



PCM

Projects | People | Investments

GENERAL CONDITIONS OF CONTRACT CONSTRUCTION

OUR REFERENCE: PCM-GCC-PGE – CONSTRUCTION

28 JANUARY 2021

GENERAL CONDITIONS OF CONTRACT PURCHASING OF GOODS AND EQUIPMENT

Between

PCM ReCon Pty (Ltd)

("The Company")
2018 / 260060 / 07
and

("The Contractor")

Reg no: _____
Contractor ID/ company registration number)

Contract Reference Number: **PCM-OM-C-CONSTRUCTION-001**

1. Commencement

This contract will begin on _____, and continue until terminated on or before _____, if the scope of work is concluded and accepted by PCM.

2. Place of work

Contractor's Own offices, PCM Offices and PCM Client Offices, Site Office At the Client

3. Job description

Job Title: **CONSTRUCTION CONTRACTOR**

Duties/ scope of work (Not limited to) - Reference to the tender document scope of work:

- Construction related activities as listed, which could include the following functional areas or part there off:
 - Design,
 - Procure,
 - Manufacture,
 - Install,
 - Commission,

4. Contract Value

Contract Value: R _____(____) (Excluding VAT)

Value of the scope of work as agreed to between the parties, remeasured through the installation/ construction of the scope of work and paid for completed items.

*Other (eg. R/ hour, fixed fee): **Turnkey scope of work, with measurable quantities.***

5. Interim deliverables and associated cost (Delete if not applicable)

Description	Deliverable	Start date	End date	Cost
% of contract value -TBC	Detail design completion			
% of contract value -TBC	Upon procurement of goods, delivered to site)			
% of contract value - TBC	Upon completion (Commissioning)			
2.5% of contract value	Retention release upon completion			
2.5% of contract value	Retention release after 12 months			

Note: Retention on invoices applicable: 10% to a maximum of 5% of the contract value

6. Value added tax

All prices are exclusive of VAT. However, invoices submitted for payment shall state the VAT separately.

7. Price basis and price escalation (Variation)

No price escalation applicable on this contract, with reference to the tendering documents – prices quoted are valid for 60 days.

agreed between the parties.

8. General notes

8.1 The contract number **PCM-C-SP-_____** **-(including the award letter revision)** shall be quoted on all correspondence

8.2 Payment shall only be effective by means of electronic wire transfer

8.3 Payments will be made 30 days after invoice, between the 25th of the next month and the last day of the month for completed scope of work, confirmed by signed off documentation

8.4 Payments shall only be made to completed milestones, no monthly incremental payments shall be entertained, unless agreed before contract placements with PCM

8.5 Invoices for payment shall be submitted before the 25th of the month to:

PCM Consulting

Company Registration: 2018 / 260060 / 07

Company Vat number: 4300272848

Project Reference: PCM-GCC-PS-_____

221 Garstfontein Road,

Pretoria

Gauteng

Attention: PCM Management

Email: invoices@pcmconsult.co.za ; finance@pcmconsult.co.za;

jprinsloo@pcmconsult.co.za

8.6 Invoices shall be presented complete in every respect and shall include the following:

8.6.1 Invoice number

8.6.2 The registration number of the consultant/ consultant and PCM

8.6.3 The consultants/ consultant company name as per the contract

8.6.4 The contract number

8.6.5 VAT registration number of the consultant and PCM

8.6.6 Total amount claimed to date

8.6.7 Value of previous claims

8.6.8 Net amount payable

8.6.9 Such VAT as may be applicable

8.6.10 Invoice review and approval document signed off by the Consultant and PCM

8.7 The following documents shall accompany invoices:

8.7.1 Copy of bank guarantee to be attached to 1st (first) invoice

8.7.2 All bank details to be attached to the 1st (first) invoice

8.7.3 Updated cash flow schedule

8.7.4 Payment in respect of this Contract will only be effected after receipt by PCM of the signed Contract.

Note: PCM do not allow any upfront payments

9. Performance Guarantee

Performance guarantee and associated delay damages for the System - performance during the first year shall be calculated as referenced below:

- Actual Performance Ration Calculations:
 - **As determined for the scope of work and agreed between the parties**

Performance Guarantee period will be 12 months from the date of hand over

- Plant Performance Damages:

Plant performance Damages will be additional to the actual performance damages above and will be paid by the contractor when the plant is not able to provide potable water in accordance to SANS 241.

The once off amount payable by the contractor will be a minimum of double the contract value. Inclusive of adjustments with amendments as agreed between the parties.

10. Construction delay damages (amount payable due to failure to complete):

- 2.5% of the Valuation of the Works per 7 day (calendar) of delay limited to 12.5% of the Contract Value

11. Compensation for occupational injuries and diseases certificate of good standing

The contractor shall, before commencement with work on site, furnish to PCM a statement obtaining from the Commissioner, Compensation for Occupational Injuries and Diseases, certifying that the Contractor has furnished all information and has made all payments required from it in terms of the Occupational Injuries and Diseases Act, Act No 130 of 1993.

The contractor shall, in respect of this workmen keep a record of all the particulars prescribed under the said compensation for occupational injuries and diseases act, act no 130 of 1993 and shall at all reasonable time produce such records on demand to any person authorized to carry out such inspections.

12. Contractors head representative on site

Effective 1st November 2004 it is obligatory that the contractor shall, in terms of the Project and Construction Management Professions Act, Act 48 of 2000 appoint a Professional Construction Project Manager and/ or a Professional Construction Manager registered with the SA Council for Project & Construction Management Professions.

The contractor is herewith requested to furnish PCM with a detailed statement, clearly setting out the qualifications and previous experience, together with proof of the contractor's construction project manager and/or construction manager's registration with the said Council.

For further information on this regard refer to SACPCMP:

www.sacpcmp.co.za

13. Safety, health, environment and quality

The contractor shall comply to all the necessary Safety, Health, Environment and Quality Standards and Regulations (SHEQ) applicable for the industry as set out in the Mines Health and Safety Act (MHSA), Occupational Health and Safety Act (OSHA), South Africa National Standards (SANS) and International Standards Organization Codes (ISO)

14. Hours of work

- 14.1 Normal working hours will be from ...07:30..... a.m. to16:00..... p.m. on Mondays to Fridays.
- 14.2 Overtime will only be worked if agreed upon between the parties from time to time upfront, or as agreed to between the parties.
- 14.3 The Contractor will be paid for overtime at the rate of one and a half times his/her total wage as set out in clause 4.

15. Meal Intervals

The Contractor agrees to a lunch break of one hour/30 minutes (delete the one that is that not applicable). Lunchtime will be taken from ...12:00..... to ...12:30/ 13:00..... daily.

16. Sunday work

Any work on Sundays will be by agreement between the parties from time to time upfront. If the Contractor works on a Sunday he/she shall be paid according to the rate/hour as set out in this contract, or as agreed to between the parties.

Note: payment is not applicable for this contract, but arrangements need to be made for overtime work

17. Public Holidays

The Contractor will be entitled to all official public holidays without pay. If the Contractor works on a public holiday he/she shall be paid according to the rate/ hour as set out in this contract, prior arrangements.

18. Annual Leave

The Contractor will plan and arrange the annual leave with no impact to the PCM operations and projects.

19. Sick leave

18.1 The Contractor will not be paid for sick leave.

20. Other conditions of contract or benefits

The contractor will be required to attend key integration meetings with PCM and /or the client

The contractor will carry out all duties in good faith and always act in the best interest of PCM

The contractor will treat all information as confidentially and will not engage with PCM's client directly without approval from PCM

The contractor is required to give regular feedback to PCM on the progress of the scope of work

21. Services

The Contractor shall always act in the best interest of the company, exercise discretion and manage other people or third parties on the projects, when required or part of the scope of work.

22. General

Any changes to this agreement will only be valid if they are in writing and have been agreed and signed by both parties.

23. Ownership

Ownership of the Contract Works and/or any part thereof, packing cases and packing materials shall pass to PCM either on shipment in respect of offshore consignments or on delivery to the Site if locally sourced.

Ownership will be transferred back to the Contractor in the condition that payment of the agreed to contract amount was not honored by PCM or PCM's Client within the conditions of the agreed to contract between the parties.

24. List of documents forming part of this agreement

- General conditions of contract – Section A.....
- Scope of work – Section B.....
- Drawings & Specifications - Section C.....
- Bill of Quantity - Section D.....
- Tender Documents - Section E.....

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.....

THUS DONE AND SIGNED AT **Pretoria** ON THIS DAY OF 201__ by the duly authorized parties:

.....

COMPANY NAME: **Jann Prinsloo (PCM Consulting, CEO)**

THUS DONE AND SIGNED AT ON THIS DAY OF 201__ by the duly authorized parties:

.....

CONTRACTOR NAME:.....

Witnesses:

.....
.....

SECTION A – GENERAL CONDITIONS OF CONTRACT

Definitions and Interpretations

1 Definition of Terms

The following terms, unless inconsistent with or otherwise expressly indicated, shall have the meaning defined hereunder in this General Conditions of Contract or on any **Contract** to be entered between **PCM** and the **Contractor**.

- (a) "**Acceptance Tests**" means tests carried out by the **Contractor** to prove that the **Contract Works** (i) comply with the **Specification** (ii) meet the performance and other guarantees specified in the **Contract** and (iii) comply with all statutory requirements.
- (b) "**Approval**" means **PCM's** express consent in **Writing** and "**Approved**" shall have a corresponding meaning.
- (c) "**Cold Commissioning**" means the trials and tests and adjustments required to determine the functional operation of the **Contract Works** without producing or handling any product.
- (d) "**Commencement Date**" means the date on which **PCM** notifies the **Contractor** in **Writing**, of the award of the **Contract**.
- (e) "**Contract(s)**" means the terms and conditions agreed to between the **Parties** in **Writing**, including all its appendices or further addenda to be entered into between **PCM** and the **Contractor** and reference is made to the General Conditions of Contract.
- (f) "**Contract Price**" means the price for the goods or services ordered by **PCM** from the **Contractor** as specified in the **Contract**. Except where otherwise expressly qualified in the **Contract**, the **Contract Price** is fixed and is not subject to revision.
- (g) "**Contract Program**" means the program detailing the sequential precise time schedule for **Commencement** and completion dates of activities in the execution of the **Contract Works** reflecting the order of procedure and method that the **Contractor** shall follow in carrying out the **Contract Works** in order to meet the **Date for Completion**.
- (h) "**Contract Works**" means all provisions, obligations and duties to be performed by the **Contractor** as specified in the **Contract**, including the **Documentation** as part of the deliverables, as well as all accessory services necessary to perform the **Contract Works** and/or complementary to achieve the **Result Obligation**.
- (i) "**Contractor**" means the party with whom **PCM** contracted to execute the **Contract**.

