



GOVERNMENT OF BERMUDA
Ministry of Public Works

Department of Works & Engineering

Form of Agreement

This agreement is made on the _____ day of _____ 2016 between

Of _____

(the *Employer*) and

Of _____

(the *Contractor*)

The *Employer* wishes to have the following *service* provided:

The *Service* of **providing operation and maintenance Services for the Affected Property known as the Tyne's Bay Seawater Desalination Plant** to meet the demand level required by the *Employer*.

- The *Contractor* will provide the *Service* in accordance with the conditions of contract identified in the Contract Data and Service Information.
- The *Employer* will pay the *Contractor* the amount due and carry out his duties in accordance with the conditions of contract identified in the Contract Data.
- The documents forming this agreement are:

- | | |
|---------------------------|----------------------------|
| 1. Term Service Contract, | 5. Service Level Table |
| 2. Priced Contract | 6. Annex A: Price Schedule |
| 3. Contract Data - Part 1 | 7. Company Information |
| 4. Contract Data - Part 2 | 8. Service Information |

Signed: _____

Name: _____

Position: _____

Duly authorized to sign proposals for and on behalf of:

(*Employer*)

Date: _____

Signed: _____

Name: _____

Position: _____

Duly authorized to sign proposals for and on behalf of:

(*Contractor*)

Date: _____

nec 3

term
service
contract
June 2005

(amended June 2006)

1 General

Actions

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10.1 The *Employer*, the *Contractor* and the *Service Manager* shall act as stated in this Contract and in a spirit of mutual trust and co-operation.

Identified and defined terms

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

11.2 (1) The Accepted Plan is the plan identified in the Contract Data or is the latest plan accepted by the *Service Manager*. The latest plan accepted by the *Service Manager* supersedes previous Accepted Plans.

(2) Affected Property is property of the *Employer* or Others which is affected by the work of the *Contractor* or used by the *Contractor* in Providing the Service and which is identified in the Contract Data.

(3) The Contract Date is the date when this contract came into existence.

(4) A Defect is

- a part of the *service* which is not provided in accordance with the Service Information or
- a part of the *service* which is not in accordance with the applicable law or the Accepted Plan.

(5) Defined Cost is payments by the *Contractor* in Providing the Service for

- Operation of the *Affected Property*,
- Maintenance and repair of the *Affected Property*, and,
- Administrative costs for the Service Period

less Disallowed Cost.

(6) Disallowed Cost is cost which the *Service Manager* decides

- is not justified by the *Contractor's* accounts and records,
- should not have been paid to a Subcontractor or supplier in accordance with his contract,
- was incurred only because the *Contractor* did not
 - follow an acceptance or procurement procedure stated in the Service Information or
 - give an early warning which this contract required him to give

and the cost of

- Plant and Materials used to provide the Service after the first six(6) months of the Service Period,

- Plant and Materials not used to Provide the Service (after allowing for reasonable wastage) unless resulting from a change to the Service Information,
- resources not used to Provide the Service (after allowing for reasonable availability and utilisation) or not taken away when the *Service Manager* requested,
- events for which this contract requires the *Contractor* to insure and
- preparation for and conduct of an adjudication or proceedings of the *tribunal*

and amounts paid to the *Contractor* by insurers.

(7) Equipment is items provided by the *Contractor* and used by him to Provide the Service and which the Service Information does not require him to include in the Affected Property.

(8) The Fee is the sum of the amounts calculated by applying the *subcontracted fee percentage* to the Defined Cost of subcontracted work and the *direct fee percentage* to the Defined Cost of other work.

(9) Others are people or organisations who are not the *Employer*, the *Service Manager*, the *Adjudicator*, the *Contractor* or any employee, Subcontractor or supplier of the *Contractor*.

(10) The Parties are the *Employer* and the *Contractor*.

(11) Plant and Materials are items intended to be included in the Affected Property.

(12) The Price List is the *price list* unless later changed in accordance with this contract. :

(13) To Provide the Service means to do the work necessary to provide the *service* in accordance with this contract and all incidental work, services and actions which this contract requires.

(14) The Risk Register is a register of the risks which are listed in the Contract Data and the risks which the *Service Manager* or the *Contractor* has notified as an early warning matter. It includes a description of the risk and a description of the actions which are to be taken to avoid or reduce the risk.

(15) Service Information is information which either

- specifies and describes the *service* or
- states any constraints on how the *Contractor* Provides the Service and is either
- in the documents which the Contract Data states it is in or
- in an instruction given in accordance with this contract.

(16) A Subcontractor is a person or organisation who has a contract with the *Contractor* to

- provide a part of the *service* or
- supply Plant and Materials which the person or organisation has wholly or partly designed specifically for the *service*.

(17) The Price for Services Provided to Date is the total of

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

(19) The Prices are the amounts stated in the Price column of the Price List. Where a quantity is stated for an item in the Price List, the Price is calculated by multiplying the quantity by the rate.

(20) A *Day* shall mean a calendar day.

Interpretation and the law 12

- 12.1 In this contract, except where the context shows otherwise, words in the singular also mean in the plural and the other way round and words in the masculine also mean in the feminine and neuter.
- 12.2 This contract is governed by the *law of the contract*.
- 12.3 No change to this contract, unless provided for by the *conditions of contract*, has effect unless it has been agreed, confirmed in writing and signed by the Parties.
- 12.4 This contract is the entire agreement between the Parties.

Communications 13

- 13.1 Each instruction, certificate, submission, proposal, record, acceptance, notification, reply and other communication which this contract requires is communicated in a form which can be read, copied and recorded. Writing is in the *language of this contract*.
- 13.2 A communication has effect when it is received at the last address notified by the recipient for receiving communications or if none is notified, at the address of the recipient stated in the Contract Data.
- 13.3 If this contract requires the *Service Manager* or the *Contractor* to reply to a communication, unless otherwise stated in this contract, he replies within the *period for reply*.

