation Construction Saving"		means the saving in the construction cost, including any Variation Acceleration Saving, which will arise as a result of complying with the Variation;
"Variation Delay Cost"		means the cost to the Contractor of delay to the Time for Completion as a result of the implementation of a Variation;
"Variation Implementation Agreement"		has a meaning ascribed to it in Clause 24.6.5;
"Variation Memorandum"		means a memorandum in Clause 24.4.6;
"Variation Overhead Cost"		means any Contractor overheads and other non-recurring expenditure, including the costs of increased management and costs of complying

with the provisions of Clause 24 (*Variation Procedure*) relating directly to the construction of the Variation;

"Variation Saving"	has a meaning ascribed to it in Clause 24.2.1(b);
"VAT or Value Added Tax"	means a value added tax as defined in the Value Added Tax Act of 1991;
"Works"	means the Permanent Works and the Temporary Works, or either of them as appropriate; and
"Works Variation"	means the works to be implemented as a result of a Variation;

1.3 Interpretation

In this Agreement:

- 1.3.1 reference to any gender includes any other gender and the singular includes the plural and vice versa;
- 1.3.2 the list of contents and the headings to the clauses and parts of this Agreement and to the paragraphs of the Schedules are for ease of reference only and shall not affect the construction or interpretation of this Agreement;
- 1.3.3 without prejudice to Clause 23, references to any statute or statutory instrument will, unless the context otherwise requires, be construed as including references to that statute or secondary legislation as from time to time amended or to any statute or secondary legislation for the time being replacing, extending, consolidating or amending the same and will include any orders, regulations, instruments or other subordinate legislation made under the relevant statute or secondary legislation;
- 1.3.4 references to clauses and Schedules are to clauses of and Schedules to this Agreement, and references to paragraphs are to paragraphs in the Schedule in which such references appear;
- 1.3.5 the Schedules form part of this Agreement and will have the same force and effect as if expressly set out in the body of this Agreement;
- 1.3.6 reference to a "day" or "days" shall be construed to mean calendar day or days, unless otherwise indicated and Business Day shall have the meaning ascribed to it in terms of this Agreement;
- 1.3.7 reference to a "person" includes any individual, firm, unincorporated association, body corporate, public authority private or listed public company, close corporation, sole proprietorship, partnership, or business trust; and
- 1.3.8 words preceding "include", "includes", "including" and "included" shall be construed without limitation by the words which follow those words unless inconsistent with the context.

1.4 Execution and Delivery of Documents

The Contractor represents and warrants to Employer that it has provided to the Employer, on or prior to the Effective Date, a document which provides evidence of the insurances required in accordance with Clause 21 (*Insurance*) having been taken out by the Contractor and that the policies comply with the requirements of this Agreement.

1.5 Priority of Documents

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

- (a) this Agreement;
- (b) the Employer's Requirements;
- (c) the Schedules; and
- (d) the Contractor's Proposal.

1.6 Assignment

1.6.1 This Agreement and any Project Document to which both the Employer and the Contractor are parties shall be binding on, and shall endure to the benefit of, them and their respective successors-in-title and permitted transferees and assigns.

1.6.2 Neither Party shall assign the whole or any part of the Agreement or any benefit or interest in or under the Agreement or Project Documents (including any benefit, interest or right which arises under or out of this Agreement including any present, future or contingent interest or right to any sums or damages payable by any Party under or in connection with this Agreement) without the prior written Agreement of the other Party and at the sole discretion of the other Party.

1.6.3 The Contractor may, subject to the prior written consent of the Employer, as security in favour of a bank or financial institution for loans or financial assistance advanced to enable the execution of the obligations under this Agreement, assign its right to any monies due, or to become due.

1.7 Project Documents

1.7.1 The Contractor must comply with the provisions of the Project Documents and, save as otherwise provided for in this Agreement, may only:

- (a) terminate, or make any amendment to or otherwise agree to such termination or amendment of any Project Document; or
- (b) in any respect depart from its obligations (or waive or allow to lapse any rights it may have in a material respect), or procure that others in any material respect depart from their obligations (or waive or allow to lapse any rights they may have in a material respect), under any Project Document; or

- (c) enter into (or permit the entry into by any other person of) any agreement replacing all or part of (or otherwise materially and adversely affecting the interpretation of) any Project Document,

with the prior written agreement of the Employer and, in respect of the Subcontracts, the Contractor has complied with Clause 30 (*Assignment, Sub-contracting and Changes in Control*).

1.7.2 The Contractor shall procure that any Project Document not executed simultaneously with this Agreement is executed in the Agreed Form annexed to this Agreement on or before the Signature Date.

1.7.3 Without limiting the restrictions on amendments to the Project Documents in Clause 1.7.1 above, the Contractor shall furnish the Employer with a true and complete copy (including all annexes) of any amendment to any Project Document or of any Project Document not executed by the Effective Date, within ten (10) Business Days of the date of the Contractor's execution of such amendment or Project Document, certified as a true copy by an officer of the Contractor, failing which such amendment is deemed not effected.

1.8 Compliance with Laws

The Contractor shall, in performing its obligations under the Agreement, comply with applicable Laws. Unless otherwise stated in this Agreement the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all Consents required by the Laws in relation to the execution and completion of the Works and remedying of any defects.

1.9 Assistance and Co-operation

1.9.1 Subject to Clause 1.9.2 each Party (the "First Party") undertakes to co-operate with the other (the "Second Party") in order to facilitate the performance of this Agreement and in particular will:

- (a) use reasonable endeavours to avoid unnecessary complaints, disputes and claims against or with the Second Party;
- (b) comply with the provisions of the Dispute Resolution Procedure in relation to any such complaints, disputes and claims;
- (c) not interfere with the rights of the Second Party in performing its obligations under this Agreement, nor in any other way hinder or prevent the Second Party from performing those obligations or from enjoying the benefits of its rights;
- (d) assist the Second Party in performing those obligations, so far as is reasonably practicable; and
- (e) take reasonable steps to mitigate any foreseeable losses and liabilities of the Second Party which are likely to arise out of any failure by the First Party to take any of the steps referred to in Clauses 1.9.1(a) to 1.9.1(d).

1.9.2 Nothing contained in Clause 1.9.1 shall:

- (a) interfere with the right of each of the Parties to arrange its affairs in whatever manner it considers fit in order to perform its obligations under this Agreement and, in the case of the Employer, its statutory duties and functions; or
- (b) oblige either Party to incur any additional Cost or expense, or suffer any loss of profit; or
- (c) relieve either Party from any obligation contained in this Agreement (subject to Clause 6 (*Indemnities and Liability*)) or from any obligation to pay any debt due and payable under this Agreement; or
- (d) in any manner constitute a basis of action by one Party against the other.

2 THE EMPLOYER'S OBLIGATIONS

2.1 Right of Access to the Site

- 2.1.1 The Employer has in terms of Clause 9 (*Site and Nature of Land Interests*) and 10 (*Condition of the Site*) made the Land available to the Contractor for the purposes of the Contractor carrying out the Works, provided that, if the Expiry Date is extended the Contractor's rights to enter, occupy, use and possess the Site shall also be extended.
- 2.1.2 With effect from the Expiry Date, the Contractor's interest in the Site in accordance with this Agreement shall automatically be assigned to the Employer unencumbered, without the need for any further formality to give effect to such assignment. The Contractor shall not be entitled to any compensation in respect of such assignment. Notwithstanding the aforesaid, the Contractor shall, on demand by the Employer, duly execute all documents which may be required by the Employer in connection with such assignment.
- 2.1.3 The Contractor shall procure that subject to complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the Schools, the Contractor's site rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time.

2.2 Employer's Claims

- 2.2.1 If the Employer considers that it is entitled to any payment under any Clause of this Agreement and/or to any extension of the Defects Notification Period, the Employer shall give notice and particulars to the Contractor.
- 2.2.2 The notice shall be given as soon as reasonably practical after the Employer became aware of the event or circumstances giving rise to the claim provided that a notice relating to any extension of the Defects Notification Period shall be given before the expiry of such a period.
- 2.2.3 The notice shall:
 - (a) specify the Clause or other basis of the claim; and

- (b) include substantiation of the amount and/or extension to which the Employer considers it is entitled to in connection with this Agreement.
- 2.2.4 The Engineer shall then proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine:
 - (a) the amount (if any) which the Employer is entitled to be paid by the Contractor;
 - (b) the extension (if any) of the Defects Notification Period in accordance with Clause 17.3 (*Extension of Defects Notification Period*),
- 2.2.5 This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Clause 2.2.5.

2.3 **Employer's Representative**

- 2.3.1 The Employer's Representative shall be (*). The Employer's Representative shall exercise the functions and powers which are devolved to him/her under this Agreement and any other of functions and powers as the Employer may notify to the Contractor from time to time.
- 2.3.2 The Employer shall be entitled at any time, by notice to the Contractor, to authorise any other or additional person(s) to exercise the functions and powers of the Employer's Representative, either generally or specifically. Any act of any such person(s) shall, for the purposes of this Agreement, constitute an act of the Employer's Representative and all references to the "Employer's Representative" in this Agreement (apart from this Clause) shall be taken as references to such person(s) so far as they concern matters within the scope of such person(s)' authority.
- 2.3.3 The Employer may by written notice to the Contractor replace the Employer's Representative. The Employer shall (as far as practicable) consult with the Contractor prior to the appointment of any replacement(s) for the Employer's Representative, taking account of the need for liaison and continuity in respect of the Project. Such replacement(s) shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Contractor in the execution of its obligations under this Agreement).
- 2.3.4 During any period when no Employer's Representative has been appointed (or when the Employer's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Employer shall carry out the functions, which would otherwise be performed by the Employer's Representative.
- 2.3.5 No act or omission of the Employer, the Employer's Representative or any officer, employee or other person engaged by the Employer shall, except as otherwise expressly provided in this Agreement:

- (a) in any way relieve or absolve the Contractor from, modify, or act as a waiver or estoppel of, any liability, responsibility, obligation or duty under this Agreement; or
 - (b) in the absence of an express order or authorisation under this Agreement, constitute or authorise a Variation.
- 2.3.6 The Contractor and the Contractor's Representative shall be entitled to treat any act of the Employer's Representative as being expressly authorised by the Employer and the Contractor and the Contractor's Representative shall not be required to determine whether an express authority has in fact been given.

3 THE ENGINEER

3.1 Engineer's Duties and Authority

- 3.1.1 The Employer shall appoint the Engineer who shall carry out the duties assigned to him/her in this Agreement. The Engineer's staff shall include suitably qualified engineers and other professionals who are competent to carry out these duties.
- 3.1.2 The Engineer shall have no authority to amend this Agreement.
- 3.1.3 The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from this Agreement. If there is any limitation to the Engineer's Duties and Authority or if the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the Employer shall by notice promptly inform the Contractor of any change to the authority attributed to the Engineer.
- 3.1.4 However, whenever the Engineer exercises a specified authority for which the Employer's approval is required, then (for the purposes of the Agreement) the Employer shall be deemed to have given approval.
- 3.1.5 Except as otherwise stated in this Agreement:
 - (a) whenever carrying out duties or exercising authority, specified in or implied by the Agreement, the Engineer shall be deemed to act for the Employer;
 - (b) the Engineer has no authority to relieve either Party of any duties, obligations or responsibilities under the Agreement;
 - (c) any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Engineer (including absence of disapproval) shall not relieve the Contractor from any responsibility he has under the Agreement, including responsibility for errors, omissions, discrepancies and non-compliances; and
 - (d) any act by the Engineer in response to a Contractor's request except as otherwise expressly specified shall be notified in writing to the Contractor within 28 days of receipt.

3.2 Delegation by the Engineer

- 3.2.1 The Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include a resident engineer, and/or independent inspectors appointed to inspect and/or test items of Plant and/or Materials. The assignment delegation or revocation shall be in writing and shall not take effect until copies have been received by both Parties,
- 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 the language for communications defined in Clause 47.3 (*Governing Law, Jurisdiction and Language*).
- 3.2.3 Each assistant, to whom duties have been assigned or authority has been delegated, shall only be authorised to issue instructions to the Contractor to the extent defined by the delegation. Any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by an assistant, in accordance with the delegation, shall have the same effect as though the act had been an act of the Engineer. However:
- (a) any failure to disapprove any work, Plant or Materials shall not constitute approval, and shall therefore not prejudice the right of the Engineer to reject the work, Plant or Materials;
 - (b) if the Contractor questions any determination or instruction of an assistant, the Contractor may refer the matter to the Engineer, who shall promptly confirm, reverse or vary the determination or instruction.

3.3 Instructions of the Engineer

- 3.3.1 The Engineer may issue to the Contractor (at any time) instructions and additional or modified designs in respect of the Works which may be necessary for the execution of the Works and the remedying of any defects, all in accordance with the Agreement. The Contractor shall only take such instructions from the Engineer, or from an assistant to whom the appropriate authority has been delegated under this Clause. If an instruction constitutes a Variation, Clause 24 (*Variations Procedure*) shall apply.
- 3.3.2 The Contractor shall comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Agreement. Whenever practicable, their instructions shall be given in writing. If the Engineer or a delegated assistant:
- (a) gives an oral instruction,
 - (b) receives a written confirmation of the instruction, from (or on behalf of) the Contractor, within 2 working days after giving the instruction, and
 - (c) does not reply by issuing a written rejection and/or instruction within two working days after receiving the confirmation,
- then the confirmation shall constitute the written instruction of the Engineer or delegated assistant (as the case may be).

3.4 Replacement of the Engineer

If the Employer intends to replace the Engineer, the Employer shall, not less than 30 days before the intended date of replacement, give notice to the Contractor of the name, address and relevant experience of the intended replacement Engineer. The Employer shall not replace the Engineer with a person against whom the Contractor raises reasonable objection by notice to the Employer, with supporting particulars.

3.5 Determinations

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

3.5.2 The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 35 (*Claims, Disputes and Arbitration*).

4 THE CONTRACTOR

4.1 Contractor's General Obligation.

4.1.1 Subject to, and in accordance with, the provisions of this Agreement, the Contractor shall:

- (a) exercise its rights and perform its obligations included in the Project Documents at its own Cost and risk without recourse to the Employer save as otherwise expressly provided in this Agreement;
- (b) execute and complete the Works in accordance with this Agreement and with the Engineer's instructions, and shall remedy any defects in the Works. When completed, the Works shall be fit for purposes for which the Works are intended; and
- (c) provide the Plant and Contractor's Documents specified in the Agreement, and all Contractor's Personnel, Goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for execution, completion and remedying of defects.

4.1.2 Without prejudice to Clause 4.1.1 above and Clause 23 (*Unforeseeable Conduct*), the Contractor shall at its own Cost and risk be solely responsible for procuring that the Project Deliverables are at all times performed:

- (a) in compliance with the Specifications;
- (b) in accordance with Good Industry Practice;
- (c) to achieve Employer's Requirements as detailed in the Specifications;

- (d) in accordance with the Contractor's obligations in terms of this Agreement;
 - (e) in accordance with the Contractor's Proposal subject to Clause 4.1.4 below;
 - (f) in a manner that is not likely to be injurious to health, to cause death or to cause damage to property or environment;
 - (g) in a manner consistent with the Employer discharging its statutory duties and functions; and
 - (h) in compliance with all Laws and Consents (including without limitation the giving of notices and the obtaining of any such Consents) and so as not to prejudice the renewal of any such Consents.
- 4.1.3 The obligations in Clauses 4.1.2(a) to 4.1.2(h) above are independent obligations. The fact that the Contractor has complied with one obligation shall not be a defence to an averment that it has not complied with the other obligation(s).
- 4.1.4 Without prejudice to Clause 4.1.1 above, if it should be found that the Contractor's Proposals do not fulfil the Employer's Requirements and/or any obligations of the Contractor in terms of this Agreement (excluding the Contractor's Proposal itself), the Contractor shall at its own Cost and risk amend the Contractor's Proposals and rectify the Works or any part affected. Such amendments and rectification shall have the effect that:
- (a) the Contractor's Proposals shall satisfy the Employer's Requirements and/or any obligations of the Contractor in terms of this Agreement (excluding the Contractor's Proposal) as the case may be; and
 - (b) following the amendment or rectification, the structural, mechanical and electrical performance of the Works will be of an equivalent standard of performance to that set out in the Contractor's Proposals prior to their amendments or rectification (for the purpose of this comparison disregarding the fault which required the amendment or rectification to be made).
- 4.1.5 The Contractor shall be responsible for the adequacy, stability and safety of all Site operations, of all methods of construction and of all Works.
- 4.1.6 The Contractor shall, whenever required by the Employer or Engineer, submit details of the arrangements and methods which the Contractor proposes to adopt for the execution of the Works, which are not already part of the Contractor's Proposal. No significant alteration to these arrangements and methods shall be made without 15 days written prior notice to the Employer.
- 4.1.7 Notwithstanding anything to the contrary contained in the Contractor's Proposal, nothing contained in the Contractor's Proposal shall impose any obligations on the Employer unless it is specifically provided for in this Agreement.

4.2 Contractor's Representative

- 4.2.1 The Contractor's Representative shall be (*insert the name of the Contractor representatives*) or such other person appointed pursuant to this clause. The Contractor's Representative shall have full authority to act on behalf of the Contractor for all purposes of this Agreement. Except as previously notified in writing by the Contractor to the Employer and the Engineer before such act, the Employer and the Engineer shall be entitled to treat any act of the Contractor's Representative in connection with this Agreement as being expressly authorised by the Contractor and the Employer and the Engineer shall not be required to determine whether any express authority has in fact been given.
- 4.2.2 The Contractor may by 30 days' written prior notice to the Employer and the Engineer replace the Contractor's Representative. Where the Contractor wishes to do so, it shall, by written notice to the Employer, propose a replacement(s) for the Contractor's Representative, who shall be subject to the approval of the Employer (which approval shall not be unreasonably withheld or delayed), and taking account of the need for liaison and continuity in respect of the Project. Such replacement shall have effect on the date specified in the Contractor's written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Employer with respect to all or any of the Project Deliverables).
- 4.2.3 The Contractor's Representative shall focus on the Contractor's performance of the Agreement. If the Contractor's Representative is to be temporarily absent from the Site during the execution of the Works, a suitable replacement person shall be appointed, subject to the Engineer's prior consent and the Engineer shall be notified accordingly.
- 4.2.4 The Contractor's Representative shall, on behalf of the Contractor, receive instructions under Clause 3.3 (*Instructions of the Engineer*).
- 4.2.5 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 15 days written prior notice signed by the Contractor's Representative, naming the person and specifying the powers, functions and authority being delegated or revoked.
- 4.2.6 The Contractor's Representative shall be fluent in the language for communications defined in Clause 47.3 (*Governing Law, Jurisdiction and Language*). If the Contractor's Representative's delegates are not fluent in the said language, the Contractor shall make competent interpreters available during all working hours in a number deemed sufficient by the Engineer.

4.3 Setting Out

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

4.4 Health and Safety

- 4.4.1 The Contractor shall maintain proof of compliance with the Occupational Health and Safety Act and produce the same to the Employer within 24 hours of a request for same.
- 4.4.2 Accidents involving the Contractor's' employees which ordinarily require reporting in accordance with the Occupational Health and Safety Act shall also be reported as soon as is practicable to the Employer.
- 4.4.3 Without derogating from any of the obligations under this Clause 4.4 (*Safety Procedures*), both the Employer and the Contractor shall each be responsible for the health and safety precautions and requirements in respect of each of its own employees and/or third party, as provided for in the Occupational Health and Safety Act and the regulations promulgated thereunder save to the extent that the liability in respect of a breach of a particular provision under the Occupational Health and Safety Act is regulated under this Agreement in terms of Schedule 8 9*Section 37(2) Principles*).
- 4.4.4 The Contractor as an employer:
- (a) shall ensure that the duties in relation to employers as contemplated in the Occupational Health and Safety Act and the regulations promulgated thereunder, are properly discharged by itself and/or its chief executive officer in accordance with section 16(1) of the Occupational Health and Safety Act;
 - (b) in accordance with section 16(2) of the Occupational Health and Safety Act, may appoint competent persons which shall be trained on any occupational health and safety matter, including any provisions in the Occupational Health and Safety Act and the regulations promulgated thereunder pertinent to the Project Deliverables. Copies of any such appointments made by the Contractor shall immediately be provided to Employer;
 - (c) shall report and/or procure that its designated person(s) appointed in terms of section 16(2) of the Occupational Health and Safety Act report to the Employer's Representative in respect of the relevant Project Site prior to commencing the Project Deliverables at the Site.
- 4.4.5 Notwithstanding the provisions of Clauses 4.4.1 to 4.4.4 above, the Employer shall not be liable in respect of a breach of any of the provisions under the Occupational Health and Safety Act in relation to the performance of the Project Deliverables by the Contractor and any of their employees to the extent agreed upon by the respective Parties to the Section 37(2) Undertaking given on the principles set out in Schedule 8 (*Section 37(2) Principles*).
- 4.4.6 The Contractor shall provide the Section 37(2) Undertaking in respect of itself and each Mandatary (as defined in Schedule 8 (*Section 37(2) Principles*)) prior to such entity entering the Site. It being recorded that the Contractor shall remain responsible for the compliance of each Mandatary with the principles set out in Schedule 8 (*Section 37(2) Principles*), including providing full co-operation and information if and when the Employer requests same in respect of the occupational health and safety issues concerning any Mandatary.

- 4.4.7 The Contractor acknowledges that the Section 37(2) Undertaking constitutes an agreement in terms of Section 37(2) of the Occupational Health and Safety Act, in terms of which, all responsibility (both civil and criminal) for health and safety matters in relation to the performance of the Project Deliverables by the Contractor and any of its employees, shall be that of the Contractor.
- 4.4.8 In accepting such responsibility as set out in Clause 4.4.7 above, the Contractor shall indemnify the Employer against any loss, damage, injury or death, however caused, to the Contractor and shall hold the Employer harmless against all and any claims, losses, damages, liability, Costs and expenses of whatsoever nature, which the Employer may, at any time sustain or incur arising out of the aforementioned circumstances; provided that such loss, damage, injury or death is not caused by the willful action or willful omission or gross negligence of the Employer.
- 4.4.9 Notwithstanding the Section 37(2) Undertaking, the Parties agree, that nothing contained therein derogates from the Contractor's obligations in terms of the Agreement and its schedules (other than Schedule 8 (*Section 37(2) Principles*)).

4.5 Quality Assurance

- 4.5.1 The Contractor shall procure that all aspects of the Works are subject to a quality assurance system including the Quality Plans, for purposes of compliance with the requirements of the Agreement. The quality assurance system shall be in accordance with the details stated in the Agreement, where applicable. The Engineer shall be entitled to audit any aspect of the system.
- 4.5.2 Details of all procedures and compliance documents shall be submitted to the Engineer for information before each execution stage of the relevant Works is commenced. When any document of a technical nature is issued to the Engineer, evidence of the prior approval by the Contractor himself shall be apparent on the document itself.
- 4.5.3 In the event that any ambiguity, uncertainty, dispute or discrepancy arises in relation to the nature and scope of the Contractor's obligations under this Clause 4.5, wherever possible, the provisions of this Clause 4.5 shall be interpreted and construed in such a manner as to resolve the apparent ambiguity, uncertainty, dispute or discrepancy so that all the provisions of this Clause 4.5 may be given meaning and effect but, if such interpretation or construction is not possible, the provisions of this Clause 4.5 shall be given meaning and effect in the following order of precedence (in descending order):
- (a) the Employer's Requirements;
 - (b) the other provisions regulating the Contractor's obligations in the Agreement, other than Contractor's Proposal;
 - (c) any quality assurance plans produced in terms of this Clause 4.5;
 - (d) Good Industry Practice; and
 - (e) Contractor's Proposals.

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

4.6 Sufficiency of the Contract Price

- 4.6.1 The Contractor shall be deemed to have satisfied itself as to the correctness and sufficiency of the Contract Price for purposes of complying and managing its obligations in terms of this Agreement.
- 4.6.2 Unless otherwise stated in this Agreement, the Contract Price covers all the Contractor's obligations under the Agreement and all things necessary for the proper execution and completion of the Works and the remedying of any defects, and any risks relating thereto or as may have been assumed by the Contractor.

4.7 Transport of Goods

Unless otherwise stated in this Agreement:

- 4.7.1 the Contractor shall be responsible for packing, loading, transporting, receiving, unloading, storing and protecting all Goods and other things required for the Works, in a manner complying with its obligations in terms of this Agreement; and
- 4.7.2 the Contractor shall indemnify and hold the Employer harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from the transport of Goods, excluding Free-Issue Material and equipment, and shall negotiate and pay all claims arising from transport.

4.8 Contractor's Equipment

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

4.9 Protection of the Environment

- 4.9.1 The Contractor shall take all steps to protect the environment (both on and off the Site) and to limit Contamination, damage and nuisance to people and property resulting from pollution, noise and other results of its operations in relation to the execution of the Works.
- 4.9.2 The Contractor shall ensure that emissions, surface discharges and effluent from the Contractor's activities shall not exceed the values prescribed by applicable Laws.
- 4.9.3 The Contractor has satisfied itself with regard to the need or otherwise of any further environmental authorisations flowing from the design of the Works and shall obtain any further environmental authorisations as may be required after the Effective Date arising from the manner in which the Works are carried out by the Contractor.

4.10 Employer's Operations

The Contractor shall perform and comply with its obligations in terms of this Agreement so as to co-ordinate with the Employer's operations on the Site and/or in the Schools and/or in the existing Schools used by the Employer and shall take all reasonable care to ensure that it does not interfere with the operations of the Employer.

4.11 Utilities

- 4.11.1 The Contractor shall be responsible for the relocation or protection, and undertake or procure the work necessary to achieve the relocation or protection, of Third Party Utilities located at the Site, as will be necessary in order to carry out the Works in accordance with Good Industry Practice and the requirements of the owner of the Third Party Utilities.
- 4.11.2 If the Contractor suffers or is likely to suffer a delay as a result of the relocation or protection of a Third Party Utility, the Contractor shall, subject to Clause 35.1 (*Contractor's Claims*) be entitled to relief in terms of clause 26 (*Relief Events*) for any such delays provided that:
- (a) the delay or likely delay is caused by action of the Utility Owner and not actions attributable to the Contractor;
 - (b) the Contractor has engaged the Utility Owner in respect of the relocation and protection of the Third Party Utility, and in respect of the measures to avoid delay;
 - (c) upon becoming aware of the delay or likely delay by the Utility Owner in the relocation or protection of any of the Third Party Utilities, the Contractor has, within 10 days, notified the Employer of the possible delay; and
 - (d) the Contractor in taking measures to mitigate the possible impact of any delays by the Utility Owner, *inter alia*, rearranged the Works and the activities relating to the Works, to the extent that such rearrangement is possible and would mitigate the delay without incurring Additional Material Expenditure.