- (j) "**Contractor's Equipment**" means the equipment used by the **Contractor** to execute the **Contract Works** but does not include the **Plant**.
- (k) "**Date for Completion**" means the date stipulated in the **Contract** for successful completion of **Acceptance Tests**.
- (l) "**Defects Liability Period**" has the meaning assigned in Clause 39.
- (m) "**Developments**" means any and all inventions, data, improvements, work, know-how or any other information on development whether patented or not and/or all elements of the **Documentation** concerned, reduced to practice, modified, developed or discovered by either **Party** in the course of the preparation or performance of any **Contract**.
- (n) "**Documentation**" shall mean all information that the **Contractor** has to hand over to **PCM** under the **Contract**, specifically with regard to the **Plant** and other equipment related to the **Contract** (including **Developments**, software, specific and standards or **Contractor's** software) that may include all plans, **Documentation** related to safety and environmental protection, spare parts, engineering, training, operation, inspection, maintenance and repair of the **Plant** or equipment, structures, drawings, diagrams, plans in office, technical documents, safety certificates, calculation, notes related to the **Plant** and/or equipment as well as the exhaustive list of spare parts and documentation.
- (o) "**Drawings**" means and includes all plans, sections and elevations, as well as working and detailed drawings, diagrams and schedules relative to the **Contract**, together with all modifications to these and "as-built" drawings forming part of the **Documentation**.
- (p) "**PCM**" means **PCM Consulting**, a private company registered in the Republic of South Africa with registration number 2018 / 260060 / 07, and/or any of its subsidiaries or affiliated companies, acting through their duly authorised representatives.
- (q) "**Hot Commissioning**" means the trials and tests and adjustments required to produce and/or handle the product(s) as per the **Specification**.
- (r) "**Intellectual Property Rights**" means any and all patents, utility models, designs, rights, author's rights or copyright (including any rights in Computer Software and Programs) database rights or topography rights or rights of a similar nature or similar effect to any of those which may subsist anywhere in the world.
- (s) "**Parties**" means **PCM** and the **Contractor**.
- (t) "**Party**" means **PCM** or the **Contractor**.

- (u) "**Plant**" means buildings, structures, equipment, machinery, intellectual property, software, hardware, training material, apparatus, materials and documentation to be provided under the **Contract** other than the **Contractor's Equipment**.
- (v) "**Result Obligation**" means the obligation for the **Contractor** to achieve the results and provide **PCM** with the deliverables as specified in the specifications or in the **Contract**, as well as the results that **PCM** is entitled to expect with regard to the performance of the **Contract**.
- (w) "**Site**" means the area or place where the **Contract Works** are to be executed and shall include but not be limited to any offloading, storage, stacking and office areas associated with the **Contract Works**.
- (x) **Software** - "**Contractor's Software**" shall mean any software, program and/or data base, owned by the **Contractor** at the signature date of the concerned **Contract** and necessary or used for operating, monitoring, maintaining the **Contract Works** or any part of them, as well as all operations relating thereto; - "**Specific Software**" shall mean any software, program and/or data-base developed and/or modified for the performance of any **Contract**; - "**Standard Software**" shall mean any software, program and/or data-base owned by a third party at the signature date of the **Contract** and necessary or used for operating, monitoring, maintaining the **Contract Works** and/or equipment or any part of them, as well as all operations relating thereto.
- (y) "**Specification**" means the commercial and technical requirements that define the **Contract Works**.
- (z) "**Subcontractor**" means any person appointed by the **Contractor** in terms of the **Contract** and a **Nominated Subcontractor** means any person nominated by **PCM** to execute any part of the **Contract Works** under the supervision and control of the **Contractor**.
- (aa) "**Take Over**" means the compliance with the **Specification** in terms of the **Contract** and confirmed by a **Take Over Certificate** by **PCM**.
- (bb) "**Writing**" or "written" means any manuscript, typewritten or printed statement and shall include letters, facsimile including electronic communication.

2 Interpretation

In this General Conditions of Contract, unless inconsistent with or otherwise expressly indicated by the context of the **Contract** entered into:

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- (a) The clause headings are for reference purposes only and shall not influence its interpretation.
- (b) References to the masculine gender shall, where applicable, include the feminine gender and *vice versa*.
- (c) Words importing the singular, where applicable, also include the plural, and *vice versa*.
- (d) References to natural persons include created legal entities (whether incorporated or unincorporated) and *vice versa*.
- (e) Where figures are referred to in numerals and in words, and there is any conflict, the words shall prevail.
- (f) If any provision in a definition is a substantive provision conferring rights or imposing obligations on any **Party**, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the **Contract**.
- (g) All data sheets and annexures hereto shall be deemed to be incorporated herein and shall form an integral part hereof.
- (h) Expressions defined in the **Contract** shall bear the same meanings in data sheets, schedules or annexures to the **Contract**, which do not contain their own definitions.
- (i) Reference to days, months or years shall be construed as Gregorian calendar days, months or years.
- (j) Where a number of days are prescribed, it shall be calendar days and shall be reckoned exclusively of the 1st (first) and inclusively of the last day.
- (k) Prevailing Contractual **Documentation** : The General Conditions of Contract and **Contract** shall prevail over all general conditions of the **Contractor**. The **Contractor** acknowledges full and unqualified acceptance of the General Conditions of Contract on entering into the **Contract**.

3 Discrepancies in Contract Documents

Should there appear to be any discordance or want of agreement in the description, dimensions or quantities between any of the documents comprised in the **Contract**, the matter shall be referred by the **Contractor** to **PCM** for a decision before proceeding with the works in respect of which the said discordance or want of agreement appears to exist.

4 Notices

- (a) Any notice, instruction, request, statement or other communication required or permitted to be given hereunder shall be in **Writing** and may be given by delivery to either **Party** or by mailing the same by prepaid registered post, addressed to the other **Party**.

- (b) Any notice or communication required or permitted in terms of the **Contract** will be valid and effective only if it is in **Writing**.
- (c) Any **Party** may by notice to the other **Party** change its facsimile number, e-mail address or the address chosen as its *domicilium citandi et executandi*, to another facsimile number, e-mail address or address which is not constituted exclusively by a post office box address. The change will become effective on the 5th (fifth) day from the deemed receipt of the notice by the addressee.
- (d) Any notice to a **Party** sent by prepaid registered mail (by airmail if appropriate) in a correctly addressed envelope to it at its *domicilium citandi et executandi* will be deemed to have been received on the 5th (fifth) day after posting unless the contrary is proved.
- (e) Any notice to a **Party** delivered by hand during ordinary business hours at its *domicilium citandi et executandi* will be deemed to have been received on the day of delivery unless the contrary is proved.
- (f) Any notice to a **Party** sent by facsimile or e-mail to its chosen *domicilium citandi et executandi*, will be deemed to have received, unless the contrary is proved, immediately upon the issuance, by the transmitting facsimile machine or transmitting computer, of a report confirming the correct transmission of all the pages of the document containing the notice.
- (g) Notwithstanding anything to the contrary herein contained a notice or communication actually received by a **Party** will be an adequate written notice or communication to it notwithstanding that it was not sent to or delivered at its chosen *domicilium citandi et executandi*.

5 Delegation and Cession.

Neither this **Contract** nor any right, remedy, obligation or liability arising hereunder or by reason hereof shall be ceded or delegated (assigned) by the **Contractor** without **Approval**. **PCM** is entitled to cede, assign or delegate any **Contract** in whole or in part to any company directly or indirectly controlled by **PCM**, being subsidiaries or related companies of **PCM**. The **Contractor** has to be notified in writing by **PCM** of any such transfer. Where the **Site** is sold or transferred by **PCM** to any third party during the term of the **Contract** concerning such **Site**, **PCM** shall be expressly entitled to cede, assign or transfer the **Contract** to the new owner of the **Site**. Such event must be notified by **PCM** to the **Contractor** at least 1 (one) month before the transfer date of the **Site** to said new owner.

6 Applicable Law and Legislation

- (a) The **Contract** shall be governed and construed in accordance to the laws of the Republic of South Africa. Where applicable the United Nation Convention on Contracts for International Sale of Goods of 1980 (Vienna Convention) is expressly not applicable.

- (b) The **Contractor** shall in respect of all matters arising in the fulfilment of the **Contract** comply at its own expense with all laws, regulations and by-laws and requirements of local or other authorities that are applicable to the **Contract Works** and upon **Written** request from **PCM** furnish proof of such compliance.
- (c) The **Contractor** shall indemnify **PCM** against all actions, claims, demands, losses, liabilities, costs, damages and expenses arising from or in connection with (i) Non-compliance in terms of South African legislation by the **Contractor**. (ii) A directive or order from any lawful authority to take measures in order to evaluate the impacts or risks associated with an incident or to prevent, mitigate or remedy any actual or potential environmental impact that has arisen or may arise in connection with the performance of the **Contract Works**.

7 Arbitration

- (a) The **Parties** shall jointly decide on appropriate mechanisms to resolve any disputes, which may arise during the duration of this **Contract**. In case of dispute the **Parties** shall do their best effort to reach an amicable settlement with respect to the interpretation, the implementation or the validity of the **Contract** concerned within 30 (thirty) days following notification to the other **Party** setting out all details of the claim or dispute together with the provisional amount in dispute.
- (c) Should the **Parties** still fail to reach any agreement, such dispute shall be determined by arbitration in the Republic of South Africa under the provisions of the Arbitration Act, Act No 42 of 1965, or any statutory modification or law passed in substitution thereof. A single arbitrator shall be appointed by agreement between the **Parties** or in the event that the **Parties** are unable to agree on an arbitrator within a period of fourteen (14) days after arbitration has been demanded, the nominee of the Chairman of the Johannesburg Bar council shall be appointed as arbitrator, who in making his appointment shall have regard for the nature of the dispute.

If the question in dispute is:

- (i) Primarily an accounting matter, an independent Chartered Accountant with a minimum of ten (10) years experience;
 - (ii) Primarily a legal matter, a practising Senior Counsel;
 - (iii) Primarily a technical matter, a suitable qualified professional person; and
 - (iv) Any other matter, a suitable qualified professional person.
- (e) The award of the arbitrator shall be final and binding upon all the **Parties** to the dispute (who hereby agree to carry out the award) unless any **Party** has reasonable belief that legal grounds exist for the taking on review of the award of the arbitrator. If any **Party** holds such a reasonable belief that legal grounds exist for the taking on review the award of the arbitrator, that **Party** will have (7) seven days after finalisation of the determination within which to notify the other **Party** of its intention to take the award on review. Any review proceedings must be commenced within thirty (30) days of giving such notice. Subject to the foregoing, the **Parties** hereby exclude all rights of review or appeal, which might otherwise be conferred on them by law.

- (f) Notwithstanding any such difference or question or matter or thing or reference to arbitration, the **Parties** shall proceed with their obligations in terms of this **Contract** unless both **Parties** agree to the suspension or cancellation thereof in **Writing**.
- (g) The aforesaid shall not prejudice the **Parties** rights to approach any court for legal relief should the circumstances warrant such action.