- 13.4 The *Service Manager* replies to a communication submitted or resubmitted to him by the *Contractor* for acceptance. If his reply is not acceptance, the *Service Manager* states his reasons and the *Contractor* resubmits the communication within the *period for reply* taking account of these reasons. A reason for withholding acceptance is that more information is needed in order to assess the *Contractor's* submission fully.
- 13.5 The *Service Manager* may extend the *period for reply* to a communication if the *Service Manager* and the *Contractor* agree to the extension before the reply is due. The *Service Manager* notifies the *Contractor* of the extension which has been agreed.
- 13.6 The *Service Manager* issues his certificates to the *Employer* and the *Contractor*.
- 13.7 A notification which this contract requires is communicated separately from other communications.
- 13.8 The *Service Manager* may withhold acceptance of a submission by the *Contractor*. Withholding acceptance for a reason stated in this contract is not a compensation event.

The *Service Manager*

14

- 14.1 The *Service Manager's* acceptance of a communication from the *Contractor* or of his work does not change the *Contractor's* responsibility to Provide the Service or his liability for his plan or his design.
- 14.2 The *Service Manager*, after notifying the *Contractor*, may delegate any of his actions and may cancel any delegation. A reference to an action of the *Service Manager* in this contract includes an action by his delegate.
- 14.3 The *Service Manager* may give an instruction to the *Contractor* which changes the Service Information.
- 14.4 The *Employer* may replace the *Service Manager* after he has notified the *Contractor* of the name of the replacement.

***Employer* provides right of access and things**

15

- 15.1 The *Employer* provides the right of access for the *Contractor* to Affected Property as necessary for the work in this contract subject to any constraints stated in the Service Information.
- 15.2 The *Employer* provides things which he is to provide as stated in the Service Information.

Early warning 16

16.1 The *Service Manager* enters early warning matters in the Risk Register by notifying the *Contractor* as soon as either becomes aware of any matter which could

- increase the total of the Prices,
- interfere with the timing of the *service* or
- impair the effectiveness of the *service*.

The *Contractor* may give an early warning by notifying the *Service Manager* of any other matter which could increase his total cost. The *Service Manager* enters early warning matters in the Risk Register. Early warning of a matter for which a compensation *event* has previously been notified is not required.

16.2 Either the *Service Manager* or the *Contractor* may instruct the other to attend a risk reduction meeting. Each may instruct other people to attend if the other agrees.

16.3 At a risk reduction meeting, those who attend co-operate in

- making and considering proposals for how the effect of the registered risks can be avoided or reduced,
- seeking solutions that will bring advantage to all those who will be affected,
- deciding on the actions which will be taken and who, in accordance with this contract, will take them and
- deciding which risks *have* now been avoided or *have* passed and can be removed from the Risk Register.

16.4 The *Service Manager* revises the Risk Register to record the decisions made at each risk reduction meeting and issues the revised Risk Register to the *Contractor*. If a decision needs a change to the Service Information, the *Service Manager* instructs the change at the same time as he issues the revised Risk Register.

Ambiguities and inconsistencies 17

17.1 The *Service Manager* or the *Contractor* notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The *Service Manager* gives an instruction resolving the ambiguity or inconsistency.

Illegal and impossible requirements 18

18.1 The *Contractor* notifies the *Service Manager* as soon as he considers that the Service Information requires him to do anything which is illegal or impossible. If the *Service Manager* agrees, he gives an instruction to change

the Service Information appropriately.

2 The *Contractor's* Main Responsibilities

Providing the Service 20

- 20.1 The *Contractor* Provides the Service in accordance with the Service Information.
- 20.2 In Providing the Service, the *Contractor* minimises the interference caused to the Affected Property and the activities taking place in it.
- 20.5 The *Contractor* prepares forecasts of the final total of the Prices for the whole of the Service in consultation with the *Service Manager* and submits them to the *Service Manager*. Forecasts are prepared at the intervals stated in the Contract Data from the *starting date* until the end of the *service period*. An explanation of the changes made since the previous forecast is submitted with each forecast.

The *Contractor's* plan 21

- 21.1 If a plan is not identified in the Contract Data, the *Contractor* submits a first plan to the *Service Manager* for acceptance within the period stated in the Contract Data.
- 21.2 The *Contractor* shows on each plan which he submits for acceptance
- the *starting date* and the end of the *service period*,
 - the order and timing of the work of the *Employer* and Others as last agreed with them by the *Contractor* or, if not so agreed, as stated in the Service Information,
 - provisions for
 - time risk allowances,
 - health and safety requirements and
 - the procedures set out in this contract,
 - the dates when, in order to Provide the Service in accordance with his plan, the *Contractor* will need
 - access to the Affected Property as stated in the Service Information,
 - acceptances,
 - Plant and Materials, equipment and other things to be provided by the *Employer* and
 - information from Others,

- for each operation, a statement of how the *Contractor* plans to do the work identifying the principal Equipment and other resources which he plans to use and
- other information which the Service Information requires the *Contractor* to show on a plan submitted for acceptance.

21.3 Within two weeks of the *Contractor* submitting a plan to him for acceptance, the *Service Manager* either accepts the plan or notifies the *Contractor* of his reasons for not accepting it. A reason for not accepting a plan is that

- the *Contractor's* plans which it shows are not practicable,
- it does not show the information which this contract requires,
- it does not represent the *Contractor's* plans realistically or
- it does not comply with the Service Information.

21.4 The *Contractor* provides information which shows how each item description on the Price List relates to the operations on each plan which he submits for acceptance.

**Revising the
Contractor's plan** 22

22.1 The *Contractor* submits a revised plan to the *Service Manager* for acceptance showing the effects of implemented compensation events and other changes. It is submitted

- within the *period for reply* after the *Service Manager* has instructed him to and
- when the *Contractor* chooses to.

**Design of
Equipment** 23

23.1 The *Contractor* submits particulars of the design of an item of Equipment to the *Service Manager* for acceptance if the *Service Manager* instructs him to. A reason for not accepting is that the design of the item will not allow the *Contractor* to Provide the Service in accordance with

- the Service Information,
- the Accepted Plan or
- the applicable law.

