



**TOMAGO ALUMINIUM** Company Pty Limited  
A.B.N. 68 001 862 228

**PART 3**  
**GENERAL CONDITIONS OF CONTRACT**  
**SUPPLY OF EQUIPMENT WITH OR WITHOUT INSTALLATION**

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**GENERAL CONDITIONS OF CONTRACT FOR THE  
SUPPLY OF EQUIPMENT WITH OR WITHOUT INSTALLATION**

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RELEASE

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## GENERAL CONDITIONS OF CONTRACT FOR THE SUPPLY OF EQUIPMENT WITH OR WITHOUT INSTALLATION

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### 1.0 CONSTRUCTION OF CONTRACT

The Contract shall be governed by and construed with reference to the laws for the time being in force in the State or Territory named in the Annexure.

Unless otherwise provided, prices are in Australian currency and payments shall be made in Australian currency at the place named in the Annexure.

Communications between the Purchaser, the Engineer and the Contractor shall be in the English language.

Measurements of physical quantities shall be in Australian legal units of measurement within the meaning of the Weights and Measures (National Standards) Act 1960 as amended from time to time.

The interpretations of:

Date for Delivery;

Date for Practical Completion;

Practical Completion,

and Clauses 5.7, 16.1, 21, 22, 23 and 24 shall apply separately to each Separable Portion and references therein to the Equipment and to work under the Contract shall mean so much of the Equipment and the work under the Contract as is comprised in the relevant Separable Portion.

If the Contract does not make provision for the amount of security, retention moneys or liquidated damages applicable to a Separable Portion, the respective amount applicable shall be such proportion of the security, retention moneys or liquidated damages applicable to the whole of the work under the Contract as the value of the Separable Portion bears to the value of the whole of the work under the Contract.

Where provisions in the General Conditions of Contract are expressed to be alternatives and the Contract fails to state which alternative applies, the first alternative shall apply.

### 2.0 INTERPRETATION

In the Contract, except where the context otherwise requires:-

'Construction Plant' means appliances and things used on or in the vicinity of the Site in the execution of the work under the Contract but not forming part of the Equipment;

'Contract Sum' means:

- (a) where the Purchaser accepted a lump sum, the lump sum;
- (b) where the Purchaser accepted rates, the sum ascertained by calculating the products of the rates and the corresponding quantities in the Schedule of Rates;
- (c) where the Purchaser accepted a lump sum and rates, the aggregate of the sums referred to in paragraphs (a) and (b),

including provisional sums but excluding any additions or deductions which may be required to be made under the Contract;

'Contractor' means the person bound to execute the work under the Contract. Where in the Contract a reference is made to "the Supplier" or "the Seller" that reference shall be read as a reference to the Contractor;

'Date for Delivery' means:

- (a) where the Annexure provides a date for Delivery, the date;
- (b) where the Annexure provides a period of time for Delivery, the last day of the period;

but if an extension of time for Delivery is granted by the Engineer under Clause 22, it means the date resulting from the extension of time;

'Date for Practical Completion' means:

- (a) where the Annexure provides a date for Practical Completion, the date;
- (b) where the Annexure provides a period of time for Practical Completion, the last day of the period;

but if an extension of time for Practical Completion is granted by the Engineer under Clause 22, it means the date resulting from the extension of time;

'Date of Acceptance of Tender' means the date which appears on the notice in writing of acceptance of the Contractor's tender;

'Day' means calendar day;

'Drawings' means the drawings referred to in the Contract and any modification of such drawings notified to the Contractor by the Engineer and includes such other drawings as may from time to time be supplied to the Contractor by the Engineer, or the use of which has been permitted by the Engineer, for the purposes of the Contract;

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'Engineer' means the person named in the Annexure as the Engineer or other person from time to time appointed in writing by the Purchaser to be the Engineer and notified as such in writing to the Contractor by the Purchaser and, so far as concerns the functions exercisable by an Engineer's Representative, includes an Engineer's Representative;

'Engineer's Representative' means a person appointed in writing by the Engineer under Clause 18;

'Equipment' means the goods to be supplied by the Contractor under the Contract, generally as described in the Scope of Work, which are to be handed over to the Purchaser or a person designated by the Purchaser;

'Person' includes a firm or body corporate or unincorporate as well as an individual;

'Practical Completion' is the stage in the execution of the work under the Contract or a Separable Portion generally when:

- (a) the Equipment is installed and the Contractor has completed all the work, except for minor omissions or minor defects:
  - (i) which, in the Engineer's opinion, do not prevent the Equipment from being used for its intended purpose;
  - (ii) in relation to which the Engineer determines that there are reasonable grounds for not rectifying them; and
  - (iii) the rectification of which will not, in the Engineer's opinion, prejudice the convenient use of the Equipment;
- (b) those tests which are required under the Contract to be carried out and passed before the issue of the Certificate of Acceptance, have been carried out and passed; and
- (c) such documents and other information required under the Contract and which, in the opinion of the Engineer, are essential for the use, occupation, operation and maintenance of the Equipment, have been supplied to the Engineer.

'Provisional sum' includes monetary sum, contingency sum and prime cost item;

'Purchaser' means the Purchaser stated in the Annexure;

'Schedule of Rates' means any schedule included in the Contract which, in respect of any section or item of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices;

'Separable Portion' means a portion of the work under the Contract described in the Contract as a Separable Portion or made a separable portion under Clause 21.4;

'Site' means the lands and places to be made available and any other lands and places made available to the Contractor by the Purchaser for the purpose of the Contract;

'Specification' means the Specification for work to be carried out as existing at the Date of Acceptance of Tender and any modification of such Specification thereafter directed or the use of which has been permitted by the Engineer pursuant to powers in that behalf contained in the Contract;

'Temporary Works' means works used in the execution of the work under the Contract but not forming part of the Equipment;

'Tender' means, where there is no tender, the Contractor's offer and then 'the date of closing of tenders' means the date of Contractor's offer or quotation;

'Work under the Contract' means the work which the Contractor is or may be required to execute or provide under the Contract generally as described in the Scope of Work and includes the Equipment, services, variations, remedial work, Constructional Plant and Temporary Works and the supply of any necessary raw, manufactured or fabricated material, goods, machine, equipment, plant, item or thing required for incorporation into the Equipment, production of designs, preparation and/or submission of drawings and performance of services.

The clause headings and sub-clause headings in the General Conditions of Contract shall not form part of the General Conditions of Contract and shall not be used in the interpretation of the Contract.

Words in the singular include the plural and words in the plural include the singular, according to the requirements of the context.

Words importing a gender include every gender.

### **3.0 NATURE OF CONTRACT**

#### **3.1 Performance and Payment**

The Contractor shall execute and complete the work under the Contract.

The Purchaser shall pay the Contractor:

- for work for which the Purchaser accepted a lump sum, the lump sum;
- for work for which the Purchaser accepted rates, the sum ascertained by multiplying the measured quantity of each section of the work actually carried out under the Contract by the rate accepted by the Purchaser for the section or item;

adjusted by any additions or deductions pursuant to the Contract.