8 Publications and Confidentiality

- (a) The **Contractor** undertakes in its own name as well as on behalf of **Subcontractors** to comply with the obligation of confidentiality, non-disclosure and non-use for the benefit of third parties of any and all Confidential Information related to the **Contract** and/or to which the **Contractor** shall have access before and during the execution of the **Contract**. For the purposes of this General Conditions of Contract, Confidential Information shall include but not be limited to (i) All information marked (in any legible form) confidential, restricted or proprietary by **PCM**. (ii) **PCM's** know-how, data, drawings, sketches or diagrams, reports, systems, technical specifications, techniques, manufacturing processes, reports and monitoring results, inventions, patents, tenders and contracts. (iii) Any other commercially sensitive information, such as names of suppliers, customers, manufacturing processes and business strategies.
- (b) The **Contractor** shall hold in confidence all Confidential Information received from **PCM** and not divulge the Confidential Information to any person including employees, save for the employees or **Subcontractors** directly involved with the execution of this **Contract**.
- (c) The **Contractor** will ensure that any **Subcontractor**, employee or other third **Party** who may require to be exposed to the Confidential Information will have signed a confidentiality agreement which contains no less favourable terms than those set out in this clause 8.
- (d) With respect to all Confidential Information provided by **PCM**, the **Contractor** will use the same care to prevent disclosure to third parties of such Confidential Information as it employs to avoid disclosure, publication or dissemination of its own information of a similar nature.
- (e) The **Contractor** will not publicly disclose the terms of this **Contract** without the prior written consent of **PCM**.
- (f) Notwithstanding the foregoing, this clause will not apply to any Confidential Information, which the **Contractor**, can demonstrate was:
- (i) At the time of disclosure to it, in the public domain.
 - (ii) After disclosure to it, published or otherwise, becomes part of the public domain through no fault of the **Contractor**; or
 - (iii) In the possession of the **Contractor** at the time of disclosure of it ;or

- (iv) Received after disclosure to it from a third party who had a lawful right to disclose such information to it or;
 - (v) Independently developed by the **Contractor** without reference to the Confidential Information of **PCM**.
- (g) At the request of **PCM**, at any time, the **Contractor** shall promptly deliver to **PCM** all written, printed, electronically stored and copied Confidential Information of whatever nature disclosed to it without retaining any copies thereof and shall either so deliver or destroy any written material based on the Confidential Information.
- (h) The **Contractor** agrees to use the Confidential Information for the sole purpose of this **Contract** only, unless agreed to otherwise in **Writing**.
- (i) No photographs whatsoever shall be taken on **Site** or of the **Contract Works** nor shall the **Contractor** be permitted or allowed to publish any information regarding the **Contract Works** without obtaining **PCM's** prior approval.
- (j) Should there be a dispute between the **Parties** as to whether the **Contractor** complied with the provisions of this clause 8 or not, the onus shall be on the **Contractor** to show that it took all reasonable steps to comply with this clause 8 and the **Contractor** shall take all reasonable steps to assist **PCM** in establishing the source from which such Confidential Information was made known.
- (k) The provisions of this clause 8 shall survive the cancellation or termination of this **Contract** for any reason whatsoever and remain binding on the **Contractor** in perpetuity.

CONTRACTOR'S OBLIGATIONS

9 Security

- (a) Unless otherwise required by **PCM**, the **Contractor** shall within 14 (fourteen) days of being called upon to do so, provide **PCM** with a security in the form as described by **PCM** and attached to the **Contract**, issued by an acceptable first rate South African commercial bank, to the extent of 10% (ten per cent) of the total **Contract Price**, unless otherwise provided for in the **Contract**, by way of undertaking as follows (i) The undertaking shall be for the due and faithful fulfilment of the **Contract**. Such undertaking shall be in supplement to and not in substitution of **PCM's** rights under the **Contract** and shall be binding notwithstanding any variations, alterations, directions or extensions of the **Date for Completion** to be made, given, conceded or agreed under the **Contract**. **PCM** shall be entitled to reject any security submitted by the **Contractor** which does not comply with **PCM's** requirements and to require the submission of another form of security fully compliant with **PCM's** requirements.
- (ii) The undertaking shall be unconditional and payable on first demand. The bank's obligation to pay shall be construed as principal and not as accessory. (iii) The undertaking will initially be valid for a period up to the **Date for Completion**. The undertaking shall however be kept in full force by suitable extensions until the acceptance by **PCM** of the corresponding contractual event.

- (b) The security lodged with **PCM** shall be kept in safe custody until all of the **Contractor's** obligations under this **Contract** have been completed in accordance with the terms and stipulations of the **Contract**.

10 Subcontracts

- (a) For work executed by a **Nominated Subcontractor** and paid for by the **Contractor**, **PCM** shall reimburse the **Contractor** at cost plus a fee of 7% (seven cent) unless otherwise specified in the **Contract**.
- (b) The **Contractor** shall within 7 (Seven) days after the **Commencement Date** of the **Contract** submit the names of any proposed **Subcontractor** to **PCM** for **Approval**. The **Contractor** shall not, without the prior written consent of **PCM**, enter into any subcontract with any person for the execution of the **Contract Works** or any part thereof or for the manufacture or supply of any of the materials to be used on the **Contract Works** other than those of which the names are listed in the **Contract** for a specific part of the **Contract Works**.
- (c) **PCM** shall have the power to withhold **Approval** of appointment of any proposed **Subcontractor** or to rescind **Approval** of any **Subcontractor** with whom **PCM** may subsequently have reason to be dissatisfied, without any liability on **PCM's** part. In such case the connection of such **Subcontractor** with the **Contract Works** shall cease and the **Subcontractor** shall be bound to withdraw at once from the **Contract Works**. The **Contractor** indemnifies **PCM** against claims, losses, and actions in this regard.
- (d) Paragraphs (a) and (b) shall not apply to **Subcontractors** for regular supplies to the **Contractor** of stock material or minor components.
- (e) **PCM's** consent to the employment of any **Subcontractor** shall not relieve the **Contractor** of its obligations under the **Contract** or in any way affect the **Contractor's** direct responsibility to **PCM**, nor shall it render **PCM** in any way responsible to such **Subcontractor**.
- (f) In the event of default or failure of the **Contractor**, and of **PCM** taking the **Contract Works** or any part thereof out of the **Contractor's** hands as hereinafter provided, **PCM** shall be entitled to but not in any way obliged to conclude a contract with such **Subcontractor**. This shall be a condition of and shall be embodied in any subcontract between the **Contractor** and **Subcontractor** and shall be binding on any **Subcontractor**, and any subcontract shall validly and in **Writing** so provide for and **PCM** shall be entitled to require exhibition thereof before consenting thereto.
- (g) Should **PCM** so require, 2 (two) copies of any order, except those for minor components issued by the **Contractor** to its **Subcontractor** or by the **Subcontractor** to its suppliers, shall be submitted to **PCM** as soon as possible after issue. No prices are required to be shown on such order but in other respects the copies shall be true copies of the original orders to the **Subcontractor** and the suppliers.

- (h) Unless expressly agreed otherwise, **PCM** shall under no circumstances effect any payment to a **Subcontractor**.
- (i) The **Contractor** shall be solely responsible for the co-ordination of its **Subcontractors**' activities.
- (j) **PCM** will only deal with **Subcontractors** through the **Contractor** and/or in the presence of the **Contractor's** representative and the **Contractor** shall advise its **Subcontractors** accordingly.
- (k) Any **Subcontractor** shall be at the **Contractor's** sole risks and costs and under its entire responsibility and liability. **PCM's** approval of any **Subcontractor** shall not limit in any way the responsibility and liability of the **Contractor** under the concerned **Contract**, nor entail any of **PCM's** responsibility. Subcontracting shall not release the **Contractor** of any of its contractual obligations, undertakings or liability while the **Contractor** remaining fully liable for any action, deficiency, failure, omission or negligence of its **Subcontractors** and their agents as it is for itself and for its own agents.
- (l) The **Contractor** shall also be responsible for the due compliance by its **Subcontractors** with all health, safety, environmental working conditions and social obligations. All **Contractor's Subcontractors** working on the **Site** for implementation of any part of the **Contract**, shall have been legally employed and properly informed of the risks related to the activities and works on **Site**. All relevant registrations, business licence certificates or any other legal or statutory requirement shall be obtained and evidenced by the **Contractor** and all **Subcontractors** throughout the performance of each **Contract**.

11 Consortium

When a **Contract** is entered into between **PCM** and a consortium or an association of **Contractors** of whatever form, each member of such consortium or association shall be deemed as being a **Contractor** of the concerned **Contract** and shall be jointly and severally responsible and liable with all the other members of said consortium or association for complying with all contractual obligations as set out in the **Contract**. The members of the consortium or similar association shall designate one of them as leader, which shall have full power to represent them to coordinate the consortium or association and to ensure the due performance of the concerned **Contract**. Such designation shall be notified to **PCM** as soon as possible and at the date of award of the **Contract** the latest.

12 Contractor's Head Representative and Workmen

- (a) During the execution of the **Contract Works** on the **Site** [excluding the **Defects Liability Period**] the **Contractor** shall nominate and make available to **PCM** one competent Head Representative and **Approved** by **PCM**, who shall at all reasonable hours be available to represent the **Contractor** for all purposes of this **Contract**, to supervise the **Contract Works** and to receive instructions from **PCM**.

- (b) Any written instructions, directions or notices by **PCM** to the said representative shall be deemed been given to the **Contractor**.
- (c) **PCM** will be at liberty to object to any representative including the Head Representative or other person employed by the **Contractor** in the execution of or otherwise about the **Contract Works** who, in **PCM's** opinion, misconducts himself or be incompetent or negligent or otherwise unsatisfactory, and the **Contractor** shall immediately replace the person so objected to upon receipt from **PCM's** notice in **Writing** in this regard.
- (d) The representative, to be nominated by the **Contractor** in terms of the provisions of this Clause to take charge of the execution of the **Contract Works** on the **Site**, shall be a competent person sufficiently experienced in the work to be performed and be acceptable to be appointed as a responsible person in terms of the Occupational Health and Safety Act, Act No 85 of 1993 and/or the Mine Health and Safety Act, Act 29 of 1996 (as amended) or any other act passed in substitution thereof. The **Contractor** shall furnish **PCM** with detailed statements clearly setting out the qualifications and previous experience of the representative to be appointed.
- (e) The **Contractor's** representative will, in addition to its own responsibility under such legislation referred to in sub-clause (d) above, be required to carry out any instruction of the Works Manager.
- (f) The **Contractor's** representative shall not at the same time be in charge of any other erection work unless the necessary permission has been obtained from **PCM**.
- (g) As soon as the **Contractor** becomes aware that its appointee is likely to be absent from the **Site** for a period of more than 48 (forty-eight) hours, the **Contractor** shall immediately notify the Works Manager and nominate a suitable person to act during such absence. If the period of absence exceeds or is expected to exceed 30 (thirty) days, the **Contractor** shall immediately take steps to nominate a person for appointment in the place of the principal appointee for the period of such absence.
- (h) The **Contractor** shall, within 14 (Fourteen) days after **Contract** award furnish **PCM** with a detailed statement, setting out the qualifications and previous experience, together with proof of the registration of its Professional Construction Project Manager and/or a Professional Construction Manager [registered with the SA Council for Project & Construction Management Professions in terms of the Project and Construction Management Professions Act, Act 48 of 2000], appointed for the management of the **Contract**.

13 Contractor's Responsibility for Protection of the Contract Works

The **Contractor** shall be responsible for the proper protection of the **Contract Works**, and shall make good all losses, damages or injuries thereto howsoever caused and reinstate the **Contract Works** in all respects at its own expense up to the time that the **Contract Works** are **Taken Over** by **PCM**.