4.12 Progress Reports

- 4.12.1 Unless otherwise stated in this Agreement, monthly progress reports shall be prepared by the Contractor and submitted to the Employer and the Engineer electronically. The first report shall cover the period up to the end of the first Contract Month following Effective Date. Reports shall be submitted monthly thereafter, each within ten (10) Business Days after the last day of the Contract Month that it relates to.
- 4.12.2 Reporting shall continue until the Contractor has completed all work which is outstanding at the completion date stated in the Taking-Over Certificate for the Works.
- 4.12.3 Each report, for each Site and summarised for a Cluster, shall include:
- (a) the report on the progress in the implementation of the Programme including current, complete, planned and delayed activities;

- (b) charts and detailed descriptions of progress, including Contractor's Documents, procurement, manufacture, delivery to the Site, construction, erection, testing, commissioning and trial operation;
- (c) photographs showing the status of manufacture and of progress on the Site;
- (d) for the manufacture of each Plant and Materials, the name of the manufacturer, manufacture location, percentage progress, and the actual or expected dates of:
 - (i) commencement of manufacture;
 - (ii) Contractor's inspections;
 - (iii) tests; and
 - (iv) shipment and arrival at the Site;
- (e) copies of quality assurance documents, test results and certificates of Materials;
- (f) financial report including invoice history, payment history and projected cashflows;
- (g) A cashflow curve for each Site and the Cluster showing the curve for actual cumulative payments to date vs planned payments for the Project. The planned curve will be updated for each change in the programme.
- (h) list of Variations indicating in such list:
 - (i) the Variations that have been confirmed through the Employer's Variation Confirmation; and
 - (ii) the Variations that are still under negotiations arising from the Employer's Variation Notice and progress of such negotiations.
- (i) list of Compensation Events, Relief Events and Force Majeure indicating in respect of each: its effect on the Contractor's ability to comply with its obligations under this Agreement, the date of occurrence, the date of notice to the Employer, whether same is still subsisting or not;
- (j) safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations;
- (k) comparisons of actual and planned progress, describing (i) all activities that are complete or ahead of Programme, (ii) all delays or potential delays irrespective of the cause or party responsible for such delays and stating the reasons therefor, (iii) details of any other events or circumstances which may jeopardise the completion in accordance with the Agreement, and (iv) the measures being (or to be) adopted to overcome delays;

- (l) measures that are implemented by the Contractor to mitigate the risk of delays to completion; and
- (m) progress made in achieving its obligations in terms of Schedule 3 (*Economic Development*).

4.13 Heritage Resources

4.13.1 Discovery

- (a) The Contractor shall in addition to the due diligence contemplated in Clause 10 (*Condition of the Site*), carry out assessments of the Project Site for Heritage Resources, wherever relevant.
- (b) Upon the discovery of any Heritage Resource during the course of the Works, the Contractor shall:
 - (i) promptly notify the Employer of such discovery;
 - (ii) take all necessary steps to comply with the Heritage Resource Act and other applicable Laws, including, where necessary, ceasing any Works to the extent that the carrying out of such Works might result in the contravention of or impede the compliance with Heritage Resources Act and other applicable Laws relevant to the heritage object or resource; and
 - (iii) confer with the Employer as to the action to be taken in relation to any such heritage object or resource discovered and the exact timelines of such actions proposed to be taken including impact that such actions will have over the progress of the Works and impact on the Programme.

4.13.2 Action

- (a) The Contractor shall act promptly to comply with applicable Laws pertaining to such Heritage Resource including taking the necessary steps to minimise disruptions to the Project including altering the manner and sequence of implementing the Programme.
- (b) The Parties shall confer with the Engineer in terms of Clause 4.13.1(b)(iii) above within ten (10) Business Days of the notice in Clause 4.13.1(b)(i) above.
- (c) The Contractor shall at its own Cost promptly and diligently implement such actions contemplated (save to the extent that if such action constitutes a Tender by the Employer for an Employer's Variation as provided in Clause 4.13.2(e) below, then such action shall be dealt with in terms of Clause 24 (*Variation Procedure*)).
- (d) If so directed by the Responsible Authority or required in order to comply with applicable Laws, the Contractor shall allow representatives of the Employer or Responsible Authority to enter

onto the Site for the purposes of removal or disposal of such discovery; provided that such entry shall be subject to the Employer or Responsible Authority complying with all relevant safety procedures which shall include any relevant health and safety plans for the construction of the Schools and any reasonable directions regarding the safety of the Site that may be issued by or on behalf of the Contractor.

- (e) If the discovery is a Relief Event and any action referred to in Clause 4.13.2(a) above in connection with the discovery includes the requirement for the Contractor to carry out works (being any work of alteration, addition, demolition or extension or variation) which are not Works that would be necessary for the purpose of compliance with the applicable Laws or any Consents, then such works shall be deemed to be an Employer's Variation and the provisions of Clause 24 (*Variation Procedure*) shall apply.
- (f) If the discovery is not a Relief Event and any instruction from the Responsible Authority or actions required to comply with applicable Laws in connection with the discovery includes the requirement for the Contractor to carry out works (being any work of alteration, addition, demolition or extension or variation), then the Contractor shall carry out such instructions or actions at its sole risk and Cost.

4.14 **Performance Security**

- 4.14.1 The Contractor shall obtain (at its cost) a performance security in the form annexed to this Agreement as Schedule 10 (*Performance Security*) for proper performance of its obligations under this Agreement. The Contractor shall deliver the Performance Security to the Employer within 7 (seven) days after Effective Date. The Performance Security shall be issued by a financial institution from within the Republic of South Africa approved by the Employer.
- 4.14.2 The Contractor shall ensure that the Performance Security is valid and enforceable until the Contractor has executed and completed the Works, including remedying any defects.
- 4.14.3 The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under this Agreement in the event of:
 - (a) failure by the Contractor to satisfy the Employer of the arrangements in place to extend the validity of the Performance Security by no later than 5 (five) Business Days prior to the date of expiry of the Performance Security, the Employer may claim the full amount of the Performance Security;
 - (b) failure by the Contractor to pay the Employer an amount due, as either agreed by the Contractor or determined under Clause 2.2 (*Employer's Claims*) or Clause 35 (*Claims, Disputes and Arbitration*), within 42 (forty two) days after determination;
 - (c) failure by the Contractor to remedy a default within 20 (twenty) days, or such longer period as agreed between the Parties, after

- receiving the Employer's notice requiring the default to be remedied;
 - (d) circumstances which entitle the Employer to termination under Clause 28.2 (*Termination by Employer*), irrespective of whether notice of termination has been given; or
 - (e) as may otherwise be specifically provided for in the Performance Security.
- 4.14.4 The Employer shall indemnify and hold the Contractor harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from a claim under the Performance Security to the extent to which the Employer was not entitled to make the claim.
- 4.14.5 The Employer shall return the Performance Security to the Contractor within 21 (twenty one) days after receiving a copy of the Performance Certificate.

5 WARRANTIES

5.1 Contractor Warranties

The Contractor warrants and undertakes that:

- 5.1.1 the legal and beneficial ownership of the Contractor at the Effective Date is as set out in Schedule 2 (*Beneficial Ownership of the Contractor*);
- 5.1.2 it will continue to be duly incorporated under the laws of South Africa and the Contractor has and will continue to have the corporate power to own its assets and carry on its business;
- 5.1.3 it has taken all necessary actions to authorise the execution of this Agreement and the performance of its obligations under the Project Documents;
- 5.1.4 all Project Documents have been duly executed on proper authority and are in full force and effect as at the Effective Date, save for those Project Documents that will be executed in the Agreed Form after the date of this Agreement on proper authority;
- 5.1.5 the execution, delivery and performance of the Project Documents do not and will not contravene:
 - (a) any provision of the memorandum or articles of association of the Contractor as at the Effective Date;
 - (b) any order or other decision of any Responsible Authority or arbitrator that is binding on the; or
 - (c) any legal obligation which is binding upon the Contractor,
- 5.1.6 all Consents required for the conduct of the Project Deliverables are in full force and effect as at the Effective Date, save for any Consents which are not required under applicable law to be obtained by the Effective Date; provided that the Contractor warrants that it knows of no reason (having made all reasonable enquiries in this regard) why any such Consent will not

be granted on reasonable terms by the time it is required to obtain such Consent;

- 5.1.7 no claim against the Contractor, or its assets is presently being assessed and no litigation, arbitration, investigation or administrative proceeding is in progress as at the Effective Date or, to the best of the knowledge of the Contractor as at the Effective Date having made all reasonable enquiries, pending or threatened against the Contractor, or any of its respective assets which will, or is likely to have, a material adverse effect on the ability of the Contractor to perform its obligations under any Project Documents to which it is a party. Neither is the Contractor nor any of its shareholders pursuing, or threatening to pursue, any claim against a third party which could have similar effects;
- 5.1.8 the Contractor is not subject to and will not subject itself to any obligation, compliance with which will, or is likely to have, a material adverse effect on the ability of the Contractor to perform its obligations under any Project Documents;
- 5.1.9 no proceedings or any other steps have been taken and not discharged (nor, to the best of the knowledge of the Contractor having made all reasonable enquiries) threatened for its winding-up or liquidation (whether voluntary or involuntary, provisional or final), judicial management (whether provisional or final) or deregistration of the Contractor or for the appointment of a liquidator, judicial manager or similar officer in relation to any of its assets or revenues;
- 5.1.10 the items referred to in Clause 31 (*Intellectual Property*) brought into existence by or on behalf of the Contractor will be original or authorised for use by the Contractor and/or in connection with the Project Deliverables (save to the extent that instructions and specifications for the design data or the Works may have been supplied by or on behalf of the Employer) and to the best of the knowledge, information and belief of the Contractor will not infringe any third party's copyright, design rights, trademark or any other Intellectual Property Rights;
- 5.1.11 all information disclosed supplied by or on behalf of the Contractor to the Employer at any time up to the Effective Date and, in particular during the bid process preceding the award of this Agreement to the Contractor is true, complete and accurate in all material aspects and the Contractor is not aware of any material facts or circumstances which have not been disclosed to the Employer and which would, if disclosed, be likely to have an adverse effect on the Employer's decision (acting reasonably) whether or not to contract with the Contractor;
- 5.1.12 the copies of the executed Project Documents, which the Contractor has delivered or, when executed, will deliver to the Employer are or, as the case may be, will be true and complete copies of such documents and there are not in existence any other agreements or documents replacing or relating to any of the Project Documents which would materially affect the interpretation or application of any of the Project Documents;

5.2 Employer Warranties

The Employer warrants and undertakes as at the Effective Date that:

- 5.2.1 all necessary actions to authorise the execution by the Employer of, and performance of its obligations under this Agreement have been taken; and
- 5.2.2 it has not knowingly omitted to disclose any material information in its possession or under its control relating to the Project for purposes of its use by the Contractor in terms of this Agreement.

6 RISK AND RESPONSIBILITY

6.1 The Contractor's indemnities

- 6.1.1 The Contractor shall indemnify and hold the Employer, Employer's Personnel and their respective agents, harmless at all times from and against all claims, damages, losses and expenses sustained by the Employer in respect of:

- (a) bodily injury to, sickness, disease or death of any person whatsoever;
- (b) breach of a statutory duty arising under applicable Law (including without limitation and/or, any penalty imposed on the Employer in terms of applicable Law);
- (c) loss of or damage to any property, real or personal; or
- (d) other claim, action, charge, Cost, demand or expense,

(including without limitation, any legal fees or Costs) insofar as such personal injury, or breach of a statutory duty or penalty or claim, action, charge, Cost, demand or expense loss or damage arises out of or is caused by the Contractor's performance or non-performance of this Agreement (including acts or omissions of the Contractor's Employees, in their capacity as such).

- 6.1.2 The Contractor's liability to indemnify the Employer shall not extend to any claims, damages, losses and expenses to the extent that they:

- (a) arise from or are caused or contributed to by any negligence or misconduct of the Employer, Employer's Personnel, its agents or subcontractors (of any tier) or the performance or non-performance by the Employer of its obligations under this Agreement provided that such loss could not have been prevented by the Contractor in complying with its obligations in terms with this Agreement including obligations arising from the occurrence of such negligence or misconduct of the Employer or the performance or non-performance by the Employer of its obligations under this Agreement; or
- (b) are claims, damages, losses and expenses suffered by the Employer which have occurred as a result of a Force Majeure in terms of Clause 27 (*Force Majeure*), a Relief Event in terms of Clause 26 (*Relief Event*), a Compensation Event in terms of Clause 25 (*Compensation Event*) and Unforeseeable Conduct in terms of Clause 23 (*Unforeseeable Conduct*) (save where they are suffered as a result of a failure by the Contractor to comply

with all of its obligations in terms of this Agreement, including obligations arising from the occurrence of such events).

6.1.3 The Employer shall not be entitled to take the benefit of the indemnity pursuant to Clauses 6.1.1 to 6.1.2 above to the extent that:

- (a) claims, damages, losses and expenses are not recoverable by the Contractor under the Insurance Policies because the Insurance Policies have been vitiated, invalidated or any payment under the same is reduced or withheld, in any such case, by reason of any act, omission or default on the part of the Employer;
- (b) it has received or will receive payment from the Project Insurance in terms of Clause 21 and Schedule 6 (*Project Insurance*).

6.2 Conduct of claims

6.2.1 This Clause shall apply to the conduct of claims by the Contractor in respect of claims made by a third person against the Employer in respect of which the Employer has (or claims to have) the benefit of the indemnity granted by the Contractor under this Agreement. Accordingly:

- (a) if the Employer receives any notice, demand, letter or other document concerning any claim for which it appears that the Employer is, or may become entitled to, indemnification under this Agreement, the Employer shall give notice in writing to the Contractor as soon as reasonably practicable and in any event within 10 (ten) Business Days of receipt of the same;
- (b) subject to Clauses 6.2.1, 6.2.2(a) and 6.2.2(b) below, on the giving of a notice by the Employer pursuant to Clause 6.2.1(a) above, the Contractor shall subject to the rights of the insurers under the Project Insurances be entitled, by giving notice to the Employer of its intention to do so, to:
 - (i) dispute, the claim or to conduct all negotiations and court, tribunal or other proceedings in respect thereof, in the name of the Employer at the Contractor's own expense; and
 - (ii) take conduct of any defence, dispute, compromise, or appeal of the claim and of any incidental negotiations.

The Employer shall give the Contractor all reasonable co-operation, access and assistance for the purposes of considering and resisting such claim all of which shall be provided by the Employer at the Cost of the Contractor (such Costs being reasonable and fair).

6.2.2 With respect to any claim conducted by the Contractor pursuant to Clause 6.2.1(b) above:

- (a) the Contractor shall keep the Employer fully informed and consult with it about material elements of the conduct of the claim;

- (b) the Contractor shall not bring the name of the Employer into disrepute; and
 - (c) the Contractor shall not pay or settle such claims without the prior consent of the Employer, such consent not to be unreasonably withheld or delayed.
- 6.2.3 The Employer shall be free to pay or settle any claim on such terms as it thinks fit and without prejudice to its rights and remedies under this Agreement if:
 - (a) the Contractor is not entitled to take conduct of the claim in accordance with Clause 6.2.1(b) above; or
 - (b) the Contractor fails to notify the Employer of its intention to take conduct of the relevant claim within twenty (20) Business Days of the notice from the Employer under Clause 6.2.1 above or notifies the Employer that it does not intend to take conduct of the claim; or
 - (c) the Contractor fails to comply in any material respect with the provisions of Clause 6.2.1(b) above.
- 6.2.4 Should the Employer settle admit, or compromise any claim by a third party, other than under circumstances referred to in Clause 6.2.3 above, in respect of which it seeks to be indemnified under this Agreement without the prior consent of the Contractor, then the Contractor's obligation to indemnify the Employer shall be limited to the extent to which the third party claimant would have in law been able to recover such claim from the Employer but for the admission, settlement or compromise thereof. Should the Contractor receiving notice referred to in Clause 6.2.1(a) above not respond within ten (10) Business Days to the Employer regarding any proposed admission, settlement or compromise of any claim that has been notified to it in terms of Clause 6.2.1(a) above then the Contractor shall be deemed to have given its consent to the proposed terms of admission, settlement or compromise of a claim, which were communicated to it.
- 6.2.5 If the Contractor pays to the Employer an amount in respect of an indemnity and the Employer subsequently recovers (whether by payment, discount, credit, saving, relief or other benefit or otherwise) a sum which is directly referable to the fact, matter, event or circumstances giving rise to the claim under the indemnity, the Employer shall forthwith repay to the Contractor whichever is the lesser of:
 - (a) an amount equal to the sum recovered less any out-of-pocket Costs and expenses properly incurred by the Employer in recovering the same; and
 - (b) the amount paid to the Employer by the Contractor in respect of the claim under the relevant indemnity,

provided that there shall be no obligation on the Employer to pursue such recovery; and
- 6.2.6 Any person taking any of the steps contemplated by Clauses 6.2.1 to 6.2.5 shall comply with the requirements of any insurer who may have an

obligation to provide an indemnity in respect of any liability arising under this Agreement.

6.3 Limits on Liability

6.3.1 No Party entitled to any indemnification or other compensation under this Agreement for any losses incurred by it (other than in the case of indemnification or compensation in respect to indemnified claim brought by a third party), whether because of the conduct of the other Party or for any other cause, shall be entitled to:

- (a) any claim for damages based delict or on any other basis in respect of such conduct or cause; or
- (b) any claim for its own loss of profit, loss of use, loss of production, as a result of such conduct or cause other than where such loss is specifically provided for as part of a compensation in terms of this Agreement.

6.3.2 Nothing in Clause 6.3.1 shall prevent or restrict the right of the Employer to seek any interdict or similar relief, any decree of specific performance or any other discretionary remedies of a court or dispute resolution body or other tribunal.

6.3.3 Save as otherwise provided in Clause 6.1.3, the Employer shall not be liable whether in contract, in delict or as a result of an indemnification in terms of this Agreement, or otherwise, to the Contractor in respect of any negligent act or omission of the Employer, its employees, officials, representatives or guests, which is or ought to be insured against pursuant to the Project Insurances. The Contractor has agreed to this on the basis that it shall mitigate the risks of any such negligent acts or omissions on the part of the Employer by obtaining and maintaining the Project Insurances.

6.4 Prohibition on Double Recovery

No party shall be entitled to recover (whether pursuant to an indemnity or otherwise) any loss to the extent that it has already been compensated for that loss whether by way of insurance or otherwise.

6.5 General Design Obligation

6.5.1 The Contractor shall be deemed to have scrutinised the Employer's Requirements.

6.5.2 The Contractor shall carry out, and be responsible for, the design of the Works and for the accuracy of such Employer's Requirements.

6.5.3 The Contractor has satisfied itself with regard to the execution of the Works in terms of the designs and compliance with the Employer's Requirements.

6.6 Training

The Contractor shall carry out the training of Employer's Personnel in the operation and maintenance of the Works to the extent specified in the Employer's Requirements. If the Agreement specifies training which is to be carried out before

taking over, the Works shall not be considered to be completed for purposes of taking over under Clause 16 (*Taking Over*) until this training has been completed.

7 STAFF AND LABOUR

7.1 Engagement of Staff and Labour

The Contractor shall make arrangements for the engagement of all staff and labour, local or otherwise engaged in relation to the execution of the Works and for their payment, housing, feeding and transport.

7.2 Contractor's Personnel

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

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

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

8 COMMENCEMENT AND DURATION

8.1 Commencement and Duration

8.1.1 This Agreement shall commence on the Effective Date and shall terminate automatically on the Expiry Date unless in the event of:

- (a) an earlier Time for Completion in terms of Clause 13.5.1(a) below; or
- (b) early termination in accordance with the provisions of this Agreement.

8.1.2 With effect from the Effective Date, the Employer grants to the Contractor and the Contractor accepts the rights, benefits, powers and obligations as conferred upon it in terms of this Agreement. The Contractor shall have no other rights or benefits or powers:

- (a) in relation to the Site and/or Project other than those as shall be conferred to it in terms of this Agreement; and
- (b) in relation to the property of the Employer not being part of the Site.

- 8.1.3 The Contractor shall, with effect from the Effective Date, commence with the execution of the Works and shall then proceed with the Works with due expedition and without delay.

9 LAND AND NATURE OF LAND INTERESTS

9.1 Site

- 9.1.1 For the purposes of the Contractor carrying out the Works and otherwise complying with its obligations and exercising its rights pursuant to this Agreement, the Employer hereby makes available the Land and grants to the Contractor (with effect from the Effective Date until the Expiry Date) the rights to enter, occupy, use and possess the Land on the terms and conditions set out in this Clause 9 (*Land and Nature of Land Interests*), provided that, if the Expiry Date is extended, the Contractor's right to enter, occupy, use and possess a Site shall also be extended.
- 9.1.2 The Contractor shall throughout the progress of the Works and the conduct of the other Project Deliverables have regard for the safety of all persons at the Site (whether lawfully or not) to the extent required by law, and shall keep the Site and the Works in an orderly state as appropriate and in accordance with Good Industry Practice to avoid danger to such persons.
- 9.1.3 With effect from the Expiry Date, the Contractor's interest in the Site shall automatically be assigned to the Employer unencumbered, without the need for any further formality to give effect to such assignment. The Contractor shall not be entitled to any compensation in respect of such assignment. Notwithstanding the aforesaid, the Contractor shall, on demand of the Employer, duly execute all documents which may be required by the Employer in connection with such assignment.

9.2 Contractor's Operations on Site

- 9.2.1 The Contractor shall confine its operations to the Site and to any additional areas which may be obtained by the Contractor in terms of Clause 9.5 below.
- 9.2.2 The Contractor shall take all necessary precautions to keep the Contractor's Equipment and Contractor's Personnel within the Site and the additional areas referred to in Clause 9.2.1 above, and to keep them off adjacent land.
- 9.2.3 The Contractor shall:
- (a) during the conduct of the Project Deliverables,
 - (i) keep the Site free from all unnecessary obstruction;
 - (ii) store and dispose of any Contractor's Equipment or surplus materials as may be appropriate and subject to the other terms of this Agreement;
 - (iii) clear away and remove from the Site any wreckage, rubbish and Temporary Works which are no longer required;

- (b) upon the issue of a Taking-Over Certificate,
 - (i) clear away and remove, from that part of the Site and Works to which the Taking-Over Certificate refers, all Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works; and
 - (ii) leave that part of the Site and the Works in a clean and safe condition.

9.3 Compliance with Title Deeds and Land Use Rights

9.3.1 The Contractor has obtained and/or has satisfied and in any case, it shall be deemed as at the Effective Date to have obtained and satisfied itself with the conditions of the title deeds and land use rights applicable to the Site

9.3.2 The Contractor shall procure that:

- (a) all Project Deliverables carried out at the Site by or on behalf of the Contractor whether before, during or after the completion of the Works shall be carried out in a manner that does not breach any conditions of the title deeds and the land use rights applicable to the Site; and
- (b) there shall be no conduct by it or a Subcontractor, which gives rise to a right for any person to obtain title to the Site or any part of it save in accordance with the terms of this Agreement.

9.4 Spoil Sites and Borrow Pits

9.4.1 The Contractor shall be responsible for identifying and acquiring at its own Costs all land not forming part of the Site to be used for:

- (a) performance of this Agreement for purposes disposing of construction spoil ("**Spoil Sites**"), if any; and/or
 - (b) the purposes of extracting aggregates ("**Borrow Pit Land**"), if any
- that it considers to be necessary for the purposes of constructing the Schools.

9.4.2 For the avoidance of doubt, the Contractor shall be responsible for obtaining all Consents necessary to use such Spoil Sites or Borrow Pit Land.

9.5 Access and Temporary Sites

9.5.1 If at any time the Contractor requires:

- (a) access to or any interest in any land which does not form part of the Land; or
- (b) access to or any interest in any land or property which is required for temporary use by the Contractor during the delivery of the Project Deliverables and not forming part of the Land; or

- (c) any additional rights beyond those which the Contractor has in relation to any part of the Site,

the Contractor shall, save as otherwise specifically provided in this Agreement, be entirely responsible for the process and Cost of securing or acquiring such access or interest.

- 9.5.2 If the Contractor intends to acquire any such rights or interests then it shall provide the Employer with not less than twenty (20) Business Days' notice of the same and, if the Employer so notifies the Contractor within twenty (20) Business Days of the date of such notice, shall acquire such rights or interest in the name of the Employer and/or on such other reasonable terms as the Employer may direct with the intent that, if this Agreement is terminated, then such rights or interests will benefit the Employer and/or its nominee provided that the Employer shall bear the prescribed Costs incurred in accordance with the applicable prescribed tariff should the Employer elect to have such rights or interests registered in its name.

9.6 Land Use Terms

- 9.6.1 The Land is made available to the Contractor for the execution of the Works and delivery of the Project, which shall include:-

- (a) the construction and commissioning of the Works;
- (b) the demolition and/or construction of buildings on the Land for purposes of the Project, except to the extent that there may be restrictions imposed by applicable Laws;
- (c) such other use as envisaged and/or permitted in terms of this Agreement and/or the applicable Laws.

- 9.6.2 The Contractor shall not use any portions of the Land for any other purpose whatsoever without the prior written consent of the Employer. Where such consent is required by the Contractor, it shall provide the Employer with prior written request which shall provide full reasons, details, surveys, diagrams and the date when such use is intended to take effect.

9.7 Contractor's obligations and restrictions.

- 9.7.1 The Contractor shall:

- (a) not:
 - (i) cede or assign or mortgage or pledge any of its rights in respect of the Site; nor
 - (ii) lease the Site or any part thereof; nor
 - (iii) place anyone else in occupation of the Site or any part thereof, on any conditions whatsoever or for any reason whatsoever,

other than in terms of this Agreement.