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### **3.2 Quantities**

Quantities in a Schedule of Rates are estimated quantities only.

An order shall not be required to be given by the Engineer by reason of the actual quantity of an item required to perform the Contract being greater or less than the quantity shown in the Schedule of Rates.

Where otherwise than by reason of a direction of the Engineer under Clause 20.1, the actual quantity of an item required to perform the Contract is greater or less than the quantity shown in the Schedule of Rates:-

- (a) where the Purchaser accepted a lump sum for the item, the difference shall be valued under Clause 20.2;
- (b) where the Purchaser accepted a rate for the item, the rate shall apply to greater or lesser quantities within the limits of accuracy stated in the Annexure and quantities outside the limits shall be valued under Clause 20.2.

### **3.3 Omitted Items**

The Schedule of Rates includes the cost of the whole of the work under the Contract and other incidentals associated with or necessary for the execution of the work under the Contract. Where an item does not appear in the Schedule of Rates, the cost shall be deemed to have been included elsewhere in the rates or prices and no adjustments shall be made to the rates or prices, the schedule or the Contract Sum, for that item.

### **3.4 Joint and Several Liability**

Where the Contractor comprises more than one person, each such person shall be jointly and severally liable to the Purchaser in respect of the Contractor's obligations under the Contract.

## **4.0 MATERIALS AND WORK**

### **4.1 Materials and Standards of Workmanship**

The Contractor shall use the materials and standards of workmanship required by the Contract and perform the work under the Contract in strict compliance and conformity with the provisions of the Contract.

The Contractor shall ensure that the execution of the work under the Contract is carried out with due diligence and efficiency and in accordance with sound engineering practice and all referenced codes, without being entitled to any reward or payment other than specifically provided for in the Contract.

The Contractor warrants to the Purchaser that:

- (a) the Equipment will be free from all defects, of merchantable quality and fit for its intended purpose and capable of operating satisfactorily in the environment to which it is to be exposed including, without limitation, conditions of weather, locality, altitude and operational conditions such as exposure to cold, heat, dust, corrosive chemicals and fluids and rough handling;
- (b) the Equipment will be strictly in accordance with the Specification and Drawings and at all times comply with the relevant Standards and Codes published by the Standards Association of Australia or such equivalent international standards as may apply to that type of equipment, material or goods, the relevant statutory authorities and the law;
- (c) the Equipment will be free of all liens, charges and encumbrances;
- (d) the Contractor has title to all materials, equipment and other items to be incorporated into the Equipment; and
- (e) any special warranty or service guarantee stated in the Contract is not revoked or varied by this clause.

Unless otherwise specified in the Contract, materials used shall be new. The Contractor, if so required by the Purchaser or the Engineer, shall submit samples of materials and workmanship for approval.

### **4.2 Operation of Equipment**

The Contractor shall supply with the Equipment, without extra charge, all parts, documents and instructions which are necessary for the proper operation or use of the Equipment, notwithstanding the fact that the Specification or Drawings do not contain reference to, or particulars of, such parts, documents or instructions.

### **4.3 Installation of Equipment**

Where the work under the Contract includes or requires the Contractor to supervise the installation, erection or commissioning of the whole or any part of the Equipment:

- (a) the Contractor, at its own cost, shall provide all necessary specialised tools, plant, equipment and specialised subcontractors; and
- (b) if given adequate written notice by the Contractor, the Purchaser, at the Purchaser's cost, will provide such general construction labour and facilities as are reasonably required by the Contractor to facilitate supervision of such installation, erection or commissioning.

## **5.0 SECURITY AND RETENTION MONEYS**

### **5.1 Purpose**

Security and retention moneys are for the purpose of ensuring the due and proper performance of the Contract.

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## **5.2 Provision of Security**

If it is provided in the Annexure that a party shall provide security then the party shall provide security in the amount stated in the Annexure and in accordance with this clause.

## **5.3 Form of Security**

The security shall be in the form of cash or an unconditional, irrevocable bank undertaking.

The party having the benefit of the security shall have a discretion to approve or disapprove of the form of an unconditional undertaking and the financial institution or insurance company giving it or other form of security offered. The form of unconditional undertaking attached to these General Conditions is approved.

If the security is not transferable by delivery it shall be accompanied by an executed transfer. The costs and expenses (including all stamp duty or other taxes) of and incidental to the transfer and retransfer shall be borne by the party providing the security.

## **5.4 Time for Lodgement of Security**

Security shall be lodged within 28 days of the Date of Acceptance of Tender. Failure to lodge security within that period shall be a substantial breach of the Contract within the meaning of Clause 30.

## **5.5 Substitution of Security for Retention Moneys**

The Contractor shall be at liberty at any time to provide in lieu of retention moneys additional security in any of the forms permitted by Clause 5.3. To the extent that additional security is provided the Purchaser shall not deduct retention moneys and shall forthwith release retention moneys.

## **5.6 Reduction of Security and Retention Moneys**

Upon issue of the Certificate of Acceptance, or if there is more than one Certificate, then upon the issue of the last Certificate of Acceptance, the Purchaser's entitlement to security and retention of moneys shall be reduced to the percentage thereof stated in the Annexure or, if no percentage is stated, by one-half.

If in the opinion of the Engineer it is reasonable to further reduce retention moneys or security, the Purchaser's entitlement shall be reduced to the amount which the Engineer determines to be reasonable.

The Purchaser shall release security and retention moneys in excess of the entitlement.

## **5.7 Release of Security**

If the Purchaser has provided security, then when the Contractor has been paid all moneys due to the Contractor under the Contract or a Separable Portion the Contractor shall account to the Purchaser for security lodged by the Purchaser in respect of the Contract or the Separable Portion, as the case may be.

If the Contractor has provided security then the Purchaser shall release it when required by Clause 28.

## **5.8 Interest on Security and Retention Moneys**

The party holding retention moneys or cash security shall own any interest earned on the retention moneys or security.

## **6.0 EVIDENCE OF CONTRACT**

### **6.1 Contract in Absence of Formal Instrument of Agreement.**

Until a Formal Instrument of Agreement is executed by the parties, the agreement in writing between the parties for the execution of the work under the Contract, including documents or parts of documents to which reference may properly be made to ascertain the rights and obligations of the parties, shall evidence the Contract.

### **6.2 Formal Instrument of Agreement**

If the conditions of tendering require that a Formal Instrument of Agreement be executed:-

- (a) Within 28 days after the Date of Acceptance of Tender the Purchaser shall prepare in duplicate a Formal Instrument of Agreement and request the Contractor to Execute it;
- (b) Immediately upon being requested in writing by the Purchaser so to do the Contractor shall execute both copies of the Formal Instrument of Agreement in the manner directed in writing by the Purchaser and return them to the Purchaser;
- (c) Within 28 days after receipt from the Contractor of the two copies of the Formal Instrument of Agreement duly executed by the Contractor the Purchaser shall execute both copies, have them stamped (unless they are exempt from duty) and forward one copy to the Contractor.

The Engineer may extend the periods.

## **7.0 SERVICE OF NOTICES**

A notice shall be deemed to have been given when it is received by the person to whom it is addressed or is delivered to the address of the person last communicated by the person to the person giving the notice, whichever is the earlier.