14 Insurance

- (a) The **Contractor** shall at its own expense adequately before the beginning of any work tasks and/or delivery of supplies on the concerned **Site** insure the **Contract Works** together with all materials and equipment for incorporation on the **Site** or on **PCM's** premises and/or any part thereof for all risks and shall keep such **Contract Works** so insured until the **Contract Works** are **Taken Over** by **PCM** to their respective full replacement costs against all insurable damages or losses. All monies received by the **Contractor** under such policies shall be applied in or towards the reconstruction, reparation or replacement of the **Contract Works**. This provision shall not affect the **Contractor's** liabilities under the **Contract**.
- (b) No claim on the insurance company shall be made without **PCM's** written consent first having been obtained, which consent shall not be unreasonably withheld. The **Contractor** shall maintain all such insurance coverage(s) for all its legal liability to **PCM** and any third parties as well arising from or in relation to the performance of any **Contract**, including in particular any liability clause for damages, resulting from any act or omission attributed to the **Contractor** to its legal successors, agents and/or employees.
- (c) In the event of the **Contractor** bringing any **Contractor's Equipment** onto the **Site**, the **Contractor** will be liable to have such **Contractor's Equipment** adequately insured against all risks. **PCM** will not accept any liability for any damage to or losses brought about through theft, damage or destruction of such **Contractor's Equipment**.
- (d) The **Contractor** shall register and timely pay assessments under the Compensation for Occupational Injuries and Diseases Act, Act No 130 of 1993 or any amendment thereto or any act passed in substitution thereof.
- (e) The **Contractor** shall, at its own expense, insure and keep all persons employed by it, who do not fall within the provisions of the Compensation for Occupational Injuries and Diseases Act, Act No 130 of 1993, insured against all risks of accident or death arising out of their employment.
- (f) The **Contractor** shall furnish proof that it is registered with the Compensation Commissioner by submitting its registration number as well as a Certificate of Good Standing issued by the Compensation Commissioner.
- (g) The **Contractor** shall at its own expense take out a Contract Works Special Risk Insurance issued by the South African Special Risk Insurance Association ("SASRIA") in accordance with its ruling terms and conditions.
- (h) The **Contractor** shall at its own expense take out a Public Liability (Third Party) Insurance for an insured amount of not less than R 5 000 000 (five million rand) for any individual claim and valid for at least the whole duration of the concerned **Contract and a minimum of twice the contract value**.

- (i) The **Contractor** shall comply with the provisions of the Unemployment Insurance Act, Act no 30 of 1996 (as amended) in respect of its employees and shall provide **PCM** with proof of Unemployed Insurance Fund (UIF) registrations and payments.
- (j) The **Contractor** shall submit copies of the aforesaid policies and receipts on **PCM's** first request or certificates issued by the respective insurers attesting to the existence of the insurance coverage contemplated therein for the premiums thereon to **PCM**.
- (k) The **Contractor** shall in respect of its workmen keep a record of all particulars prescribed under the Compensation for Occupational Injuries and Diseases Act, Act No 130 of 1993 (or any act passed in substitution thereof) and shall at all reasonable times produce such records on demand to any person authorised to carry out such inspections.
- (l) Any insurance coverage provided by the **Contractor** shall not release the **Contractor** from any of its contractual and legal liabilities. The insured amounts are not to be considered or construed as limitations of liability.
- (m) Where the **Contractor**, in the course of undertaking the **Contract Works** is required to undertake any work of a professional nature, the **Contractor** may be called upon to prove to **PCM** that it holds adequate and appropriate Professional Indemnity Insurance.

15 Injury to Persons or Damage to Property

- (a) The **Contractor** shall take all precautions requisite for the protection of life and property on or about or in connection with the **Contract Works** as well as anywhere upon **PCM's** property.
- (b) The **Contractor** shall be liable to **PCM** for and shall be deemed to have indemnified it as he hereby does indemnify it against injury to any person on **PCM** property or damage to **PCM** property or of any other party.
- (c) Without derogating from the foregoing, the **Contractor** indemnifies **PCM** against all actions, suits, demands, claims, costs or expenses arising in connection therewith either at common law or under the Occupational Diseases in Mines and Works Act, Act no 78 of 1973 or any amendment thereto, the Compensation for Occupational Injuries and Diseases Act, Act No 130 of 1993 or any amendment thereto, the Occupational Health and Safety Act, Act 85 of 1993 or any amendment thereto, or the Mine Health and Safety Act, Act 29 of 1996 or any amendment thereto, or any applicable legislation, or otherwise caused by or incidental to the negligence or default of the **Contractor** or its servants, agents, workmen or **Subcontractor**, or the non-compliance by the **Contractor** or **Subcontractor** with the terms of this **Contract**.
- (d) The **Contractor** shall make good at its own expense any damage caused by him, its employees, agents, workmen or **Subcontractors**.

- (e) The **Contractor** shall report each and every accident to **PCM** within 24 (twenty-four) hours of its occurrence and shall furnish **PCM** with two copies of all accident reports.
- (f) The **Contractor** shall at all times supervise and exercise proper control over all its employees and shall hold **PCM** harmless for any damage caused by its employees to private or public property.
- (g) The **Contractor** must ensure that the noise levels emitted by installed equipment is conspicuously displayed with the noise levels emitted by it, for **PCM** to be in a position to effectively manage all factors related to noise induced hearing loss.

CONTRACT WORKS

16 Ownership of Plant

- (a) Ownership of the **Contract Works** and/or any part thereof, packing cases and packing materials shall pass to **PCM** either on shipment in respect of offshore consignments or on delivery to the **Site** if locally sourced.
- (b) The **Contractor** hereby expressly waives any lien or pledge or any claim to a lien or pledge of any nature, in respect of the provision, delivery or incorporation of **Plant** into the **Contract Works**.
- (c) The risk of loss or damage to the **Contract Works** shall only pass to **PCM** upon **Take Over**.

17 Use of Client's Aerodromes and/or Landing/ Air Strips

The Contractor shall, prior to use, obtain permission for the use of the client's aerodromes and/or landing/air strips and in the event of such permission being granted, he shall absolve, release and forever discharge the Client's, its servants, employees or agents from any and all liabilities whatsoever for death, injury, loss, damage, costs and expenses which may be sustained by him or anybody whatsoever, arising out of or in connection with using the aerodromes and/or landing/air strips.

DESIGN

18 Drawings

- (a) **Submission of drawings for approval** Before manufacture, supply or construction of any part of the **Contract Works** the **Contractor** shall submit the **Drawings** to **PCM** for **Approval** in the form and quantity specified and in accordance with an agreed program.
 - (i) **PCM** will approve or comment on **Drawings** within 10 (ten) working days. No drawing shall be considered as **Approved** unless the approval has been given in **Writing**.
 - (ii) Any part of the **Contract Works** which is manufactured, supplied or constructed prior to the **Approval** of the relevant drawing by **PCM**, may be rejected by **PCM** and in such case the

Contractor shall, at its own expense, remanufacture, re-supply, reconstruct or modify such part to conform with the relevant drawing as then **Approved** by **PCM**.

- (iii) Unless **Approval** of **Drawings** on imported equipment has been granted the **Contractor** shall not be allowed to proceed with the shipment of the imported equipment.
- (iv) The **Approval** of **Drawings** shall not exonerate the **Contractor** of its responsibility for design, design competence, detail and dimension and from its liability to carry out the work in accordance with the terms of the **Contract**.
- (v) Proposed alterations and/or modifications to the **Contract Works** either in the design or construction stage shall be covered by formal revisions to the original **Drawings** submitted for **Approval**. Revisions shall be submitted by the **Contractor**, at its own expense, to **PCM** for **Approval**.
- (vi) No drawing **Approved** by **PCM** shall be departed from and/or amended without the instruction or **Approval** of **PCM**. All dimensions shown on **Drawings** supplied by the **Contractor** shall be considered correct although measurements by scale may differ there from.
- (vii) Amendments and/or additions shall be incorporated in the relevant **Drawings** and be resubmitted for **Approval** by **PCM** and if subsequently **Approved** in **Writing** by **PCM**, shall be considered as part of the **Contract**.
- (viii) The **Contractor** shall deliver to **PCM**, within 1 (one) month, or within the period as stipulated in the **Contract** after the **Contract Works** have been **Taken Over**, all final “as built” documentation of the **Contract Works** as actually executed and shall certify that it include all corrections and/or modifications made during the course of the **Contract** and that a complete, final list of **Drawings** with titles and latest revisions has been supplied.

(b) **PCM’s right to use drawings**

- (i) **PCM** shall have the right to use all **Drawings** and/or issue all the **Drawings** supplied by the **Contractor** in terms of the **Contract** to third parties for the purpose of maintenance of the **Contract Works**, including repairs, replacements, modernisation and renewals, obtaining competitive tenders for and ordering of spare parts and to manufacture or have manufactured spares for the **Contract Works**.
- (ii) **PCM** shall furthermore be entitled to issue general arrangement **Drawings** supplied by the **Contractor** to third parties where an interface is required between existing and/or new plant and the **Contract Works** supplied by the **Contractor**.

19 Operating and Maintenance Information

Prior to commissioning the **Contractor** shall furnish **PCM** with the specified number of sets of descriptions and recommended operating and maintenance information for the **Plant** incorporated in the **Contract Works**.

20 Intellectual Property Rights

The provisions of this clause 20 shall remain in full force and effect after the end of each **Contract** for their own duration.

- (a) In the event of (i) Any design of the **Contract Works** provided by the **Contractor**; (ii) The manufacture and supply of the **Contract Works** or any part thereof; (iii) Any work done or method employed in the execution of the **Contract Works**; and (iv) The operation or use of the **Contract Works** or any part thereof; being covered by any letters patent, registered design, trade mark, copyright or other industrial property right protected by law, then the **Contractor** shall be responsible for obtaining the necessary licence or permission and shall be responsible for the payment of all fees, royalties and other charges, if any, that may be payable under the terms of any such licence or permission. Alternatively the **Contractor** warrants that it owns all the existing **Intellectual Property Rights** required for the performance and implementation of each **Contract** and, if not, that it has been entitled to use it through a duly acquired licence including the right of sublicensing. The **Contractor** further warrants that it is properly entitled to the rights of use, diffusion, commercialisation, operation and modification of the **Contract Works** that it does not own and which it may use for the purpose of the concerned **Contract**. The **Contractor** also warrants that it has freely carried out any and all adaptations, modifications and uses as may be necessary with respect to the **Contract Works** without committing an offence or contravening any prohibition or sanctions.
- (b) Notwithstanding the above should infringement of any letters patent, registered design, trade mark, copyright or other industrial property right protected by law, occur or allegedly occur, then the **Contractor** shall be liable to **PCM** and hereby indemnifies and keeps **PCM** indemnified against all liabilities, damages, claims, costs and expenses (including indirect damages for delay in executing the work, legal costs and settlements resulting there from) that may result from such infringement or alleged infringement.
- (c) In the event of any claim being made or proceedings instituted against **PCM** to which the above indemnity applies, the **Contractor** shall immediately stand in for **PCM**, defend indemnity and hold harmless **PCM** and its respective officers, directors and employees, against all losses, liabilities, damages, costs and/or all expenses, including attorney fees and expert fees, arising directly or indirectly from any such claims, action law suits, attorney infringement of any **Intellectual Property Rights** in connection with the **Contract Works** and/or use thereof as specified in the **Contract**. The **Contractor** shall at its own expense defend all such claims, proceedings or actions against **PCM**. All sums that may be disbursed by **PCM** as a result of legal penalties or decisions against **PCM** shall be fully reimbursed by the **Contractor** to **PCM** without prejudice to other rights that **PCM** may have to claim damages against the **Contractor**.
- (d) In the event of any threat of a lawsuit or any provisional or definitive prohibition of use of any element of the **Intellectual Property Rights** arising from whatever cause, including but not limited to claims of counterfeit or from legal settlement, the **Contractor** shall inform **PCM** of such occurrence without delay and the **Contractor** shall at its own expense and in the shortest possible period obtain on behalf of **PCM** the right to:
- continue the use of such **Intellectual Property Rights** or element thereof, or alternatively to
 - replace or modify the **Intellectual Property Rights** or element by a no counterfeiting element strictly equivalent thereto.