- (b) will not contravene any law, by-law or statutory regulation or the conditions of any permit or consents relating to or affecting the Schools, occupation of, or the construction activities, on the Site or any property on the Site or which may expose the Employer to any claim, action or prosecution;
- (c) not contravene any of the conditions of title under which the Employer holds title to, nor any laws which the Employer is required to observe by reason of its title over the Site;
- (d) maintain the improvements over the Site, including storm water infrastructure and drains, in accordance with, and to the standard specified in this Agreement;
- (e) enter into such agreements as shall be reasonably required by the local municipal authority/ies and/or other Responsible Authority/ies for the delivery of services including water, electricity, refuse removal and taxes and/or utilisation of such services;
- (f) at all times inhabit the Site and all improvements thereon and keep it in a clean, tidy and sanitary condition;
- (g) be responsible for the removal of any blockage of any sewerage or water pipes or drains in or used in connection with the Site and improvements thereon to the extent caused by or relate to the execution of the Works;
- (h) have no claim of any nature whatsoever against the Employer (outside this Agreement) whether for damages or otherwise nor shall the Contractor be entitled to retain the possession of the Site or delay the restoration of the possession of the Site to the Employer, arising from the termination of this Agreement, due to expiry or early termination, which shall be subject to the continuing obligations of the Contractor in this Agreement;
- (i) have no claim of any nature whatsoever against the Employer, (whether for damages or otherwise) in respect of any damage caused to the Contractor's fixtures, fittings and furniture, books, papers or other articles kept in or on the Site or any other damage or loss caused to or sustained by the Contractor in the Site or loss of life and/or injury to person as a result of stormwater, water seepage or leakage wherever and howsoever occurring in the Site, or by rain, hail, lightning, fire, riot or civil commotion or as a result of any other *vis major* or *casus fortuitus* or (without limitation by reference to the preceding categories) for any other reason whatsoever whether due to the negligence of the Employer, agents or independent contractors (except to the extent that they be in breach of this Agreement) or otherwise except for and without prejudice to claims that the Contractor otherwise has in terms of this Agreement for, *inter alia*, Force Majeure, Compensation Events, Relief Events or Employer Events of Default;
- (j) procure that insurance taken out by the Contractor in terms of this Agreement is, subject to the provisions of the Agreement regulating insurance arrangements, adequate to cover the

damages claims referred to sub-Clause (i) above, and/or any other claims by any third party that may be instituted against the Employer, arising from the use of the Site by the Contractor;

- (k) procure that all improvements and/or activities on/or relating to the Site in the form of, *inter alia*, constructions or otherwise which are effected by the Contractor on/or relating to the Site, comply with the applicable Laws and are not in breach of any of the provisions of the title deed and this Agreement; and
- (l) shall take all steps as may be necessary to keep the Site from the date of taking possession thereof, secure from intruders or squatters including without limitations all forms of access control measures, such as security-manned access gates, fencing (electric and otherwise), floodlighting as deemed necessary by the Contractor and approved by Engineer.

9.8 Employer's Rights and Obligations

9.8.1 The Employer:

- (a) makes the Land available in terms of Clause 9.6.1 above;
- (b) shall procure that the Contractor continues to have the right to use and occupation of the Site for the duration of this Agreement; and
- (c) shall make the Land available vacant of occupation by any person, subject to and in accordance with the terms of this Agreement, subject further to,-
 - (i) any rights of public passage or access over the Land;
 - (ii) the right of access of any person arising under this Agreement or pursuant to any Laws; and
 - (iii) any rights of the relevant Responsible Authority in respect of the Land required for permanent deviation of roads that are directly affected by the route and construction of the Schools.

9.9 Early Termination and Expiry of the Agreement

9.9.1 If this Agreement is terminated for any reason prior to the Expiry Date, the Contractor's rights to use and/or possess the Land in this Clause 9 (*Land and Nature of Land Interests*) shall automatically cease and be terminated with effect from the date of termination of this Agreement and the Contractor shall forthwith:

- (a) deliver to the Employer all and any documentation, certificates and/or deeds which the Contractor has by virtue of its rights in terms of this Agreement registered against the title deed of the Site, if any, and any other documents, (including releases and/or directives and/or consents) duly completed by the Contractor, as shall be required by the Employer, the Registrar of Deeds, or any other relevant authority to re-instate the status quo ante position prior to the conclusion of this Agreement;

- (b) take all steps as may be proper and reasonable to cancel or assist in the cancellation of all entries endorsements and registrations against the title deed (if any) in relation to this Agreement; and
- (c) on demand from the Employer sign such documents as shall be necessary to cede, delegate, and assign its rights, duties and obligations in terms of this Agreement to a person designated by the Employer to assume the Contractor's rights , duties and obligation.

9.9.2 If on the Expiry Date there is no renewal and/or extension of the period of this Agreement, the Contractor's rights to use and/or possess the Land as contemplated in this Clause 9 (*Land and Nature of Land Interests*) shall automatically cease and be terminated with immediate effect from the Expiry Date unless where such date is extended as a consequence of the extension of Time for Completion under Clauses 10.4.5 (*Condition of the Site*); 25 (*Compensation Events*); 26 (*Relief Events*); and 27 (*Force Majeure*).

9.9.3 It is recorded that nothing contained in this Clause 9 (*Land and Nature of Land Interests*) shall be deemed, construed, or interpreted to alter or affect the provisions of this Agreement with regard to the handback of the Land to the Employer.

10 CONDITIONS OF THE SITE

10.1 Subject to Clause 10.3 and Clause 10.4 below, the condition of the Site, including without limitation, Known Pre-Existing Contamination, the climatic, hydrological, hydrogeological, ecological, geotechnical, geological, palaeontological and archaeological conditions of the Site (the "Site Conditions") shall be the sole responsibility of the Contractor. Accordingly, without limiting any other obligations of the Contractor that are included in the Project Deliverables, the Contractor shall be deemed as at the Effective Date to have:

10.1.1 carried out an investigation of, inspected and examined all Site Conditions and the surroundings of the Site and of any extraneous materials, existing structures or works, in, on or under the Site (including its surface, sub-soil and ground water) to enable the Works to be designed and constructed and the Works to be carried out with due regard for the Site Conditions and the seismic activity (if any) in the region of the Site;

10.1.2 satisfied itself as to:

- (a) the nature of the Site Conditions, the surface, sub-soil and ground water conditions of the Site;
- (b) the form and nature of the Site, the load-bearing and other relevant properties of the Site;
- (c) the risk of injury or damage to property affecting the Site;
- (d) the nature of the materials (whether natural or otherwise) to be excavated;
- (e) the nature of the design, work and materials necessary for the execution of the Works;

- (f) the adequacy of the rights of passage over, access to and through the Site;
 - (g) any accommodation it may require for the purposes of fulfilling its obligations under this Agreement (such as additional land or buildings outside the Site);
 - (h) the possibility of interference by persons of any description whatsoever (other than the Employer), with rights-of-way across, access to or use of, or rights in respect of, the Site, with particular regard to the owners and users of any land adjacent to the Site;
 - (i) the possibility of, and necessary precautions and method of construction to prevent, minimise or mitigate Contamination either to the Site or adjacent Properties, arising from the Contractor's activities on the Site and/or from Known Pre-Existing Contamination; and
 - (j) the precautions, times and methods of working necessary to prevent or minimise any nuisance or interference, whether public or private, being caused to any third parties.
- 10.2 The Contractor shall attend to demolition of any structures, buildings on the Site, which are required to be demolished or removed for purposes of performing the Project Deliverables.
- 10.3 To avoid doubt the Contractor accepts full responsibility for all matters referred to in Clause 10.1 and 10.2 and the Contractor shall not be entitled to make any claim against the Employer whether in contract, delict or otherwise on any grounds relating to matters in Clause 10.1, including (without limitation) the fact that incorrect or insufficient information on any matter relating to the Site or the Site Conditions was given to it by any person, whether or not an Employer's Personnel (save for any material information which was knowingly withheld by the Employer prior to the Effective Date and of which the Contractor or its representatives (including the Lenders) could not reasonably have been aware).
- 10.4 In the case of Unknown Pre-Existing Contamination on the Site, the Contractor shall:
- 10.4.1 in the course of carrying out the Works conduct such tests as are reasonably necessary to assess the presence of any Unknown Pre-Existing Contamination that may have an impact on the Contractor's obligations with regard to delivery of the Works;
 - 10.4.2 upon the discovery of Unknown Pre-Existing Contamination, the Contractor shall deal with the Unknown Pre-Existing Contamination in accordance with its obligations under this Agreement.
 - 10.4.3 The Contractor shall, to the extent necessary:
 - (a) amend its methods of construction of the Works to manage and mitigate the impact Unknown Pre-Existing Contamination (upon its discovery) may have on the construction of the Works or to other persons or properties which may be affected by such contaminated material;

- (b) take measures to prevent the cause of any further Contamination to the Site (to the extent that it was not contaminated) or other persons or properties which may be affected by such contaminated material;
 - (c) comply with the legal obligations of the Contractor in relation to its activities on the Site, as a result of the existence of Unknown Pre-Existing Contamination (upon its discovery), which shall include without limitation the treatment, and/or removal and/or disposal, of such contaminated material.
- 10.4.4 The Contractor shall identify and obtain such Consents as shall be required for dealing with Known Pre-Existing Contamination and Unknown Pre-Existing Contamination, for the purposes of carrying out its obligations in terms of this Agreement.
- 10.4.5 If the Contractor encounters adverse Unknown Pre-Existing Contamination:
- (a) the Contractor shall give notice to the Engineer and the Employer. This notice shall:
 - (i) describe the condition of the Site so that it can be inspected by the Engineer and the Employer;
 - (ii) set out the reasons why the Contractor considers them to be Unknown Pre-Existing Contamination; and
 - (iii) state what emergency, immediate and subsequent mitigating measures, if any, the Contractor will or must implement to comply with Laws and its obligations under this Agreement;
 - (b) subject to the Contractor's immediate implementation of emergency measures where the nature of Contamination necessitates immediate implementation of such emergency measures, the Parties shall confer as to the action proposed to be taken by the Contractor in order to comply with its obligations in terms of this Clause 10.4;
 - (c) the Contractor shall prepare and present a report to the Engineer on the emergency measures it has taken and the measures it considers appropriate for it to take in order to comply with its obligations in terms of this Clause 10.4. The Contractor shall prepare a detailed Cost analysis of the impact its compliance with Clause 10.4 will have on the Cost of the Works, which Cost analysis shall constitute the Contractor's proposed fixed Cost for dealing with the discovered Unknown Pre-Existing Contamination;
 - (d) the Employer and the Contractor shall, in the case where Unknown Pre-Existing Contamination is discovered on the Site, negotiate and agree the proposed Costs for dealing with Unknown Pre-Existing Contamination and, failing such agreement, the determination of the Costs shall be referred to the Engineer in accordance with Clause 3.5 (*Determinations*);

- (e) upon agreement or determination by the Engineer, in accordance with Clause 3.5 (*Determinations*), of the Costs referred to in Clause 10.4.5(d) above and time of dealing with Unknown Pre-Existing Contamination, then:
 - (i) the Contractor shall be entitled to such Costs as the total Costs of dealing with the Unknown Pre-Existing Contamination discovered on the Land; and
 - (ii) the Time for Completion shall be extended by such additional time as is reasonably required to deal with the impact of the Unknown Pre-Existing Contamination on the implementation of the Programme, having regard to the actual progress of the Works so that the Contractor is placed in a position it would have been in but for the discovery of the Unknown Pre-Existing Contamination.

Provided that, should the Contractor and the Employer agree or it is determined by the Engineer that any Unknown Pre-Existing Contamination cannot be dealt with in the manner contemplated in this Clause 10.4.5 and that the existence of such Unknown Pre-Existing Contamination will render it impossible for the Contractor to materially carry out its obligations in terms of this Agreement for the construction and/or completion of the Works, then the Employer shall be deemed to have issued an Employer's Variation Notice in terms of the provisions of Clause 24.1.

- 10.5 The Contractor 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 or any interest in any land which does not form part of the Site, access to or any interest in any land or property which is required for temporary use by the Contractor during the conduct of the Project Deliverables and not forming part of the Site or any additional rights beyond those which the Contractor has in relation to any part of the Site.

11 CONSENTS AND PLANNING

- 11.1 The Contractor shall be responsible for:
 - 11.1.1 obtaining all Consents which may be required in connection with the performance of the Project Deliverables;
 - 11.1.2 maintaining in full force and effect all Consents; and
 - 11.1.3 implementing each Consent in accordance with their respective terms within the period of its validity in accordance with its terms.
- 11.2 The Employer shall provide such assistance, in accordance with Clause 1.9 (*Assistance and Co-operation*), to the Contractor as may be reasonably necessary for the Contractor to obtain all the Consents referred to in Clause 11.1.
- 11.3 The obligation of the Contractor under Clause 11.1.1 above shall not include Consents and/or approvals relating to the zoning and land use rights required for the purposes of the Project in respect of the Site, which the Employer shall be obliged to obtain.

12 RIGHT OF MONITORING AND INSPECTION, AND ACCESS OF THE ENGINEER

12.1 Monitoring and Inspections

12.1.1 The Employer shall at all reasonable times:

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

12.1.2 The Contractor shall give the Engineer full opportunity to carry out these activities, including providing Contractor's personnel as shall be required to inform or assist the Employer's monitoring and inspection, access, facilities, permissions, safety equipment. No such activity shall relieve the Contractor from any obligation or responsibility.

12.2 Access to Site

12.2.1 The Contractor shall procure that:

- (a) subject to complying with all relevant safety procedures, which shall include any relevant health and safety plans for the construction of the School, the Contractor's site rules from time to time and any reasonable directions with regard to site safety that may be issued by or on behalf of the Contractor's Site Manager from time to time, the Engineer or a person nominated by the Employer from time to time shall have unrestricted access at all reasonable times to:
 - (i) view the carrying out of the Works at the Site; and
 - (ii) subject to obtaining the consent of the relevant manufacturer or supplier (which the Contractor agrees to use all reasonable endeavours to obtain), visit any site or workshop where materials, Plant or equipment are being manufactured, prepared or stored for use in the Works for the purposes of general inspection and of attending any test or investigation being carried out in respect of the Works;
- (b) the Engineer and such other persons nominated by the Employer shall have such access to the Site in cases of emergency as the Engineer and/or the Employer (acting reasonably) considers suitable in the circumstances; and
- (c) periodic progress meetings and site meetings of a frequency to be agreed between the Employer and the Contractor are held and that the Engineer or a person nominated by the Engineer from time to time shall have the right to attend such periodic progress meetings and site meetings and to attend such other meetings as the Engineer may reasonably request.

12.3 Increased Monitoring

If, following any viewing, visit or inspection made pursuant to Clauses 12.1 (*Monitoring and Inspection*) and 12.2.1(a) (*Access to Site*) the Engineer believes, or if following the exercise by the Employer's Representative of his rights pursuant to Clause 12.4 (*Right to Open Up*), it is discovered that there are defects in the Works or any part of them or that the Contractor has failed to comply with the Employer's Requirements, or any of the obligations of the Contractor in terms of this Agreement (excluding the Contractor itself) or the Contractor's Proposals, the Employer may (without prejudice to any other right or remedy available to the Employer) by notice to the Contractor increase the level of its monitoring of the Contractor until such time as the Contractor shall have demonstrated to the satisfaction of the Engineer that it is capable of performing and will perform all its obligations under this Agreement. The Contractor shall compensate the Employer for any reasonable additional Costs incurred by the Employer as a result of such increased monitoring.

12.4 Right to Open Up

In respect of the work which the Employer and/or Engineer is entitled to examine, inspect measure and/or test, the Contractor shall give notice to the Engineer whenever any such work is ready and before it is covered up, put out of sight, or packaged for storage or transport. The Engineer shall then either carry out the examination, measurement or testing without unreasonable delay or promptly give notice to the Contractor that the Engineer does not require to do so. Provided that:

12.4.1 if the Contractor fails to give the notice, it shall, if and when required by the Engineer, uncover the work and thereafter reinstate and make good, all at the Contractor's Cost;

12.4.2 if the Contractor does give notice to the Employer in terms of this Clause 12.4 and the Employer does not inspect, examine measure or test any such work within 7 days of the notice given by the Contractor, the Contractor shall be entitled to cover up such work. If subsequently, the Engineer requires the Contractor to uncover the work, the Contractor shall uncover the work and thereafter the Contractor shall reinstate and make good, such subsequent work all at the Employer's Cost.

12.5 Limited Effect of Employer's Monitoring and Inspection

Notwithstanding any other provision of this Agreement, the Employer and the Engineer shall not, and shall not be deemed by their actions, inactions or otherwise at any time to confirm or agree that the construction of the Works or any part thereof complies with the Employer's Requirements, the Contractor's Proposal and/or this Agreement and such compliance shall at all times be the sole responsibility and risk of the Contractor.

12.6 Safety during Construction

In addition to the other provisions of this Agreement in relation to safety, the provisions of Part 1 of Schedule 1 (*Specifications: Employer's Requirements*) shall apply to matters of safety.

13 PROGRAMME AND DATES FOR COMPLETION

13.1 Time for Completion

- 13.1.1 The Contractor shall complete the whole of the Works in respect of the Schools within Scheduled Completion Date.
- 13.1.2 The Contractor shall not abandon the Works other than as a consequence of a breach by the Employer under this Agreement which renders it substantially impractical to continue with the sections of the Works abandoned.

13.2 The Programme

- 13.2.1 Any programme submitted in accordance with the provisions set out below shall be prepared in accordance with Good Industry Practice and shall be in sufficient detail so as to enable the Engineer to monitor the progress of the Works including all Completion activities and likely future progress of the Works.
- 13.2.2 The Contractor shall submit a detailed programme to the Engineer and the Employer for the Employer's prior written approval, within twenty eight (28) days of the Effective Date, which shall be prepared in the similar format as, and level of detail not less than the one in the Baseline Programme ("**Programme**"):
 - (a) the then intended completion of the Works, which shall occur after exactly the same period from the Effective Date as was provided for in the Baseline Programme, without prejudice to the provisions of Clause 13.1 (*Time for Completion*);
 - (b) the order in which the Contractor proposes to carry out the Works consistent with the Contractor's Proposal and obligations under this Agreement, all applicable Laws and Schedule 9 Part 1 (Schedule of General Milestones and Key Milestones) and Part 2 (Schedule of General Milestones Payments and Key Milestone);
 - (c) the timing of the implementation and progress of all significant requirements set out in this Agreement for implementation during the carrying out of the Works including, without limitation, the:
 - (i) logical linkages in respect of activities to be carried out in undertaking the Works,
 to take into account the date on which the Effective Date occurred; and
- 13.2.3 The Programme submitted in accordance with Clause 13.2.2 shall be subject to the review by Employer
- 13.2.4 Once the Programme has been reviewed by the Employer it shall not be amended without the prior written consent of the Employer.
- 13.2.5 Each Programme shall include
 - (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of procurement, manufacture, inspection, delivery to Site, construction, erection, testing, commissioning and trial operation as applicable,

- (b) the sequence and timing of inspections and tests specified in the Agreement, and
- (c) a supporting report which includes:
 - (i) a general description of the methods which the Contractor intends to adopt, and of the major stages, in the execution of the Works, and
 - (ii) details showing the Contractor's reasonable estimate of the number of each class of Contractor's Personnel and of each type of Contractor's Equipment, required on the Site for each major stage.

13.2.6 If any dispute concerning the preparation or approval of the Programme shall arise, such dispute shall be referred for resolution to the Dispute Resolution Procedure.

13.2.7 When the Programme has been agreed or finalised by a determination made pursuant to the Dispute Resolution Procedure, it shall become the current Programme to which the Parties are to adhere, subject to any amendments made pursuant to this clause. Nothing in such agreed or determined Programme shall change the Time for Completion which shall only be extended in terms of this Agreement where it specifically provides for an extension of the Time for Completion.

13.2.8 If at any time the actual progress of carrying out the Works does not or will not conform with the Programme in a material respect (including as a result of a Compensation Event, Relief Event, Force Majeure and Unforeseeable Conduct) the Contractor shall produce and submit to the Engineer as soon as practicable (and in any event no later than ten (10) Business Days after being requested in writing to do so by the Engineer) an updated Programme and supporting report describing the revised methods which the Contractor proposes to adopt in order to expedite progress and complete the Works by the Time for Completion. The updated Programme shall not replace the current Programme unless agreed to in terms of Clause 13.2.4 above.

13.3 Report on Delay

13.3.1 The Contractor shall closely monitor the progress of the Works and shall promptly give notice to the Engineer regarding any specific prevailing or probable future events or circumstances which may adversely affect the Works or otherwise delay the execution and/or completion of the Works:

- (a) the impact thereof on the Time for Completion; and/or
- (b) as a whole and the impact thereof on the Scheduled Completion Date.

13.3.2 In the circumstances outlined in Clause 13.3.1 above, or, if it appears to the Employer or the Engineer at any time that the actual progress of the Works as a whole or a significant portion thereof have significantly fallen behind the Programme, then the Engineer may require the Contractor to submit to the Engineer a report identifying the reasons for the delay and, unless the event causing the delay is still subsisting and it is not possible to predict

with any certainty when the delay might come to an end, require the Contractor (at the Engineer's option):

- (a) to produce and submit to the Engineer a revised Programme for each affected school and the cluster showing the manner and the periods in which the Works will be carried out to ensure completion of the whole of the Works by Scheduled Completion Date; and/or
- (b) to produce and submit to the Engineer a revised Programme for each affected school and the cluster showing the steps which are to be taken to eliminate or reduce the delay including identifying any possible mitigating measures, and the effect of any such delay on the completion of the Works by Time for Completion and/or completion of the whole of the Works by the Scheduled Completion Date.

13.4 Extension of Time for Completion and Scheduled Completion Date at a school and for the cluster

- 13.4.1 The Contractor shall be entitled subject to Clauses 10.4.5 (*Condition of the Site*), 25 (*Compensation Event*), 26 (*Relief Events*), 27 (*Force Majeure*) and 35.1 (*Contractor's Claims*) to an extension of the Time for Completion or Scheduled Completion Date in all instances where the Time for Completion or Scheduled Completion Date is delayed and the terms of this Agreement expressly provides for such an extension.
- 13.4.2 If the Contractor considers himself to be entitled to an extension of the Time for Completion or Scheduled Completion Date, the Contractor shall give notice to the Engineer in accordance with Clause 26 (*Relief Events*) and subject to Clause 35.1 (*Contractor's Claims*). When determining each extension of time under Clause 35.1 (*Contractor's Claims*), the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time previously allowed.
- 13.4.3 Whenever the Employer allows an extension of the Time for Completion or Scheduled Completion Date, the Employer shall simultaneously consider the effect of such extension on the Expiry Date and the Project Term and shall notify the Contractor accordingly.

13.5 Notification of early completion

- 13.5.1 The Contractor shall notify the Engineer if at any time the actual progress of the Works is significantly ahead of the Programme or if progress of the Works is significantly ahead of the relevant part of the Programme so that the Contractor anticipates that completion of the Works will be earlier than the Time for Completion or Scheduled Completion Date respectively. The Engineer shall be entitled to require the Contractor to produce and submit to the Engineer, a revised Programme showing the manner and the periods in which the Works will be carried out and what the revised date for completion would be to enable the parties to consider (at their absolute discretion):
 - (a) whether to agree an earlier Time for Completion or Scheduled Completion; and

- (b) what modifications (if any) will be required to the Agreement, including the effect on the Expiry Date and the Project Term (if any), in order to accommodate such earlier date for completion.

13.6 Delay Damages

- 13.6.1 If the Contractor fails to comply with Clause 13.1 (*Time for Completion*), the Contractor shall subject to Clause 2.2 above (*Employer's Claims*) pay delay damages to the Employer for this default. These delay damages shall be the sum in the amount of R(•)¹³, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Clause 13.6.1 shall not exceed the maximum amount equivalent to 5% of the Contract Price of delay damages in the amount of R(•)).
- 13.6.2 These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Clause 28.2 (*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 Agreement.

14 PLANT, MATERIALS AND WORKMANSHIP

14.1 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:

- 14.1.1 in the manner specified in this Agreement,
- 14.1.2 in a proper workmanlike and careful manner, in accordance with recognised good practice, and
- 14.1.3 with properly equipped facilities and non-hazardous Materials, except as otherwise specified in the Agreement.

14.2 Standards

- 14.2.1 The Contractor shall ensure that the Plant, Materials, Goods, equipment, consumables and materials used by it or any Subcontractor in connection with the provision of any of the Project Deliverables (each as a distinct and separate obligation) are:
 - (a) maintained in a safe, serviceable and clean condition in accordance with Good Industry Practice;
 - (b) of the type specified in the Agreement (where appropriate); and
 - (c) in compliance with any relevant rules, regulations, codes of practice and/or South African standards, including without limitation the appropriate SANS or equivalent specification and/or codes of practice,

¹³ Drafting Note: the amount to be fixed with the Preferred Bidder

and shall maintain comprehensive records of tests, certificates and other documentary verifications and evidence of standards achieved in relation to the Works and compliance with the Quality Plans, and shall after receiving a request from the Employer's Representative, shall supply to the Employer's Representative within 3 days, such records and documentary evidence to demonstrate its compliance with this Clause 14.2.1.

- 14.2.2 The Contractor shall procure that sufficient Plant, Materials, stocks of Goods, consumables, equipment and materials are held in order to comply with its obligations under this Agreement.

14.3 Samples

- 14.3.1 The Contractor shall submit the following samples of Materials, and relevant information, to the Engineer for review:

- (a) manufacturer's standard samples of Materials and samples as required and specified by the Engineer, all at the Contractor's Cost; and

any required and/or available test certificates relevant to such samples of or related to the actual Materials to be incorporated in the Works.

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

14.4 Ownership of Works, Plant and Material

- 14.4.1 The Employer shall have the ownership of and/or title to the Works, Plant and/or Materials procured by the Contractor for the purposes of executing the Works.

- 14.4.2 For purposes of this Clause 14.4, ownership of the Works, Plants, Materials or assets forming part of or any other components of the Schools shall pass to the Employer on the earlier of the date:-

- (a) on which such Works, Plants, Materials or assets forming part of or any other components of the Schools which form a completed part of the Works are delivered to the Contractor, excluding such Works, Plants, Materials which have been paid for by the Contractor, out of its own resources and for which the Contractor has not received payment in respect of the Milestone Payments, which relates to such Works, Plant, Materials; or
- (b) on which payment of the full purchase price for such Works, Plant, Materials or assets forming part of or any other components of the Schools which form a completed part of the Works is made by the Contractor, excluding such Works, Plant, Materials which have been paid for by the Contractor out of its own resources and for which the Contractor has not received payment in respect of the Milestone Payments, which relates to Works, Plant, Materials; or
- (c) on which delivery of such Works, Plant, Materials or assets forming part of or any other components of the Works is made to the Site.