People 24

24.1 The *Contractor* either employs each key person named to do the job stated in the Contract Data or employs a replacement person who has been accepted by the *Service Manager*. The *Contractor* submits the name, relevant qualifications and experience of a proposed replacement person to the *Service Manager* for acceptance. A reason for not accepting the person is that his relevant qualifications and experience are not as good as those of the

person who is to be replaced.

- 24.2 The *Service Manager* may, having stated his reasons, instruct the *Contractor* to remove an employee. The *Contractor* then arranges that, after one day, the employee has no further connection with the work included in this contract.

**Working with the
Employer and
Others 25**

- 25.1 The *Contractor* co-operates with Others in obtaining and providing information which they need in connection with the *service*. He co-operates with Others and shares the Affected Property with them as stated in the Service Information.
- 25.2 The *Employer* and the *Contractor* provide facilities and other things as stated in the Service Information. Any cost incurred by the *Employer* as a result of the *Contractor* not providing the facilities and other things he is to provide is assessed by the *Service Manager* and paid by the *Contractor*.

Subcontracting 26

- 26.1 If the *Contractor* subcontracts work, he is responsible for Providing the Service as if he had not subcontracted. This contract applies as if a Subcontractor's employees and equipment were the *Contractor's*.
- 26.2 The *Contractor* submits the name of each proposed Subcontractor to the *Service Manager* for acceptance. A reason for not accepting the Subcontractor is that his appointment will not allow the *Contractor* to Provide the Service The *Contractor* does not appoint a proposed Subcontractor until the *Service Manager* has accepted him.
- 26.3 The *Contractor* submits the proposed conditions of contract for each subcontract to the *Service Manager* for acceptance unless
- an NEC contract is proposed or
 - the *Service Manager* has agreed that no submission is required.

The *Contractor* does not appoint a Subcontractor on the proposed subcontract conditions submitted until the *Service Manager* has accepted them. A reason for not accepting them is that

- they will not allow the *Contractor* to Provide the Service or
- they do not include a statement that the parties to the subcontract shall act in a spirit of mutual trust and co-operation.

**Other
responsibilities 27**

- 27.1 The *Contractor* obtains approval from Others where necessary.
- 27.2 The *Contractor* provides access to work being done and to Plant and Materials being stored for this contract for the *Service Manager* and Others notified to him by the *Service Manager*.
- 27.3 The *Contractor* obeys an instruction which is in accordance with this contract and is given to him by the *Service Manager*.
- 27.4 The *Contractor* acts in accordance with the health and safety requirement: stated in the Service Information.

3 Time

Starting and the service period 30

- 30.1 The *Contractor* does not start work until the *starting date* and Provides the Service throughout the *service period*.

Access 31

- 31.1 The *Employer* allows the *Contractor* access to the Affected Property as shown on the Accepted Plan.

Instruction to stop or not to start work 32

- 32.2 The *Service Manager* may instruct the *Contractor* to stop or not to start any work and may later instruct him that he may re-start or start it.

4 Testing and Defects

Tests and inspections 40

- 40.1 The sub-clauses in this clause only apply to tests and inspections required by the Service Information or the applicable law.
- 40.2 The *Contractor* and the *Employer* provide materials, facilities and samples for tests and inspections as stated in the Service Information.
- 40.3 The *Contractor* and the *Service Manager* each notifies the other of each of his tests and inspections before it starts and afterwards notifies the other of its results. The *Contractor* notifies the *Service Manager* in time for a test or

inspection to be arranged and done before doing work which would obstruct the test or inspection. The *Service Manager* may watch any test done by the *Contractor*.

- 40.4 If a test or inspection shows that any work has a Defect, the *Contractor* repeats the work if possible and the test or inspection is repeated.
- 40.5 The *Service Manager* does his tests and inspections without causing unnecessary delay to the work.
- 40.6 The *Service Manager* assesses the cost incurred by the *Employer* in repeating a test or inspection after a Defect is found. The *Contractor* pays the amount assessed.

Testing and inspection before delivery

41

- 41.1 The *Contractor* does not deliver those Plant and Materials which the Service Information states are to be tested or inspected before delivery until the *Service Manager* has notified the *Contractor* that they have passed the test or inspection.

Correcting Defects

42

- 42.1 The *Contractor* corrects Defects within a time which minimises the adverse effect on the *Employer* or Others. If the *Contractor* does not correct a Defect within the time required by this contract, the *Service Manager* assesses the cost to the *Employer* of having the Defect corrected by other people and the *Contractor* pays this amount.
- 42.2 The *Service Manager* arranges for the *Employer* to allow the *Contractor* access if it is needed for correcting a Defect.

Accepting Defects

43

- 43.1 The *Contractor* and the *Service Manager* may each propose to the other that the Service Information should be changed so that a Defect does not have to be corrected. If the *Contractor* and the *Service Manager* are prepared to consider the change, the *Contractor* submits a quotation for reduced Prices to the *Service Manager* for acceptance. If the *Service Manager* accepts the quotation, he gives an instruction to change the Service Information and the Prices accordingly.

5 Payment

Assessing the amount due 50

50.1 The *Service Manager* assesses the amount due at each assessment date. The first assessment date is decided by the *Service Manager* to suit the procedures of the Parties and is not later than the assessment interval after the *starting date*. Later assessment dates occur at the end of each assessment interval until four weeks after the end of the service period.

50.2 The amount due is

- the Price for Services Provided to Date,
- plus other amounts to be paid to the *Contractor*,
- less amounts to be paid by or retained from the *Contractor*.

Any tax which the law requires the *Employer* to pay to the *Contractor* is included in the amount due.

50.3 If no plan is identified in the Contract Data, one quarter of the Price for Services Provided to Date is retained in assessments of the amount due until the *Contractor* has submitted a first plan to the *Service Manager* for acceptance showing the information which this contract requires.

50.4 In assessing the amount due, the *Service Manager* considers any application for payment the *Contractor* has submitted on or before the assessment date. The *Service Manager* gives the *Contractor* details of how the amount due has been assessed.