The Purchaser, the Contractor and the Engineer shall each notify the others of a change of address.

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## **8.0 CONTRACT DOCUMENTS**

### **8.1 Discrepancies**

In the event of any discrepancy, contradiction or ambiguity between anything contained in the Contract documents, the following order of precedence shall apply:

- (a) the Formal Instrument of Agreement;
- (b) the Special Conditions;
- (c) the Tender Form, Commercial Terms and Schedules (except Schedule G);
- (d) the General Conditions of Contract;
- (e) the Technical Specification (Scope of Work)
- (f) the Specifications other than the Technical Specification and the Standard Specifications;
- (g) the Drawings other than the Standard Drawings;
- (h) the Standard Drawings;
- (i) the Standard Specifications and Reference Drawings;
- (j) the other Contract Documents; and
- (j) Schedule G to the Commercial Terms and Schedules.

Annexures and appendices shall be accorded the respective authority of the document incorporating them into the Contract. In the event of any difference between any document and its annexure or appendix, the document shall prevail.

The Contractor shall notify the Engineer of any ambiguity or discrepancy discovered by the Contractor. In the event of an ambiguity or discrepancy being discovered and brought to the attention of the Engineer, the Engineer shall direct the Contractor as to the interpretation to be followed by the Contractor in carrying out the work. In the event that any ambiguity or discrepancy relates to a standard of quality or finish of work, unless otherwise directed by the Engineer, the highest standard is required.

The Contractor shall be deemed to have carefully checked all documents comprising the Contract for ambiguities or discrepancies before commencing to carry out the Works and the failure of the Contractor immediately to refer any such ambiguity or discrepancy to the Engineer in due time before incurring any associated expense or delay shall prohibit the Contractor from claiming for any additional expenses or extension of time arising from any such ambiguity, discrepancy or inconsistency.

If the direction causes the Contractor to incur more or less expenditure than the Contractor could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 20.2.

### **8.2 Dimensions**

Where any discrepancy exists between figured and scaled dimensions, figured dimensions shall prevail.

### **8.3 Supply of Documents by Purchaser and Engineer**

The Purchaser shall supply to the Contractor the number of copies stated in the Annexure, or if no number is stated then 5 copies of the Drawings, Specification and other documents required by the Contract to be supplied to the Contractor by the Purchaser.

Documents supplied to the Contractor shall remain the property of the Purchaser and shall be returned by the Contractor to the Purchaser on demand in writing. All drawings supplied by the Purchaser or Engineer, unless stamped "Approved for Construction" by the Engineer, shall be deemed to be marked "Hold" and the provisions of Clause 8.9 shall apply.

An "Approved for Construction" stamp on a drawing shall not override a "Hold" marking on any part of that drawing.

### **8.4 Supply of Documents by Contractor**

The Contractor shall supply the documents and information specified in the Scope of Work, within the times and with the number of copies specified. If no time or number of copies is specified then within a reasonable time and with five (5) copies.

If the Contract provides that the Contractor must obtain the Engineer's approval to the use of documents supplied by the Contractor then:-

- (a) The Engineer shall not be bound to check the documents for errors, omissions or compliance with the requirements of the Contract;
- (b) Notwithstanding the provisions of Clause 18, the Engineer's approval shall not relieve the Contractor from responsibility for the Contractor's errors or omissions or compliance with the requirements of the Contract; and
- (c) The documents shall be reviewed in accordance with Vendor Drawings and Data Instructions.

Copies of documents supplied by the Contractor shall be the property of the Purchaser.

### **8.5 Availability of Documents**

During the manufacture, assembly or erection of any significant part of the work under the Contract a legible set of the drawings and written information relevant to that part of the work shall be kept by the Contractor at the places of manufacture, assembly and erection and shall be available for reference by the Purchaser, the Engineer and any person nominated in writing by either of them.

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## **8.6 Confidential Information**

All specifications, drawings, samples, models, patterns, calculations, data, flowsheets, know-how, reports, notes, proposals, commercial data and other information or things developed by the Purchaser or the Engineer or provided to the Contractor by the Purchaser or Engineer shall be confidential and shall not be disclosed by the Contractor to a third party, except with the Purchaser's prior, written consent.

If required in writing by a party the other party shall enter into a separate agreement not to disclose to anyone else any confidential matter even after the expiry of the Contract.

The Contractor shall not, and shall ensure that its subcontractors and suppliers do not:

- (a) take any photographs of the work under the Contract, the Equipment or the installations, buildings, equipment or any part of or activity related to the project; or
- (b) disclose to any other person any information relating to the work under the Contract, the Equipment or the project,

without the Purchaser's prior, written consent.

## **8.7 Media Releases**

The Contractor shall not, and shall ensure that its subcontractors and suppliers to not, issue any information, publication, document, photograph, text or article for publication concerning the work under the Contract, the Equipment or the project in any media without the prior, written approval of the Purchaser.

## **8.8 Holds on Documents**

"Hold" marked by the Purchaser, Engineer or those producing documents for either on any drawing, specification or other data indicates that the information or section so marked is tentative only. The Contractor shall not proceed with the work shown in that area or section before being advised in writing by the Engineer that the "Hold" no longer applied. If "Hold" markings will delay progress or commencement and completion dates or cause extra cost to be incurred, the Contractor shall report in writing such likely delay or cost to the Engineer as soon as it becomes apparent to the Contractor, but not less than five (5) days prior to the anticipated start of the delay and before any extra cost is incurred.

The failure of the Contractor so to report such likely delay or cost to the Engineer in due time before suffering or incurring the cost or delay shall prohibit the Contractor from being entitled to claim any such cost or extension of time arising from such "Hold" markings.

## **8.9 Identification of Documents**

The Contractor shall note the Contract number clearly on all documents supplied by it under the Contract, including invoices, claims, letters, memoranda, transmittal notes, notices, packing lists, containers, delivery notes, way bills and Bills of Lading.

## **9.0 ASSIGNMENT AND SUBCONTRACTING**

### **9.1 Assignment**

The Contractor shall not, without the prior, written approval of the Purchaser, assign, mortgage, charge or encumber the Contract or any part thereof or any benefit, moneys or interest thereunder. The Purchaser may, without the prior, approval of the Contractor, assign, mortgage, charge or encumber the Contract or any part thereof or any benefit, moneys or interest thereunder.

### **9.2 Subcontracting**

The Contractor shall not without the written approval of the Engineer, which approval shall not be unreasonably withheld, subcontract or allow a subcontractor to assign or subcontract work described in the Annexure.

With a request for approval, the Contractor shall provide to the Engineer particulars in writing of the work to be subcontracted and the name and the address of the proposed subcontractor.

The Contractor shall provide to the Engineer other information which the Engineer reasonably requests, including the proposed subcontract documents without prices.

Within 14 days after a request by the Contractor for approval the Engineer shall advise the Contractor of approval or the reasons why approval is not given.