- (e) No modification nor replacement in connection with the above shall result in a deterioration or reduction of functionality or fitness of the **Contract Works** with the **Contract Site** in compliance with the **Contract**.
- (f) The **Contractor** warrants that it owns all existing **Intellectual Property Rights** required for the performance and implementation of each **Contract** and, if not, that it has been entitled to use them through a licence including the right of sublicenses. The **Contractor** further warrants that it is properly entitled to the rights of use, diffusion, commercialisation, operation and modification of the **Contract Works** that it does not own and which it may use for the purpose of the concerned Contract. The **Contractor** also warrants that it has freely carried out any and all adaptations, modifications and uses as well as may be necessary with respect to the **Contract Works** without committing any offence or contravening any prohibition.
- (g) The granting of the right to **PCM** to make use of the **Documentation** that is not developments for the purpose of: - operation, use, reproduction whatever the use and the process, on all existing or future supports; - representation by all means and on all supports, including transmission via networks, Internet/Intranet, edition, diffusion; and - adaptation, modification, correction, development, integration, transcription, translation, bearing provided that the abovementioned rights are necessary for the operation, maintenance, modification, monitoring, repairing and/or use of the **Contract Works** or the needs specified in the concerned **Contract** to the extent provided in this General Terms and Conditions. Such granting of rights to **PCM** shall be: - applicable and valid in any relevant country throughout the world; and - granted for at least the protection duration of the concerned **Intellectual Property Rights**; All abovementioned **PCM's** rights shall be assignable together with the **Contract Works**.
- (h) **Developments** - The **Developments** shall belong to **PCM**. Title to and ownership of the **Developments** and any related **Intellectual Property Rights**, including author's rights and copyrights, shall be vested in **PCM**. Accordingly **PCM** shall have the exclusive right to apply under its own name and at its own costs and benefits, for such **Intellectual Property Rights** in any country throughout the world with respect to the **Developments**. If a **Development** (as for example any element of the **Documentation**) is protected by any author's right or copyright, the **Contractor** shall transfer to **PCM**, in an exclusive way, the entirety of the rights of:
- exploitation, use, reproduction, whatever the use and the process, on all existing or future supports;
 - representation by all means and on all supports, including transmission via networks Internet/Intranet, publication, edition and diffusion;
 - adaptation, modification, correction, development, integration, transcription, translation and bearing;
 - commercialisation and diffusion whatever the way.

Such transfer of the **Developments** and any related **Intellectual Property Rights** including author's rights and copyrights to **PCM** shall:

- occur at a price which is an integral part of the contractual price paid by **PCM** to the **Contractor** as defined in the concerned **Contract**;
- be applicable and valid in the country where the **Site** is located as well as in any country throughout the world;
- be granted at least for the protection duration of the concerned **Intellectual Property Rights**; and
- include the right for **PCM** to transfer those rights and to grant licences and sublicenses of such rights.

Notwithstanding the above, if the **Contractor** can establish that any **Development** and any related **Intellectual Property Rights** arise from the **Contractor's** sole inventive capacity independently of the preparation and/or implementation of the General Conditions or of the concerned **Contract**, as well as independently of any Confidential Information of **PCM**, then the related **Intellectual Property Rights** shall belong to the **Contractor** and shall be included in the licence granted in terms hereof without any additional payment.

(i) **Software**

Each **Contract** will specify **Standard Software**, **Specific Software** and/or **Contractor's Software** to be provided and/or delivered under any **Contract** by the **Contractor** to **PCM**.

In case of a software and/or program is not specified in the concerned **Contract** as being either a **Standard Software** or a **Contractor's Software**, such software and/or program shall be considered and construed as being a **Specific Software**.

Specific Software The **Specific Software**, including the related source code shall belong to **PCM**. Title to and ownership of the **Specific Software**, including the related source code, and any related **Intellectual Property Rights**, including author's rights and copyrights, shall be vested in **PCM**. Accordingly, **PCM** shall have the entirety of the rights for:

- exploitation, operation, reproduction whatever be the use and the process, on all existing or future supports;
- representation by all means and supports, including the transmission via networks Internet/Intranet, publication, edition, diffusion;
- adaptation, modification, correction, development, integration, transcription, translation, bearing;
- commercialisation and diffusion whatever the way; and the exclusive right to apply, under its own name and at its own cost and benefits, for such **Intellectual Property Rights** in any country throughout the world with respect to the **Specific Software**. It is understood that a **Contractor's Software** owned by the **Contractor** at the award date of the concerned **Contract**, that is expected to be modified and/or adapted for the performance of said **Contract** shall be deemed to be a **Specific Software**. The transfer of ownership to **PCM** of the **Specific Software**, including the related source code and any related **Intellectual Property Rights**, including author's rights and copyrights shall:
- occur at a price which is an integral part of the contractual price paid by **PCM** to the **Contractor** as defined in the concerned **Contract**;
- be applicable and valid in the country where the **Site** is located as well as in all countries throughout the world; and

- be granted at least for the duration which the concerned **Specific Software** are protected by any **Intellectual Property Rights**. Any exhaustive and updated copy of the source code of each **Specific Software** shall be communicated to **PCM** at any time, without any restriction of any kind, upon **PCM's** first demand. **Contractor's Software** If the **Contract Works** and/or Equipment include **Contractor's Software** protected in whole or in part by **Intellectual Property Rights**, the **Contractor** shall grant to **PCM** the entirety of the rights related to:
 - operation, use, reproduction whatever the use and the process, on all existing or future supports;
 - representation by all means and supports, including the transmission via networks Internet/Intranet, edition, diffusion; and
 - adaptation, modification, correction, development, integration, transcription, translation, bearing, provided that the abovementioned rights are necessary for the operation, maintenance, modification and/or use of the **Contract Works**. The licence granted by the **Contractor** to **PCM** as to the **Contractor's Software** shall:
 - occur at a price which is an integral part of the contractual price paid by **PCM** to the **Contractor** as defined in the **Contract**;
 - be applicable and valid in the relevant country where the **Site** is located as well as in any other country(ies) in which the **Contract Works** and/or Equipment may be further moved, sold and/or transferred;
 - be granted at least for the duration during which the concerned **Contractor's Software** are protected by any **Intellectual Property Rights**; and
 - include the right for **PCM** to grant licences and sublicences of such rights for the operation, maintenance, modification and/or use of the **Contract Works** and/or Equipment. The **Contractor** shall communicate to **PCM** the method and know-how used to develop the **Contractor's Software** with its best performance. During the whole term of the **Contract** and at least 3 (three) calendar months, unless expressly otherwise specified the concerned Contract, the **Contractor** shall deliver to **PCM** and any future owners and/or users of the **Contract Works** an exhaustive and updated copy of the source codes of the **Contractor's Software** and all related documentation, the exhaustive and updated copy of the **Contractor's Software** source codes having to be finally delivered at the **Take Over** at the latest.

Notwithstanding the foregoing, if so expressly agreed upon by the **Parties**, the source code related to the **Contractor's Software** shall be delivered to any independent third party of the **Parties'** choice but at the **Contractor's** cost, together with the written evidence of the corresponding escrow agreement signed with the said third party for keeping the related source codes and making them available to **PCM** in the case of:

- any breach of the **Contractor's** obligations concerning or in relation to the **Contractor's Software** or any other software covered by an escrow agreement as specified in the concerned **Contract**;
- reasonable risk of **Contractor's** seizure, bankruptcy, concordat, winding up or insolvency;
- dissolution of the **Contractor**, whichever may be the reason thereof;
- stop of commercialisation or development of the considered **Contractor's Software**;
- **Contractor's** lack of maintenance services as reasonably requested by **PCM**; or

- Lack of interoperability of the **Contractor's Software** or any other software covered by an escrow agreement as specified in the concerned **Contract**, leading to a lack of interoperability of the **Contract Works** with other equipment or installations as described in the concerned **Contract**. **Standard Software** The **Contractor** shall deliver to **PCM** all **Standard Software** as necessary for the performance of the concerned **Contract**. If the **Contract Works** and/or Equipment include **Standard Software** protected in whole or in part by **Intellectual Property Rights**, the **Contractor** shall grant to **PCM** the entirety of the rights related to:

- operation, use, reproduction whatever the use and the process, on all existing or future supports;
- representation by all means and supports, including the transmission via networks Internet/Intranet, edition, diffusion; and
- adaptation, modification, correction, development, integration, transcription, translation, bearing, provided that the abovementioned rights are necessary for the operation, maintenance, modification and/or use of the **Contract Works**. **PCM's** rights to use the **Standard Software** shall be assignable together with the relevant **Contract Works**.

In addition, the **Contractor** shall, upon **PCM's** request and at no additional cost, provide **PCM** with all information and source code necessary to achieve the interoperability of other program(s) with the **Standard Software**. In case of failure of the **Contractor** to fulfil its obligations about or in relation to any **Standard Software** after the receipt of 2 (two) weeks written notices of **PCM**, the **Contractor** shall, upon **PCM's** first request and at no additional cost, provide the other with the source code (as specified here above) of the **Standard Software** and all related **Documentation**. It is understood and agreed between the **Parties** that any access to source code,

- shall not release the **Contractor** from any of its obligations and
- shall not transfer nor assign any additional **Intellectual Property Rights** to

PCM which shall be solely entitled to use the source code for operating the **Contract Works** and/or Equipment. This licence to **PCM** shall:

- occur at a price which is an integral part of the contractual price paid by **PCM** to the **Contractor** as defined in the concerned **Contract**;
- be applicable and valid in the country where the **Site** is located as well as in any other country(ies) in which the **Contract Works** and/or Equipment may be further moved, sold and/or transferred;
- be granted at least for the duration during which the concerned **Standard Software** is protected by any **Intellectual Property Rights**; and
- include the right for **PCM** to grant licences and sublicences of such rights for the operation, maintenance, modification and/or use of the **Contract Works** and/or Equipment.

The **Contractor** shall communicate to **PCM** the method and know-how related to the use of the **Standard Software** with its best performance for the best practice by **PCM** of the **Contract Works** and/or Equipment.

All the above is subject to the rights the Contractor actually possesses, it being understood that the Contractor cannot transfer any more rights than what it actually has.

SITES

21 Access to Site of Erection

- (a) **PCM** shall afford occupation of the **Site** or part thereof to the **Contractor** at such date or dates as stipulated in the **Contract**.
- (b) In the execution of the **Contract Works** no person other than the **Contractor** or its duly appointed representatives, **Subcontractors** and workmen shall be allowed to perform any work on the **Site** or have access to the **Site** except with special written permission from **PCM**. All entrants on site shall be subject to security and safety arrangements on **Site**.
- (c) Access to any part of the **Contract Works** shall at all times be accorded to **PCM's** duly authorised personnel/ or as arranged with **PCM**.