50.5 The *Service Manager* corrects any wrongly assessed amount due in a later payment certificate.

Payment 51

51.1 The *Service Manager* certifies a payment within one week of each assessment date. The first payment is the amount due. Other payments are the change in the amount due since the last payment certificate. A payment is made by the *Contractor* to the *Employer*- if the change reduces the amount due. Other payments are made by the *Employer* to the *Contractor*. Payments are in the *currency of this contract* unless otherwise stated in this contract.

51.2 Each certified payment is made within three weeks of the assessment date or,

if a different period is stated in the Contract Data, within the period stated. If a certified payment is late, or if a payment is late because the *Service Manager* does not issue a certificate which he should issue, interest is paid on the late payment. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made.

51.3 If an amount due is corrected in a later certificate either

- by the *Service Manager* in relation to a mistake or a compensation event or
- following a decision of the *Adjudicator* or the *tribunal*,

interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount.

51.4 Interest is calculated on a daily basis at the *interest rate* and is compounded annually.

Defined Cost 52

52.1 All the *Contractor's* costs which are not included in the Defined Cost are treated as included in the Fee. Amounts included in the Defined Cost are at open market or competitively tendered prices with deductions for all discounts, rebates and taxes which can be recovered.

The Price List 54

54.1 Information in the Price List is not Service Information.

54.2 If the *Contractor* changes a planned method of working at his discretion so that the item descriptions on the Price List do not relate to the operations on the Accepted Plan, he submits a revision of the Price List to the *Service Manager* for acceptance.

54.3 A reason for not accepting a revision of the Price List is that

- it does not comply with the Accepted Plan,
- any changed Prices are not reasonably distributed between the items in the Price List or
- the total of the Prices is changed.

6 Compensation Events

Compensation Events 60

60.1 The following are compensation events.

(1) The *Service Manager* gives an instruction changing the Service Information except

- a change made in order to accept a Defect or
- a change to the Service Information provided by the *Contractor* for his plan which is made either at his request or to comply with other Service Information provided by the *Employer*.

(2) The *Employer* does not provide the right of access to the Affected Property in accordance with the Accepted Plan.

(3) The *Employer* does not provide something which he is to provide as stated in the Service Information in accordance with the Accepted Plan.

(4) The *Service Manager* gives an instruction to stop or not to start any work.

(5) The *Employer* or Others do not work in accordance with the Accepted Plan or within the conditions stated in the Service Information.

(6) The *Service Manager* does not reply to a communication from the *Contractor* within the period required by this contract.

(7) The *Service Manager* changes a decision which he has previously communicated to the *Contractor*.

(8) The *Service Manager* withholds an acceptance (other than acceptance of a quotation for not correcting a Defect) for a reason not stated in this contract.

(9) A test or inspection done by the *Service Manager* causes unnecessary delay.

(10) A change to the Affected Property other than a change as a result of Providing the Service.

(11) The *Employer* does not provide materials, facilities and samples for tests and inspections as stated in the Service Information.

(12) An event which is an *Employer's* risk in this contract.

(13) The *Service Manager* notifies a correction to an assumption which he has stated about a compensation event.

(14) A breach of contract by the *Employer* which is not one of the other compensation events in this contract.

**Notifying
compensation
events**

61

61.1 For compensation events which arise from the *Service Manager* giving an instruction or changing an earlier decision, the *Service Manager* notifies the *Contractor* of the compensation event at the time of giving the instruction or changing the earlier decision. He also instructs the *Contractor* to submit quotations, unless the event arises from a fault of the *Contractor* or quotations have already been submitted. The *Contractor* puts the instruction or changed decision into effect.

61.2 The *Service Manager* may instruct the *Contractor* to submit quotations for a proposed instruction or a proposed changed decision. The *Contractor* does not put a proposed instruction or a proposed changed decision into effect.

61.3 The *Contractor* notifies the *Service Manager* of an event which has happened or which he expects to happen as a compensation event if

- the *Contractor* believes that the event is a compensation event, and
- the *Service Manager* has not notified the event to the *Contractor*.

If the *Contractor* does not notify a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices unless the *Service Manager* should have notified the event to the *Contractor* but did not.

61.4 If the *Service Manager* decides that an event notified by the *Contractor*

- arises from a fault of the *Contractor*,
- has not happened and is not expected to happen,
- has no effect upon Defined Cost or
- is not one of the compensation events stated in this contract

he notifies the *Contractor* of his decision that the Prices are not to be changed.

If the *Service Manager* decides otherwise, he notifies the *Contractor* accordingly and instructs him to submit quotations.

If the *Service Manager* does not notify his decision to the *Contractor* within either

- one week of the *Contractor's* notification or
- a longer period to which the *Contractor* has agreed,

the *Contractor* may notify the *Service Manager* to this effect. A failure by the *Service Manager* to reply within two weeks of this notification is treated as acceptance by the *Service Manager* that the event is a compensation event and an instruction to submit quotations.

61.5 If the *Service Manager* decides that the *Contractor* did not give an early warning of the event which an experienced contractor could have given, he notifies this decision to the *Contractor* when he instructs him to submit quotations.

61.6 If the *Service Manager* decides that the effects of a compensation event are too uncertain to be forecast reasonably, he states assumptions about the event in his instruction to the *Contractor* to submit quotations. Assessment of the event is based on these assumptions. If any of them is later found to have been wrong, the *Service Manager* notifies a correction.

61.7 A compensation event is not notified after the end of the service period.

Quotations for compensation events

62

62.1 After discussing with the *Contractor* different ways of dealing with the compensation event which are practicable, the *Service Manager* may instruct the *Contractor* to submit alternative quotations. The *Contractor* submits the required quotations to the *Service Manager* and may submit quotations for other methods of dealing with the compensation event which he considers practicable.

62.2 Quotations for compensation events comprise proposed changes to the Prices assessed by the *Contractor*. The *Contractor* submits details of his assessment with each quotation. If the plan for remaining work is altered by the compensation event, the *Contractor* includes the alterations to the Accepted Plan in his quotation.