Approval may be conditional upon the subcontract including:

- provision that the subcontractor shall not assign or subcontract without the consent in writing of the Contractor;
- provisions which may be reasonably necessary to enable the Contractor to fulfil the Contractor's obligations to the Purchaser; and
- terms and conditions similar to or identical with the terms and conditions of the Contract.

### **9.3 Contractor's Responsibility**

Approval to subcontract shall not relieve the Contractor from any liability or obligation under the Contract. Except where the Contract otherwise provides, the Contractor shall be liable to the Purchaser for the acts and omission of subcontractors and employees and agents of subcontractors as if they were acts or omissions of the Contractor.



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## **10.0 DESIGNATED, SELECTED AND NOMINATED SUBCONTRACTORS**

### **10.1 Definitions**

If the Contract provides that certain work or the supply of certain items shall be subcontracted to a Designated, Selected or Nominated Subcontractor, the work or the supply of the items is 'Designated Subcontract Work', 'Selected Subcontract Work' or 'Nominated Subcontract Work', and:

'Designated Subcontractor' means a subcontractor named in the Contract or chosen jointly by the Contractor and the Purchaser or the Engineer on the Purchaser's behalf and may include persons with whom the Purchaser has entered a contract before this Contract on terms that the prior contract will be assigned by the Purchaser to the Contractor;

'Selected Subcontractor' means a subcontractor selected by the Contractor from a list of subcontractors approved for Selected Subcontract Work;

'Nominated Subcontractor' means a subcontractor to whom the Contractor is directed by the Engineer to subcontract Nominated Subcontract Work.

### **10.2 Designated Subcontract**

If the Contract includes Designated Subcontract Work, the Contractor shall subcontract the Designated Subcontract Work to the Designated Subcontractor.

If the Contract provides that the Purchaser may assign to the Contractor a prior contract between the Purchaser and a Designated Subcontractor, the Contractor shall accept the assignment and, unless the Contract otherwise provides, the Contractor shall give the Purchaser credit for payments made by the Purchaser to the Designated Subcontractor in respect of the Designated Subcontract Work.

If the Contract does not name a Designated Subcontractor and the Contractor and the Purchaser cannot agree upon a Designated Subcontractor or the Designated Subcontractor refuses to subcontract with the Contractor, the Designated Subcontract Work shall be regarded as Nominated Subcontract Work and the Engineer shall nominate a Nominated Subcontractor.

### **10.3 Selected Subcontract**

If the Contract does not include a list of approved subcontractors, the Contractor shall provide a list for the approval of the Engineer. The Engineer shall not unreasonably refuse to approve of any subcontractor on the list.

If the Engineer does not approve of any subcontractor on the list provided by the Contractor or if no subcontractor on the list included in the Contract or provided by the Contractor will subcontract to perform the Selected Subcontract work, the Selected Subcontract Work shall be regarded as Nominated Subcontract Work and the Engineer shall nominate a Nominated Subcontractor.

### **10.4 Nominated Subcontract**

If the Contract includes Nominated Subcontract Work, at such time as is necessary to avoid delay to the Contractor the Engineer shall direct the Contractor to subcontract the Nominated Subcontract Work to a Nominated Subcontractor.

The Contractor shall ensure that the provisions of the subcontract are severally set out in the subcontract documents, so that the subcontract is fully expressed and complete in itself and includes provisions:-

- (a) that in respect of the Nominated Subcontract Work the Nominated Subcontractor will undertake towards the Contractor obligations and liabilities which will enable the Contractor to discharge the Contractor's obligations and liabilities to the Purchaser under the terms of the Contract;
- (b) that the Nominated Subcontractor will indemnify the Contractor against loss resulting from any failure by the Nominated Subcontractor to perform such obligations or fulfil such liabilities;
- (c) that the Nominated Subcontractor will indemnify the Contractor against loss resulting from any negligence by the Nominated Subcontractor and the Nominated Subcontractor's servants and agents and against any misuse by them of any Constructional Plant or Temporary Works provided by the Contractor for the purposes of the Contract;
- (d) That the Nominated Subcontractor will lodge security in a form provided by Clause 5.3 and that security and retention moneys shall be calculated on the same scale and on the same basis respectively as apply in the Contract between the Purchaser and the Contractor;
- (e) Equivalent to those in Clause 30; and
- (f) Such other terms and conditions similar to or identical with the terms and conditions of the Contract, as the Engineer requires.

The Contractor shall not be obliged to subcontract with a Nominated Subcontractor against whom the Contractor raises reasonable objection.

Provided that the Contractor's program or proposed program is reasonable, 'reasonable objection' includes the ground that the Nominated Subcontractor will not be able to or refuses to contract to carry out the Nominated Subcontract Work in the sequence and at the times shown in the program.

If the Contractor declines to enter into a subcontract with the Nominated Subcontractor on the ground that the Nominated Subcontractor refuses to enter into a subcontract containing provisions in paragraphs (a) to (f) of Clause 10.4 the Engineer shall nominate another Nominated Subcontractor or direct the Contractor to enter into a subcontract with the Nominated Subcontractor on such other terms as the Engineer specifies. In the latter event:

- (i) the Contractor shall not be bound to discharge obligations and liabilities under the Contract to the extent that the subcontract terms so specified by the Engineer are inconsistent with the discharge;

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- (ii) if the Contractor suffers loss arising out of the refusal of the Nominated Subcontractor to accept such provisions the Purchaser shall pay to the Contractor the amount of loss which the Contractor could not reasonably avoid subject to the Contractor providing proof of such loss to the reasonable satisfaction of the Purchaser.

The Contractor shall not be required to enter a subcontract on terms which, bearing in mind the provisions of sub-paragraphs (i) and (ii), are unreasonable.

#### **10.5 Provisions Applying Generally to Designated, Selected and Nominated Subcontract Work**

If the Contractor is required by Clause 10 to enter a subcontract, the Contractor shall proceed promptly to do so and shall notify the Engineer in writing as soon as the subcontract has been entered.

With the consent of the Contractor, the Engineer may direct the Contractor to perform Designated, Selected or Nominated Subcontract Work.

If the Contractor is to be responsible to the Purchaser for the design or suitability of Designated, Selected or Nominated Subcontract Work, as distinct from the quality or workmanship, the responsibility shall be expressly stated in the Contract and the Contractor's liability for the design or suitability of the Designated, Selected or Nominated Subcontract Work shall only be that which is expressly stated in the Contract.

The Purchaser as stakeholder shall hold retention moneys and security provided by a Designated or Nominated Subcontractor and shall disburse or apply the retention moneys or security as jointly requested by the Contractor and the subcontractor or in accordance with the decision of an arbitrator or court.

#### **10.6 Termination of Designated and Nominated Subcontracts**

The Contractor shall not unreasonably terminate a subcontract for Designated or Nominated Subcontract Work and as early as possible the Contractor shall notify the Engineer of the Contractor's intention to terminate and the reasons. If a Designated or Nominated Subcontractor repudiates or abandons the subcontract or it is terminated, the Contractor shall forthwith notify the Engineer in writing and the Engineer shall proceed under Clause 10.4 to nominate a Nominated Subcontractor to complete the subcontract work and Clause 11(b) shall apply.