22 Delivery of Plant

- (a) The Contractor shall not be entitled to deliver any Plant forming or intended to form part of the Contract Works to the Site at a date more than 1 (one) month prior to the date stipulated in the Contract unless prior written consent has been obtained from PCM.
- (b) Where Plant are to be transported by rail the Contractor shall enter into a third party agreement with "TRANSNET" for the use of the Client's siding, and shall consign all Plant to the Site in its own name and at its own expense.
- (c) The Contractor shall deliver all Plant transported by rail to the main siding indicated by the Client. From the Client's main siding the wagons containing such Plant will be hauled free of charge, by the Client's locomotives to the siding nearest the erection Site but without liability for any damage which may occur during such haulage.
- (d) The Contractor shall give timely notice to PCM that it requires use of the Client's locomotives in order to avoid delays in transporting the wagons between the Client's main siding and the branch siding(s).
- (e) The Contractor shall, irrespective of whether the Plant are delivered to the erection Site or to an allocated stacking Site, offload the Plant with its own employees and provide its own tools and tackle for offloading and be directly responsible to "TRANSNET" for any demurrage on wagons. All Plant shall be stacked at the Site allocated by PCM pending erection.

- (f) The control of all railway traffic over the Client 's main and branch sidings shall be vested solely in PCM and the Client, and PCM and the Client will not accept any liability for delays caused to the Contractor.

23 Storage, Stacking and Office Sites

- (a) If the Contractor so requires, PCM will, on receiving reasonable notice in Writing provide, where land of PCM or the Client is available in a convenient situation in South Africa (of which PCM shall be the sole judge), storage ground for materials, Plant and apparatus delivered before erection of these items can proceed, but the Contractor shall satisfy himself of the suitability of such a location for this purpose.

The provision of such location by PCM shall not relieve the Contractor of any of its obligations or responsibilities under the Contract or of any cost incurred by him on account of such storage. Plant and equipment shall be packed specifically and protected in such a way that no damages can arise during the transportation, their handling and storage on Site. At PCM's request the Contractor shall take back at its own expense the material after delivery.

- (b) PCM will allocate stacking Sites to the Contractor, at points convenient to PCM, where it shall store materials required for the Contract Works. Space will also be made available where it may erect temporary offices and other structures as may be necessary in the execution of the Contract Works. The Contractor will not be permitted to occupy any other ground belonging to the Client.
- (c) The Contractor shall make its own arrangements for fencing in such Sites if deemed necessary and be responsible for removing such fencing after completion of the Contract Works. Under-roof storage or other protection from the elements will not be supplied by PCM and if this is required it shall be provided by the Contractor. The cost thereof shall be for the account of the Contractor.
- (d) A request in Writing for a Site indicating the requirements regarding area and location shall be submitted to PCM as early as possible, but at least 2 (two) months prior to the requirement thereof.
- (e) The Contractor shall be responsible for the loss or damage to any of the Contractor's Equipment and/ or Plant brought onto Site by the Contractor.

24 Setting-out of the Contract Works (as applicable to the contract)

- (a) The **Contractor** shall be responsible for the correctness of the positions, levels and dimensions of the **Contract Works** notwithstanding that the **Contractor** may have been assisted by **PCM** or other contractors in setting-out the same. If at any time during the progress of the **Contract Works** any error shall appear or arise therein the **Contractor** shall remove and amend such **Contract Works** at its own expense.

- (b) **PCM/ Client** will provide permanent beacons, marking the main setting-out lines of the **Site** as a whole and permanent level benchmarks at suitable positions on the **Site**. These beacons and benchmarks will be the sole points of reference for setting-out and levelling purposes.
- (c) The **Contractor** shall ensure that none of such permanent beacons and benchmarks are damaged or destroyed in any way. The cost of restoring any beacons and benchmarks destroyed or damaged by the **Contractor** will be recovered from the **Contractor** by **PCM**.
- (d) Although **PCM** may cause the **Contractor's** setting-out and levelling to be checked from time to time, such checking will not relieve the **Contractor** of its full responsibility for the accuracy of such setting-out and levelling.
- (e) All necessary pegs, profiles, sight rails, templates and other devices required for the proper alignment of the **Contract Works** shall be erected by the **Contractor**. The cost of all such setting-out shall be borne by the **Contractor** and shall be deemed to be included in the **Contract Price**.
- (f) The **Contractor** shall be responsible for verifying all dimensions and coordinates reflected on any drawing supplied by **PCM** and check all foundations and foundation bolts provided by **PCM** for dimensional correctness before commencing with the **Contract Works**.
- (g) The **Contractor** shall notify **PCM** in **Writing** of all defects found in the foundations and positioning of the foundation bolts provided by **PCM** within 5 (five) days from the time that such foundations were made available to the **Contractor** for checking. **PCM** will rectify these defects at its own cost.
- (h) If **PCM** is not notified within the 5 (five)-day period of any defects then the **Contractor** shall modify the **Contract Works** at its own expense however, if the **Parties** are in mutual agreement that it will be quicker and/or less expensive if **PCM** rectify the foundations and foundation bolts on behalf of the **Contractor**, then all costs incurred by **PCM** shall be for the **Contractor's** account. (i) All fossils, coins, articles of value or antiquity and structures and other remains or things of geological or archaeological interest discovered on the **Site** shall be deemed to be the absolute property of **PCM** and the **Contractor** shall immediately advise **PCM** of such finding. The **Contractor** shall take reasonable precautions to prevent any person from removing or damaging any such article or item and shall, immediately upon discovery thereof and before removal, inform **PCM** of such discovery and carry out **PCM's** instructions for dealing therewith. If by reason of such instructions, the **Contractor** suffers any delay or incurs extra costs it shall be entitled to make a claim as provided for in the **Contract**.

25 Site to be left clear

The **Contractor** shall keep the **Site** of the **Contract Works** and the adjoining ground clean and tidy during the execution of the **Contract**. Upon the termination of the **Contract**, for whatever reason, the **Contractor** shall reinstate the condition of the **Site** to meet the requirements of **PCM** and the local authorities.

PLANT AND WORKMANSHIP

26 Quality of Plant, Workmanship and Labour

- (a) All **Plant** to be supplied under this **Contract** shall be new, in accordance with the **Result Obligation**, unless otherwise specified in the **Contract**. The whole of the **Contract Works** shall be provided and carried out in accordance with the **Contract** and shall at all times be subject to **PCM's Approval**.
- (b) The **Contractor** shall be responsible for the suitability of the **Plant**, the workmanship and the stability of the **Contract Works**, and shall not be relieved of its obligations in respect of the adequacy of the **Plant**, workmanship and work by reason of the fact that **PCM** did not object thereto during manufacture or construction, although the same may have been inspected in the regular course of events.
- (c) The **Contractor** shall assume sole responsibility for the design, quality, workmanship and suitability of all such items of **Plant** manufactured or fabricated for incorporation in the **Contract Works** and shall ensure that the **Contract Works** are accessible and easy to maintain.
- (d) The **Contractor** shall undertake the **Contract Works** in such a manner as to cause the minimum disturbance to **PCM's** current operations.

27 Inspections and Testing

- (a) **Inspection** (i) **PCM** may inspect and test the various portions of the **Contract Works** at all stages and shall have full power to reject all or any portion of the **Contract Works** that it considers to be defective or inferior in quality, workmanship or design to what is required by the **Contract**. (ii) If **PCM** gives notice that it is dissatisfied with the **Contract Works** or with any part thereof at any time during the progress of the **Contract Works** or within the **Defects Liability Period** then the **Contractor** shall immediately remove the affected part from the **Contract Works**. The **Contractor** shall reconstruct such part of the **Contract Works** at its own expense in accordance with the **Contract**. No extension to the **Date for Completion** shall be granted by reason of such reconstruction. (iii) Should the **Contractor** fail to remove the unsatisfactory **Plant** or incompetent labour from the **Contract Works** by an agreed date or delay execution of necessary remedial work, **PCM** may have such unsatisfactory **Plant** and incompetent labour removed, or such remedial work executed at the **Contractor's** risk and expense. (iv) The **Contractor** shall advise **PCM** in **Writing** which portions of the **Contract Works** are ready for inspection, and shall not (until **PCM** so direct i.e. no part of the **Contract Works** may be covered up without the consent of **PCM**) proceed with the **Contract Works**. The fact that such inspections have been carried out by **PCM** shall in no way exonerate the **Contractor** from any of its obligations under the **Contract**.
- (b) **Testing**
- (i) The **Contractor** shall grant all the necessary facilities and supply test pieces, samples, test certificates and other information that may be called for by **PCM**. All Tests shall be performed under the **Contractor's** direction, supervision and liability (accordingly all consequences arising

from another source, incurred during the performance of such Tests, shall be borne exclusively by the **Contractor** until compliance with the **Contract**).

- (ii) The **Contractor** shall carry out such tests as agreed upon to be necessary to determine that the **Contract Works** comply with the conditions of the **Contract** and such additional tests as may be specified in the **Contract**, whether the **Contract Works** are under test conditions (in the manufacturer's works, or on the **Site** or elsewhere) or in actual working positions. All tests shall be carried out at such times as **PCM** may determine and, if required, in the presence of **PCM**. All Tests shall be evidenced by written reports signed by both Parties as well as any involved **Subcontractors**.
- (iii) The cost of all tests and/or analyses shall (except so far as otherwise provided in the **Contract**) be borne by the **Contractor**.
- (iv) In cases where **PCM** requires the **Contractor** to conduct additional tests to prove that the **Contract Works** meet the **Specification** and the results of such tests show that the **Contract Works** do not meet the **Specifications** then the **Contractor** shall be responsible for such costs. Any such Tests shall be performed again under the **Contractor's** direction, liability and supervision until those parameters, requirements and performances are duly fulfilled. Alternatively **PCM** will carry such costs if the results of the tests confirm the **Contractor's** compliance with the **Specifications**.

28 Commissioning

- (a) Commissioning of the **Contract Works** shall be carried out under the **Contractor's** direction and liability by competent representatives of the **Contractor**, an appropriate number of whom shall remain in attendance until the successful completion of the **Contract Works**.
- (b) The **Contractor** shall be responsible for carrying out **Cold** and **Hot Commissioning** in the presence of **PCM**. Should **PCM** be involved in the **Hot Commissioning** of the **Contract Works** it will be under the **Contractor's** supervision and the **Contractor** shall remain responsible for the compliance with the **Contract**.
- (c) The **Contractor** will be permitted to make such final adjustments it may deem necessary during **Hot Commissioning**. Upon completion of the trials/tests the **Contractor** shall give **PCM** notice of its readiness to have the **Contract Works** subjected to **Acceptance Tests**.
- (d) The **Contractor** shall provide all apparatus, instruments and connections required for the **Cold and Hot Commissioning** and the **Acceptance Tests** at its own expense.
- (e) During the execution of **Cold Commissioning**, **Hot Commissioning** and **Acceptance Tests** **PCM** will provide on the **Site**, free of charge, the required services and materials as set out in the **Contract**.
- (f) If further trials and tests are necessary or if further official tests are required due to the **Contract Works** not complying with the conditions of the **Contract** or not passing the tests specified, **PCM** may call upon the **Contractor** to pay for the additional services and materials required.

(g) Should it be found that the **Contract Works** or any part thereof do not comply with the **Specification** or do not pass the tests specified, the **Contractor** shall forthwith and at its own expense provide such modifications, alterations or adjustments to the **Contract Works** as may be necessary to ensure full compliance with the **Specification**. Alternatively **PCM** may elect to exercise such rights as are available to it in terms of the **Contract**.