62.3 The *Contractor* submits quotations within three weeks of being instructed to do so by the *Service Manager*. The *Service Manager* replies within two weeks of the submission. His reply is

- an instruction to submit a revised quotation,
- an acceptance of a quotation,
- a notification that a proposed instruction will not be given or a proposed changed decision will not be made or
- a notification that he will be making his own assessment.

62.4 The *Service Manager* instructs the *Contractor* to submit a revised quotation only after explaining his reasons for doing so to the *Contractor*. The *Contractor* submits the revised quotation within three weeks of being instructed to do so.

62.5 The *Service Manager* extends the time allowed for

- the *Contractor* to submit quotations for a compensation event and
- the *Service Manager* to reply to a quotation

if the *Service Manager* and the *Contractor* agree to the extension before the submission or reply is due. The *Service Manager* notifies the extension that has been agreed to the *Contractor*.

62.6 If the *Service Manager* does not reply to a quotation within the time allowed, the *Contractor* may notify the *Service Manager* to this effect. If the *Contractor* submitted more than one quotation for the compensation event, he states in his notification which quotation he proposes is to be accepted. If the *Service Manager* does not reply to the notification within two weeks, and unless the quotation is for a proposed instruction or a proposed changed decision, the *Contractor's* notification is treated as acceptance of the quotation by the *Service Manager*.

Assessing compensation events

63

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

63.2 For other compensation events, the changes to the Prices are assessed as the effect of the compensation event upon

- the actual Defined Cost of the work already done,
- the forecast Defined Cost of the work not yet done and
- the resulting Fee.

The date when the *Service Manager* instructed or should have instructed the *Contractor* to submit quotations divides the work already done from the work not yet done.

Effects on the Defined Cost are assessed separately for

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

The *Contractor* shows how each of these effects is built up in each quotation for a compensation event.

- 63.3 If the *Service Manager* and the *Contractor* agree, rates and Prices in the Price List may be used as a basis for assessment instead of Defined Cost and the resulting Fee.
- 63.4 If the effect of a compensation event is to reduce the total Defined Cost, the Prices are not reduced except as stated in this contract.
- 63.5 The rights of the *Employer* and the *Contractor* to changes to the Prices are their only rights in respect of a compensation event.
- 63.6 If the *Service Manager* has notified the *Contractor* of his decision that the *Contractor* did not give an early warning of a compensation event which an experienced contractor could have given, the event is assessed as if the *Contractor* had given early warning.
- 63.7 Assessment of the effect of a compensation event includes risk allowances for cost for matters which have a significant chance of occurring and are at the *Contractor's* risk under this contract.
- 63.8 Assessments are based upon the assumptions that the *Contractor* reacts competently and promptly to the compensation event, that any Defined Cost due to the event is reasonably incurred and that the Accepted Plan can be changed.
- 63.9 A compensation event which is an instruction to change the Service Information in order to resolve an ambiguity or inconsistency is assessed as if the Prices were for the interpretation most favourable to the Party which did not provide the Service Information.
- 63.10 If the effect of a compensation event is to reduce the total Defined Cost and the event is
- a change to the Service Information or
 - a correction of an assumption stated by the *Service Manager* for assessing an earlier compensation event,
- the Prices are reduced.
- 63.12 Assessments for changed Prices for compensation events are in the form of changes to the Price List.

Manager's assessment

- 64.1 The *Service Manager* assesses a compensation event
- if the *Contractor* has not submitted a quotation and details of his assessment within the time allowed,
 - if the *Service Manager* decides that the *Contractor* has not assessed the compensation event correctly in a quotation and he does not instruct the *Contractor* to submit a revised quotation,
 - if, when the *Contractor* submits quotations for a compensation event, he has not submitted a plan or alterations to a plan which this contract requires him to submit or
 - if, when the *Contractor* submits quotations for a compensation event, the *Service Manager* has not accepted the *Contractor's* latest plan for one of the reasons stated in this contract.
- 64.2 The *Service Manager* notifies the *Contractor* of his assessment of a compensation event and gives him details of it within the period allowed for the *Contractor's* submission of his quotation for the same event. This period starts when the need for the *Service Manager's* assessment becomes apparent.
- 64.3 If the *Service Manager* does not assess a compensation event within the time allowed, the *Contractor* may notify the *Service Manager* to this effect. If the *Contractor* submitted more than one quotation for the compensation event, he states in his notification which quotation he proposes is to be accepted. If the *Service Manager* does not reply within two weeks of this notification the notification is treated as acceptance of the *Contractor's* quotation by the *Service Manager*.

Implementing compensation events

- 65**
- 65.1 A compensation event is implemented when
- the *Service Manager* notifies his acceptance of the *Contractor's* quotation,
 - the *Service Manager* notifies the *Contractor* of his own assessment or
 - a *Contractor's* quotation is treated as having been accepted by the *Service Manager*.
- 65.2 The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong.
- 65.3 The changes to the Price List are included in the notification implementing a compensation event.

7 Use of equipment, Plant and Materials

The Parties' use of equipment, Plant and Materials 70

- 70.1 The *Contractor* has the right to use equipment, Plant and Materials provided by the *Employer* only to Provide the Service.
- 70.2 At the end of the service period the *Contractor*
- returns to the *Employer*, equipment and surplus Plant and Materials provided by the *Employer*,
 - provides items of Equipment for the *Employer's* use as stated in the Service Information and
 - provides information and other things as stated in the Service Information.

8 Risks and Insurance

Employer's risks 80

- 80.1 The following are *Employer's* risks.
- Claims, proceedings, compensation and costs payable which are due to
 - the unavoidable result of the service or of Providing the Service,
 - negligence, breach of statutory duty or interference with any legal right by the *Employer* or by any person employed by or contracted to him except the *Contractor* or,
 - a fault of the *Employer* or a fault in his design.
 - Loss of or damage to Plant and Materials supplied to the *Contractor* by the *Employer*, or by Others on the *Employer's* behalf, until the *Contractor* has received and accepted them.
 - Loss of or damage to the Affected Property, Plant and Materials due to
 - war, civil war, rebellion, revolution, insurrection, military or usurped power,
 - strikes, riots and civil commotion not confined to the *Contractor's* employees or
 - radioactive contamination.