#### **11.0 PROVISIONAL SUMS**

A provisional sum or provisional item included in the Contract shall not itself be payable by the Purchaser but:-

- (a) where at the direction of the Engineer the work or item to which the provisional sum relates is performed or supplied by the Contractor, the work or item shall be valued under Clause 20.2;
- (b) where at the direction of the Engineer the work or item to which the provisional sum relates is performed or supplied by a subcontractor to the Contractor the Purchaser shall pay the Contractor the amount payable to the subcontractor for the work or item, disregarding any damages payable by the Contractor to the subcontractor or vice versa, plus the amount or percentage thereon for profit and attendance stated in the Annexure or elsewhere in the Contract; and
- (c) where at the option of the Purchaser the work covered by a provisional sum or a provisional item is omitted, the Contractor shall not be entitled to any compensation arising from such omission notwithstanding that the amount omitted may have been included in the Contract Sum.

The amount payable to a subcontractor for materials or goods is to be taken to be the nett cost to the Contractor (disregarding any deduction of cash discount for prompt payment).

#### **12.0 CONTRACTOR TO INFORM ITSELF**

##### **12.1 The Contractor to Inform Itself**

The Contractor shall be deemed to have:

- (a) examined carefully and acquired actual knowledge of the contents of the Contract, including the annexures, and any other information made available by the Purchaser or the Engineer to the Contractor for the purpose of execution of the work under the Contract;
- (b) examined all information relevant to the risks, contingencies and other circumstances having an effect on the work under the Contract;
- (c) examined the Site, the buildings presently comprising the Tomago Smelter, the surroundings of the Site and all physical conditions and characteristics connected with the Site, including all relevant physical conditions on and below the surface of the Site;
- (d) informed itself of the nature of the work and materials necessary for the execution of the work under the Contract, the means of access to and facilities at the Site, the transport facilities for deliveries to the Site;
- (e) informed itself as to the availability of professional services and labour and the terms and conditions on which those services and labour can be engaged for the work under the Contract; and
- (f) satisfied itself as to the correctness and sufficiency of the Contract Sum and that the prices and rates (if any) in the Contract cover all of the costs of complying with its obligations under the Contract.

##### **12.2 Failure by Contractor to Inform Itself**

Failure by the Contractor to do all or any of the things that it is deemed to have done under Clause 12.1 will not relieve it of its liability to carry out and complete the work under the Contract in accordance with the terms and conditions of the Contract.

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### **13.0 PATENTS, COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS**

The Purchaser warrants that unless otherwise provided in the Contract:-

- design;
- materials;
- documents; and
- methods of working

specified in the Contract or provided or directed by the Purchaser or the Engineer will not infringe any patent, registered design, trademark or name, copyright or other protected right.

The Contractor warrants that any other design, materials, documents and methods of working provided by the Contractor will not infringe any patent, registered design, trademark or name, copyright or other protected right.

All payments for royalties or fees in respect of letters patent, registered designs, trademarks or names, copyright or other protected rights due or payable for or in connection with any matter or things used or required to be used in performance of the Contract or to be supplied under the Contract, whether payable in one sum or by instalments or otherwise, shall be deemed to have been included by the Contractor in the Contract Sum and shall be paid by it to those to whom they may be due or payable. Such payments shall not include continuing payments arising out of the use by the Purchaser of any part of the Equipment, provided that details of the liability for such continuing payments and any relevant conditions as to the use have been notified in writing to the Purchaser by the Contractor and accepted in writing by the Purchaser.

The Contractor shall indemnify the Purchaser and Engineer against any action, claim or demand, costs or expenses from or incurred by reason of any infringement or alleged infringement of letters patent, registered design, trademark or name, copyright or other protected right in respect of any design, document, machine, equipment, work, material or thing, system or method of using, fixing, working or arrangement used or fixed or supplied by the Contractor.

### **14.0 STATUTORY REQUIREMENTS**

#### **14.1 Complying with Statutory Requirements**

The Contractor shall comply and shall ensure that its subcontractors and suppliers comply with the requirements of:

- (a) Acts of the Commonwealth of Australia;
- (b) Acts and Ordinances of the State or Territory in which the work under the Contract or any part thereof is carried out;
- (c) Ordinances, regulations, by-laws orders and proclamations under the Acts and Ordinances;
- (d) Persons acting in the exercise of statutory powers enabling them to give directions affecting the work under the Contract or the work of other contractors on the Site.

If a requirement is at variance with a provision of the Contract, as soon as the Contractor discovers the variance the Contractor shall notify the Engineer in writing specifying the difference.

If a requirement necessitates a change to the Equipment or so much of the Temporary Works or method of working as may be specified in the Contract, the Engineer shall order a variation under Clause 20.1.

Except to the extent that Clause 14.1 or another provision of the Contract provides reimbursement in respect of a requirement referred to in Clause 14.1 and irrespective of whether the requirement existed at the time of tendering or not, the Contractor shall bear the cost of complying with the requirement.

Without affecting the generality of the provisions of this Clause 14.1, the Contractor assumes full and exclusive responsibility and liability for withholding and paying as may be required by law, all Federal, State and local taxes and contributions with respect to, assessed against, or measured by the Contractor's earnings hereunder or the Contractor's employees, all sales and use taxes, and all other taxes or contributions applicable to the work under the Contract and the Equipment (including taxes measured by the value of personal property, Payroll Tax and Work Care Levy) and shall make all returns and/or reports required in connection with any and all such laws, taxes and contributions.

#### **14.2 Notices and Fees**

The Contractor shall give the notices and pay the fees necessary to comply with the requirements referred to in Clause 14.1.

If, after the 28th day prior to the date of closing of tenders, there is an increase or a decrease in a fee required to be paid by the Contractor to a municipal or statutory authority in relation to the Works or the Temporary Works the difference shall be valued under Clause 20.2. A new fee shall be regarded as increase in the fee.

#### **14.3 Documents Evidencing Approvals of Authorities**

The Contractor shall give the Purchaser copies of documents issued to the Contractor by municipal or other statutory authorities in respect of the work under the Contract and, in particular, any approvals of work.

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## **15.0 PROTECTION OF PEOPLE AND PROPERTY**

### **15.1 Persons, Property and Traffic**

In executing the work under the Contract, in relation to the Site and the Tomago Smelter, the Contractor shall:

(a) **Obstruction**

Avoid, and shall ensure that its subcontractors avoid, obstruction of or damage to drains, watercourses, public utilities, air conditioning, light and power supply and other services on or adjacent to the Site which are visible or the location of which can be ascertained by the Contractor from the appropriate Authority or from this Contract and shall have any obstruction removed immediately and shall have made good all damage caused by the Contractor, its employees, agents or subcontractors. In the event of the Contractor's failure to so do, the Engineer may have the remedial work carried out and the cost incurred shall be a debt due from the Contractor to Purchaser or may be deducted from any payment to the Contractor under Clause 26.4.