14.4.3 To the extent that Schedule 9 (*Schedule of Milestones*) of the Agreement provides that an Interim Payment shall be in respect of Works or Materials referred to in this Clause 14.4 (*Ownership of Works, Plant and Material*) which are not yet on the Site, the Contractor shall nevertheless not be entitled to such payment unless:

- (a) the relevant Works or Materials are in the Republic of South Africa and have been marked as the Employer's property in accordance with the Employer's instructions; or
- (b) the Contractor has delivered to the Employer and the Engineer, evidence of insurance being taken out in relation to and arrangements in place with regard to the proper storage, transportation to Site and protection against loss, damage or deterioration of the relevant Works and Material, provided that the Contractor shall not be required to deliver such evidence in relation to a request for payment for Milestones relating to Works or Materials that are subject to such arrangements, if the Contractor has already provided such evidence to the Engineer. For the avoidance of doubt payment shall not be withheld for reasons relating to the evidence that has already been provided to the extent that the Contractor is not required to provide any further evidence in terms of this Clause 14.4.3(b); and
- (c) the Contractor has, in the case where the Interim Payment is in respect of the placing of orders or otherwise procuring the Plant, Works and Materials, delivered to the Employer and the Engineer evidence of arrangements in place for the Employer to take cession and delegation of the Contractor's obligations under contracts relating to the procurement of the Plant, Works and Materials.

14.4.4 Nothing contained in this Clause 14.4 shall prevent the Contractor or the Relevant Entities or any of their members from:

- (a) using the Works, Plant and Materials for purposes of carrying out the Works; or
- (b) disposing of the Works, Plant and Materials not required for the operation nor forming part of the Schools after the Time for Completion whether by sale or lease or otherwise and the Employer hereby consents to such disposal.

14.5 **Testing**

14.5.1 This Clause 14.5 (*Testing*) shall apply to all tests specified in this Agreement, other than the Tests after Completion (if any).

14.5.2 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 Contractor shall agree, with Engineer, the time and place for the specified testing of any Plant, Materials and other parts of the Works.

14.5.3 The Engineer may by notice to the Contractor vary the location or details of specified tests, or instruct the Contractor to carry out additional tests. If

these varied or additional tests show that the tested Plant, Materials or workmanship is not in accordance with the Agreement, the Cost of carrying out such varied or additional tests shall be borne by the Contractor, notwithstanding other provisions of the Agreement.

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

14.5.5 The Contractor shall bear the sole responsibility at its own Cost and risk to make arrangements for such tests which shall include arrangements for personnel and/or facilities required for the Test. The Employer shall not bear any responsibility whatsoever relating to such tests notwithstanding any assistance that the Employer may provide or offer to provide in respect of such tests.

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

14.6 **Rejection**

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

14.6.2 If the Engineer requires this Plant, Materials, or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If the rejection and retesting causes the Employer to incur additional Costs, the Contractor shall subject to Clause 2.2 (*Employer's Claims*) pay these Costs to the Employer.

14.7 **Remedial Work**

14.7.1 Notwithstanding any previous test or certification and consistent with the Contractor's obligations to, at its own Cost and risk, carry out the Works, including without limitation the obligations in Clause 4.1 (*Contractor's General Obligations*), the Engineer may instruct the Contractor to:

- (a) remove from a Site and replace any Plant or Materials which is not in accordance with the Agreement;
- (b) remove and re-execute any other Works which are not in accordance with the Agreement, and
- (c) execute any work which is urgently required as a result of an emergency or for the safety of the Works, whether because of an accident, unforeseeable event or otherwise.

- 14.7.2 The Contractor shall at its own Cost and risk comply with the instruction within a reasonable time, which shall be the time (if any) specified in the instruction, or immediately if urgency is specified under Clause 14.7.1(c) above.
- 14.7.3 If the Contractor fails to comply with the instruction, the Employer shall be entitled to employ and pay other persons to carry out the work. Except to the extent that the Contractor would have been entitled to payment for the Work, the Contractor shall subject to Clause 2.2 (*Employer's Claims*) pay to the Employer all Costs arising from this failure.

14.8 **Royalties**

The Contractor shall at its own Cost and risk be responsible in respect of all royalties, rents and other payments for:

- 14.8.1 natural Materials obtained from outside the Site, and
- 14.8.2 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 Agreement.

14.9 **Hazardous substances and materials**

- 14.9.1 The Contractor shall not, without the consent of the Employer and that of any Responsible Authority (where applicable) install, keep or use in or on the Site any materials, equipment or apparatus, the installation, keeping or use of which is likely to cause (or in fact causes):

- (a) material damage to the Works; or
- (b) dust, noise or vibration constituting a nuisance to the users of the Schools and/or occupiers of any property adjoining or near to the Schools;

and shall use all reasonable endeavours to ensure (by directions to staff and otherwise) that all materials, equipment or apparatus in or on the Site is operated so as to minimise noise and vibration likely to cause annoyance or disturbance and the unlawful generation or migration of any hazardous substance.

- 14.9.2 The Contractor shall not bring in or on to (or keep or maintain in or on) the Site any hazardous materials or equipment without the prior written consent of the Employer and unless the Contractor has complied with all relevant Law.

- 14.9.3 Without prejudice to the generality of its obligations, the Contractor shall:

- (a) procure that all hazardous materials and equipment necessary for the purpose of the Contractor's compliance with its obligations in terms of this Agreement and which are used or stored on the Site shall be kept in accordance with applicable laws, and Good Industry Practice, properly and securely labelled and stored, under appropriate supervision and used only by appropriately trained and competent staff; and

- (b) use all practicable and reasonable means to:
 - (i) prevent or counteract the unlawful emission of any hazardous substance;
 - (ii) avoid the unlawful discharge into any conducting media serving the Site of any hazardous substance;
 - (iii) prevent the unlawful generation, accumulation or migration of any hazardous substance at or from the Site; and
 - (iv) prevent any environmental claims arising or any circumstances arising that are likely to result in any environmental claims,

in so far as such hazardous substance is, or should be, under the control of the Contractor pursuant to this Agreement.

15 TESTS ON COMPLETION

15.1 Contractor's Obligations

- 15.1.1 The Contractor shall carry out the Tests on Completion in accordance with this Clause 15 and Clause 14.5 (*Testing*), after providing the documents in accordance with Clause **Error! Reference source not found.** (*Operation and Maintenance Manuals*).
- 15.1.2 The Contractor shall in respect of the Test on Completion described in Clauses 15.1.3(a), 15.1.3(b) and 15.1.3(c), give to the Employer and the Engineer not less than 21 days' prior notice of the date after which the Contractor will be ready to carry out each of the Tests on Completion ("Notified Date"). Unless otherwise agreed, Tests on Completion shall be carried out within 14 days after the Notified Date, on such day or days and times the Engineer shall instruct.
- 15.1.3 Unless otherwise stated in this Agreement, the Tests on Completion shall be carried out in the following sequence under the supervision of a suitably qualified and dedicated person who shall oversee all the requirements of this Clause 15:
 - (a) pre-commissioning tests, which shall include the appropriate inspections and ("dry" or "cold") functional tests to demonstrate that each item of Plant can safely undertake the next stage;
 - (b) commissioning tests, which shall include the specified operational tests to demonstrate that the Works have been built and can be used safely and as specified, under all available operating conditions; and
 - (c) trial operation, which shall demonstrate that the Works or section of Works perform reliably and in accordance with this Agreement;
- 15.1.4 During the period when the Works are operating under stable conditions prior to taking-over under Clause 16.1, ("Trial Operation"), the Contractor shall give notice to the Employer and the Engineer that the Works are ready

for any other tests that the Contractor wants to carry out, including performance tests to demonstrate whether the Works conform with the Agreement, criteria specified in Schedule 1 Part 1 (*Specifications: Employer's Requirements*) and with the Contractor's Proposal ("Trial Operation Tests"). The notice given by the Contractor under this Clause 15.1.4 shall be given not less than ten (10) days prior to the date on which such Trial Operation Tests are intended to be carried out by the Contractor and shall stipulate the date and time where such tests will be carried out, provided that they shall (unless otherwise agreed) be carried out on Site and during normal working hours.

15.1.5 Trial Operation shall not constitute a taking-over under Clause 16.1 (*Employer's Taking Over*). Unless otherwise stated in the Agreement, any product produced by the Works during trial operation shall be the property of the Employer.

15.1.6 In considering the results of the Tests on Completion, the Engineer shall make allowances for the effect of any use of the Works by the Employer on the performance or other characteristics of the Works. As soon as the Works have passed each of the Tests on Completion described in Clauses 15.1.3(a), 15.1.3(b) or 15.1.3(c), the Contractor shall submit a certified report of the results of these Tests to the Engineer and the Employer.

15.1.7 The Contractor shall bear the sole responsibility at its own Cost and risk to make arrangements for the Tests on Completion and the Trial Operations Tests which shall include arrangements for personnel and/or facilities required for the Test. The Employer shall not bear any responsibility whatsoever relating to such tests notwithstanding any assistance that the Employer may provide or offer to provide in respect of such tests.

15.2 **Delayed Tests**

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

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

15.3 **Retesting**

If the Works fail to pass the Tests on Completion, Clause 14.6 (*Rejection*) shall apply, and the failed Tests, and Tests on Completion on any related work, shall be repeated under the same terms and conditions.

15.4 **Failure to Pass Tests on Completion**

15.4.1 If the Works fail to pass the Tests on Completion repeated under Clause 15.3 (*Retesting*), the Engineer shall be entitled to:

- (a) order further repetition of Tests on Completion under Clause 15.3 (*Retesting*);
 - (b) if the failure deprives the Employer of substantially the whole benefit of the Works, reject the Works in which event the Employer shall have the same remedies as are provided in Clause 17.4.2(b) (*Failure to Remedy Defects*); or
 - (c) issue a Taking-Over Certificate, if the Employer so requests.
- 15.4.2 In the event of Clause 15.4.1(c), the Contractor shall then proceed in accordance with all other obligations under the Agreement, and the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Employer as a result of this failure. Unless the relevant reduction for this failure is stated (or its method of calculation is defined) in the Agreement, the Employer may require the reduction to be:
- (a) agreed by both Parties (in full satisfaction of this failure only) and paid before this Taking-Over Certificate is issued; or
 - (b) determined in accordance with Clause 3.5 (*Determinations*).

16 TAKING OVER

16.1 Employer's Taking Over

- 16.1.1 Except as stated in Clause 15.4 (*Failure to Pass Tests on Completion*), the Works shall be taken over by the Employer when:
- (a) the Works have been completed in accordance with the Agreement, including the matters described in Clause 13.1 (*Time for Completion*) and except as allowed in Clause 16.1.2(a) below; and
 - (b) a Taking-Over Certificate for the Works has been issued.
- 16.1.2 The Engineer shall within 15 days after receiving the Contractor's application:
- (a) if he/she is satisfied that the Works have been completed in accordance with the Agreement, except for any minor outstanding work and defects which 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), issue the Taking-Over Certificate to the Contractor, stating the date on which the Works were completed; or
 - (b) if he or she is not satisfied that the Works have been completed in accordance with the Agreement, reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work before issuing a further notice under this sub-Clause (b).

16.2 Taking Over of Parts of the Works

- 16.2.1 The Engineer may, at the Engineer's sole discretion, issue a Taking-Over Certificate for any part of the Works.
- 16.2.2 The Employer shall not use any part of the Works (other than as a temporary measure which is either specified in the Agreement or agreed by both Parties) unless and until the Engineer has issued a Taking-Over Certificate for this part.
- 16.2.3 After the Engineer has issued a Taking-Over Certificate for a part of the Works, the Contractor shall be given the earliest opportunity to take such steps as may be necessary to carry out any outstanding Tests on Completion. The Contractor shall carry out these Tests on Completion as soon as practicable before the expiry date of the relevant Defects Notification Period.
- 16.2.4 If a Taking-Over Certificate has been issued for a part of the Works, the delay damages in accordance with Clause 13.6 for completion of the remainder of the Works shall be reduced. For any period of delay after the date stated in this Taking-Over Certificate, the proportional reduction in these delay damages shall be calculated as the proportion which the value of the part so certified bears to the value of the Works as a whole. The Engineer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine these proportions. The provisions of this Clause 16.2.4 shall only apply to the daily rate of delay damages under Clause 13.6 (*Delay Damages*), and shall not affect the maximum amount of these damages.

16.3 Interference with Tests on Completion

- 16.3.1 If the Contractor is prevented, for more than 14 days, from carrying out the Tests on Completion by a cause for which the Employer is responsible and if the Contractor suffers a delay and/or incurs Cost as a result of this delay in carrying out the Tests on Completion, the Contractor shall give notice to the Employer and the Engineer, and shall be entitled subject to Clause 35.1 (*Contractor's Claims*) to:
- (a) an extension of time for any such delay, if completion is or will be delayed, under Clause 13.4 (*Extension of Time for Completion*), and
 - (b) payment of any such Cost, which shall be included in the Contract Price.

16.4 Surfaces Requiring Reinstatement

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

17 DEFECTS LIABILITY

17.1 Completion of Outstanding Work and Remedying Defects

- 17.1.1 Without any prejudice or change to the obligations of the Parties in terms of Clause 17.9 (*Unfulfilled Obligations*), the Contractor shall:

- (a) complete any work which is outstanding on the date stated in a Taking-Over Certificate, within such reasonable time as is instructed by the Engineer; and
 - (b) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period for the Works.
- 17.1.2 If a defect appears or damage occurs, the Contractor shall be notified accordingly, by (or on behalf of) the Employer.

17.2 Cost of Outstanding Work and Remedying Defects

- 17.2.1 All work referred to in Clause 17.1.1 above (*Completion of Outstanding Work and Remedying Defects*) shall be executed at the risk and Cost of the Contractor, if and to the extent that the work is attributable to:
- (a) Plant, Materials or workmanship not being in accordance with the Agreement;
 - (b) improper operation or maintenance which was attributable to matters for which the Contractor is responsible (under Sub-Clauses 6.6 to **Error! Reference source not found.** or otherwise), or
 - (c) failure by the Contractor to comply with Clause 4.1.2 above and any other obligation in terms of the Agreement.
- 17.2.2 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 24 (*Variation Procedure*) shall apply.

17.3 Extension of Defects Notification Period

The Employer shall be entitled to an extension of the Defects Notification Period for the Works or a section if and to the extent that the Works cannot be used for the purposes for which they are intended by reason of a defect or damage. However, a Defects Notification Period shall not be extended by more than two years.

17.4 Failure to Remedy Defects

- 17.4.1 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.
- 17.4.2 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 17.2 (*Cost of Remedying Defects*), the Employer may (at his option):
- (a) carry out the work itself or by others, in a reasonable manner and at the Contractor's Cost and risk and the Contractor shall pay to the Employer the Costs reasonably incurred by the Employer in remedying the defect or damage; or

- (b) if the defect or damage deprives the Employer of substantially the whole benefit of the Works or any major part of the Works, the Employer may at its sole discretion decide to terminate the Agreement as a whole, or in respect of such major part which cannot be put to the intended use. Without prejudice to any other rights, under the Agreement or otherwise, the Employer shall then be entitled to recover from the Contractor all damages suffered as a result of such defect or damage and sums paid for the Works or for such part (as the case may be), plus financing Costs and the Cost of dismantling the same, clearing the Site and returning Plant and Materials to the Contractor.

17.5 Removal of Defective Work

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

17.6 Further Tests

- 17.6.1 If the work of remedying of any defect or damage may affect the performance or functioning or integrity of the Works, the Engineer may require the repetition of any of the tests described in the Agreement, including Tests on Completion and/or Tests after Completion. The requirement shall be made by notice within 28 days after the defect or damage is remedied.
- 17.6.2 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 17.2 (*Cost of Remedying Defects*), for the Cost of the remedial work and the Defects Notification Period shall be extended in accordance with Clause 17.3 above.

17.7 Right of Access

Until the Performance Certificate has been issued, the Contractor shall have the right of access to all parts of the Works and to records of the operation and performance of the Works, except as may be inconsistent with the Employer's reasonable security restrictions or the Employer's Policies.

17.8 Performance Certificate

- 17.8.1 Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued a certificate ("Performance Certificate") to the Contractor, stating the date on which the Contractor completed his obligations under Clause 17.1.1 (*Completion of Outstanding Work and Remedying Defects*) of the Agreement.
- 17.8.2 The Engineer shall issue the Performance Certificate within 28 days after the latest of the expiry dates of the Defects Notification, or as soon thereafter as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects. A copy of the Performance Certificate shall be issued to the Employer.
- 17.8.3 Only the Performance Certificate shall be deemed to constitute acceptance of the Works.

17.9 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 or failure of the Works carried out to comply with the obligations of such Party under this Agreement. For the purposes of determining the nature and extent of unperformed obligations or failure of the Works carried out to comply with the obligations of such Party under this Agreement, the Agreement shall be deemed to remain in force.

17.10 Clearance of the Site

- 17.10.1 Upon receiving the Performance Certificate, the Contractor shall remove any remaining Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works from the Site.
- 17.10.2 If all these items have not been removed within 28 days after the Employer receives a copy of the Performance Certificate, the Employer may sell or otherwise dispose of any remaining items. 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.
- 17.10.3 Any balance of the moneys from the sale shall be paid to the Contractor. If these moneys are less than the Employer's Costs, the Contractor shall, subject to Clause 2.2 (*Employer's Claims*), pay the outstanding balance to the Employer.

18 TESTS AFTER COMPLETION

18.1 Procedure for Tests after Completion

- 18.1.1 The Tests after Completion shall be undertaken and completed to test items referred to in Volume (●) (*Items for Tests After Completion*) of Schedule 1 Part 1. During the Tests after Completion, the Employer shall:
 - (a) provide all electricity, equipment, fuel, instruments, labour, materials, and suitably qualified and experienced staff, as are necessary to carry out the Tests after Completion efficiently, and
 - (b) carry out the Tests after Completion in accordance with the manuals supplied by the Contractor under Clause **Error! Reference source not found.** (*Operation and Maintenance Manuals*) and/or as may be directed by the Independent Certifier and as such guidance as the Contractor may be required to give during the course of these Tests; and in the presence of such Contractor's Personnel as either Party may reasonably request.
- 18.1.2 The Tests after Completion shall be carried out by the Employer after the Works have been taken over by the Employer, during the Defects Notification Period. The Employer shall give to the Contractor 21 days' notice of the date after which the Tests after Completion will be carried out. Unless otherwise agreed, these Tests shall be carried out within 14 days after this date, on the day or days determined by the Employer.
- 18.1.3 If the Contractor does not attend at the time and place agreed, the Employer may proceed with the Tests after Completion, which shall be deemed to

have been made in the Contractor's presence, and the Contractor shall accept the readings as accurate.

18.1.4 The results of the Tests after Completion shall be compiled and evaluated by both Parties. Appropriate account shall be taken of the effect of the Employer's prior use of the Works.

18.1.5 If and to the extent that failure and retesting are attributable to any of the matters provided in Clauses 17.2.1(a) to 17.2.1(c) and cause the Employer to incur additional Costs, the Contractor shall subject to Clause 2.2 (*Employer's Claims*) pay these Costs to the Employer.

18.1.6 If the Works or any section of the Works fail to pass the Tests after Completion:

(a) Clause 17.1.1(b) (*Completion of Outstanding Work and Remedying Defects*) shall apply; and

(b) Either Party may require the failed Tests, and Tests After Completion on any related work to be repeated under the same terms and conditions.

If and to the extent that this failure and retesting are attributable to any of the matters listed in Clause 17.2 (*Cost of Outstanding Work and Remedying Defects*) and causes the Employer to incur additional Costs, the Contractor shall subject to Clause 2.2 (*Employer's Claim*) pay these Costs.

18.2 Failure to Pass Tests after Completion

18.2.1 If the following conditions apply, namely:

(a) the Works, or a section thereof, fail to pass any or all of the Tests after Completion,

(b) the relevant sum payable as non-performance damages for this failure is stated (or its method of calculation is defined) in the Agreement, and

(c) the Contractor pays this relevant sum to the Employer during the Defects Notification Period,

then the Works or section thereof shall be deemed to have passed these Tests after Completion.

18.2.2 If the Works fail to pass a Test after Completion and the Contractor proposes to make adjustments or modifications to the Works the Contractor may be instructed by (or on behalf of) the Employer that right of access to the Works cannot be given until a time that is convenient to the Employer. The Contractor shall then remain liable to carry out the adjustments or modifications and to satisfy this Test, within a reasonable period of receiving notice by (or on behalf of) the Employer of the time that is convenient to the Employer to carry out the adjustments or modifications and to satisfy this Test. However, if the Contractor does not receive this notice during the relevant Defects Notification Period, the Contractor shall be relieved of this obligation and the Works shall be deemed to have passed this Test after Completion.

18.2.3 If the Contractor incurs additional Cost as a result of any unreasonable delay by the Employer in permitting access to the Works or Plant by the Contractor, either to investigate the causes of a failure to pass a Test after Completion or to carry out any adjustments or modifications, the Contractor shall:

- (a) give notice to the Engineer; and
- (b) be entitled, subject to Clause 35.1 (*Contractor's Claims*), to payment of any such Cost, which shall be included in the Contract Price.

18.2.4 After receiving this notice, the Engineer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine this Cost.

19 SITE SECURITY AND PERSONNEL ISSUES

19.1 Access

19.1.1 The Employer shall have the right to refuse admittance to, or order the removal from, the Schools of any person employed by (or acting on behalf of) the Contractor, (including for the avoidance of doubt, any Subcontractor) whose presence, in the reasonable opinion of the Employer, is likely to have a or has had material adverse effect on the performance by the Employer of its duties or poses a serious threat to the health and safety of others in the Schools.

19.1.2 Action taken under Clause 19.1.1 shall forthwith be confirmed in writing by the Employer to the Contractor and, to avoid doubt, shall not relieve the Contractor of any of its obligations under this Agreement.

19.1.3 If and when so directed in writing by the Employer, the Contractor shall within twenty (20) Business Days provide a list of the names and addresses of all persons it expects may require admission in connection with this Agreement, to any premises occupied by the Employer, specifying the capacities in which those persons are concerned with this Agreement and giving such other particulars as the Employer may reasonably require.

19.2 Employer Policies

19.2.1 The Contractor shall in the construction of the Works and in performing its obligations in terms of this Agreement, comply at all times with:

- (a) all Employer Policies that have been made available to it by the Employer prior to the Effective Date; and
- (b) such other Employer Policies that have not been made available to the Contractor before the Effective Date, but only to the extent that such compliance will not have an adverse effect on the Contractor's ability to comply or on the Cost to be incurred by the Contractor in complying with its obligations in terms of this Agreement.

19.2.2 The Employer shall notify the Contractor of any amendments to the Employer Policies as soon as possible (and in any event prior to such amendment taking effect in relation to the Contractor) and if the Contractor

believes, acting reasonably, that the amendment will have an adverse effect on the Contractor's ability to provide or on the Cost of providing the Project Deliverables or any part of them as contemplated in Clause 19.2.1(b) above, the Contractor shall notify the Employer's Representative accordingly and the effect shall be treated as a Variation in accordance with Clause 24 (*Variation Procedure*).

- 19.2.3 The Employer may, at its sole discretion, notify the Contractor that the Contractor shall not be obliged to comply with any amendment to any Employer Policy and that the Contractor should continue to comply with the relevant Employer Policy prior to any amendment, in which case such amendment shall not be treated as a Variation.

19.3 Resources and Training

- 19.3.1 The Contractor shall procure that:

- (a) there shall at all times be a sufficient number of staff (including all relevant grades of supervisory staff) engaged in the provision of Project Deliverables with the requisite level of skill and experience. To avoid doubt, this obligation shall include ensuring that there are sufficient staff to cover periods of holiday, sickness, other absence, and anticipated and actual peaks in respect of the Project Deliverables; and
- (b) all staff receive such training and supervision as is necessary to ensure the proper performance of this Agreement, maintenance of a quality service in accordance with the Quality Plans established under Clause 4.5 (*Quality Assurance*) and compliance with all health and safety rules, procedures and requirements.

19.4 Lists and Records

- 19.4.1 The Contractor shall procure that the Employer's Representative shall at all reasonable times have access to all material details in respect of all Contractor's Personnel or any Subcontractor engaged in the provision of the Project Deliverables including numbers and categories of staff employed to perform the Project Deliverables and including in respect of each such Private Personnel:

- (a) details of qualifications; and
- (b) details of training undertaken by the Private Personnel.

20 CONTRACT PRICE AND PAYMENT

20.1 The Contract Price

- 20.1.1 The Contract Price means an amount of [*insert amount*] payable by the Employer in accordance with the Milestone Payment Schedule (Schedule (•)).

20.2 Application for Interim Payment Certificates

- 20.2.1 The Contractor shall submit with the relevant report on progress in accordance with Clause 4.12 (*Progress Report*), a statement (a "Statement") in electronic form to the Employer and two (2) to the Engineer for the purpose of certification of Milestones and payments for such Milestones claimed that are the subject of the Statement, in a form approved by the Employer and the Engineer showing in detail the amounts specified in Clause 20.2.2, together with supporting documents and information.
- 20.2.2 The Statement shall include the following items, as applicable, which shall be expressed in South African Rand in which the Contract Price is payable, in the sequence listed:
- (a) the estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including Variations but excluding items described in Clauses 20.2.2(b) to (e) below);
 - (b) any amounts to be added and deducted for changes in legislation in accordance with Clause 23 (*Unforeseeable Conduct*);
 - (c) any other additions or deductions which may have been determined to be due under the Agreement or otherwise, including those under Clause 35 (*Claims, Disputes and Arbitration*);
 - (d) the deduction of amounts certified in all previous Payment Certificates; and
 - (e) any amount to be deducted for retention, calculated as 10% of each Milestone, until the amount so retained by the Employer reaches the limit of Retention Money stated in Schedule 12 (*Limit of Retention Money*).

20.3 Issue of Interim Payment Certificates

- 20.3.1 The Contractor shall, subject to Clause 20.2 be entitled to, and shall issue a VAT invoice for payments of the amounts not exceeding the amounts established in terms of Clause 20.2.2 in respect of the Milestones that have been certified in any Interim Payment Certificates, equal to the amounts as shown in such Interim Payment Certificates ("Interim Payment") plus any amounts referred to in Clause 20.2.2(c) where applicable plus VAT calculated on each of the total amounts in respect of each of the currencies in the VAT invoice and payable in such relevant currency, where VAT is applicable in respect of such amount.
- 20.3.2 The Employer shall pay into the Contractor's Bank Accounts the amount which is due to the Contractor in terms of Clause 20.3.1. The Contractor shall be entitled to such payment within ten (20) Business Days of certification of an Interim Payment by the Engineer.
- 20.3.3 The Employer may, by any payment, make any correction or modification (which is not in dispute between the Parties or for amounts that have been determined in terms of Clause 35.1 (*Claims, Disputes and Arbitration*) to be due by the Contractor to the Employer) that should properly be made to any amount previously considered due provided that the Employer has given twenty (20) Business Days' notice to the Contractor of its intention to make

such correction or modification. Any payment made by the Employer shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction to or with anything related to such payment or the execution of the Works.