(h) **Take Over** shall take place upon successful completion of the **Acceptance Tests or at Hand over**.

COMMENCEMENT, DELAYS, DEFAULT AND SUSPENSION

29 Program

- (a) PCM and the Contractor shall prior to Contract award, based upon the milestone dates and other requirements specified by PCM, agree a “high level” Contract Program to meet the Date for Completion. Within 1 (one) week after Contract award the Contractor shall submit the Contract Program detailed to an agreed level for PCM’s approval. Time shall be the essence of the Contract.
- (b) The Contractor shall in all instances work in accordance with the Contract Program and may not deviate therefrom without PCM’s consent in Writing. The Contract Program shall be used for (i) verification of actual progress of contract execution and (ii) the application of all contractual remedies.
- (c) The Contractor shall submit, together with the Contract Program, a histogram detailing construction labour and Contractor’s Equipment build-up required for the Contract indicating the rate of implementation at the Site.
- (d) The Contractor shall, at such intervals as may be required by PCM, submit information on actual progress to PCM in Writing, with a minimum of 1 month.
- (e) If, at any time, PCM gives notice to the Contractor that actual progress is inconsistent with the Contract Program, the Contractor shall submit a revised program and proposed remedial actions to be taken to meet the Date for Completion. PCM will within 7 (seven) days after receipt thereof approve or comment thereon.
- (f) The Contract Program shall not be deemed amended or revised unless the confirmation thereto has been given in Writing and PCM has issued a revised Contract Program to this effect.
- (g) Notwithstanding the above, should Contract execution not be in accordance with the Contract Program, the Contractor shall also submit a program for the actual execution of the Contract Works for verification purposes. This program shall however not replace the Contract Program.

30 Default

- (a) If the **Contractor** commits a breach of any provision of this **Contract** with regard to the **Contract Works**, all of which are deemed to be material, then **PCM** may call in **Writing** on the **Contractor** to remedy the breach pursuant to Subclause (c) hereunder.
- (b) In the event that the stated guaranteed services for the operation of the **Contract Works** are exceeded, the **Contractor** shall forthwith and at its own expense, provide such modifications, alterations or adjustments to the **Contract Works** as may be necessary, to ensure compliance with the **Contract** within the **Contract Program**.
- (c) If the **Contractor** fail to remedy the breach and/or fail to take positive steps acceptable to **PCM** to remedy the breach complained of within 7 (seven) days, or such other period as provided for in the notice of complaint, from the date of notification calling for the remedy of the complaint, **PCM** shall without prejudice to any of its rights under common law and particularly its rights under the **Contract** be at liberty to
- (i) Employ other workmen and forthwith perform such work as may be required to remedy the breach and/or;
 - (ii) Take possession and control of the **Contract Works** and **Site**, whether in whole or in part, with any other person or provide any other **Plant** or labour for the purpose of completing the **Contract Works** or any part thereof and/or;
 - (iii) Terminate the **Contract** with immediate effect on further **Written** notice to the **Contractor**.
- (d) **PCM** shall have the free use of all the **Contractor's Equipment** that may be on the **Site** for use at any time in connection with the **Contract Works**, to the exclusion of any right of the **Contractor** over the same. **PCM** shall be entitled to retain and apply any balance of payments which may be otherwise due on the **Contract** by it to the **Contractor**, or such part thereof as may be necessary for the payment of the cost of executing such **Contract Works** as aforesaid.
- (e) **PCM** shall not be answerable for any loss of or damage to any of such **Contractor's Equipment** so used, either by way of the same being lost, stolen, damaged or destroyed by fire, flood, tempest or the free use by **PCM**, its employees, contractors or agents, or for any other loss or damage that may be sustained in consequence of **PCM's** action in taking the **Contract Works**, or any part thereof out of the **Contractor's** hands.
- (f) If the cost of executing the **Contract Works** as aforesaid exceeds the balance due to the **Contractor** and the **Contractor** fail to make good the deficit, then the said **Contractor's Equipment**, or any portion thereof, may be sold by **PCM** and the proceeds applied towards the payment of such difference and the cost of and incidental to such sale. The **Contractor** shall upon demand, pay any outstanding balance due by the **Contractor** after crediting the proceeds of such sale. After all expenses, costs and charges incurred in the completion of the **Contract Works** have been paid by the **Contractor**, all such **Contractor's Equipment** remaining unsold shall revert to and be removed by the **Contractor**.

- (g) **PCM** shall in the event of any litigation to enforce its rights in terms of the **Contract** be entitled to recover from the **Contractor** all legal expenses on an attorney-client basis.
- (h) The **Contractor** shall cede to **PCM** any unexpired guarantees/benefit of any contract and/or subcontract in respect of the **Contract Works** taken over by **PCM** under this Clause.

31 Insolvency of Contractor

If the **Contractor** become insolvent or proposes any assignment to its creditors for settlement of its debts, or makes or offers to make any assignment with any of its creditors for releasing it wholly or partly from its debts, or if execution is issued against it by virtue of any judgement, or if it commits any act of insolvency, or being a legal entity is placed under judicial management, or commences to be wound up not being merely a voluntary liquidation for the purpose of reconstruction (all of which are deemed to be events of breach) or on reasonable statements that the **Contractor's** financial situation could be construed as preventing the concerned contract to be implemented properly by the **Contractor**, or important modification(s) affecting its legal structure or any important changes in the control of its share capital then, **PCM** may give notice in **Writing** to the **Contractor** to terminate the **Contract**. **PCM** shall thereupon be at liberty to proceed with the **Contract Works** as provided for in the **Contract** as if the notice period of 7 (seven) days to be given there under had been given and the period to elapse there under before the **Contract Works** can be taken out of the **Contractor's** hands had expired.

32 Extension of Time

(a) Should the completion of the Contract Works be delayed resulting from the inability of PCM to fulfil any of its material obligations under the Contract (other than under a force majeure situation) or from a delay directly attributable to a contractor engaged by PCM for work related to the Contract Works then the Contractor shall within 24 (Twenty Four) hours of the occurrence of such alleged delay or event proven to be suffered by the Contractor, give notice thereof in Writing and of its claim for an extension of time and cost, strictly provided that such event directly causes a delay in the performance of the Contract. Other than aforesaid events only, the following events shall affect the Contract Program and cause extension thereof:

- (i) Event of force majeure;
- (ii) Further PCM's requests affecting the performance progress of the Contract Works by the Contractor in compliance with the said Contract;
- (iii) delayed or insufficient supplies, tasks, services and/or information strictly attributable to PCM; and/or
- (iv) orders of any supplementary works affecting the Contract Program.

Any agreement to extend the Contract Program shall except for item (i) above, take into consideration the impact of the said extension on the Contractor's costs.

- (b) PCM shall not be liable for any reimbursement of costs other than the Contractor's necessary and documented costs for additional supervision and management tasks, if the event(s) causing any delay with respect to the Contract Program are notified by PCM to the Contractor at least 30 (thirty) days prior to their occurrence.
- (c) Claims for variation in the Contract Price submitted by the Contractor shall detail the circumstances and facts covering the claim with substantiating information and details of Contractor's Equipment relevant to each claim, provisions of the Contract upon which the claim relies, length of the extension of time and basis of measuring it and the amount of money claimed with its basis of calculation.
- (d) Within 30 (thirty) days after occurrence of the incident giving rise to such claim, the Contractor shall submit its detailed claim together with substantiated documentary evidence and amounts in support of such claim to PCM for consideration.
- (e) The Contractor shall not be entitled to any such extension of the Date for Completion unless notice of its intention to apply for such extension is received within 24 (hours) hours after the occurrences of an event of supposed delay.

33 Force Majeure

- (a) Neither of the **Parties** shall be held liable in respect of any failure to fulfil its obligations or commitments in terms of this **Contract**, when such failure is caused by or arises from the following events which are deemed to be force majeure events in terms of the **Contract**, but not limited to:
 - (i) exceptional adverse weather conditions unforeseen at the time when the contract was concluded;
 - (ii) strikes or lock-outs or any combination of workmen usually employed by the **Contractor** and/or **Subcontractors** or strikes, lock-outs or any combination of workmen usually employed by firms manufacturing or preparing materials for the **Contract Works**, or any other strike, lock-out or combination of workmen which may interfere with the commencement or progress of the **Contract Works**;
 - (iii) fires or accidents in manufacturers' premises or on the **Site** not occasioned by negligence on the part of the **Contractor** or his employees or agents;
 - (iv) war or civil commotion; or
 - (v) any cause, except as may otherwise be provided for in the **Contract**, beyond the reasonable control of the **Contractor**. In such case the affected **Party** shall immediately notify the other **Party** in writing of the presumable duration and extent of the circumstances responsible for such failure and shall endeavour to remove the said circumstances with the least delay possible.

- (b) Should a **Party** be unable to fulfil a material part of its obligations under the **Contract** for a period in excess of 30 (thirty) days due to the force majeure event, as contemplated in Sub-Clause (a), then either **Party** shall, in its sole discretion have the right to cancel the **Contract** in **Writing**.
- (c) Neither **PCM** nor the **Contractor** shall have any claim of any nature whatsoever against the other for any delayed performance or failure to carry out any of its obligations under the **Contract** as a result of a force majeure event.

34 Power to use the **Contract Works** if not completed in due time

- (a) If **PCM** shall at any time after the **Date for Completion** of any part of the **Contract Works** decide that such part, though not completed, can be used without material damage thereto, **PCM** may, on giving the **Contractor** 7 (seven) days prior notice in **Writing** of its intention to do so, use such part in a reasonable and proper manner unless the **Contractor** proves within that period that such use would cause material damage thereto.
- (b) Such use shall be at the **Contractor's** risk and without prejudice to the provisions of clause 36 and shall under no circumstances be construed as **Take Over** of the **Contract Works**.

MODIFICATIONS, TAKE OVER, PENALTIES AND LIMITATION OF LIABILITY

35 Modification of **Contract**

- (a) **PCM** may from time to time, by notice in **Writing** require the **Contractor** to alter, amend, omit, add to, suspend, postpone or vary the order of execution of the **Contract Works** or any part thereof as in its opinion may be necessary and may reasonably vary any portion of the **Contract Works** without invalidating the **Contract**.
- (b) The **Contractor** shall carry out such modifications and be bound by the same conditions, as far as applicable, as though the said modifications occurred in the **Contract**.
- (c) If such modifications would, in the opinion of the **Contractor**, if carried out involve a claim for additional payment or extension of time or prevent it from fulfilling any of its obligations or guarantees under the **Contract**, it shall, before proceeding therewith, notify **PCM** of the quantified effect thereof in **Writing** within 7 (seven) days after receiving the notice.
- (d) Where required by **PCM**, the **Contractor** shall quote a price for any such modifications and, failing agreement between **PCM** and the **Contractor** as to the price, the value of such modifications shall be determined in accordance with the rates (if any) specified in the **Contract** as far as the same may be applicable.