(b) **Interference**

Avoid, and shall ensure that its subcontractors avoid, interference with or damage to property on or adjacent to the Site, and ensure the provision of temporary protection for, and shall make good all damage caused to, such property of the Purchaser, the Engineer, the employees, professional consultants or agents, either directly or indirectly. In the event of the Contractor's failure to do so, the Engineer may provide the temporary protection and have the remedial work carried out and the cost incurred shall be a debt due from the Contractor to the Purchaser or may be deducted from any payment to the Contractor under Clause 26.4.

(c) **Nuisance**

Prevent, and ensure that its subcontractors prevent, nuisance to Purchaser's and Engineer's employees, agents and visitors and of properties adjacent to the Site and to the public generally.

Without limiting the generality of the Contractor's obligations, they include the provision of barricades, guards, fencing, temporary roads, footpaths, warning signs, lighting, watching, traffic flagging, safety helmets and clothing, removal of obstructions and protection of services.

In addition to the abovementioned obligations, if the Contractor or the employees or agents of the Contractor damage property, including but not limited to public utilities and services and property on or adjacent to the Site, the Contractor shall promptly make good the damage and pay any compensation which the law requires the Contractor to pay.

If the Contractor fails to comply with an obligation under Clause 15 the Purchaser may, in addition to any other remedy, perform the obligation on the Contractor's behalf and the cost incurred by the Purchaser shall be a debt due from the Contractor to the Purchaser.

### **15.2 Safe-Working Practices**

- (a) The Contractor shall indemnify and keep indemnified the Purchaser, the Engineer or their employees and agents from and against any claim, action, loss, damage or penalty that may be brought against or imposed on any of them for a breach of any Act, regulation or by-law relating to health or safety that may be a direct or indirect consequence of an act or omission of the Contractor, its subcontractors and its or their employees or agents.

### **15.3 Underground Services**

The location of some underground services may vary from positions indicated on the Drawings. Where the Contract includes work or services within the Site, the Contractor shall ensure that all reasonable care is exercised during the excavation. The Contractor shall repair any damage caused by it, its subcontractors or its workers at its own expense. The Contractor shall not undertake any excavation work prior to obtaining from the Engineer an "Excavation Permit".

## **16.0 INSURANCE**

### **16.1 Insurance of Equipment and Work**

If it is provided in the Annexure that insurance of Equipment or Equipment and work is required, then the party named in the Annexure must effect and maintain an insurance policy covering the Equipment or the Equipment and work, as the case may be, for its full value from time to time against loss or damage, including loss or damage in transit.

The policy must be effected prior to the time for the first payment claim.

The policy must be maintained until the issue of the Certificate of Acceptance.

The policy must nominate the Purchaser as an interested party and must cover the Purchaser, the Contractor, all subcontractors and their respective employees and agents.

### **16.2 Public Liability Insurance**

If it is provided in the Annexure that Public Liability Insurance is required, then the party named in the Annexure must effect and maintain a Public Liability Policy of Insurance for an amount in respect of any one occurrence not less than the amount stated in the Annexure.

The policy must be effected by the time stated in the Annexure.

The policy must be maintained until the issue of the Final Payment Certificate under Clause 28.

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The policy must nominate the Purchaser as an interested party and must cover the Purchaser, the Contractor, the Engineer, all subcontractors and their respective employees and agents in respect of liability, other than liability covered by the Workers Compensation Policy, to each other and to third parties for death or injury or damage to property other than the Equipment.

### **16.3 Insurance of Employees**

Before commencing work under the Contract, the Contractor shall ensure that a suitable insurance policy is effected covering liability, loss, damage, claims, demand, actions, suits or proceedings, and all costs and expenses whatever, arising at common law or under any statute or other legislative provision, including any statute or such provision relating to Workers' Compensation insurance, as a result of personal injury to or the death of any person employed by the Contractor in or about the execution of the work under the Contract.

Such insurance shall be with an insurer and in terms approved by the Purchaser, for the maximum amount of cover permitted by law, extend to indemnify the Purchaser for its statutory liability to persons employed by the Contractor and shall be maintained in full force and effect until all work under the Contract, including remedial work, is properly completed.

The Contractor shall ensure that every subcontractor is similarly insured.

### **16.4 Motor Vehicle Third Party Insurance**

Before commencing the work under the Contract, the Contractor shall effect motor vehicle Third Party Liability insurance for an amount of not less than five million dollars (\$5,000,000) in respect of all motor vehicles (which expression shall include any item of plant or equipment which is licensed as a motor vehicle or which is required to be so licensed in accordance with requirements of any statute) belonging to or under the physical or legal care, custody or control of the Contractor and used in connection with the execution of the work under the Contract, the Contractor's obligations under the Contract or any activity directly or indirectly connected therewith.

Such insurance shall be with an insurer and in terms approved by the Purchaser, extended to include the Purchaser as a joint insured, and shall be maintained in full force and effect until all work under the Contract, including remedial work, is properly completed.

The Contractor shall ensure that every subcontractor is similarly insured.

The Contractor, in addition to complying with the requirements hereof, shall comply with all statutory requirements concerning the arrangement of motor vehicle Third Party Liability insurance in respect of the ownership, possession, operation, or use of such motor vehicles and shall ensure that each of its subcontractors similarly complies.

### **16.5 Inspection and Provision of Insurance Policies**

#### **16.5.1 Proof of Insurance**

Before the Contractor or a subcontractor commences work and whenever requested in writing by the Engineer, the Contractor shall produce evidence to the satisfaction and approval of the Engineer of the insurance effected and maintained.

The effecting of insurance by the Contractor or by the Purchaser or approval by the Purchaser or Engineer of the Contractor's insurance shall not limit the liabilities or obligations of the Contractor under other provisions of the Contract.

#### **16.5.2 Failure to Produce Proof of Insurance**

If, after being requested in writing to do so by the Engineer, the Contractor fails to produce evidence of compliance with insurance obligations under Clause 16 which is to the satisfaction and approval of the Engineer, the Engineer may effect and maintain the insurance and pay the premiums. The amount so paid shall be a debt due from the Contractor to the Purchaser and may be recovered under Clause 26.4. Until evidence of compliance with the Contractor's insurance obligations under above Clauses is produced by the Contractor to the satisfaction and approval of the Engineer, the Purchaser may refuse the Contractor access to the Site or may refuse payment under the Contract. The rights given by this Clause are in addition to any other rights.

## **17.0 PROGRESS, SUSPENSION, ACCESS AND CLEANING UP**

### **17.1 Rate of Progress**

The Contractor shall be responsible for programming, progress reporting, forecasting, updating and controlling the work under the Contract in accordance with the requirements of the Contract and the contract program submitted and approved under Clause 17.2.

The Contractor shall proceed with the work under the Contract with due expedition and without delay.

The Contractor shall not suspend the progress of the whole or any part of the work under the Contract except where the suspension is under Clause 30.9 or is directed or approved by the Engineer under Clause 17.3.

The Contractor shall give the Engineer reasonable advance notice of any information, documents or instructions required by the Contractor.

If the progress on any item on the contract program falls behind schedule or if progress is not being maintained on any item which would affect the critical dates or the commencement and completion dates set down in the contract program if no action were taken, the Contractor, at its own initiative and expense, shall take measures to eliminate delay. Such measures may consist of working overtime, shift work, using additional Construction Plant and/or labour or other measures as may be necessary to eliminate the delay.