20.4 Delayed Payment

- 20.4.1 If the Contractor does not receive payment in accordance with Clause 20.3 (*Issue of Interim Payment Certificates*), the Contractor shall be entitled to receive financing charges (based on financing of the payment due under this Agreement) compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Clause 20.3 (*Issue of Interim Payment Certificates*).
- 20.4.2 These financing charges shall be calculated at the annual rate of two (2) percentage points above the repo rate and shall be paid in Rand.

20.5 Payment of Retention Money

- 20.5.1 When the Taking-Over Certificate has been issued for the Works and the Works have passed all specified tests (including the Tests after Completion), then forty percent (40%) of the Retention Money shall be certified by the Engineer for payment to the Contractor, thereafter the balance shall be certified by the Engineer for payment to the Contractor on the issuance of a Performance Certificate.
- 20.5.2 After the issue of a Performance Certificate, the outstanding balance of the Retention Money to be paid to the Contractor shall be certified by the Engineer for payment to the Contractor in terms of Clause 20.7 (*Application for Final Payment*).
- 20.5.3 However, if any work remains to be executed under Clause 17 (*Defects Liability*), the Engineer shall be entitled to withhold certification of the estimated Cost of this work until it has been executed.

20.6 Statement at Completion

- 20.6.1 Within 20 days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Employer and the Engineer six copies of a Statement at completion ("Completion Statement") with supporting documents, in accordance with Clause 20.2 (*Application for Interim Payment Certificates*), showing:
- (a) the value of all work done in accordance with the Agreement up to the date stated in the Taking-Over Certificate for the Works; and
 - (b) any further sums which the Contractor considers to be due in respect of the Contract Price (as may have been adjusted) and Variations, based on the work done up to the date stated in the Taking-Over Certificate having regard to all payments in respect of the Contract Price and Variations to date.
- 20.6.2 The Engineer shall then certify in accordance with Clause 20.3 (*Issue of Interim Payment Certificates*) the Completion Statement certifying amounts it considers be due to the Contractor on the date stated in the Taking-Over

Certificate, after taking into account all payments made in respect of the Contract Price and Variations, and the Works done in accordance with the Agreement.

20.7 Application for Final Payment

- 20.7.1 The Contractor shall submit a Statement (the "Final Statement") in electronic form to the Employer and the Engineer within twenty (20) Business Days after receipt of the Performance Certificate, in a form approved by the Employer and the Engineer showing in detail the amounts specified in Clause 20.7.2 together with supporting documents, which shall include the relevant report on progress in accordance with Clause 4.12 (*Progress Reports*).
- 20.7.2 The Final Statement shall, to the extent relevant, show:
- (a) the value of all Works done in accordance with this Agreement at the date of Performance Certificate; and
 - (b) payment that the Contractor considers to be due to it in respect of the balance of the Retention money.
- 20.7.3 If the Employer disagrees with or the Engineer cannot verify any part of the Final Statement, the Contractor shall submit such further information as the Employer or the Engineer may reasonably require and shall make such changes in the Final Statement as may be agreed between them. The Contractor shall then prepare and submit to the Employer and the Engineer the Final statement as agreed provided that any dispute relating to the Final Statement shall be referred for resolution in accordance with Clause 35 (*Claims, Disputes and Arbitration*).
- 20.7.4 When submitting the Final Statement, the Contractor shall submit a written discharge which confirms that the total of the Final Statement represents full and final settlement of the Contract Price due to the Contractor in connection with the Works.

20.8 Final Payment

- 20.8.1 The Contractor shall, subject to Clause 20.7, be entitled to, and shall issue a VAT invoice not exceeding the amounts established in terms of Clause 20.7 in respect of the Milestones achieved and the balance of the Retention Money that have been certified in the Final Statement by the Engineer ("Final Payment Certificate"). The VAT invoice shall reflect the total amounts as shown in such Final Payment Certificate ("Final Payment") plus the applicable VAT amounts calculated on each of the total amounts respectively.
- 20.8.2 Except as otherwise agreed the Employer shall pay into the Contractor's Bank Accounts the amount which is due to the Contractor in terms of Clause 20.8.1 in respect of the Final Statement within ten (10) Business Days after receipt of the Final Payment Certificate from the Engineer.
- 20.8.3 The Employer may, in respect of the Final Payment, make any correction or modification (which is not in dispute between the Parties or for amounts that have been determined in terms of Clause 35 (*Claims, Disputes and Arbitration*)) to be due by the Contractor to the Employer) that should properly be made to the Final Payment.

- 20.8.4 Payment or certification in terms of Clauses 20.3 (*Issue of Interim Payment Certificate*), 20.6 (*Statement at Completion*), 20.7 (*Application for Final Statement*) and 20.8 (*Application for Final Payment*) shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction to or with anything related to such payment, certification or the execution of the Works in relation to such payment or certification.

21 INSURANCE

21.1 Required and other Insurances Policies

- 21.1.1 The Contractor shall take out and shall thereafter maintain and keep in full force and effect (or procure that they are taken out, maintained and kept in full force and effect) the insurances listed in Schedule 6 (*Project Insurance*) and any other insurances in respect of the Project as may be required by Law and in accordance with Good Industry Practice (the "Project Insurances"). Each of the Project Insurances listed in Schedule 6 (*Project Insurance*) must be taken out and become fully effective not later than the corresponding date set forth in Schedule 6 (*Project Insurance*). Each of the Project Insurances (if any) not listed in Schedule 6 (*Project Insurance*) must be taken out and become fully effective not later than the earliest date required by Law. The Contractor shall place all the Project Insurances with permitted insurers in accordance with applicable Law.
- 21.1.2 Each of the Required Insurances must be taken out with reputable insurer(s) and on terms approved by the Employer. The Employer will not unreasonably withhold or delay its approval of the proposed insurer or proposed terms of insurance. For the avoidance of doubt, the Employer having approved the terms of all Required Insurance policies and the identity of the insurers with whom they are taken out, any changes to or substitution for such and/or to the identity of the insurers with whom they are taken out shall be subject to the approval of the Employer (such approval not to be unreasonably withheld or delayed) which approval shall be deemed to have been given if not expressly withheld within ten (10) Business Days of such terms and such identity being notified to the Employer.
- 21.1.3 Subject to any other provisions to the contrary in this Agreement, the payment of the insurance premiums due and payable in respect of any Project Insurance shall be the responsibility of the Contractor.
- 21.1.4 No Party to this Agreement shall take any action or fail to take any action, or (in so far as is reasonably within its power) permit anything to occur in relation to it, which would entitle any insurer to refuse to pay any claim under the policy applying to any Project Insurance.
- 21.1.5 The Contractor undertakes that each of the Project Insurance shall:
- (a) name the Contractor as the insured and Employer as co-insured for its separate interest;
 - (b) apply to each of the insured parties as if a separate policy had been issued to each of them, other than in the event of exhaustion of the sum insured or the limit of indemnity;
 - (c) provide for non-vitiating protection in respect of any claim made by the Employer as co-insured. If non-vitiating protection

becomes an Uninsurable Risk when any such insurance policy is first placed, then the Contractor shall procure same insofar as any non-vitiation protection subsequently becomes available prior to each renewal of the policy, or provide written confirmation promptly upon the renewal thereof as to the unavailability thereof to the Employer. If any non-vitiation protection subsequently becomes available, the Employer shall be entitled to require the Contractor to procure such protection and the Costs thereof shall be borne by the Contractor;

- (d) contain a provision waiving the insurers' subrogation rights against the Employer, the Employer's Personnel and Employer's agents;
- (e) provide for 90 (ninety) days' prior written notice of its cancellation, non-renewal or amendment or changes in the policy to be given to the Employer by the underwriter of such Project Insurance;
- (f) contain a provision recording that such Project Insurance is a primary insurance and shall not be brought into contribution by any other insurances; and
- (g) provide for payment of any proceeds under any of the material damage insurances included in the Project Insurances to be made by the insurers in accordance with Clause 21.4 (*Reinstatement*).

21.1.6 The Contractor shall furnish the Employer, on request, with:

- (a) true and complete copies of the policies of all the Project Insurances (together with any other information reasonably requested by the Employer relating to such policies) and the Employer shall be entitled to inspect them during ordinary business hours; and
- (b) satisfactory up to date evidence from all respective insurers or underwriters that the premiums due and payable under any such Project Insurances have been paid and that the Project Insurances are in full force and effect in accordance with the requirements of this Clause 21.

21.1.7 The Contractor shall, as and when required pursuant to the terms of the relevant Project Insurance, renew each Project Insurance for so long as any risk covered thereby exists and shall furnish the Employer with true and complete copies of each certificate of renewal for such Project Insurance as soon as possible but in any event no less than at least 10 (ten) Business Days before the relevant renewal date.

21.1.8 If the Contractor breaches any of sub-Clauses 21.1.1 or 21.1.3 above in relation to any Project Insurance, the Employer may pay any premiums required to keep such Project Insurance in force and effect, or itself procure such Project Insurance, to the extent that Employer has insurable interests, and may, subject to Clause 2.2 above (*Employer's Claims*), recover all premiums or other Costs incurred by it in doing so from the Contractor on written demand.

- 21.1.9 The Contractor shall notify Employer within 5 (five) days after submitting any claim in excess of R100 000,00 (Indexed) under any of the Project Insurances, accompanied by full details of the event that gave rise to the claim.
- 21.1.10 The Contractor shall notify the Employer of any cancellation, non-renewal or amendment or changes to the insurance policy in respect of the Project Insurance 30 days prior to such cancellation, non-renewal or amendment or change to the insurance policy becoming effective.
- 21.1.11 Neither the failure to comply nor full compliance with the insurance provisions of this Agreement shall limit or relieve the Contractor of its liabilities and obligations under this Agreement.

21.2 Uninsurable Risks

- 21.2.1 The Contractor shall notify the Employer of any risk, against which Project Insurance are required, becoming an Uninsurable Risk within 5 Business Days of becoming aware of the same and, in any event, at least 30 Business Days before the expiry of any existing insurance in respect of such risk.
- 21.2.2 If both parties agree, or it is determined in accordance with Dispute Resolution Procedure, that:
- (a) the risk is an Uninsurable Risk;
 - (b) the risk being Uninsurable is not caused by the actions or omissions of the Contractor or a Subcontractor; and
 - (c) other service providers carrying on businesses similar to the Project would cease to do so as a result of such Uninsurability,
- then the Parties shall meet to discuss the means by which the risk should be managed (including by way of self-insurance by either Party).
- 21.2.3 The Contractor shall bear the onus of proving the circumstances in Clause 21.2.2(a) to 21.2.2(c)
- 21.2.4 Where there is an Uninsurable Risk:
- (a) the Agreement shall continue notwithstanding the fact that the Parties may not have been able to agree the means by which such risk should be managed;
 - (b) upon the existing cover lapsing (or where relevant prior to inception) the Contractor shall be relieved of its obligation to maintain insurance in respect of the Uninsurable Risk or where it is possible to obtain such cover without the Uninsurable Risk, then the Contractor shall only be relieved from its obligation to include such risk in the insurance cover;
 - (c) the Contract Price shall be reduced in each year for which the relevant insurance is not maintained, by an amount equal to the premium paid by the Contractor in respect of the relevant risk in the year prior to it becoming an Uninsurable Risk (Indexed).

Where the risk is an Uninsurable Risk for part of a year only, the reduction in the Contract Price shall be pro- rated to the number of months for which the risk was an Uninsurable Risk; and

- (d) in the case of any risk as set out in Schedule 6 (*Project Insurance*) in respect of physical loss or damage to all or part of the Works ("Physical Damage Risk") or third party liability insurance not including for the avoidance of doubt non-vitiation Clause or endorsement, or insurances or protection for professional indemnity risk or any portion of such Physical Damage Risk or Third Party Liability Risk as may be pertaining to equity returns or shareholder dividends or any form of director and officers liability insurance ("Third Party Liability Risk"), on the occurrence of the relevant Uninsurable Risk (to the extent not caused by the conduct of the Contractor in failing to comply with its obligations in terms of this Agreement) the Employer may (at its option) either:
 - (i) pay to the Contractor for application in accordance with Clause 21.3.2, an amount equal to the insurance proceeds that would have been payable by the insurer had the relevant Project Insurance continued to be available (payment to be made to the Insurance Proceeds Account in accordance with Clause 21.3.1 (*Application of Proceeds*) within six (6) calendar months of the date on which the risk occurs, in which case the Agreement shall continue but the Contractor shall be responsible for the amount, if any, of the deductible which would have been payable with respect to such loss, provided that the Employer shall have the same rights and powers that the insurer(s) had in respect of the relevant insurance policies, immediately prior to such risk becoming Uninsurable; or
 - (ii) this Agreement shall terminate and the provisions of Clause 27.5 (*Optional Termination, Payment and Release*) shall apply.
- 21.2.5 Where there is an Uninsurable Risk, the Contractor shall approach the then current underwriters on a regular basis and in any event at intervals of not less than six (6) months, and at the time of the twelve (12) monthly renewal of Project Insurances, approach the insurance market generally to establish whether such risk remains an Uninsurable Risk. The Contractor shall in addition make such other enquiries as to the availability of non-vitiation cover as the Employer may reasonably request from time to time.
- 21.2.6 Where a risk which was previously an Uninsurable Risk ceases to be so, and the Contractor has become aware that this is the case, the Contractor shall forthwith notify the Employer accordingly and forthwith take out and maintain insurance in accordance with the requirements of this Agreement in respect of the risk and the provisions of Clauses 21.2.1, 21.2.4 and 21.2.5 (*Uninsurable Risks*) shall no longer apply to the risk.

21.3 Application of Proceeds

- 21.3.1 All insurance proceeds received by the Contractor under the Project Insurances referred to in Schedule 6 (*Project Insurance*) shall be paid into

the Insurance Proceeds Account for the purposes of, and to be applied in accordance with this Agreement. The Contractor shall provide a monthly report on the application of the Insurance Proceeds indicating the credit balance if any.

21.3.2 The Contractor shall apply any proceeds of any policies of:

- (a) third party liability or employers' liability insurance, directly in satisfaction of the claim, demand, proceeding or liability in respect of which such proceeds are payable or to reimburse the Contractor to the extent that the liability has already been made by it;
- (b) in the case of a claim against which the Employer is indemnified by the Contractor either in meeting such claim or (at the Employer's option) by paying such money to Employer;
- (c) any other insurance so as to ensure the performance by the Contractor of its obligations under this Agreement, including where necessary the reinstatement, restoration or replacement of the Schools or any other assets, materials or Goods, provided that if, an amount of the relevant proceeds remains unused, the Contractor shall be entitled to retain that remainder;

21.3.3 If the proceeds of any insurance claim are insufficient to cover the settlement of such claims, the Contractor will make good any deficiency forthwith at his own Cost and the Contract Price shall not be adjusted for any of these Costs.

21.4 Reinstatement

21.4.1 Where a claim is made or proceeds of insurance are received or are receivable under any of the Project Insurances referred to in Schedule 6 (*Project Insurance*) (other than as described in Clauses 21.3.2(a) or 21.3.2(b)) in respect of a risk of physical loss or damage to Works, plant and equipment or temporary buildings or to the Schools, or proceeds of the Project Insurance providing cover for expenditure necessary to complete the Works ("Material Damage Insurance") then:

- (a) such proceeds shall be applied to repair, reinstate or replace each part or parts of the Works, plant and equipment or temporary buildings or the Schools in respect of which Insurance Proceeds are received, in each case to the standard complying with the Contractor's obligations in terms of this Agreement;
- (b) the Contractor shall prepare and deliver to the Engineer as soon as practicable and in any event within twenty (20) Business Days after the making of the claim a plan (the "Reinstatement Plan") for the Engineer's agreement for the carrying out of the works necessary (the "Reinstatement Works") to repair, reinstate or replace such portion of the Works and/or Schools as are the subject of the relevant claim or claims in accordance with Clause 21.4.2 below. The Reinstatement Plan shall set out:
 - (i) the identity of the person(s) proposed to effect the Reinstatement Works, if such person(s) is/are not the Contractor or Material Subcontractor such persons

proposed shall be subject to the prior written approval of the Engineer (not to be unreasonably withheld or delayed);

- (ii) the proposed terms and timetable upon which the Reinstatement Works are to be carried out (including the date that the Schools will become fully operational, to the extent that it has been affected by the insured event), the final terms of which shall be subject to the prior written agreement of the Engineer (not to be unreasonably withheld or delayed); and
- (iii) the amount of all relevant insurance proceeds reasonably expected to be received in respect of the claim submitted and the manner of distribution of such proceeds to the various components of the Reinstatement Works,

provided that if the Parties fail to reach any such agreement, then the dispute shall be referred for determination in accordance with the Dispute Resolution Procedure,

- (c) if the Engineer is satisfied that the Reinstatement Plan (as amended by agreement with the Employer or as determined by Dispute Resolution Procedure) will enable the Contractor to comply with Clause 21.4.2 below within a reasonable timescale:
 - (i) the Reinstatement Plan will be adopted;
 - (ii) the Contractor shall enter into contractual arrangements to effect the Reinstatement Works with the person(s) identified in the approved Reinstatement Plan adopted by the Employer;
 - (iii) prior to the earlier to occur of the Termination Date or the Expiry Date, any amounts standing to the credit of the Insurance Proceeds Account in respect of the claim submitted for the Material Damage Insurance, (the "Relevant Proceeds") (together with any interest accrued) may be withdrawn by the Contractor from the Insurance Proceeds Account as required to enable it to make payments in accordance with the terms of the contractual arrangements, referred to in sub-Clause (b)(ii) and to meet any other reasonable Costs and expenses of the Contractor for the sole purposes of funding the Reinstatement Works. Following the earlier to occur of the Termination Date and the Expiry Date, the Employer may withdraw amounts standing to the credit of the Insurance Proceeds Account for the purposes of funding any Reinstatement Works;
 - (iv) the Employer agrees and undertakes that, subject to compliance by the Contractor with its obligations under this Clause 21.4.1, and provided that the Contractor procures that the Reinstatement Works are carried out and completed in accordance with the contractual arrangements referred to in sub-Clause (c)(ii) it shall not

exercise any right which it might otherwise have to terminate the Agreement by virtue of the event which gave rise to the claim for the Relevant Proceeds;

- (v) the Employer undertakes to use reasonable endeavours to assist the Contractor in the carrying out of the Reinstatement Plan; and
- (vi) after the Reinstatement Plan has been implemented to the reasonable satisfaction of the Employer and in accordance with Clause 21.4.2 below, the Employer shall permit withdrawal by the Contractor of any Relevant Proceeds then held in the Insurance Proceeds Account that have not been paid under sub-Clause (c)(iii) in respect of the Relevant Incident, together with any interest accrued;

21.4.2 Where insurance proceeds are to be used in accordance with this Agreement to repair, reinstate or replace any Project Assets forming part of the Works, the Contractor shall carry out the Reinstatement Works or procure that such Works are carried out in accordance with Schedule 1 (*Specifications*) so that on completion of the Works, the provisions of the Agreement are complied with.

22 INFORMATION AND AUDIT ACCESS

22.1 Records To Be Retained

22.1.1 The Contractor shall retain and maintain and procure that each Subcontractor and the Material Subcontractor retains and maintains all the records relating to the Project and/or Project Documents (including superseded records) referred to in this Clause 22.1, in accordance with the requirements of Good Industry Practice, in chronological order, in a form that is capable of audit and at its own expense:

- (a) the supporting information in relation to Annexure (•) (*Contract Price Breakdown*);
- (b) the Agreement, its Schedules and the Project Documents including all amendments to such agreements;
- (c) all other documents, software or other information expressly referred to in this Agreement;
- (d) records relating to the appointment and supersession of the Engineer and the Contractor's Representative;
- (e) Project Data;
- (f) documents relating to planning applications, consents, refusals and appeals;
- (g) documents relating to the Quality Plans;
- (h) records relating to any specialist or statutory inspections of the Schools, including any roadways;

- (i) notices, reports, results and certificates relating to completion of the Works and completion of the commissioning activities;
- (j) all operation and maintenance manuals;
- (k) documents relating to incidents of Compensation Events, Force Majeure, Relief Events and the consequences of the same;
- (l) all formal notices, reports or submissions made to or received from the Engineer in connection with the provision of Project Deliverables;
- (m) all consents, authorisations, certificates, licences, registrations or warranties related to the Works and/or provision of the Project Deliverables;
- (n) documents in support of claims for payments in terms of this Agreement;
- (o) documents submitted in accordance with Clause 24 (*Variation Procedure*) and all documents provided in support;
- (p) documents related to referrals to the Dispute Resolution Procedure;
- (q) documents related to change in ownership or any interest in any or all of the shares in the Contractor;
- (r) documents relating to the rescheduling of the indebtedness of the Contractor or refinancing of the Project;
- (s) tax invoices and records related to Value Added Tax;
- (t) financial records, including audited and unaudited accounts of the Contractor and related reports;
- (u) records required by Law (including in relation to Health and Safety matters) and all Consents;
- (v) documents relating to insurance and insurance claims;
- (w) all other records, notices or certificates required to be produced and/or maintained by the Contractor pursuant to this Agreement or any Project Document; and
- (x) all records required in connection with Schedule 3 (*Economic Development*)

22.1.2 The Contractor shall provide to the Engineer all information, including built drawings, documents, records and the like in the possession of, or available to, the Contractor as may be reasonably requested by the Engineer for any purpose in connection with this Agreement or Employer's compliance with any of its statutory reporting obligations in accordance with any Law.

22.1.3 For the purpose of:

- (a) the examination and certification of the Employer's accounts;
- (b) any examination pursuant to Public Audit Act 25 of 2004; or
- (c) any auditing of the Employer required for purposes of compliance with any Law,

the Auditor General may examine such documents as he may reasonably require which are owned, held or otherwise within the control of the Contractor (and the Contractor shall procure that any person acting on its behalf who has such documents and/or other information shall also provide access) and may require the Contractor to produce such oral or written explanations as he considers necessary. To avoid doubt, it is hereby declared that the carrying out of an examination under Public Audit Act 25 of 2004 and/or the Public Finance Management Act 1 of 1999 in relation to the Contractor is not a function exercisable under this sub-Clause. The Parties acknowledge that the office of the Auditor General has the right to publish defaults of the Agreement (including Confidential Information) in its relevant reports to Government.

- 22.1.4 The Contractor shall such information as the Employer may reasonably require from time to time to enable it to meet its obligations to provide reports and returns pursuant to regulations, directions or guidance applicable to the Employer or as required by external agencies including, without limitation, reports and returns regarding the physical condition of buildings occupied by the Employer, health and safety, under the fire code and relating to environmental health.
- 22.1.5 The Contractor shall note and facilitate the Employer's compliance with the Promotion of Access to Information Act 2 of 2000 ("PAIA") or any other legal duty to disclose information. In the event that the Employer is required to provide information to a person as a result of a request made to it under PAIA, the Employer shall adhere to the requirements of the relevant obligations in disclosing information relating to the Agreement and the Contractor.

22.2 Retention of Records

- 22.2.1 Wherever practical, original records shall be retained and maintained in hard copy form. True copies of the original records may be kept by the Contractor where it is not practicable to retain original records.
- 22.2.2 Those records relating to the Project Deliverables (including the construction, development, and/or enhancement of the Schools) shall be retained for the duration of the Agreement.
- 22.2.3 Financial and other records (including without limitation all information provided in support of any Variation, Contractor's claim, Compensation Event, Relief Event or Force Majeure) shall be retained and maintained by the Contractor for the duration of the Agreement in sufficient detail, in appropriate categories and generally in such a manner to enable the Contractor to comply with its obligations under the Agreement.
- 22.2.4 Where the Contractor wishes to dispose of any records maintained as provided in this Clause 22 which are more than fifteen (15) years old then the Contractor shall notify the Employer and if, within forty (40) Business Days of such notice, the Employer elects to receive certain of those records,

then the Contractor shall deliver up such records to the Employer in the manner and at the location as the Employer shall reasonably specify, and the Costs of retaining those records in safe storage and delivering up the same shall be borne by the Contractor.

- 22.2.5 Any drawings required to be made or supplied pursuant to this Agreement shall be of a size appropriate to show the detail to be depicted clearly without magnifying aids. Where by prior agreement the Employer has agreed to accept microfilm, microfiche or other storage media (which must include secure back up facilities), drawings and other documents shall be made or supplied in such form as has been agreed.
- 22.2.6 To the extent that the records are to be created or maintained on a computer or other electronic storage device, the Contractor shall comply with any reasonable request of the Employer from time to time relating to procedures for the back-up and off-site storage for copies of such records.
- 22.2.7 Upon termination for whatever reason of the Agreement, the Contractor shall deliver to the Employer, in such manner and at such location as the Employer shall reasonably specify, the original of all records which are in existence at the date of termination (or, where those records are required by statute to remain with the Contractor, copies thereof) or such part of such records as the Employer may by notice to the Contractor specify. The Contractor shall be entitled to take and retain copies of all records so delivered.

22.3 Inspection

- 22.3.1 The Contractor shall make such records available to, for inspection by or on behalf of the Employer at all reasonable times, on receipt of reasonable notice for access to such records.
- 22.3.2 The Employer shall be entitled at the time of such access to or inspection of the records to take one (1) copy of any record at no Cost to the Employer and for that purpose to use such copying facilities as are maintained at the place where the records are kept.