- Loss of or wear or damage to any Equipment, Plant and Materials retained by the *Employer* after a termination, except loss, wear or damage due to the activities of the *Contractor* after the termination.
- Additional *Employer's* risks stated in the Contract Data.

The Contractor's risks 81

81.1 From the *starting date* until the end of the service period, the risks which are not carried by the *Employer* are carried by the *Contractor*.

Indemnity 82

82.1 Each Party indemnifies the other against claims, proceedings, compensation and costs due to an event which is at his risk.

82.2 The liability of each Party to indemnify the other is reduced if events at the other Party's risk contributed to the claims, proceedings, compensation and costs. The reduction is in proportion to the extent that events which were at the other Party's risk contributed, taking into account each Party's responsibilities under this contract.

Insurance cover 83

83.1 The *Contractor* provides the insurances stated in the Insurance Table except any insurance which the *Employer* is to provide as stated in the Contract Data. The *Contractor* provides additional insurances as stated in the Contract Data.

83.2 The insurances are in the joint names of the Parties and provide cover for events which are at the *Contractor's* risk from the *starting date* until the end of the service period or the termination certificate has been issued.

INSURANCE TABLE

Insurance against	Minimum amount of cover or minimum limit of indemnity
Loss of or damage caused by the <i>Contractor</i> to the <i>Employer's</i> property	The amount stated in the Contract Data
Loss of or damage to Plant and Materials	The replacement cost, including the amount stated in the Contract Data for the replacement of any Plant and Materials provided by the <i>Employer</i>
Loss of or damage to Equipment	The replacement cost
The <i>Contractor's</i> liability for loss of or damage to	The amount stated in the Contract Data for anyone

property (except the <i>Employer's</i> property, Plant and Materials and Equipment) and liability for bodily injury to or death of a person (not an employee of the <i>Contractor</i>) arising from or in connection with the <i>Contractor's</i> Providing the Service	event with cross liability so that the insurance applies to the Parties separately
Liability for death of or bodily injury to employees of the <i>Contractor</i> arising out of and in the course of their employment in connection with this contract	The greater of the amount required by the applicable law and the amount stated in the Contract Data for any one event

Insurance policies 84

- 84.1 Before the *starting date* and on each renewal of the insurance policy, the *Contractor* submits to the *Service Manager* for acceptance certificates which state that the insurance required by this contract is in force. The certificates are signed by the *Contractor's* insurer or insurance broker. A reason for not accepting the certificates is that they do not comply with this contract.
- 84.2 Insurance policies include a waiver by the insurers of their subrogation rights against directors and other employees of every insured except where there is fraud.
- 84.3 The Parties comply with the terms and conditions of the insurance policies.
- 84.4 Any amount not recovered from an insurer is borne by the *Employer* for events which are at his risk and by the *Contractor* for events which are at his risk.

If the *Contractor* does not insure 85

- 85.1 The *Employer* may insure a risk which this contract requires the *Contractor* to insure if the *Contractor* does not submit a required certificate. The cost of this insurance to the *Employer* is paid by the *Contractor*.

Insurance by the *Employer* 86

- 86.1 The *Service Manager* submits policies and certificates for insurances provided by the *Employer* to the *Contractor* for acceptance before the *starting date* and afterwards as the *Contractor* instructs. The *Contractor* accepts the policies and certificates if they comply with this contract.
- 86.2 The *Contractor's* acceptance of an insurance policy or certificate provided

by the *Employer* does not change the responsibility of the *Employer* to provide the insurances stated in the Contract Data.

- 86.3 The *Contractor* may insure a risk which this contract requires the *Employer* to insure if the *Employer* does not submit a required policy or certificate. The cost of this insurance to the *Contractor* is paid by the *Employer*.

9 Termination

Termination 90

- 90.1 If either Party wishes to terminate the *Contractor's* obligation to Provide the Service, he notifies the *Service Manager* and the other Party giving details of his reason for terminating. The *Service Manager* issues a termination certificate to both Parties promptly if the reason complies with this contract.
- 90.2 The *Contractor* may terminate only for a reason identified in the Termination Table. The *Employer* may terminate for any reason. The procedures followed and the amounts due on termination are in accordance with the Termination Table.

TERMINATION TABLE

Terminating Party	Reason	Procedure	Amount Due
<i>The Employer</i>	A reason other than R1-R21	P1, P2 and P4	A1, A2 and A4
	R1-R15 or R18	P1, P2, P3 and P4	A1, A2 and A3
	R17 or R20	P1 and P4	A1 and A2
	R21	P1, P3 and P4	A1 and A2
<i>The Contractor</i>	R1-R10, R16 or R19	P1, P2 and P4	A1, A2 and A4
	R17 or R20	P1, P2 and P4	A1 and A2

Reasons for termination 91

- 91.1 Either Party may terminate if the other Party has done one of the following or its equivalent.

- If the other Party is an individual and has
 - presented his petition for bankruptcy (R1),
 - had a bankruptcy order made against him (R2),
 - had a receiver appointed over his assets (R3) or
 - made an arrangement with his creditors (R4).
- If the other party is a company or partnership and has
 - had a winding-up order made against it (R5)
 - had a provisional liquidator appointed to it (R6),
 - passed a resolution for winding-up (other than in order to amalgamate or reconstruct) (R7),
 - had an administration order made against it (R8),
 - had a receiver, receiver and manager, or administrative receiver appointed over the whole or a substantial part of its undertaking or assets (R9) or
 - made an arrangement with its creditors (R10).

91.2 The *Employer* may terminate if the *Service Manager* has notified that the *Contractor* has defaulted in one of the following ways and not put the default right within four weeks of the notification.

- Substantially failed to Provide the Service (R11).
- Not provided a bond or guarantee which this contract requires (R12).
- Appointed a Subcontractor for substantial work before the *Service Manager* has accepted the Subcontractor (R13).