Should the Contractor fail to take the necessary measures to eliminate any delay, the Engineer may direct the Contractor to take such measures as the Engineer deems necessary and all costs related thereto shall be borne by the Contractor.

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If the Contractor fails to carry out any direction of the Engineer pursuant to this clause, the Purchaser, in addition to any rights with the Purchaser may have under the Contract, may withhold the whole or a portion of any payment until such time as these directions are performed by the Contractor.

#### **17.2 Contract Program**

Within ten (10) days after the Date of Acceptance of Tender, the Contractor shall submit to the Engineer in a form approved by the Engineer, a detailed contract program which shall incorporate critical dates required by the Contractor and all commencement and completion dates set down in the Contract and shall reflect and incorporate any preliminary program previously agreed by the Engineer or the Purchaser.

Where in the opinion of the Engineer the program does not comply with above requirements, the Contractor shall resubmit the contract program as required by the Engineer until it complies. No payments will be made by the Purchaser to the Contractor under the Contract before approval of the contract program is obtained, which approval shall not be unreasonably withheld.

Upon approval of the contract program, the Contractor shall perform the work under the Contract in accordance with the contract program, subject to any approved revisions resulting from the granting of an extension of time pursuant to Clause 22.

The Contractor shall not, without the Engineer's prior, written approval, depart from the approved contract program.

The furnishing or approval of a contract program or of a further contract program shall not relieve the Contractor of any obligations under the Contract including the obligation not, without approval, to depart from an earlier contract program.

#### **17.3 Suspension by Engineer**

The Engineer, by written notice, may direct the Contractor to suspend progress of the whole or any part of the work under the Contract for such time as the Engineer thinks fit.

Upon receipt of such a direction, the Contractor shall promptly cease the work under the Contract, and, during the suspension, properly care for and protect the work under the Contract and all work in progress, materials, supplies and equipment over which it has custody or control for performance of the Contract.

The Contractor shall resume the work under the Contract on the date specified in the Engineer's direction to suspend or any subsequent written notice.

#### **17.4 Suspension by Contractor**

If the Contractor wishes to suspend the whole or part of the work under the Contract, otherwise than under Clause 30.9, the Contractor shall obtain the prior approval of the Engineer. The Engineer may approve of the suspension and may impose conditions of approval.

#### **17.5 Recommencement of Work**

As soon as the Engineer becomes aware that the reason for any suspension no longer exists, the Engineer shall direct the Contractor to recommence work on the whole or on the relevant part of the work under the Contract.

If the work is suspended pursuant to Clause 17.4, or Clause 30.9 the Contractor may recommence work at any time after reasonable notice to the Engineer.

#### **17.6 Cost of Suspension**

Any cost incurred by the Contractor by reason of a suspension under Clause 17.3 or Clause 17.4 shall be borne by the Contractor but if the suspension is necessary because of an act, default or omission of the Purchaser, the Engineer or an employee, consultant or agent of the Purchaser and the suspension causes the Contractor to incur more or less expenditure than otherwise would have been incurred, the difference shall be valued under Clause 20.2.

#### **17.7 Effect of Suspension**

Suspension shall not affect the Date for Delivery or the Date for Practical completion but the cause of suspension may be a ground for extension of time under Clause 22.

#### **17.8 Access and Cleaning Up**

Clause 17.8 applies when the Contractor is to carry out work on the Site.

The Purchaser shall permit the Contractor such access to the Site as the Contractor may reasonably require to perform the work under the Contract.

Such access is non-exclusive and is subject to Clause 17.9.

Notwithstanding the provisions of Clause 17.8, if the Contractor is in breach of Clause 16.4, the Purchaser may refuse to give the Contractor access to the Site or any part of the Site until the Contractor has complied with the requirements of Clause 16.4.

The Contractor shall keep the Site and the work clean and tidy. The Contractor shall regularly remove rubbish and surplus material.

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### **17.9 Access for the Purchaser and Others**

Where the Contract includes work or services within the Site, the Purchaser and its employees, agents and consultants at any time may have access to any part of the Site for any purpose.

The Contractor acknowledges that the Purchaser will operate the Tomago Smelter upon and adjacent to the Site during the progress of the work under the Contract.

The Contractor shall use its best endeavours, and ensure that its subcontractors and suppliers use their best endeavours, to execute the work under the Contract in such a manner as not unreasonably to interfere with or disrupt, delay or hinder the operation of the Tomago Smelter or any part of it. The Contractor shall be responsible for any cost, loss, expense or damage resulting from a breach of this obligation.

The Contractor shall co-operate with other contractors engaged by the Purchaser and integrate its work with their work, so as not to cause any unreasonable interference with or disruption, delay or hindrance to those other contractors. The Contractor shall be responsible for any cost, loss, expense or damage resulting from a breach of this obligation.

The Contractor shall be deemed to have allowed for delays and disruptions to the work under the Contract that could reasonably be anticipated by a contractor experienced and competent in carrying out work of the type to which the Contract relates, as a result of the continuing operation of the Tomago Smelter and the concurrent activities of the other contractors. Such delays and disruptions shall not constitute acts, defaults or omissions of the Purchaser and shall not entitle the Contractor to any extra costs, increases to the Contract Sum or extensions of time.

The Contractor at all reasonable times shall give the Purchaser, the Engineer, the Engineer's Representatives and Inspectors appointed under Clause 18 and other persons authorised in writing by the Purchaser or by the Engineer, access to the work under the Contract at any place where the work is being carried out or materials are being prepared or stored, including all parts of the Contractor's premises and the premises of the Contractor's subcontractors and suppliers.

### **18.0 ENGINEER AND ENGINEER'S REPRESENTATIVES**

#### **18.1 Engineer**

The Purchaser shall give the Contractor prior notice of intention to appoint as Engineer a person who is not named in the Annexure. The Purchaser shall not appoint that person if the Contractor makes reasonable objection.

If, pursuant to a provision of the Contract enabling the Engineer to give directions, the Engineer gives a direction, the Contractor shall comply with the direction.

In Clause 18 'direction' includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.

Except where the Contract otherwise provides, a direction may be given orally but the Engineer shall as soon as practicable confirm it in writing.

If the Contractor in writing requests the Engineer to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Engineer confirms it in writing.

If at any time there is not an Engineer, the Purchaser shall be deemed to be the Engineer.

#### **18.2 Engineer's Representatives**

The Engineer may from time to time appoint individuals to exercise any functions of the Engineer under the Contract but not more than one Engineer's Representative shall be delegated at the same function at the same time. The appointment of an Engineer's Representative shall not prevent the Engineer from exercising any function.

The Engineer shall forthwith notify the Contractor in writing of:

- the appointment and the name of any Engineer's Representative and the functions delegated to the Engineer's Representative;
- the termination of the appointment of an Engineer's Representative.

The Contractor may in writing request the Engineer's Representative to refer to the Engineer any direction of the Engineer's Representative with which the Contractor is dissatisfied.