23 UNFORESEEABLE CONDUCT

23.1 Definition of Unforeseeable Conduct

- 23.1.1 "Unforeseeable Conduct" shall occur if, after the Effective Date, the Employer or any Responsible Authority takes any action (including the introduction or application or change in any Law; regulation, by-law or order having the force of law) or fails to carry out its obligations as prescribed by Law but excluding any decisions made in relation to Consents in accordance with the Laws; and

- (a) the principal effect of which is directly borne by:
 - (i) the Project and not other projects procured under similar arrangement;
 - (ii) the Contractor and not other persons; or

- (iii) parties undertaking projects procured under similar arrangement as the Project and not other persons;
- (b) in respect of which the Contractor is not entitled to any other relief pursuant to any other provisions of this Agreement;
- (c) which was not foreseen and could not reasonably have been foreseen by the Contractor on or before the Effective Date; and
- (d) which could not reasonably have been foreseen by any person in the position of the Contractor on or before the Effective Date;

provided that the Unforeseeable Conduct shall be deemed not to have occurred:

- (e) where any act or omission of the Employer or a Responsible Authority is in direct response to any act or omission of the Contractor which is illegal or contravenes Laws (other than an act or omission rendered illegal or in contravention of Laws by virtue of such conduct of the Employer or Responsible Authority) or in violation of agreements to which the Contractor is a party;
- (f) an increase in taxes of general application which does not discriminate against the Contractor or against the Contractor and other parties undertaking project procured under similar arrangement as the Project shall be deemed not to be Unforeseeable Conduct; and
- (g) if such conduct by the Employer or a Responsible Authority is required as a result of an event of Force Majeure and is reasonably proportionate thereto.

23.1.2 The Contractor shall only be entitled to protection in terms of this Clause 23:

- (a) from Unforeseeable Conduct in respect of which, the Contractor is not entitled to any other relief pursuant to any other provisions of this Agreement; or
- (b) in the case of Unforeseeable Conduct which is not the introduction of any change of Law (by legislative steps), regulation or by-law or an order of court:-
 - (i) has no other legal recourse either to prevent or redress (by restitution or otherwise), the Unforeseeable Conduct concerned or to recover compensation outside of this Agreement; or
 - (ii) has other legal recourse to either prevent or redress (by restitution or otherwise) the Unforeseeable Conduct concerned and has instituted legal action up to the court of first instance in the local division of the High Court and a determination has been made against the Contractor; and

- 23.1.3 For a period of forty (40) Business Days commencing upon the date on which the Contractor ought reasonably to have known of such Unforeseeable Conduct and/or for the period while the Contractor is pursuing legal recourse instituted in the manner contemplated by Clause 23.1.2(b)(ii) and for as long as the Unforeseeable Conduct continues, the Contractor shall be entitled to relief referred to in Clause 23.2 below, provided that the Contractor shall on completion of such legal recourse be returned to a no better and no worse position in comparison to its position prior to the occurrence of the Unforeseeable Conduct.

23.2 General

- 23.2.1 The Contractor shall take all steps necessary to ensure that the Project Deliverables are performed in accordance with the terms of this Agreement (including, without limitation, Clause 1.8 (*Compliance with Laws*)) following any Unforeseeable Conduct.
- 23.2.2 Should any Unforeseeable Conduct occur which results in an increase in the Costs ("Additional Unforeseeable Conduct Costs"), the Contractor shall be entitled to compensation for Additional Unforeseeable Conduct, on the basis that the Contractor shall carry and not be entitled to payment of the first R(•) (indexed).
- 23.2.3 Should any Unforeseeable Conduct occur which results in a decrease in the Costs ("Reduced Unforeseeable Conduct Costs"), the Contractor shall pay the value of such Reduced Unforeseeable Conduct Costs to the Employer on the basis that the Contractor shall be entitled to retain the benefit of and the Employer shall not be entitled to payment of the first R(•) (indexed).
- 23.2.4 The Party claiming the occurrence of the Unforeseeable Conduct ("Claiming Party") shall give written notice to the other Party ("Receiving Party") containing reasonable particulars of such conduct and its likely economic consequences to the Contractor.
- 23.2.5 For so long as the Unforeseeable Conduct continues, the Contractor shall be entitled to relief from the performance of any of its obligations under this Agreement that it is not able to perform as a result of such conduct or event and the Employer shall not be entitled to exercise its rights to terminate this Agreement under Clause 28.2.1 (*Contractor Events of Default*) on grounds of the Contractor's failure to perform its obligations under this Agreement to the extent that such failure is caused by the Unforeseeable Conduct.
- 23.2.6 If Unforeseeable Conduct occurs which has an effect or impact on the duration of the Agreement (whether or not it is one in respect of which the Contractor is entitled to any Additional Unforeseeable Conduct Costs under this Clause 23.2) then this shall be deemed to give rise to a Variation and either Party may give notice to the other to this effect and such notice shall be deemed to be an Employer's Variation Notice.
- 23.2.7 In so far as the Contractor is the Claiming Party, it shall use all reasonable endeavours to minimise and mitigate the effects of any Unforeseeable Conduct.

23.3 Contractor to Pursue Further Legal Course

In the case of Unforeseeable Conduct in respect of which Clause 23.1.2(b)(ii) applies:

- 23.3.1 the Contractor shall at the request of the Employer (such request being reasonable in the circumstances) be obliged to take such further legal steps including review, where appropriate, or appeal, agreed with the Employer (including for the avoidance of doubt the mechanism to determine the legal Costs to be incurred) to set aside or overturn the determination made against it by the High Court;
- 23.3.2 the Employer shall bear the Costs of the Contractor taking any steps agreed with the Employer pursuant to Clause 23.3.1 above;
- 23.3.3 the Employer shall be entitled at its election to take control of and direct proceedings referred to in Clause 23.3.1 above provided that the Employer shall not require the Contractor to do anything other than that which is in the normal course of conducting legal proceedings reasonably required in order to bring the proceedings to finality, in favour of the Party instituting such proceedings;
- 23.3.4 should the determination in relation to which the Contractor is taking further steps as referred to in Clause 23.3.1 be set aside or overturned, the Parties shall, with effect from the date of occurrence of the Unforeseeable Conduct, each be returned to the position they would have been in but for the Unforeseeable Conduct, including to the extent appropriate refunding any payments received by either Party.

24 VARIATION PROCEDURE

24.1 Right to Vary

- 24.1.1 The Employer has the right to propose Variations in accordance with this Clause 24 (*Variation Procedure*). If the Employer requires a Variation, the Employer's Representative must serve a notice to the Contractor (a "Employer's Variation Notice") which:
 - (a) states on its face that it is an Employer's Variation Notice; and
 - (b) sets out the Variation required in sufficient detail as to enable the Contractor to consider the matters referred to in Clause 24.3 (*Contractor's Rights to Refuse*) and to calculate and provide financial effects of the proposed Variation as contemplated in Clause 24.4.6(b) and the nature of the Works Variation and any specific requirements to amend the provisions of the Specification which are required to be amended to accommodate the relevant Variation.
- 24.1.2 Before the Employer issues an Employer's Variation Notice, it shall discuss the intended Variation with the Contractor and where possible, indicate whether and to what extent the Employer will request the Contractor to seek funding in accordance with Clause 24.2 (*Funding of Variations*).
- 24.1.3 The Employer shall have the right to specify in any Employer's Variation Notice that it:
 - (a) considers the Variation to be one that requires urgent implementation; and/or

- (b) that the Contractor should proceed with providing the Contractor Variation Response without having to give an Outline Proposal.
- 24.1.4 The Employer's Representative may not issue an Employer's Variation Notice other than in accordance with the provisions of this Clause 24.1.

24.2 Funding of Variations

- 24.2.1 If the implementation of a Variation requested by the Employer would give rise to a Variation Cost then:
 - (a) the Employer shall pay to the Contractor the Variation Costs (where the sum thereof results in a positive number), in respect of that Employer's Variation in terms of the Variation Memorandum; and
 - (b) where the sum of the Variation Costs results in a negative number ("Variation Saving"), then the Contract Amount shall be adjusted to be reduced by the Variation Saving with corresponding adjustments to Schedule 9 (*Schedule of Milestones*), or the Contractor shall otherwise pay the Variation Savings to the Employer.
- 24.2.2 If the implementation of a Variation requested by the Employer would give rise to a Variation Acceleration Saving, or a Variation Construction Saving, then the Contractor shall pay to the Employer such Variation Acceleration Saving, or a Variation Construction Saving.

24.3 Contractor's Right to Refuse

- 24.3.1 Without prejudice to its other rights under this Clause 24, the Contractor may refuse to effect any Variation on one or more of the following grounds:
 - (a) that implementation of the Variation would materially and adversely affect the health and safety of persons using the Schools in a manner that the Contractor is not able to prevent or manage in compliance with the requirements of the Law; or
 - (b) that implementation of the Variation would:
 - (i) infringe any Law in a manner that the Contractor will not be able to prevent such an infringement; or
 - (ii) cause any existing Consent (which is not reasonably likely, on a balance of probabilities, to be capable of modification) to be revoked; or
 - (iii) require a new Consent which will not (using all reasonable endeavours) be obtainable; or
 - (iv) have a material and adverse effect on the performance of the Project Deliverables (except those Project Deliverables which have been specified as requiring to be amended in the Employer's Variation Notice) in a manner not compensated pursuant to this Clause 24; or

- (v) be a departure from Good Industry Practice,
- (c) that the Employer does not have the legal power or capacity to require the Variation to be implemented or to do anything envisaged by this Clause 24 in respect of, or in connection with, the Variation; or
- (d) that the Employer's Variation Notice does not comply with Clause 24.1 above; or
- (e) that the information contained in the Employer's Variation Notice is inadequate to enable the Contractor to respond in accordance with Clause 24.4.6 below on the assumption, whether or not is the case, that it has no objection under sub-Clauses (a) to (d) above, provided that the Contractor shall, notwithstanding any other provisions of this Clause 24, have delivered such an objection within 10 days of receipt of the Employer's Variation Notice and shall in such objection provide details of the information that it will reasonably require in order for it to be in a position to respond in accordance with Clause 24.4.6 below.

24.4 Contractor's Response to Employer's Variations

- 24.4.1 The Contractor shall, within fifteen (15) Business Days, reply to the Employer's Variation Notice with an Outline Proposal.
- 24.4.2 The Employer shall within ten (10) Business Days of receipt of the Outline Proposal issue a notice to the Contractor indicating whether or not it wishes the Contractor to proceed with the Contractor's Variation Response as defined in Clause 24.4.3 below.
- 24.4.3 The Contractor shall issue a written response to the Employer (the "Contractor's Variation Response") as soon as reasonably practicable after receipt of:
 - (a) Employer's Variation Notice requesting that the Contractor proceeds with a Contractor's Variation Response without compliance with Clause 24.4.2 above; or
 - (b) a notice issued by the Employer in terms of Clause 24.4.2 above, in response to the Outline Proposal, indicating that the Employer wishes the Contractor to proceed with the Contractor's Variation Response.
- 24.4.4 Where the Employer's Variation Notice states that the Variation requires urgent implementation, the period within which the Contractor responds shall recognise that urgency.
- 24.4.5 Any Contractor's Variation Response (the Contractor acting reasonably) shall state with as much precision as is practicable, consistent with promptness, to provide a basis for the negotiations of a Variation Memorandum to be conducted under Clause 24.6 (*Variation Negotiations and Agreement of Variation Memorandum*) (covering in as much detail as possible the matters provided to be addressed in the Variation Memorandum under Clause 24.4.6 below), the Contractor's estimate of the matters to be set out in the Variation Memorandum.

24.4.6 The Variation Memorandum shall set out:

- (a) in relation to the non-financial effects of the proposed Variation indicating:
 - (i) the steps which the Contractor proposes to take to implement the Variation giving such level of detail as is reasonable and appropriate in all the circumstances;
 - (ii) any effect on the Programme indicating where applicable whether, in the view of the Contractor, implementing the Employer's Variation Notice would be likely to prevent completion of the Works from occurring by the Time for Completion (prior to any adjustment being made to the Time for Completion by reason of the implementation or proposed implementation of the Variation where appropriate) and, if so, giving an estimate of the extension of time likely to be required (subject to any further time required to obtain or amend any Consent);
 - (iii) any Consent which must be obtained or amended for the Variation to be implemented;
 - (iv) such amendments to the provisions of this Agreement and/or any Project Document which are necessary as a consequence of the Variation, the objective of such amendments being to ensure that (save for the obligation of the Employer to make payments or altered payments in respect of the Variation or any other adverse consequences for the Employer arising from the Variation itself) the Parties are in no better and no worse position in relation to the Project than they would have been in if such Variation had not been implemented;
 - (v) any effect on the availability and/or cost of insurance; and
 - (vi) the impact of the proposed Variation on the Contractor's ability to provide the Works;
 - (vii) any impact on any of the Subcontracts and any other contractual rights or obligations of the Contractor, including any existing warranties provided to the Contractor; and
 - (viii) any other amendments which may be required to this Agreement, including without limitation Clause **Error! Reference source not found.** (*Economic Development*) and Schedule 3 (*Economic Development*), or any Party's obligations or rights hereunder or any other Project Documents in the event that the Variation is implemented;
- (b) in relation to the financial effects of the proposed Variation:

- (i) any Variation Construction Price;
- (ii) any Variation Construction Saving;
- (iii) any Variation Overhead Cost;
- (iv) any Variation Delay Cost;
- (v) any Variation Acceleration Saving;
- (vi) (any Variation Costs);
- (vii) the proposed adjustment to the Contract Price and Schedule 9 (*Schedule of Milestones*) for the Variation Costs;
- (viii) any amendments necessary for the Independent Certifier to certify the Works and/or payment in respect to the Variation.

24.5 Timetable and Cost Plan

Forthwith after the issue of the Contractor's Variation Response, the Parties shall endeavour to agree a timetable and Cost plan for the further consideration of the Variation by the Parties.

24.6 Variation Negotiations and Agreement of Variation Memorandum

- 24.6.1 The Parties shall seek to agree the Variation Memorandum.
- 24.6.2 If any matters covered by the Variation Memorandum cannot be agreed within a reasonable period having regard to the nature of the Variation then these matters shall be determined by the Engineer in accordance with the Clause 3.5 (*Determinations*), provided that such determination shall ensure that the Contractor is placed in a no better and no worse position following such determination.
- 24.6.3 The obligation under this Clause 24.6 to seek to agree the Variation Memorandum shall be a continuing one, so that the Parties' agreement shall be based on all relevant matters and Costs required to implement the Variation as these become apparent including as a result of the application of Clause 24.2 (*Funding of Variations*).
- 24.6.4 Notwithstanding the requirements of this Clause 24.6, and without prejudice to Clause 24.7 (*Implementation of Variations*), if the Contractor must, in order to comply with Laws resulting from Unforeseeable Conduct, proceed with works in relation to a Variation prior to the agreement or determination of the Variation Memorandum, it may do so and shall be reimbursed its Costs incurred in accordance with the agreement or determination subsequently reached.
- 24.6.5 Notwithstanding the requirements of this Clause 24.6 and without prejudice to Clause 24.7 (*Implementation of Variations*), if the Employer and the Contractor agree on parts of the Variation (which shall include agreement on the impact of the Variation on the Works, the financial effects of such Variations and matters contemplated in Clause 24.4.6(a)(vi) while others

remain unresolved, the Parties can enter into an agreement to commence with the implementation of such Variation pending finalisation of the Variation Memorandum ("Variation Implementation Agreement"). Upon the conclusion of such Variation Implementation Agreement, the Contractor shall proceed with such part with due regard to the content, conditions and provisions of such Variation Implementation Agreement, subject to this Clause 24.6 and 24.7 (*Implementation of Variations*). Unless otherwise expressly agreed in the Variation Implementation Agreement, the partial implementation of the Variation shall not take away any of the Employer's rights under Clause 24.7. The Parties shall, in the Variation Implementation Agreement consider and agree on the impact of the provisions of Employer's exercise of its powers in terms of Clauses 24.7.1(b), 24.7.2 and the impact of Clause 24.7.3 to any of the actions or steps taken in terms of the Variation Implementation Agreement.

24.7 Implementation of Variations

- 24.7.1 Once the Variation Memorandum has been agreed or determined, the Employer shall either:
- (a) issue a confirmation of the terms of the Variation as so agreed or determined forthwith following such agreement or determination (a "Employer's Variation Confirmation"); or
 - (b) withdraw the relevant Employer's Variation Notice.
- 24.7.2 Until the issue of an Employer's Variation Confirmation in respect of any Variation, the Employer shall be entitled to withdraw the Employer's Variation Notice at any time by notice to the Contractor to this effect.
- 24.7.3 Unless an Employer's Variation Confirmation is issued as soon as reasonably practicable but in any event within twenty (20) Business Days of such agreement or determination, the Employer's Variation Notice shall be deemed to be withdrawn.

24.8 Payment of Variation Cost

Whether or not an Employer's Variation Confirmation is issued, the Employer shall, upon demand, pay to the Contractor all reasonable, out of pocket, and other Costs including the Costs of any consultants and legal advisers, and Costs properly incurred by the Contractor in considering or dealing with Variations requested by the Employer, provided that:

- 24.8.1 the Contractor has notified the Employer of the amount which the Contractor considers would be recoverable under this Clause 24.8 if it will exceed hundred thousand Rand (R100 000,00) (Indexed) before incurring Costs in excess of this amount; and
- 24.8.2 the Employer shall not be required to make payments pursuant to this Clause 24.8 to the extent that such Costs have been included in the Variation Cost effects of any Variation in respect of which an Employer's Variation Confirmation has been issued.

24.9 Implementation of Employer's Variation

Upon receipt of an Employer's Variation Confirmation reflecting the Variation Memorandum as agreed or determined, the Contractor shall carry out the relevant works to effect the Variation and the terms of this Agreement shall be deemed to be amended on the terms of such Employer's Variation Confirmation.

24.10 Value Engineering

24.10.1 The Contractor may:

- (a) as a result of any further environmental authorisations referred to in Clause 4.9.3 above submit to the Employer's Representative a written Tender; or
- (b) at any time, submit to the Employer's Representative a written proposal which (in the Contractor's opinion) will, if adopted,
 - (i) accelerate completion;
 - (ii) reduce the Cost of executing, maintaining or operating the Works;
 - (iii) improve the efficiency or value of the completed Works; or
 - (iv) otherwise be of benefit to the Employer.

24.10.2 The Tender shall be prepared at the Cost of the Contractor and shall set out:

- (a) the nature of the Works Variation and which of the provisions of the Output Specification and/or Contractor's Proposals proposed to be amended; and
- (b) indicate any implications of the tender including, for the avoidance of doubt any impact on the Programme.

24.10.3 The tender shall not be implemented without the Employer's consent, which consent in the case of

- (a) a tender contemplated in Clause 24.10.1(a) above shall not be unreasonable withheld provided that there shall not be financial consequences to the Employer; and
- (b) a tender contemplated in Clause 24.10.1(b) above shall be at the Employer's absolute discretion and which consent, if granted, shall be subject to such conditions, including conditions as to consequential financial adjustments between the Parties, as the Employer may at its absolute discretion specify.

24.10.4 For the avoidance of doubt, any Cost savings arising from a value engineering in respect of the execution of Works, whether pursuant to Clause 24.10.1 or otherwise contemplated by or implemented by the Contractor shall be for the benefit of the Contractor.

25 COMPENSATION EVENTS

25.1 Definition

For purposes of this Clause 25, a "Compensation Event" means any breach by the Employer of any of its obligations under this Agreement (save for any breach that constitutes an Employer Event of Default and in respect of which the Contractor exercises its rights under Clause 29 (*Employer Events of Default*)) to the extent in each case that the breach is not caused or contributed to by the Contractor or any Subcontractor.

25.2 Consequences of a Compensation Event

25.2.1 If, as a direct result of the occurrence of a Compensation Event:

- (a) the Contractor is unable to achieve completion of the Works on or before the Time for Completion;
- (b) the Contractor is unable to comply with its obligations under this Agreement; and/or
- (c) the Contractor incurs Costs;

then the Contractor is entitled, subject to Clause 46 (*Mitigation*), to apply for relief from its obligations and/or claim compensation under this Agreement.

25.2.2 To obtain relief and/or claim compensation the Contractor must:

- (a) as soon as practicable, and in any event within 5 (five) Business Days after it became aware that the Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement and/or the Contractor to incur Costs or lose revenue, give to the Engineer a notice of its claim for an extension of time for Time for Completion, payment of compensation and/or relief from its obligations under this Agreement;
- (b) within twenty (20) days of receipt by the Engineer of the notice referred to in Clause 25.2.2(a) above, give full details of the Compensation Event and the extension of time and/or any estimated change in project Costs claimed; and
- (c) demonstrate to the reasonable satisfaction of the Engineer that:
 - (i) the Compensation Event was the direct cause of the estimated change in project Costs and/or any delay in the achievement of the Time for Completion; and
 - (ii) the estimated change in project Costs, time lost, and/or relief from the obligations under this Agreement claimed, could not reasonably be expected to be mitigated or recovered by the Contractor acting in accordance with Good Industry Practice.

25.2.3 In the event that the Contractor has complied with its obligations under Clause 25.2.2 above, then:

- (a) the Time for Completion shall be postponed by such time as shall be reasonable to the extent that the Compensation Event has an impact on the overall Programme and the ability on the part of the Contractor to have completed the Works by the Time for Completion, taking into account the actual progress of the Works on the occurrence of the Relief Event (without compensation for or recovering any delays caused by the Contractor's conduct) and the likely effect of delay; and
- (b) in the case of an additional Cost being incurred by the Contractor:
 - (i) on or before the Time for Completion; or
 - (ii) as a result of Additional Material Expenditure being incurred by the Contractor at any time,

the Employer shall compensate the Contractor for the actual estimated change in project Costs as adjusted to reflect the actual Costs reasonably incurred within (x) days of its receipt of a written demand by the Contractor supported by all relevant information;
- (c) in the case of a payment of compensation for the estimated change in project Costs that does not result in Additional Material Expenditure being incurred by the Contractor but which reflects a change in the Costs being incurred by the Contractor after the Time for Completion, the Employer shall compensate the Contractor by placing the Contractor in a no better, no worse position; and /or
- (d) the Employer shall, subject to Clause 25.2.5 below, give the Contractor such relief from its obligations under this Agreement, as is reasonable for such a Compensation Event.

25.2.4 In the event that the Contractor :

- (a) fails to give notice in terms of Clause 25.2.2(a) above; or
- (b) has given the notice in terms of Clause 25.2.2(a) above, but the information is provided after the dates referred to in Clause 25.2.2(b) above,

then Clause 35.1.2 below shall apply.

25.2.5 If the Parties cannot agree on the extent of any compensation, delay incurred, or relief from the Contractor's obligations under this Agreement, or the Employer disagrees that a Compensation Event has occurred (or as to its consequences), or that the Contractor is entitled to any relief under this Clause 25 (*Compensation Events*), then the provisions of Clause 3.5 (*Determinations*) read with Clause 35.1.9 (*Contractor Claims*) shall apply.

26 RELIEF EVENTS

26.1 For the purposes of this Agreement, subject to Clause 46 (*Mitigation*), Relief Events mean any of the following events:

- 26.1.1 fire, explosion, lightning, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, ionising radiation (to the extent it does not constitute Force Majeure), earthquake, riot, civil commotion or pressure waves caused by devices travelling at supersonic speeds;
- 26.1.2 without prejudice to the obligations of the Contractor pursuant to this Agreement, failure by a Responsible Authority, Utility Owner, local authority or other like body to carry out their legal obligations in relation to the Works or Schools where the Contractor had in compliance with the requirements of such Responsible Authority, Utility Owner, local authority or the like body made arrangements with such body in relation to the Works or Schools;
- 26.1.3 any accidental loss or damage to the Works and/or Schools;
- 26.1.4 without prejudice to any obligation of the Contractor to provide stand-by power facilities in accordance with the Employer's Requirements, any failure or shortage of power, fuel or transport;
- 26.1.5 any blockade or embargo which does not constitute an event of Force Majeure;
- 26.1.6 the Contractor's compliance with the Laws upon the discovery of any Heritage Resources that could not have been discovered by the Contractor in complying with its obligations as contemplated in Clause 10 (*Conditions of the Site*); or
- 26.1.7 any delay in obtaining any Consent;
- 26.1.8 any official or unofficial strike, lockout, go slow or other dispute in each case generally affecting the construction, building maintenance or facilities management industry (or a significant sector of that industry) which does not constitute an event of Force Majeure and which is not confined to the employees of the Contractor and/or any Subcontractor; or
- 26.1.9 interference with the Works or the performance of the Project Deliverables by persons with access to or use of or rights in respect of the Site, to the extent that the Contractor is not deemed to or required to have satisfied itself as to the possibility of such interference pursuant to the provisions of Clause 10.1.2(h) above;

to the extent that, in each case, such event does not arise (directly or indirectly) as a result of any wilful act or default of the party claiming relief and/or (i) in the case of the Contractor claiming relief, any Contractor's Personnel and (ii) in the case of the Employer claiming relief, any Employer's Personnel, its subcontractors and agents.

26.2 No right of termination shall arise under this Agreement by reason of any failure by a Party to perform any of its obligations under this Agreement to the extent that such failure to perform occurs because of the occurrence of a Relief Event.

26.3 **Consequences of a Relief Event**

26.3.1 If and to the extent that a Relief Event:

- (a) directly causes a delay to complete the Works by Time for Completion; and/or
- (b) materially adversely affects the ability of the Contractor to perform any of its obligations under this Agreement,

then the Contractor shall, subject to Clause 26.3.2 below, be entitled to apply for an extension of the Time for Completion and relief from any rights of the Employer arising under Clause 28 (*Termination for Contractor Default*).

26.3.2 To obtain relief, the Contractor must:

- (a) as soon as practicable, and in any event within 5 (five) Business Days after it became aware that the Relief Event has caused or is likely to cause delay and/or materially adversely affect the ability of the Contractor to perform its other obligations, give to the Employer a notice of its claim for relief from its obligations under this Agreement, including full details of the nature of the Relief Event, the date of occurrence, its likely duration and steps taken or proposed to be taken by the Contractor to prevent or mitigate or recover the time lost and the relief sought from obligations under this Agreement;
- (b) within 20 (twenty) Business Days of receipt by the Employer of the notice referred to in sub-Clause (a) above, give full details of the relief claimed; and
- (c) demonstrate to the reasonable satisfaction of the Employer that –
 - (i) the Contractor could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken and acting in accordance with Good Industry Practice, without incurring material expenditure that they would otherwise not have incurred but for the Relief Event occurring ("Additional Material Expenditure");
 - (ii) the Relief Event directly caused the delay to the Time for Completion and/or that it has materially and adversely affected the ability of the Contractor to perform any of its obligations under this Agreement in respect of which it is seeking relief;
 - (iii) the time lost and/or relief from the obligations under this Agreement claimed could not reasonably be expected to be prevented or mitigated or recovered by the Contractor acting in accordance with Good Industry Practice, without incurring Additional Material Expenditure; and
 - (iv) the Contractor is using reasonable endeavours to perform its obligations under this Agreement.