- (e) In default of any applicable rates, the value of such modifications shall be deemed to be the reasonable cost of wages and materials in carrying out the same plus such addition as shall be reasonable under the circumstances to cover supervision and other expenses and a profit not exceeding 10% (ten per cent) on such cost of wages and materials as aforesaid.
- (f) **PCM** shall then decide forthwith whether or not the modification shall be carried out and, if **PCM** confirms its instructions in **Writing**, the **Contractor's** obligations and guarantees shall be modified to such an extent as may be agreed upon in **Writing** between **PCM** and the **Contractor**.
- (g) Resolutions of a purely technical nature not affecting the **Contract Price** and/or contractual **Date/s for Completion** and/or other conditions contained in the **Contract** taken at meetings between the **Parties** and reflected in the minutes of meetings shall be binding on the **Parties**.
- (h) Resolutions taken at meetings between **PCM** and the **Contractor** that would affect the **Contract Price** and/or **Date/s for Completion** and/or other conditions of the **Contract**, shall become binding on the parties to the **Contract** only after the **Contractor** has notified **PCM** in **Writing** of the changes which would be involved and obtained **PCM's** official **Approval** thereto.
- (i) All risk and expense of proceeding with any modifications without a valid **Contract** modification shall be for the **Contractor's** account.

36 Penalties

- (a) Should the **Contractor** fail to meet the date for commencement of **Hot Commissioning** in terms of the **Contract Program**, the **Contractor** shall compensate **PCM** by 3% (three per cent) of the total **Contract Price** for each week from the date when **Hot Commissioning** should have commenced to the actual date when **Hot Commissioning** had commenced, up to an amount not exceeding 15% (fifteen per cent) of the total **Contract Price**. This penalty shall only apply in instances where the **Contractor** failed to meet the date when **Hot Commissioning** should have commenced and to no other forms of default. However, **PCM** may elect in its sole discretion whether it wishes to invoke this penalty or claim damages suffered as part of its common law rights.
- (b) Notwithstanding the provisions contained under sub clause (a), should the **Contractor** fail to execute and complete any part of the **Contract Works** within the times and dates stipulated in the **Contract Program**, the **Contractor** shall compensate **PCM** for damages incurred as a result thereof and shall also include claims for damages by other contractors and/or subcontractors affected by the delay, together with all legal costs on an attorney-client basis.
- (d) In the event that the **Contract Works** do not pass the **Acceptance Tests** within the period stipulated in the **Contract**, **PCM** may in its sole discretion decide to accept the **Contract Works** unconditionally against payment of compensation by the **Contractor** if such compensation has been specified and previously agreed upon. This penalty shall only apply in instances where the **Contract Works** do not pass the **Acceptance Tests** and to no other forms of default. However, **PCM** may elect in its sole

discretion whether it wishes to invoke this penalty or claim damages suffered as part of its common law rights.

37 Limitation of Liability

Neither **PCM** nor the **Contractor** shall be liable or responsible to each other for any indirect, consequential, incidental or contingent damages, including but not limited to such loss of profit or loss of production arising out of a breach of this **Contract** or negligence on its/their part.

38 Take Over

- (a) **PCM** shall within 30 (thirty) days after receiving the **Contractor's** application for a **Take Over Certificate** either issue the certificate to the **Contractor** stating the date of **Take Over** of the **Contract Works** or reject the application, giving reasons and specifying the work required to be done by the **Contractor** to enable the certificate to be issued. The **Contractor** shall then complete this work before issuing a further notice in this regard.
- (b) The consequence of **Take Over** of the **Contract Works** by **PCM** is (i) Risk of loss or damage to the **Contract Works** shall pass to **PCM** and shall also be deemed to be the date of transfer of responsibility from the **Contractor** to **PCM** in terms of the Occupational Health and Safety Act, Act No 85 of 1993 and/or the Mine Health and Safety Act, Act No 29 of 1996 and/or amendments thereto; (ii) The commencement of the **Defects Liability Period**; (iii) The release of **Take Over** monies; and (iv) The release of the Letter of Undertaking.

39 Defects after Take Over

- (a) During the **Defects Liability Period** of 12 (twelve) months, commencing on the date of **Take Over**, the **Contractor** shall be responsible to remedy all defects or faults that may develop or appear at its own cost when called upon to do so by **PCM**. This responsibility of the **Contractor** is exclusive of normal wear and tear.
- (b) If it becomes necessary for the **Contractor** to replace or renew any defective portions of the **Contract Works**, the provisions of this Clause shall apply to the portions of the **Contract Works** so replaced or renewed until the expiration of 6 (six) months from the date of such replacement or renewal, or until the end of the **Defects Liability Period**, whichever may be the later. If any defects are not remedied within a reasonable time of being notified, **PCM** may proceed to do so at the **Contractor's** risk and expense, but without prejudice to any other rights that **PCM** may have against the **Contractor** in respect of such defects.
- (c) During the **Defects Liability Period** the **Contractor** shall make such arrangements as to ensure the attendance on the **Site**, within 24 (twenty-four) hours of it being called upon, of a competent representative for the purpose of carrying out any remedial work for which the **Contractor** shall be liable.

- (d) All extended warranties/guarantees from **Subcontractors** beyond the **Defects Liability Period** shall be ceded to **PCM**.
- (e) On the expiration of the **Defects Liability Period**, **PCM** will issue a letter to this effect advising the **Contractor** that the final retention monies and/or the release of any bank guarantees will be effected.

FINANCIAL

40 Contract Price

- (a) The **Contractor** acknowledges that it has satisfied it as to all the stipulations, conditions and circumstances affecting the **Contract Price**, as specified in the **Contract**, for the execution of the **Contract Works** in accordance with the **Contract** and as to the general circumstances of the **Site** of the **Contract Works**. The **Contractor** further acknowledges that it has fixed its prices according to the aforesaid stipulations, conditions, circumstances and executing possibilities and that it is not entitled to any additional allowance beyond the **Contract Price**, except as otherwise expressly provided for in the **Contract**. Except otherwise expressly stipulated in the **Contract**, the price of the **Contract Works** and equipment are fixed and is not subject to revision.
- b) The contractual price agreed upon in each **Contract** includes all taxes (except Value Added Tax) and accessory expenses of all kinds, as well as delivery (DDP Delivery Duty Paid according to Incoterms 2000) unloaded on **Site**.

41 Sea Freight, Customs and Import Duties, Import Permits and Railage

- (a) Freight, marine and transit insurance, landing, clearing, import, customs, excise and other duties, levies, forwarding, railage and all other transportation and delivery charges on imported **Plant** and railage, insurance and other transportation and delivery charges on **Plant** manufactured or obtained in South Africa, shall be deemed to be included in the **Contract Price** and shall be paid by the **Contractor**.
- (b) The **Contractor** shall be responsible for obtaining all import permits.

42 Deductions from Contract Price

All costs, penalties, damages, compensation or expenses which **PCM** may have a claim to or may have paid, for which the **Contractor** is liable under the **Contract**, may be deducted by **PCM** (and it is hereby irrevocably and in rem suam authorised to do so) from any monies due or becoming due by it to the **Contractor** under the **Contract**, and/or may be recovered by action of law or otherwise from the **Contractor**.

43 Payments not to affect Rights of PCM or the Contractor

No sum paid by **PCM** nor any extension of time for completion of the **Contract Works** granted by **PCM** shall affect or prejudice the rights of **PCM** against the **Contractor**, or relieve the **Contractor** of its obligations for the due fulfilment of the **Contract**, or be interpreted as **Approval** of the **Contract Works**. No payment shall place an obligation on **PCM** to pay for alterations, amendments or variations, or additional work not ordered in **Writing** by **PCM**, or discharge the liability of the **Contractor** for the payment of penalties or damages, whether due, ascertained or liquidated or not, or of any sum against the payment of which he is bound to indemnify **PCM**. Neither shall any such payment or the acceptance by the **Contractor** of any sum paid affect or prejudice the rights of the **Contractor** against **PCM**.

MISCELLANEOUS LEGAL PROVISIONS

44 Whole Agreement

This **Contract** constitutes the whole agreement between **PCM** and the **Contractor** as to the subject matter hereof and no agreements, representations or warranties, other than those set out herein, are binding on the **Parties**.

45 Severability

If any provision of this **Contract** is found or held to be invalid or unenforceable, the validity of all the other provisions hereof will not be affected thereby and the **Parties** agree to meet and review the matter and, if any valid and enforceable means is reasonably available to achieve the same objective as the invalid or unenforceable provision, to adopt such means by way of variation of this **Contract**.

46 Waiver of Rights

No waiver on the part of any **Party** or any rights arising from a breach of any provision of this **Contract** will constitute a waiver of rights in respect of any subsequent breach of the same or any other provision.

47 Terms of Payment

The terms of payment shall be as stated in Section F to the General Conditions of Contract.

48 Units of Measure

The only units of measure that are allowed for the performance of the **Contract** are metric units except otherwise duly agreed upon by the **Parties** in any **Contract**.

49 Non-variation

No addition to variation, waiver or consensual cancellation of the **Contract** including this clause 49 shall be of any force or effect unless in writing and signed by or on behalf of both the **Parties**. For this purpose only **PCM's** authorized representative may sign any addition to, variation, waiver or consensual cancellation of the **Contract** on behalf of **PCM**.

50 Fraud and Corruption

The **Contractor** shall take all necessary steps, in accordance with good industry practice to prevent any fraudulent activity by the **Contractor** (including its shareholders, members, directors and employees) and/or by any of the **Contractor's** suppliers, agents, contractors, **Subcontractors** and/or their employees in connection with the receipt of monies from **PCM**. The **Contractor** shall notify **PCM** immediately if it has reason to suspect that any fraud has occurred or is occurring or is likely to occur. The **Contractor** shall not offer or give or agree to give, to any employee, agent, servant or representative of **PCM** any gift, commission or other consideration of any kind as an inducement or reward for doing, refraining from doing, or for having done or refrained from doing, any act in relation to the obtaining or execution of any **Contract** or any other agreements with **PCM**, or for showing or refraining from showing favour or disfavour to any person in relation to a **Contract** or any other agreements with **PCM**. The **Contractor** warrants that it has not paid commission, nor has agreed to pay commission to any employee, agent, servant or representative of **PCM** in connection with any **Contract** or any other agreements with **PCM**. Where the **Contractor** or its employees, servants, **Subcontractors**, suppliers or agents or anyone acting on the **Contractor's** behalf, engages in conduct prohibited by the provisions here above in relation to any **Contract** or any other agreements with **PCM**, **PCM** shall be entitled to: (i) terminate the concerned **Contract** and recover from the **Contractor** the amount of any loss suffered by **PCM** resulting from such termination; or (ii) recover in full from the **Contractor** any other loss sustained by **PCM** in consequence of any breach of this clause 50 whether or not the concerned **Contract** has been terminated.

SECTION B – SCOPE OF WORK

1. Breakdown of the scope of work set out in this contract

Reference to tender documents/quote Reference number:

- PCM- _____

SECTION C – DRAWINGS AND SPECIFICATIONS

1. List of drawings as set out in this contract

Reference to tender documents/quote Reference number:

- PCM- _____

2. List of specifications as set out in this contract

Reference to tender documents/quote Reference number:

- PCM- _____

SECTION D – BILL OF QUANTITIES

1. Bill of quantities and preambles as set out in this contract

Reference to tender documents/quote Reference number:

- PCM- _____

SECTION E – TENDER DOCUMENTS

2. Bill of quantities and preambles as set out in this contract

Reference to tender documents/quote Reference number:

- PCM- _____
- Clarification Documents