91.3 The *Employer* may terminate if the *Service Manager* has notified that the *Contractor* has defaulted in one of the following ways and not stopped defaulting within four weeks of the notification.

- Substantially hindered the *Employer* or Others (R14).
- Substantially broken a health or safety regulation (R15).

91.4 The *Contractor* may terminate if the *Employer* has not paid an amount certified by the *Service Manager* within thirteen weeks of the date of the certificate (R16).

91.5 Either Party may terminate if the Parties have been released under the law from further performance of the whole of this contract (R17).

91.6 If the *Service Manager* has instructed the *Contractor* to stop or not to start any substantial work or all work and an instruction allowing the work to restart or start has not been given within thirteen weeks,

- the *Employer* may terminate if the instruction was due to a default by the *Contractor* (R18),
- the *Contractor* may terminate if the instruction was due to a default by the *Employer* (R19) and

- either Party may terminate if the instruction was due to any other reason (R20).

91.7 The *Employer* may terminate if an event which the Parties could not reasonably prevent has substantially affected the *Contractor's* work for a continuous period of more than thirteen weeks (R21).

Procedures on termination 92

92.1 On termination, the *Employer* may complete the service and may use any Plant and Materials provided by the *Contractor* (P1).

92.2 The procedure on termination also includes one or more of the following as set out in the Termination Table.

P2 The *Employer* may instruct the *Contractor* to remove any Equipment, Plant and Materials and assign the benefit of any subcontract or other contract related to performance of this contract to the *Employer*.

P3 The *Employer* may use any Equipment to which the *Contractor* has title to complete the service. The *Contractor* promptly removes the Equipment when the *Service Manager* notifies him that the *Employer* no longer requires it to complete the service.

P4 The *Contractor* provides to the *Employer* information and other things which the *Service Information* states he is to provide at the end of the service period.

Payment on termination 93

93.1 The amount due on termination includes (A1)

- an amount due assessed as for normal payments,
- the Defined Cost for Plant and Materials
 - which have been delivered and retained by the *Employer* or
 - which the *Employer* owns and of which the *Contractor* has to accept delivery,
- other Defined Cost reasonably incurred in expectation of completing the whole of the service and
- any amounts retained by the *Employer*.

93.2 The amount due on termination also includes one or more of the following as set out in the Termination Table.

- A2 The forecast Defined Cost of removing the Equipment.
- A3 A deduction of the forecast of the additional cost to the *Employer* of completing the whole of the service.
- A4 The direct fee percentage applied to
- for Options A and C, any excess of the total of the Prices at the Contract Date over the Price for Services Provided to Date or
 - for Option E, any excess of the first forecast of the Defined Cost for the service over the Price for Services Provided to Date less the Fee.

Dispute Resolution

Dispute Resolution **W1** **Delete this Section in its entirety and refer to Secondary Option Clause Z28 for replacement**

Price Adjustment for Inflation

- Defined Terms** **X1**
- X1.1 (a) The Base Date Index (B) is the latest available index before the base date.
 (b) The Latest Index (L) is the latest available index before the date of assessment of an amount due.
 (c) The Price Adjustment Factor is the total of the products of each of the proportions stated in the Contract Data multiplied by $(L - B)/B$ for the index linked to it.
- Price adjustment factor** X1.2 If an index is changed after it has been used in calculating a Price Adjustment Factor, the calculation is repeated and a correction included in the next assessment of the amount due.
- Compensation events** X1.3 The Defined Cost for compensation events is assessed using the
- Defined Cost current at the time of assessing; the compensation event adjusted to base date by dividing by one plus the Price Adjustment Factor for the last assessment of the amount due and
 - Defined Cost at base date levels for amounts calculated from rates and prices in the Price List.

- Price adjustment Option A** X1.4 Each amount due includes an amount for price adjustment which is the sum of
- the change in the Price for Services Provided to Date since the last assessment of the amount due multiplied by the Price Adjustment Factor for the date of the current assessment,
 - the amount for price adjustment included in the previous amount due and
 - correcting amounts, not included elsewhere, which arise from changes to indices used for assessing previous amounts for price adjustment.

Changes in the law

Changes in the law X2

- X2.1 A change in the law of the country in which the Affected Property is located is a compensation event if it occurs after the Contract Date. The *Service Manager* may notify the *Contractor* of a compensation event for a change the law and instruct him to submit quotations. If the effect of a compensation event which is a change in the law is to reduce the total Defined Cost, the Prices are reduced.

Parent Company Guarantee

Parent Company Guarantee X4

- X4.1 If a parent company owns the *Contractor*, the *Contractor* gives to the *Employer* a guarantee by the parent company of the *Contractor's* performance in the form set out in the Service Information. If the guarantee was not given by the Contract Date, it is given to the *Employer* within four weeks of the Contract Date.

Low service damages

Low service damages X17

- X17.1 If a part of the *service* does not meet the service level stated in the *service level table*, the *Contractor* pays the amount of low service damages stated in the *service level table*.

Limitation of liability

Limitation of liability

- X18**
- X18.1 The *Contractor's* liability to the *Employer* for the *Employer's* indirect or consequential loss is limited to the amount stated in the Contract Data.
- X18.2 For any one event, the liability of the *Contractor* to the *Employer* for loss of damage to the *Employer's* property is limited to the amount stated in the Contract Data.
- X18.3 The *Contractor's* liability to the *Employer* for Defects due to his design of an item of Equipment is limited to the amount stated in the Contract Data.
- X18.4 The *Contractor's* total liability to the *Employer* for all matters arising under: in connection with this contract, other than the excluded matters, is limited: the amount stated in the Contract Data and applies in contract, tort or delict and otherwise to the extent allowed under the *law of the contract*.
- The excluded matters are amounts payable by the *Contractor* as stated in the contract for
- loss of or damage to the *Employer's* property,
 - low service damages if Option X17 applies,
 - delay damages if Option X19 applies and
 - *Contractor's* share if Option C applies.
- X18.5 The *Contractor* is not liable to the *Employer* for a matter unless it is notified to the *Contractor* before the *end of liability date*.