26.3.3 In the event that the Contractor has complied with its obligations under Clause 26.3.2 above, then:

- (a) the Time for Completion shall be postponed by such time as shall be reasonable to the extent that the Relief Event has an impact on the overall Programme and the ability on the part of the Contractor to have completed the Works by the Time for Completion, taking into account the actual progress of the Works on the occurrence of the Relief Event (without compensation for or recovering any delays caused by the Contractor's conduct) and the likely effect of delay; and/or
- (b) the Employer shall not be entitled to exercise its rights to terminate this Agreement under Clause 28.1 (*Contractor Events of Default*) on grounds of the Contractor's failure to perform its obligations under this Agreement to the extent that such failure is caused by the Relief Event; or
- (c) subject to Clause 26.3.4 below, the Employer shall give such other relief as has been requested by the Contractor and agreed between the Parties or decided pursuant to the Dispute Resolution Procedure.

26.3.4 In the event that the Contractor:

- (a) fails to give a notice of a Relief Event in terms of Clause 26.3.2(a) above; or
- (b) provides the information required by Clause 26.3.2(b) above after the dates referred to in that Clause, then the Contractor shall not be entitled to any relief during the period for which the information is delayed.

26.3.5 The Contractor shall notify the Employer if at any time it receives or becomes aware of any further information relating to the Relief Event, giving details of that information to the extent that such information is new or renders information previously submitted materially inaccurate or misleading.

26.3.6 In the event a Relief Event continue for a period in excess of 180 (180) days the Parties shall meet in order to agree a mutually satisfactory solution for dealing with such prolonged Relief Event. If the Parties cannot reach agreement on a mutually satisfactory solution for dealing with such a prolonged Relief Event, the provisions of Clause 27.1.1(d) (*Force Majeure*) shall apply.

26.3.7 If the Parties cannot agree on the extent of the relief required, or the Employer disagrees that a Relief Event has occurred or that the Contractor is entitled to any extension of a Time for Completion and/or relief from other obligations under this Agreement, then the provisions of Clause 3.5 (*Determinations*) read with Clause 35.1.9 (*Contractor Claims*) shall apply.

27 FORCE MAJEURE

27.1 Definition of Force Majeure

27.1.1 For the purposes of this Agreement, a "Force Majeure" means any of the following events or circumstances occurring after the Effective Date, to the extent that they are uninsurable and do not constitute a Relief Event (other than in the case of a Relief Event referred to in Clause 27.1.1(d)):

- (a) war, civil war, armed conflict or terrorism; or
- (b) nuclear contamination unless in any case the Contractor and/or any Contractor Personnel is the source or cause of the contamination; or
- (c) chemical or biological contamination of the Works and/or the Schools and/or the Site; or
- (d) a Relief Event as contemplated in Clause 26.3.6 that has lasted continuously for more than 180 days and
 - (i) only for the period that is continuing after the 180 days;
 - (ii) which is, at the date of this Agreement a risk for which the provisions of parts (a) and (b) of the definition of Uninsurable Risk apply;

which directly causes either Party to be unable to comply with all or a material part of its obligations under this Agreement.

27.2 Notice of Force Majeure

27.2.1 If a Party is or will be prevented from performing any of its obligations under the Agreement by Force Majeure, then it shall give notice to the other Party:

- (a) of the event or circumstances constituting the Force Majeure;
- (b) specifying the obligations, the performance of which is or will be prevented; and
- (c) of the action being or proposed to be taken in accordance with Clause 27.3 (*Mitigation*) to prevent or mitigate or recover the effect of such Force Majeure.

The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

27.2.2 The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.

27.2.3 If, following the issue of any notice referred to in Clause 27.2.1 above, the Party claiming relief receives or becomes aware of any further information relating to the event of Force Majeure (and/or any failure to perform), it shall submit such further information to the other Party as soon as reasonably possible.

- 27.2.4 Notwithstanding any other provision of this Clause 27, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under this Agreement.

27.3 Duty to Mitigate

- 27.3.1 Each Party shall at all times comply with Clause 46 (*Mitigation*) use all reasonable endeavours to minimise any delay in the performance of the Agreement as a result of Force Majeure, which obligation shall include without limitation the use of reasonable alternative mechanisms or steps towards complying with its obligations in terms of this Agreement for the duration of the Force Majeure.
- 27.3.2 A Party shall give notice to the other Party when it ceases to be affected by the Force Majeure.
- 27.3.3 The Party claiming relief shall notify the other as soon as the consequences of the event of Force Majeure have ceased and of when performance of its affected obligations can be resumed.

27.4 Consequences of Force Majeure

- 27.4.1 If the Contractor is prevented from performing any of his obligations under the Agreement by Force Majeure of which notice has been given under Clause 27.2 (*Notice of Force Majeure*), and suffers delay by reason of such Force Majeure, the Contractor shall be entitled subject to Clause 35.1 (*Contractor's Claims*) to an extension of time for any such delay, if completion is or will be delayed, under Clause 13.4 (*Extension of Time for Completion*)
- 27.4.2 During the continuance of any event of Force Majeure, the Contractor shall not be entitled to receive any payment in respect of the Works to the extent affected by the event of Force Majeure.
- 27.4.3 Subject to Clause 27.5 (*Optional Termination, Payment and Release*), the Contractor's sole right to payment or otherwise in relation to the occurrence of an event of Force Majeure shall be as provided in this Clause.

27.5 Optional Termination, Payment and Release

- 27.5.1 If the execution of substantially all the Works in progress is prevented for a continuous period of eighty four (84) days by reason of Force Majeure of which notice has been given under Clause 27.2 (*Notice of Force Majeure*), or for multiple periods which total more than hundred and forty (140) days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Agreement. In this event, the termination shall take effect seven (7) days after the notice is given, and the Contractor shall proceed in accordance with Clause 29.4 (*Cessation of Work and Removal of Contractor's Equipment*).
- 27.5.2 Upon such termination, the Engineer shall, without double counting and taking into account all payments that have already been made to the Contractor, determine the value of the work done and issue a Payment Certificate which shall include:

- (a) the amounts payable for any work carried out for which a price is stated in the Agreement;
- (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery. This Plant and Materials shall become the property of (and be at the risk of the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor;
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works; and
- (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

27.6 Release from Performance under the Law

27.6.1 Notwithstanding any other provision of this Clause 27, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Agreement, entitles the Parties to be released from further performance of the Agreement, then upon notice by either Party to the other Party of such event or circumstance:

- (a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Agreement, and
- (b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Clause 29.4 (*Optional Termination, Payment and Release*) if the Agreement had been terminated under Clause 29.4.

28 TERMINATION BY EMPLOYER

28.1 Notice to Correct

If the Contractor fails to carry out any obligation under this Agreement, the Employer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.

28.2 Termination by Employer

28.2.1 For the purposes of this Agreement, the Employer shall, subject to this Clause 28, be entitled to terminate on the occurrence of Contractor Events of Default. A Contractor Events of Default means any of the following events or circumstances:

- (a) Contractor's failure to comply with Clause 4.14 (*Performance Security*) or with a notice under Clause 28.1 (*Notice to Correct*),
- (b) the occurrence of any of the following events in respect of the Contractor, namely:
 - (i) any arrangement, compromise or composition with or for the benefit of creditors (including any voluntary arrangement as defined in the Insolvency Act 24 of 1936 or the Companies Act 61 of 1973) being entered into by or in relation to the Contractor;
 - (ii) the Contractor being placed under provisional or final liquidation, or committing an act, that would (if committed by a natural person) be an act of insolvency within the meaning of the Insolvency Act, 1936, or a resolution being passed for the liquidation or administration or judicial management of the Contractor, or liquidator or a judicial manager being appointed to manage the affairs of the Contractor;
 - (iii) the Contractor ceasing to carry on business; or
- (c) the Contractor fails:
 - (i) to proceed with the Works in accordance with Clause 8 (*Commencement, Delays and Suspension*);
 - (ii) subject to Clause **Error! Reference source not found.**, to complete the whole of the Works by the expiry of four (4) Contract Months after the Defects Notification Period; or
 - (iii) to comply with a notice issued under Clause 14.6 (*Rejection*) or Clause 14.7 (*Remedial Work*), within 28 days after receiving it,
- (d) the Contractor committing a material breach of its obligations under this Agreement not covered by sub-Clauses (e), (f), **Error! Reference source not found.**, (g), (h) or by other Contractor Events of Default;
- (e) the Contractor committing a material breach of its obligations in relation to the Schools under this Agreement (other than as a consequence of a breach by the Employer of its obligations under this Agreement) which results in a criminal investigation, prosecution and conviction of the Contractor or any Contractor's Personnel under the Occupational Health and Safety Act (an "H&S Conviction") provided that an H&S Conviction of a Contractor's Personnel shall not constitute a Contractor Event of Default if, within ninety (90) Business Days from the date of the H&S Conviction (whether or not the H&S Conviction is subject to an appeal or any further judicial process), the involvement in the Project Deliverables of each relevant Contractor's Personnel (which in the case of an individual director, officer or employee shall be deemed to include Contractor's Personnel of which that

person is a director, officer or employee) is terminated and a replacement is appointed by the Contractor;

- (f) the Contractor fails to comply with any provisions in Clause 30 (*Assignment and Changes in Control*);
- (g) the Contractor failing to pay any sum or sums due and payable to the Employer in accordance with the terms of this Agreement (which sums are not in dispute) or have been determined by dispute resolution process which, either singly or in aggregate, exceed(s) one hundred thousand Rand (R100 000,00) Indexed and such failure continues for sixty (60) Business Days from receipt by the Contractor of a notice of non-payment from the Employer;
- (h) subject to Clause **Error! Reference source not found.**, the Contractor fails to obtain and maintain any Project Insurances as required in terms of Clause 21 (*Insurance*);
- (i) where the Employer is entitled to terminate the Agreement in accordance with Clause 34.3 (*Remedies Against Corrupt Act*).
- (j) any breach of any provision of this Agreement other than breach already referred to in Clause 28.2.1(a) to Clause 28.2.1(h) above has occurred more than once and:
 - (i) the Employer has given an initial warning notice to the Contractor describing that breach in reasonable detail and stating that if that breach persists or recurs then the Employer may take further steps to terminate this Agreement ("Initial Warning"); and
 - (ii) the Employer has issued a second and final warning notice following the persistence or recurrence of that breach in the period of thirty (30) days after the Initial Warning notice, stating that if that breach persists or recurs within the period of thirty (30) days after the final warning notice then the Employer may terminate this Agreement on fourteen (14) Business Days' notice to the Contractor.

28.2.2 Notification

The Contractor shall notify the Employer of the occurrence, and details, of any Contractor Event of Default and of any event or circumstance which is likely, with the passage of time or otherwise, to constitute or give rise to a Contractor Event of Default, in either case promptly on the Contractor becoming aware of its occurrence

28.2.3 Employer's Options

- (a) On the occurrence of a Contractor Event of Default, or within a reasonable time after the Employer becomes aware of the same, the Employer may:

- (i) in the case of the Contractor Event of Default referred to in Clauses 28.2.1(a), 28.2.1(b), 28.2.1(c), **Error! Reference source not found.** 28.2.1(g) and 28.2.1(i) terminate this Agreement in its entirety by notice in writing having immediate effect;
- (ii) and while the same is subsisting, in the case of any other Contractor Event of Default not referred in Clause 28.2.3(a)(i) above serve notice of default on the Contractor requiring the Contractor at the Contractor's option either:
 - (1) to remedy the Contractor Event of Default referred to in such notice of default (if the same is continuing) within thirty (30) Business Days of such notice of default; or
 - (2) to put forward within twenty (20) Business Days of such notice of default a reasonable programme for remedying the Contractor Event of Default, acceptable to the Employer. The programme shall specify in reasonable detail the manner in, and the latest date by, which such Contractor Event of Default is proposed to be remedied.

28.2.4 Remedy Provisions

- (a) Where the Contractor puts forward a programme in accordance with Clause 28.2.3(a), the Employer shall have twenty (20) Business Days from receipt of same within which to notify the Contractor that it does not accept the programme, failing which the Employer shall be deemed to have accepted the programme.
- (b) If:
 - (i) the Contractor Event of Default notified in a notice of default is not remedied before the expiry of the period referred to in the notice; or
 - (ii) where the Contractor puts forward a programme which has been accepted by the Employer and the Contractor fails to achieve any element of the programme or to complete the programme by the specified end date for the programme (as the case may be)

then the Employer may, terminate this Agreement in its entirety by written notice to the Contractor with immediate effect. Provided that, for the purposes of Clause 28.2.3(a)(ii)(2), if the Contractor's execution of the programme is adversely affected by the occurrence of an event of Force Majeure or a Relief Event then, subject to the Contractor complying with the mitigation and other requirements in this Agreement concerning Force Majeure or Relief Events (as the case may be), the time for execution of the programme or any relevant element of it shall be deemed to be extended by a period equal to the delay caused by the Force Majeure event or Relief Event (as the case may be) which is

agreed by the Parties or determined in accordance with Fast-track Dispute Resolution.

28.2.5 Employer's Costs

- (a) The Contractor shall, reimburse the Employer with all Costs incurred by the Employer in exercising any of its rights in terms of this Clause. The Employer should take reasonable steps to mitigate such Costs.
- (b) The Employer shall not exercise, or purport to exercise, any right to terminate this Agreement except as expressly set out in this Agreement. The rights of the Employer (to terminate or otherwise) under this Clause are in addition (and without prejudice) to any other right which the Employer may have in law to claim the amount of any direct loss or damages suffered by the Employer on account of the acts or omissions of the Contractor (or to take any action other than termination of this Agreement).

28.2.6 Consequences of Termination by the Employer

- (a) Upon receipt of a notice from the Employer terminating this Agreement from the Employer in terms of Clause 28.2 (*Termination by Employer*), the Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other documents made by or for it, to the Employer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice:
 - (i) for the assignment of any subcontract; and
 - (ii) for the protection of life or property or for the safety of the Works.

28.2.7 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 documents made by or on behalf of the Contractor.

28.2.8 The Employer shall then give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and Cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the 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.

28.3 Valuation at Date of Termination

As soon as practicable after a notice of termination under Clause 28.2 (*Termination by Employer*) has taken effect, the Engineer 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 Agreement.

28.4 Payment after Termination

After a notice of termination under Clause 28.2 (*Termination by Employer*) has taken effect, the Employer may:

- 28.4.1 proceed in accordance with Clause 2.2 above (*Employer's Claims*);
- 28.4.2 withhold further payments to the Contractor until the Costs of, execution, completion and remedying of any defects, damages for delay in completion (if any), and all other Costs incurred by the Employer, have been established, and/or
- 28.4.3 recover from the Contractor any losses and damages incurred by the Employer and any extra Costs of completing the Works, after allowing for any sum due to the Contractor under Clause 28.3 (*Valuation at Date of Termination*). After recovering any such losses, damages and extra Costs, the Employer shall pay any balance to the Contractor.

28.5 Employer's Entitlement to Termination for Convenience.

- 28.5.1 The Employer shall be entitled to terminate the Agreement, 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 later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security. The Employer shall not terminate the Agreement under this Clause 28.5 in order to execute the Works himself or to arrange for the Works to be executed by another Contractor.
- 28.5.2 Upon the termination by the Employer becoming effective in terms of Clause 28.5.1 above, the provisions of Clauses 27.5 and 28.2.6 above shall apply.

29 SUSPENSION AND TERMINATION BY CONTRACTOR

29.1 Contractor's Entitlement to Suspend Work

- 29.1.1 If the Employer fails to comply with Clause 20.3 (*Issue of Interim Payment Certificate*), the Contractor may, 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 the Payment Certificate, reasonable evidence or payment, as the case may be and as described in the notice.
- 29.1.2 The Contractor's action shall not prejudice its entitlements to financing charges under Clause 20.4 (*Delayed Payment*) and to termination under this Clause 29 (*Suspension and Termination by Contractor*).
- 29.1.3 If the Contractor subsequently receives such payment (as described in Clause 20.3 (*Issue of Interim Payment Certificate*) and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.
- 29.1.4 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 29.1.4, the Contractor shall give notice to the Employer and shall be entitled subject to Clause 35.1 (*Contractor's Claims*) to
 - (a) an extension of time for any such delay, if completion is or will be delayed; and

- (b) payment of any such Cost, which shall be included in the Contract Price.

29.2 Termination by the Contractor

29.2.1 The Contractor shall, subject to the provisions of this Clause 29, be entitled to terminate the Agreement in the event of the occurrence of any of the Employer Events of Default. For purposes of this Agreement, Employer Events of Default means any of the following events or circumstances:

- (a) failure of the Employer to pay any amount due to the Contractor under an Interim Payment Certificate within ninety (90) days after the expiry of the time stipulated in Clause 20.3.2 (*Issue of Interim Payment Certificate*); or
- (b) an expropriation of a material part of the Project Assets and/or shares of the Contractor, by the Employer or other Responsible Authority with the result that the Contractor or the Employer can no longer carry out all or material part of its rights and/or obligation under this Agreement; or
- (c) a breach by the Employer of its obligations in terms of this Agreement, which has an aggregate financial impact to the Contractor of not less than two million Rand (R2 000 000,00) Indexed.

29.3 Contractor's Options

29.3.1 On the occurrence of an Employer Event of Default, or within a reasonable time after the Contractor becomes aware of the same, and while the same is still subsisting, the Contractor must, if it wishes to trigger termination in terms of this Agreement, serve notice ("Employer's Default Notice") on the Employer of the occurrence of such Employer Event of Default specifying :

- (a) the type and nature of the Employer Event of Default that has occurred, giving reasonable details; and
- (b) that the Agreement will terminate on the day falling:
 - (i) fourteen (14) days of the notice referred to in this Clause 29.3.1 in the case of default referred to in Clause 29.2.1(a); or
 - (ii) thirty (30) Business Days after the date the Employer is served with the Employer Default Notice in the case of any other Employer Events of Default unless and only in the case of default referred to in Clause 29.2.1(c):
 - (1) within twenty (20) Business Days, the Employer delivers to the Contractor a programme for the rectification of the default which programme is in the Contractor's reasonable opinion capable of rectifying the default ("Employer's Rectification Programme"); or

- (2) the Employer rectifies the Employer Event of Default within thirty (30) Business Days of receipt of the Employer's Default Notice.

29.3.2 If the Employer either rectifies the Employer Event of Default within the time period specified in the Employer's Default Notice, or implements the Employer's Rectification Programme in accordance with its terms (where applicable), the Employer's Default Notice shall be deemed to be revoked and this Agreement shall continue.

29.3.3 If the Employer fails to rectify the Employer Event Default within the time period specified in the Employer's Default Notice or fails to implement any Employer's Rectification Programme in accordance with its terms (where applicable), then this Agreement shall terminate on the day falling thirty (30) Business Days after the date the Employer is served with the Employer's Default Notice or on the failure to implement the Employer's Rectification Plan in accordance with its terms.

29.3.4 The Contractor shall not exercise or purport to exercise any right to terminate this Agreement (or accept any repudiation of this Agreement) except as expressly set out in this Agreement.

29.3.5 The Contractor's election to terminate the Agreement shall not prejudice any other rights of the Contractor, under the Agreement or otherwise.

29.4 Cessation of Work and Removal of Contractor's Equipment

After a notice of termination under Clause 28.5 (*Employer's Entitlement to Termination*), Clause 29.2 (*Termination by Contractor*) or Clause 27.5 (*Optional Termination. Payment and Release*) has taken effect, the Contractor shall promptly:

29.4.1 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;

29.4.2 hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and

29.4.3 remove all other Goods from the Site, except as necessary for safety, and leave the Site.

29.5 Payment on Termination

After a notice of termination under Clause 29.2 (*Termination by Contractor*) has taken effect, the Employer shall promptly:

29.5.1 return the Performance Security to the Contractor;

29.5.2 pay the Contractor in accordance with Clause 27.5 (*Optional Termination, Payment and Release*), and

29.5.3 pay to the Contractor the amount of any loss or damage sustained by the Contractor as a result of this termination.

30 ASSIGNMENT, AND CHANGES IN CONTROL

30.1 Assignment

- 30.1.1 This Agreement and any Project Document to which both the Employer and the Contractor are Parties shall be binding on, and shall endure to the benefit of them and their respective successors-in-title and permitted transferees and assigns.
- 30.1.2 None of the Parties shall be entitled to assign the benefit or transfer the burden of any of this Agreement or Project Documents (including any benefit, interest or right which arises under or out of this Agreement including any present, future or contingent interest or right to any sums or damages payable by any Party under or in connection with this Agreement) without the prior written consent of the other Party (such approvals not to be unreasonably withheld or delayed).
- 30.1.3 At the time of any such assignment or transfer, the relevant Party shall transfer and/or assign (in the same manner) the benefit and burden of each of the Project Documents to which it is a party and the Direct Agreement.
- 30.1.4

30.2 Changes in Control¹⁴

- 30.2.1 Subject to Clauses **Error! Reference source not found.** and 30.2.3 and to the requirements of Schedule 3 (*Economic Development*), prior to the expiry of a period of twelve (12) months commencing on the Time for Completion, no Change in Control in any or all of the shares in the Contractor (or any company of which the Contractor is a Subsidiary) shall be permitted without the prior written approval of the Employer.
- 30.2.2 Subject to Clause 30.2.3, the conditions and restrictions in Clause 30.2.1 shall not apply to a Change in Control in any shares in the Contractor held by any Third Party Shareholder.
- 30.2.3 Subject to the provisions of Schedule 3 (*Economic Development*), no Change in Control (at any time) in any or all of the shares in the Contractor (or in any company of which the Contractor is a Subsidiary or which is holding shares in the Contractor or in any of the companies which are controlled by HDIs) shall be permitted without the prior written approval of the Employer where the person acquiring control does not comply with the requirements of Schedule 3 (*Economic Development*) which are then applicable or where such person's sub-contractors or sub-contracting arrangements do not comply with such requirements.

31 INTELLECTUAL PROPERTY

31.1 Project Data

- 31.1.1 The Contractor shall make available to the Employer free of charge, and hereby irrevocably licences the Employer to use, all Project Data that might reasonably be required by the Employer and the Contractor shall ensure that it obtains all necessary licences, permissions and consents to ensure

¹⁴ **Drafting Note:** Subject to the preferred bidder's proposed structure.

that it can make the Project Data available to the Employer on these terms, for the purposes of:

- (a) the Employer carrying out its duties and/or exercising its rights under this Agreement;
- (b) following termination of this Agreement, the construction of the Schools, the operation, maintenance or improvement of the Schools and/or the carrying out of operations the same as, or similar to, the Project Deliverables in respect of the Schools;

(together, the "Approved Purposes"), and in this Clause "use" shall include the acts of copying, modifying, adapting and translating the material in question and/or incorporating them with other materials and the term "the right to use" shall be construed accordingly.

31.2 Intellectual Property of the Contractor

31.2.1 The Contractor

- (a) hereby grants ownership of the Intellectual Property Rights (if any), to the Employer, which are or become vested in the Contractor or in the Subcontractor or in the Material Subcontractor or their members which are created or acquired after the Effective Date for purposes of implementing the obligations of the Contractor in terms of this Agreement and not acquired in the course of business for general use by such Party acquiring it, in its business outside of the Project;
- (b) shall, in the case of Licensed Intellectual Property Rights use all reasonable endeavours to procure the grant of a free of charge, an irrevocable, non-exclusive and transferable license. Such license shall carry the right to grant sub-licenses and shall be only to any assignee or transferee of any rights or benefits under this Agreement upon or at any time following termination of this Agreement) license (carrying the right to grant sub-licences); and
- (c) shall use all reasonable endeavours to ensure that the Intellectual Property Rights referred to in Clause 31.2.1(a) vest, and remain vested throughout the term of this Agreement, in the Contractor.

in both cases, solely for the Approved Purposes.

31.2.2 The Contractor shall be liable for, shall indemnify and shall hold the Employer harmless against any and all claims, demands, proceedings, losses liabilities, damage, Costs (including without limitation, legal Costs) and/or expenses the Employer may suffer or incur in the event:

- (a) that the Employer's rights and interests provided under Clause 31.1 are at any time determined by a court of law to be invalid, ineffective or impaired in any way;
- (b) of any claim, threat, demand or proceedings by any third party, the contention of which being the exercise of the Employer's rights and interests under Clause 31.1 infringe the Licensed Intellectual Property Rights; and/or

- (c) that performance by the Contractor of its responsibilities under, pursuant to, or arising from this Agreement and/or the provision or operation of the Schools leads to, or would lead to, the infringement of any Licensed Intellectual Property Right.

31.2.3 The Indemnity referred to in Clause 31.2.2 (without prejudice and subject to Clause 1.1 (*Background Information*)) shall not apply:

- (a) to any infringement resulting from the Employer's failure to comply with specific written instructions reasonably required to:
 - (i) regulate the use of Intellectual Property Rights by the Employer in terms of the rights and/or interest provided under Clause 31.2.1 (which was not reasonably foreseen by the Contractor at the time of granting rights and interest in Intellectual Property Rights by the Contractor); or
 - (ii) to prevent any of the instances referred to in Clauses 31.2.2(a) to 31.2.2(c) above; or
- (b) to any infringement resulting from any infringing material or information provided by the Employer to the Contractor to the extent that the Contractor reasonably relied on such materials or information in the course of the performance of this Agreement and has complied with the requirements of Clause 1.1 (*Background Information*);
- (c) to any claims, demands, proceedings, losses, liabilities, damage, Costs (including, without limitation, legal Costs) and/or expenses the Employer may suffer or incur arising from errors, omissions or defects in the materials or information provided by the Employer to the extent that such errors, omissions or defects are as a result of negligence or wilful misconduct of the Employer or its employees subject to the Contractor having complied with the requirements of Clause 1.1 (*Background Information*).

31.2.4 The Contractor shall, at its own Cost, provide such co-operation and assistance and take such action and institute such proceedings as the Employer requests in the event of any claims, demands, proceedings under Clause 31.2.3(c) and shall assist the Employer in resolving queries concerning the ownership and licensing of Intellectual Property Rights relating to this Agreement and the provision of the Schools.

31.3 Intellectual Property of the Employer

31.3.1 All Intellectual Property Rights whatsoever, whether capable of registration or not, regarding the Employer's name, trademarks, logos, image and all other intellectual property matters relating to the Employer, including its name, trademarks, logos and/or image shall remain the sole property of the Employer.

31.3.2 Subject to existing rights and obligations and Clause 31.3.3, the Employer shall, on prior written application by the Contractor, grant a non-exclusive revocable right and license to the Contractor to use the Employer's trademarks and logos for a period not to exceed the remainder of the Project Term.

- 31.3.3 In order to establish and maintain standards of quality and propriety acceptable to the Employer, in the event that the Contractor desires to use the Employer's trademarks or logos in any way, the Contractor shall first submit the concept or a sample of the proposed use to the Employer for approval, which shall be in its sole and absolute discretion. The Employer shall use reasonable endeavours to advise the Contractor of its approval or disapproval of the concept or sample within 20 (twenty) Business Days of its receipt of the concept or sample. If the Employer approves the concept or sample, the Contractor shall not depart therefrom in any respect without the Employer's further prior written approval.
- 31.3.4 If at any time the Employer revokes its approval for the specified use of any trademark or logo, the Contractor shall forthwith discontinue all use of such trademark or logo and shall remove from public sale or distribution any previously approved product in respect of which the Employer has revoked its approval. The Costs incurred by the Contractor as a result of such revocation shall be borne by the Contractor, if the grounds for the revocation include any ground described in Clause 31.3.5.
- 31.3.5 The Employer may revoke its approval immediately upon 5 (five) Business Days written notice to the Contractor if the Contractor commits any crime or otherwise engages in conduct which violates any Law, or engages in any conduct that offends against public morals and decency and, in the Employer's reasonable opinion, materially prejudices the reputation and public goodwill of the Employer.
- 31.3.6 The Contractor acknowledges that the name(s) of the Employer (the 'Protected Names') are associated with and peculiar to the Employer and are the intellectual property of the Employer. Consequently, the Contractor agrees that the sole and exclusive ownership of the Protected Names shall vest in the Employer.
- 31.3.7 In circumstances where the Contractor utilises any of the Protected Names, either on its own or in combination or association with any other name, it does so only in terms of this Agreement and with the prior approval of the Employer. On termination or expiry of this Agreement, the Contractor shall not be entitled to operate or conduct any business using any of the Protected Names either on its own or in combination or association with any other name.
- 31.3.8 Within 60 (sixty) Business Days after the end of the Project Term and where the Contractor has operated a company utilising any of the Protected Names with the permission of the Employer, the Contractor shall either:
- (a) de-register the company bearing any of the Protected Names; or
 - (b) change the name to a name not substantially similar to any of the Protected Names.
- 31.3.9 The naming of the Contractor's business operation shall be undertaken in consultation with the Employer and subject to the Employer's approval. In circumstances where the name chosen by the Contractor and approved by the Employer is not part of the Employer's intellectual property, then the rights of the Employer contemplated in Clause 31.3.8 shall not be applicable and the intellectual property shall be the sole property of the Contractor.

32 CONFIDENTIALITY

32.1 Confidential Information

32.1.1 In this Agreement, "Confidential Information" means all information relating to the other Party which is supplied by or on behalf of the other Party (whether before or after the date of this Agreement), either in writing, orally or in any other form, directly or indirectly from or pursuant to discussions with the other party or which is obtained through observations made by the receiving Party. "Confidential Information" also includes all analyses, compilations, studies and other documents whether prepared by or on behalf of a party, which contain or otherwise reflect or are derived from such information.

32.1.2 Each Party shall hold in confidence any Confidential Information and shall also use reasonable endeavours to prevent its employees, agents from making any disclosure to any person of any Confidential Information, provided that the provisions of this Clause shall not restrict either Party from passing such information to its professional advisers, to the extent necessary, to enable it to perform (or to cause to be performed) or to enforce its rights or obligations under this Agreement.

32.2 Exceptions

32.2.1 The obligation to maintain the confidentiality of the Confidential Information does not apply to Confidential Information:

- (a) which the other party confirms in writing is not required to be treated as Confidential Information;
- (b) which is or comes into the public domain otherwise than through any disclosure prohibited by this Agreement;
- (c) which is disclosed as part of any attempt to resolve a dispute in accordance with Clause 35 (*Claims, Disputes and Arbitration*);
- (d) to the extent any person is required to disclose such Confidential Information by Law or rules of any stock exchange or any regulatory or government authority (but only to that extent);
- (e) that is already lawfully in the possession of the receiving party prior to its disclosure by the disclosing Party;
- (f) as the Employer may require for the purpose of the Project Deliverables in the event of, or following, termination of this Agreement;
- (g) disclosed by the Employer to any Responsible Authority; or
- (h) to the extent required to be disclosed pursuant to Clause 22.1.2 (*Information and Audit Access*).

32.3 Announcements

Unless otherwise required by any Law or any regulatory or governmental authority (but only to that extent), neither Party shall make or permit or procure to be made any

public announcement or disclosure (whether for publication in the press, the radio, television screen or any other medium) of any Confidential Information or in the case of the Contractor of its (or any Contractor Party's) interest in the Project or, in any such case, any matters relating thereto, without the prior written consent of the other party (which shall not be unreasonably withheld or delayed).

33 TAXATION

33.1 VAT

- 33.1.1 All amounts stated to be payable by either Party under this Agreement shall be exclusive of any VAT properly chargeable on any amount.
- 33.1.2 Each Party shall pay to the other Party any VAT properly chargeable on any supply made to it under this Agreement provided that it shall first have received from the other party a valid tax invoice in respect of that supply which complies with the requirements of the Value Added Tax Act No 89 of 1991.

34 CORRUPT GIFTS AND PAYMENTS

34.1 Prohibition on Corruption

- 34.1.1 The term "Corrupt Act" means:
 - (a) offering, giving or agreeing to give to the Employer or any other organ of state or to any person employed by or on behalf of the Employer or any other organ of state any gift or consideration of any kind as an inducement or reward:
 - (i) for doing or not doing (or for having done or not having done) any act in relation to the obtaining or performance of this Agreement or the Project or any other agreement with the Employer or any other organ of state; or
 - (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement, the Project or any other agreement with the Employer or any other organ of state;
 - (b) entering into this Agreement or any other agreement with the Employer or any other organ of state in connection with which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment of such commission have been disclosed in writing to the Employer;
 - (c) committing any offence:
 - (i) under the any Law from time to time dealing with bribery, corruption or extortion;
 - (ii) under any Law creating offences in respect of fraudulent acts; or

- (iii) at common law, in respect of fraudulent acts in relation to this Agreement, the Project or any other contract with the Employer or any other public body; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Employer or any other public body.

34.2 **Warranty**

The Contractor warrants that in entering into this Agreement it has not committed any Corrupt Act.

34.3 **Remedies against Corrupt Act**

- 34.3.1 If the Contractor or, any Contractor Party (or anyone employed by or acting on behalf of them) commits or is reasonably suspected by the Employer of having committed any Corrupt Act, then the Employer shall be entitled to act in accordance with sub-Clauses (a) to (f) below:
- (a) if the Corrupt Act is committed by the Contractor, any shareholder, any director of the Contractor, any director of the shareholder, or by an employee of the Contractor or of any shareholder acting under the authority of or with the knowledge of a director of the Contractor or such shareholder, as the case may be, then in any such case, the Employer may terminate the Agreement with immediate effect by giving written notice to the Contractor;
 - (b) if the Corrupt Act is committed by an employee of the Contractor or of any shareholder acting of his or her own accord, then in any such case, the Employer may give written notice to the Contractor of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor terminates the employee's involvement in the Project and (if necessary) procures the performance of the relevant part of the Project Deliverables previously performed by him or her is performed by another person;
 - (c) if the Corrupt Act is committed by a Subcontractor, director of a Subcontractor or by an employee of a Subcontractor acting under the authority or with the knowledge of a director of that Subcontractor, then in any such case, the Employer may give written notice to the Contractor of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor terminates the relevant Subcontract and procures the performance of the relevant part of the Project Deliverables by another person, where relevant, in accordance with Clause 30 (*Assignment, Sub-contracting and Change in Control*);
 - (d) if the Corrupt Act is committed by an employee of a Subcontractor acting of his or her own accord, then the Employer may give notice to the Contractor of termination and the Agreement will terminate, unless within twenty (20) Business Days of receipt of such notice the Contractor procures the termination of the employee's involvement in the Project, and (if necessary) procures the performance of the relevant part of the Project

Deliverables previously performed by that employee by another person;

- (e) if the Corrupt Act is committed in relation to this Project by any other person not specified in Clauses (a) to (d) above, but involved in the Project as a subcontractor or supplier to any Subcontract or to the Contractor, then the Employer may give notice to the Contractor of termination and the Agreement will terminate unless, within twenty (20) Business Days, the Contractor procures the termination of such person's involvement in the Project, and of the appointment of their employer (where such person is not employed by the Contractor or the Subcontractor) and (if necessary) procures the performance of the relevant part of the Project Deliverables by another person; and
 - (f) any notice of termination under this Clause shall specify:
 - (i) the nature of the Corrupt Act;
 - (ii) the identity of the party or parties who the Employer believes has committed the Corrupt Act; and
 - (iii) the date on which the Agreement will terminate in accordance with the applicable provisions of this Clause.
- 34.3.2 Without prejudice to its other rights or remedies under this Clause 34, the Employer shall, subject to Clause 2.2 above (*Employer's Claims*) be entitled to recover from the Contractor, the greater of :
- (a) the amount or value of any such gift, consideration or commission, which is the subject of the Corrupt Act; and
 - (b) any other loss sustained in consequence of any breach of this Clause.

34.4 Permitted Payments

Nothing contained in this Clause 34 shall prevent the Contractor from paying any proper commission or bonus to its employees within the agreed terms of their employment.

34.5 Notification

The Contractor shall notify the Employer of the occurrence (and details) of any Corrupt Act promptly on the Contractor becoming aware of its occurrence.

34.6 Replacement of Subcontractor

Where the Contractor is required to replace any Subcontractor pursuant to this Clause, the provisions of Clause 30 (*Assignment, Subcontracting and Changes in Control*) shall be construed accordingly.

35 CLAIMS, DISPUTES AND ARBITRATION

35.1 Contractor's Claims

- 35.1.1 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 Agreement or otherwise in connection with the Agreement, save for Compensation Event in terms of Clause 25 above, Relief Events in terms of Clause 26 above and Force Majeure in terms of Clause 27 above, the Contractor shall give notice to the Employer and the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 20 days after the Contractor became aware, or should have become aware, of the event or circumstance.
- 35.1.2 If the Contractor fails to give notice of a claim within such period of 20 days, the Time for Completion shall not be extended and/or, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Clause 35.1 shall apply.
- 35.1.3 The Contractor shall also submit any other notices which are required by the Agreement, and supporting particulars for the claim, all as relevant to such event or circumstance.
- 35.1.4 The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. The Engineer may, after receiving any notice under this Clause 35.1, monitor the record-keeping and/or on his own accord or at the request of the Employer instruct the Contractor to keep further contemporary records. The Contractor shall permit the Employer and the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer and the Employer.
- 35.1.5 Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer on the consent of the Employer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:
- (a) this fully detailed claim shall be considered as interim;
 - (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
 - (c) the Contractor shall send a final claim within 28 days after the event giving rise to a claim comes to an end.
- 35.1.6 In the event that the Contractor gives provides the information required by Clause 35.1.5 above after the dates referred to in that Clause, then the Contractor shall not have a claim against the Employer based on the notice given in accordance with Clause 35.1.1 above, save where the Contractor

has applied in writing with reason to the Engineer for an extension of the time periods in Clause 35.1.5 and the Engineer has agreed thereto in writing prior to the expiry of such time periods.

- 35.1.7 Within 42 days after receiving a claim or any further particulars supporting a claim, or within such other period as may be proposed by the Engineer which period shall not exceed 20 days from the expiry of the 42 days period referred to in this Clause 35.1.7 unless where the Parties agree to a longer period, the Engineer shall respond with approval, or with disapproval and detailed comments. The Engineer may also request any necessary further particulars, but shall nevertheless give his approval or disapproval of the claim within such time.
- 35.1.8 Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Agreement. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.
- 35.1.9 The Engineer shall proceed in accordance with Clause 3.5 (*Determinations*) to agree or determine:
 - (a) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Clause 13.4 (*Extension of Time for Completion*), and/or
 - (b) the additional payment (if any) to which the Contractor is entitled under the Agreement.
- 35.1.10 The requirements of this Clause 35.1 are in addition to those of any other provision which may apply to a claim. If the Contractor fails to comply with this or another provision in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under Clause 35.1.7.

35.2 Amicable Settlement

- 35.2.1 When a Dispute arises between the Parties they shall, without prejudice to any one of their rights under this Agreement, endeavour in good faith to resolve the dispute amicably.
- 35.2.2 The Party seeking to have a Dispute resolved shall refer the Dispute for resolution in accordance with Clause 35.2.3 below.
- 35.2.3 Upon receipt by a Party of a Notice of Dispute, the Parties shall engage their respective chief executives (or duly authorised individuals) to seek an amicable settlement and the following shall apply:
 - (a) within two (2) Business Days of the service of the Notice of Dispute, the Party who has served the Notice of Dispute shall provide the other Party with brief details of the matter in issue and the remedy sought and making express reference to this sub-Clause (a);

- (b) the Party receiving such details will issue, within five (5) Business Days, its brief response making express reference to this Clause (b); and
 - (c) the chief executives (or duly authorised individuals) will meet within ten (10) Business Days of the issue of the response to discuss the matter in an endeavour to amicably resolve the Dispute. They may use whichever means they jointly consider appropriate to resolve the Dispute.
- 35.2.4 If the Dispute is not resolved by amicable settlement within ten (10) Business Days of the first meeting of the chief executives (or duly authorised individuals) the Party who served the Notice of Dispute may issue a notice requiring the Dispute to be resolved by the procedures provided below in this Clause 35.
- 35.2.5 Disputes between the Parties shall remaining unresolved following the amicable settlement process described in Clause 35.2.3 shall be resolved in accordance with the following procedures:
 - (a) First Fast Track Dispute Resolution Procedure:
 - (i) for the resolution of all Disputes; and
 - (ii) any proceedings under this Clause 35.2.5(a) shall be conducted in accordance with the AFSA Rules for Expedited Arbitrations,
 - (b) Court Procedure:
 - (i) if either Party is dissatisfied with the decision of Fast Track Dispute Resolution Procedure, either Party shall be entitled to refer that decision to the High Court having jurisdiction to adjudicate the matter; and
 - (ii) any such proceedings referred to the High Court shall be considered by the High Court as a court of appeal, based on the powers of determination of issues by the High Court as it would have had if the matter had been adjudicated by another court as a court of first instance;

35.3 Associated Contract Disputes

- 35.3.1 A notice of an Associated Contract Dispute ("Notice of Associated Contract Dispute") from either Party shall be served on the other Party contemporaneously with any Notice of Dispute served by that Party on the other Party, or within three (3) Business Days of receipt of a Notice of Dispute from either Party as the case may be, so that it may be determined in the same proceedings as any Dispute referred to the Fast Track Dispute Resolution Procedure in accordance with this Clause 35.
- 35.3.2 The provisions of this Clause 35 shall, where an Associated Contract Dispute arises, be modified accordingly.
- 35.3.3 Where the Employer notifies a Dispute and the Contractor considers it to be an Associated Contract Dispute, the Contractor shall timeously notify the

appropriate Associated Party(ies) of the Associated Contract Dispute. Provision shall be made in the Associated Contracts for the Notice of Associated Contract Dispute to be given timeously to the relevant Associated Parties.

35.3.4 The Contractor undertakes to procure that in the case of a Notice of Associated Contract Dispute being given by any Subcontractor to the other Subcontractor then the relevant Associated Party giving the notice to the other shall in turn timeously notify the Contractor of that Associated Contract Dispute.

35.3.5 The Arbitrator in the relevant Dispute Resolution Procedure shall have the same powers in relation to the Associated Contract Dispute as it has in relation to the Dispute.

35.4 **Prescription**

The Parties agree that, for the purposes of prescription of claims in terms of the Prescription Act 68, of 1969, prescription in respect of any particular Dispute shall be interrupted on the date of service pursuant to Clause 35.2 of this Agreement of the relevant Notice of Dispute on the other Party.

36 **NOTICES**

36.1 All notices and any communication whatsoever (including without limitation, any approval, consent, demand, query, request, all certificates, notices or instructions) by either Party in terms of this Agreement or relating to it shall be

36.1.1 given in writing and shall be delivered by hand (against receipt), sent by registered post, or by facsimile transmission or by electronic mail to the recipient party at its relevant address and/or facsimile number and/or email address set out below:

36.1.2 delivered, sent or transmitted to the address and/or facsimile number and/or electronic mail address for recipient's communications as stated in this Clause 36 (*Notices*). However if the recipient gives notice of another address, communications shall thereafter be delivered accordingly.

36.1.3 All notices and any communication whatsoever (including without limitation, any approval, certificates, consent, determinations, notices, demand, query, request or instructions) by either Party in terms of this Agreement or relating to it shall be given in writing and shall be sent by registered post, or delivered by hand, or by facsimile transmission or by electronic mail to the recipient Party at its relevant address and/or facsimile number and/or electronic mail address set out below:

(a) If to the **Contractor**:

Physical address:

Postal address:

E-mail address:

(marked for the attention of :

(b) If to the **Employer**:

Physical address:

Postal address:

Electronic mail address:

(marked for the attention of :

(copied in each case to the Employer)

36.2 Either Party to this Agreement (and either Representative) may by written notice to the other Party, change its nominated address, facsimile number or email address or the designated person for whose attention those notices or other communication are to be given, by prior notice to the other Party.

36.3 Any notice or other communication given by any Party to the other Party which:

36.3.1 is delivered by hand to the addressee at its specified address, shall be rebuttably presumed to have been received by the addressee at the time of delivery;

36.3.2 is transmitted by electronic mail to the addressee at its specified electronic mail, shall be rebuttably presumed to have been received by the addressee on the date of transmission as reflected on the sender's electronic mail records;

36.3.3 is sent by registered post to the addressee, shall be rebuttably presumed to have been received by the addressee on the 2nd (second) day after posting;

provided in each case that if the time of such deemed service is either after 4.00 p.m. on a Business Day or on a day other than a Business Day service shall be deemed to occur instead at 10.00 a.m. on the next following Business Day.

36.4 The previous provisions of this Clause shall not invalidate any notice or other communication actually given and received otherwise than as described in those provisions.

36.5 The Parties choose their respective physical addresses in this Clause 36 as their respective *domicilia citandi et executandi* at which all documents relating to any legal proceedings to which they are a party may be served. If that address is changed to another address which is not a physical address in the Republic of South Africa, then the original address shall remain the *domicilium citandi et executandi* of the relevant Party until it nominates a new physical address within the Republic of South Africa in writing to be its new *domicilium citandi et executandi*.

37 AMENDMENTS

No provision of this Agreement (including, without limitation, the provisions of this Clause 37) may be amended, substituted or otherwise varied, and no provision may

be added to or incorporated in this Agreement, except (in any such case) by an agreement in writing signed by the duly authorised representatives of the Parties.

38 WAIVER

Any relaxation, forbearance, indulgence or delay (together "indulgence") of any Party in exercising any right shall not be construed as a waiver of the right and shall not affect the ability of that Party subsequently to exercise that right or to pursue any remedy, nor shall any indulgence constitute a waiver of any other right (whether against that Party or any other person).

39 NO AGENCY

- 39.1 Nothing in this Agreement shall be construed as creating a partnership or as a contract of employment between the Employer and the Contractor.
- 39.2 Save as expressly provided otherwise in this Agreement, the Contractor shall not be, or be deemed to be, an agent of the Employer and the Contractor shall not hold itself out as having authority or power to bind the Employer in any way.
- 39.3 Without limitation to its actual knowledge, the Contractor shall for all purposes of this Agreement, be deemed to have such knowledge in respect of the Project as is held (or ought reasonably to be held) by any Contractor Party.

40 ENTIRE AGREEMENT

- 40.1 Except where expressly provided otherwise in this Agreement, this Agreement constitutes the entire agreement between the parties in connection with its subject matter and supersedes all prior representations, communications, negotiations and understandings concerning the subject matter of this Agreement.
- 40.2 Each of the Parties acknowledge that:
- 40.2.1 it does not enter into this Agreement on the basis of and does not rely, and has not relied, upon any statement or representation (whether negligent or innocent) or warranty or other provision (in any case whether oral, written, express or implied) made or agreed to by any person (whether a Party to this Agreement or not) except those expressly contained in or referred to in this Agreement and the only remedy or remedies available in respect of any misrepresentation or untrue statement made to it shall be any remedy available under this Agreement; and
- 40.2.2 this Clause shall not apply to any statement, representation or warranty made fraudulently, or to any provision of this Agreement which was induced by fraud, for which the remedies available shall be all those available under the Laws governing this Agreement.

41 CONFLICTS OF AGREEMENTS

The documents forming part of this Agreement are to be taken as mutually explanatory of one another. To the extent of any inconsistency between the provisions of this Agreement and those of the Schedules, the following order of priority shall (save where the contrary is expressly provided) prevail:

- 41.1 this Agreement (excluding schedules to the Agreement);

- 41.2 Schedule 3 (*Economic Development*), Schedule 5 (*Collateral Agreements*), Schedule 6 (*Project Insurance*), Schedule 7 (*Land*), Schedule 8 (*Section 37(2) Principles*), Schedule 9 (*Schedule of Milestones*), Schedule 10 (*Performance Security*); Schedule 11 (*Project Documents*), Schedule 12 (*Limit of Retention Money*),
- 41.3 Schedule 1 Part 1 (*Specifications – Employer's Requirements*);
- 41.4 Schedule 1 Part 2 (*Specifications – Contractor's Proposal*); and
- 41.5 all other Schedules.

42 SEVERABILITY

- 42.1 If any provision of this Agreement (in this Clause the "**Invalid Provision**") is agreed between the Parties or held by a court of competent jurisdiction to be illegal, unenforceable or invalid then (without prejudice to the rights of either Party if such illegality, unenforceability or invalidity arises in consequence of breach by the other Party):
- 42.1.1 the legality, validity and enforceability of the remaining provisions shall not be affected;
- 42.1.2 the Parties shall agree as soon as reasonably practicable one or more provisions (in this Clause the "**New Provision**") in lieu of the Invalid Provision such as will, so far as is possible under applicable law, have the same commercial effect as the Invalid Provision would have had if it had not been illegal, unenforceable or invalid; and
- 42.1.3 if the New Provision is not agreed within one month after agreement between the Parties or ruling that the Invalid Provision is illegal, unenforceable or invalid, the matter in dispute shall be referred to the Disputes Resolution Procedure.

43 COUNTERPARTS

This Agreement may be executed in any number of identical counterparts, all of which when taken together shall constitute one agreement. Any single counterpart or a set of counterparts taken together which, in either case, executed by all the parties shall constitute a full original of this Agreement for all purposes.

44 COSTS AND EXPENSES

Each Party shall be responsible for paying its own Costs and expenses incurred in connection with the negotiation, preparation and execution of this Agreement.

45 NO PRIVACY

It is agreed that this Agreement is not intended to, and does not, give to any person who is not a Party to this Agreement any rights to enforce any provisions contained in this

Agreement except for any person to whom the benefit of this Agreement is assigned or transferred in accordance with Clause 30.

46 MITIGATION

- 46.1 Each of the Employer and the Contractor shall at all times take all reasonable steps to minimise and mitigate any loss for which the relevant Party is entitled to bring a claim against the other Party pursuant to this Agreement.
- 46.2 Where there is reference to any breach of any express provision in this Agreement or any deliberate act or omission of the Employer or any Employer Party, in relation to and/or limitation of an indemnity by the Contractor to the Employer, the limitation to the indemnity from the Contractor to the Employer shall not apply and the Employer and/or Employer Party shall nonetheless be indemnified notwithstanding the breach or deliberate act or omission of the Employer and/or Employer Party, to the extent that the Contractor could have reasonably prevented the consequences of such breach, deliberate act or omission giving rise to the indemnified claim within the execution of the Contractor's obligations in carrying out the Project Deliverables to the standard required by this Agreement.

47 GOVERNING LAW, JURISDICTION AND LANGUAGE

- 47.1 This Agreement shall be considered as a contract made in the Republic of South Africa and shall be subject to the Laws of South Africa.
- 47.2 Subject to the provisions of the Dispute Resolution Procedure, both parties agree that the High Court of South Africa shall have exclusive jurisdiction to hear and decide any application action, suit, proceeding or dispute in connection with this Agreement and irrevocably submit to the jurisdiction of the High Court of South Africa.
- 47.3 The language of this Agreement is English. All correspondence, notices, drawings, designs, test reports, certificates, specifications and information shall be in English. All name plates, identification labels, instructions and notices to the public and staff and all other written, printed or electronically readable matter required in accordance with, or for purposes envisaged by, this Agreement shall be in English.

48 FURTHER ASSURANCE

Each Party shall do all things and execute all further documents necessary to give full effect to this Agreement.

49 WAIVER OF SOVEREIGN IMMUNITY

In relation only to the execution by it of this Agreement and the exercise and performance by it of its rights and obligations under this Agreement, the Employer unconditionally and irrevocably waives any sovereign immunity for itself from any suit, or other legal process and agrees that the execution by it of this Agreement and the exercise and performance by it of its rights and obligations under this Agreement constitute private and commercial acts done and performed for private and commercial purposes subject to the provisions of the Public Finance Management Act, 1 of 1999.

50 NO BETTER NO WORSE POSITION

- 50.1 Any reference in this Agreement to "**no better and no worse**" or to leaving the Contractor in a "**no better and no worse position**" shall be construed by reference to the Contractor's:

- 50.1.1 rights, duties and liabilities discharged and/or Costs and expenses incurred under or arising pursuant to performance of this Agreement and any other Project Document to which it is a party;
- 50.1.2 ability to perform its obligations hereunder and exercise its rights hereunder and under any other Project Document to which it is a party; and
- 50.1.3 any amount which the Contractor will recover under any of the Insurances (or would have recovered if it had complied with the requirements of this Agreement or of any policy of Insurances required under this Agreement) which amount, to avoid doubt, shall not include the amount of any excess or deductibles or any amount above the maximum insured amount applicable to such insurance policy,

so as to ensure that:

- 50.1.4 the Contractor is left in a position which is no better and no worse than it would have been had the event not occurred; and
- 50.1.5 the ability of the Contractor to exercise its rights or to perform its obligations under this Agreement is not adversely affected or improved as a consequence of the event.

IN WITNESS whereof this Agreement has been executed and is delivered on the date first above written

SIGNED at _____ on the _____ day of _____ 2023

_____ in his/her capacity as the Accounting Officer of the
Employer

on behalf of the Employer

SIGNED at _____ on the _____ day of _____ 2023

_____ on behalf of the CONTRACTOR