Task Order

Identified and defined terms

- X19**
- X19.1 (1) A Task is work within the *service* which the *Service Manager* may instruct the *Contractor* to carry out within a stated period of time.
(2) A Task Order is the *Service Manager's* instruction to carry out a Task.
(3) Task Completion is when the *Contractor* has done all the work in the Task and corrected Defects which would have prevented the *Employer* or

Others from using the Affected Property and Others from doing their work.

(4) Task Completion Date is the date for completion stated in the Task Order unless later changed in accordance with this contract.

Providing the Service

- X19.2 A Task Order includes
- a detailed description of the work in the Task,
 - a priced list of items of work in the Task in which items taken from the Price List are identified,
 - the starting and completion dates for the Task,
 - the amount of delay damages for the late completion of the Task and
 - the total of the Prices for the Task when Option A or C is used or the forecast total of the Prices for the Task if Option E is used.

The *Service Manager* consults the *Contractor* about the contents of a Task Order before he issues it.

- X19.3 The delay damages in a Task Order, if any, are not more than the estimated cost to the *Employer* of late completion of the Task. If Task Completion is later than the Task Completion Date, the *Contractor* pays delay damages at the rate stated in the Task Order from the Task Completion Date until Task Completion.
- The Prices for items in the Task price list which are not taken from the Price List are assessed in the same way as compensation events.

Time

- X19.4 The *Contractor* does not start any work included in the Task until the *Service Manager* has instructed him to carry out the Task and does the work so that Task Completion is on or before the Task Completion Date. No Task Order is issued after the end of the *service period*.

Task Order programme

- X19.5 The *Contractor* submits a Task Order programme to the *Service Manager* for acceptance within the period stated in the Contract Data.

- X19.6 The *Contractor* shows on each Task Order programme which he submits for acceptance
- the Task starting date and the Task Completion Date,
 - planned Task Completion,
 - the order and timing of the operations which the *Contractor* plans to do in order to complete the Task,
 - provisions for
 - float,
 - time risk allowances,
 - health and safety requirements and
 - the procedures set out in this contract,
 - the dates when, in order to Provide the Service in accordance with

his Task Order programme, the *Contractor* will need

- access to the Affected Property,
 - acceptances,
 - Plant and Materials, equipment and other things to be provided by the *Employer* and
 - information from Others,
- for each operation, a statement of how the *Contractor* plans to do the work identifying the principal Equipment and other resources which he plans to use and
 - other information which the Service Information requires the *Contractor* to show on a Task Order programme submitted for acceptance.

X19.7 Within one week of the *Contractor* submitting a Task Order programme to him for acceptance, the *Service Manager* either accepts the programme or notifies the *Contractor* of his reasons for not accepting it. A reason for not accepting the Task Order programme is that

- the *Contractor's* plans which it shows are not practicable,
- it does not show the information which this contract requires or
- it does not comply with the Service Information.

Revising the Task Order programme

X19.8 The *Contractor* shows on each revised Task Order programme

- the actual progress achieved on each operation and its effect upon the timing of the remaining work,
- the effects of implemented compensation events,
- how the *Contractor* plans to deal with any delays and to correct notified Defects and
- any other changes which the *Contractor* proposes to make to the Task Order programme.

X19.9 The *Contractor* submits a revised Task Order programme to the *Service Manager* for acceptance

- within the period for reply after the *Service Manager* has instructed him to and
- when the *Contractor* chooses to.

The latest programme accepted by the *Service Manager* supersedes previous accepted programmes.

Compensation events

X19.10 The following are compensation events.

- (1) The *Service Manager* gives an instruction changing a Task Order.

(2) The *Contractor* receives the Task Order after the starting date stated in the Task Order.

(3) The *Employer* does not provide the right of access to the Affected Property in accordance with the latest accepted Task Order programme.

(4) The *Employer* does not provide something which he is to provide as stated in the Service Information in accordance with the latest accepted Task Order programme.

(5) The *Employer* or Others do not work in accordance with the latest accepted Task Order programme or within the conditions stated in the Service Information.

(6) An event which

- stops the *Contractor* completing a Task or
- stops the *Contractor* completing a Task by the Task Completion Date,

and which

- neither Party could prevent,
- an experienced contractor would have judged at the date of issue of the Task Order to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it and
- is not one of the other compensation events stated in this contract.

(7) A Task Completion Date is later than the end of the *service period*.

X19.11 If, due to the compensation event, planned Task Completion is delayed, the delay is stated in the *Contractor's* quotation for the event and a programme is submitted with details of the assessment of the delay.

Assessments of delay include time risk allowances and are based on the assumption that the Task Order programme can be changed and that delays were or will be reasonably incurred.

The *Service Manager* may assess the delay if, when the *Contractor* submits quotations for a compensation event, the *Contractor* has not submitted a Task Order programme required by this contract.

**Implementing
compensation
events**

X19.12 The changes to the calculated total of the Prices for the Task Order and any delay to the Task Completion Date are included in the *Service Manager's* notification implementing a compensation event.

Key Performance Indicators

Incentives

X20

- X20.1 A Key Performance Indicator is an aspect of performance by the *Contractor* for which a target is stated in the Incentive Schedule. The Incentive Schedule is the incentive schedule unless later changed in accordance with this contract.
- X20.2 From the *starting date* until the end of the service period, the *Contractor* reports to the *Service Manager* his performance against each of the Key Performance Indicators. Reports are provided at the intervals stated in the Contract Data and include the forecast final measurement against each indicator.
- X20.3 If the *Contractor's* forecast final measurement against a Key Performance Indicator will not achieve the target stated on the Incentive Schedule, he submits to the *Service Manager* his proposals for improving performance.
- X20.4 The *Contractor* is paid the amount stated in the Incentive Schedule if the target for a Key Performance Indicator is improved upon or achieved. Payment of the amount is due when the target has been improved upon or achieved.
- X20.5 The *Employer* may add a Key Performance Indicator and associated payment to the Incentive Schedule but may not delete or reduce a payment stated in the Incentive Schedule.