### **19.0 CONTRACTOR'S REPRESENTATIVE**

The Contractor shall at all times have an individual to whom the Purchaser and the Engineer can give directions and make enquiries.

The Contractor shall notify the Engineer in writing of the name of the individual. The individual shall be known as the 'Contractor's Representative'.

If the Contractor is carrying out work on the Site the Contractor's Representative shall be present on the Site while the work is being performed.

Matters within the knowledge of the Contractor's Representative shall be deemed to be within the knowledge of the Contractor.

Directions given to the Contractor's Representative shall be deemed to have been given to the Contractor.

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## **20.0 VARIATIONS**

### **20.1 Variations to the Work**

The Contractor shall not vary the work except as directed or approved by the Engineer. The Engineer may direct the Contractor to alter, add to or omit work under the Contract and may change any order or dates for the performance or completion of the work under the Contract, including accelerate the contract program or completion of the work under the Contract.

Where the Purchaser requires a variation to the work under the Contract:

- (a) the Engineer shall notify the Contractor of the variation and, within 7 days thereafter, the Contractor shall submit to the Engineer a report, in writing, specifying the effect the variation will have on the Date for Practical Completion of the work under the Contract and, where appropriate, each Separable Portion, and the cost of the work under the Contract;
- (b) within 7 days thereafter, the Engineer shall inform the Contractor in writing
  - (i) approves;
  - (ii) approves, but subject to alterations which shall be noted in writing by the Engineer; or
  - (iii) disapproves,the variation;
- (c) where the Purchaser approves the variation, the Contractor shall so vary the work under the Contract and otherwise carry out or cause the variation to be carried out;
- (d) where the Purchaser approves the variation, but with alterations, the Contractor shall re-submit its report, incorporating the Purchaser's proposed alterations, to the Engineer and the terms of this Clause 20.1 shall re-apply;
- (e) where the Purchaser disapproves the variation, it shall not be carried out; and
- (f) notwithstanding paragraphs (a) to (e) inclusive, the Engineer may at any time direct the Contractor to execute a variation without first following the procedure in those paragraphs and the Contractor shall so vary the work under the Contract and otherwise carry out or cause the variation to be carried out and the variation shall be valued under Clause 20.2.

No variation shall invalidate the Contract.

If the Contractor requests the Engineer to approve the variation, the Engineer may do so in writing. The approval may be conditional. The conditions may include a condition that the Contractor shall not be entitled to any extension of time for delivery or Practical Completion or extra remuneration in respect of the variation or anything arising out of the variation which would not have arisen, had the variation not been approved.

The Engineer shall not be obliged to direct or approve a variation to assist the Contractor.

Unless the Engineer and the Contractor agree upon the price for a variation directed or approved under Clause 20, the variation shall be valued under Clause 20.2.

If the Contractor considers that any work constitutes a variation and a variation has not been directed or approved under Clause 20.1, the Contractor shall not commence the work until it has either notified the Engineer in writing that it claims that the work constitutes a variation and a variation is directed or approved under Clause 20.1 or received the Engineer's written confirmation that it should commence that work notwithstanding that a variation has yet to be directed or approved. If the Contractor fails to comply with this provision, it shall not be entitled to payment for the relevant work.

### **20.2 Valuation**

Where the Contract provides that a valuation shall be made under Clause 20.2 the Purchaser shall pay or allow the Contractor, or the Contractor shall pay or allow the Purchaser, as the case may require, an amount ascertained as follows:-

- (a) If the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;
- (b) If Clause 20.2(a) does not apply, the rates or prices in a Schedule of rates shall be used to the extent that it is reasonable to use them;
- (c) To the extent that neither Clause 20.2(a) or (b) apply, reasonable rates or prices shall be used;
- (d) In determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads;
- (e) If the valuation is of an increase or decrease in a fee under Clause 14.2, the value shall be the actual increase or decrease without regard to overheads or profit;
- (f) The valuation of the variation shall not include costs of or in connection with any delay or disruption to the work under the Contract; and
- (g) If Clause 11(b) applies, the percentages referred to in Clause 11(b) shall be used for valuing the Contractor's profit and attendance.

### **20.3 Variation Allowance**

In this clause, "Variation Allowance" means the aggregate of delays caused by the carrying out of variations in accordance with Clause 20.1, which variations increases the Contract Sum, in total, by up to 20% and are the result of an increase in or addition to the quantity of work and not a change to the quality or nature of materials used in the work.



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The times or periods allowed by the Contractor for the purpose of achieving Milestone Dates or the Date for Practical Completion of the work under the Contract or a Separable Portion shall include the Variation Allowance such that the Contractor shall not be entitled to an extension of time for variations which cause a delay to the progress of the work under the Contract within the Variation Allowance.

## **21.0 DELIVERY AND PRACTICAL COMPLETION**

### **21.1 Time for Delivery and Liquidated Damages**

Clause 21.1 applies only where the Contract includes a Date for Delivery.

Not earlier than the Earliest Date for Acceptance stated in the Annexure or later than the Date for Delivery, the Contractor shall deliver and the Purchaser shall take delivery of the Equipment at the Place for Delivery stated in the Annexure.

The Contractor shall give the Purchaser reasonable notice but not less than 48 hours notice of the time at which the Contractor intends to deliver the Equipment.

If the Contractor fails to deliver the Equipment at the Place for Delivery by the Date for Delivery, the Contractor shall pay the Purchaser by way of pre-estimated and liquidated damages and not as a penalty, the amount per day stated in the Annexure for every day after but not including the Date for Delivery to and including the date upon which the Equipment is delivered. The maximum liability of the Contractor under Clause 21.2 shall not exceed the amount stated in the Annexure and such amount shall be in full satisfaction of the Contractor's liability for such delay.

### **21.2 Time for Practical Completion and Liquidated Damages**

Clause 21.2 applies only where the Contract includes a Date for Practical Completion.

The Contractor shall execute the work to Practical Completion by the Date for Practical Completion.

If the Contractor fails to achieve Practical Completion by the Date for Practical Completion, the Contractor shall pay the Purchaser by way of pre-estimated and liquidated damages and not as a penalty, the amount per day stated in the Annexure for every day after but not including the Date for Practical Completion to and including the date upon which Practical Completion is achieved. The maximum liability of the Contractor under Clause 21.2 shall not exceed the amount stated in the Annexure and such amount shall be in full satisfaction of the Contractor's liability for such delay.

### **21.3 Reduction of Liquidated Damages for Part of the Equipment Capable of Use**

If during a period or portion of a period for which the Contractor is liable for liquidated damages the Contractor has provided to the Purchaser a part of the Equipment or a part of the work, which is capable of being usefully employed by the Purchaser, the amount of liquidated damages for that period or portion thereof, as the case may be, shall be reduced by an amount which bears the same proportion to the liquidated damages for the period or portion thereof, as the case may be, as the value of the part capable of being usefully employed bears to the value of the whole of the Equipment or the work as the case may be.

### **21.4 Creation of Separable Portions**

If part of the Equipment has been delivered or part of the work under the Contract has reached Practical Completion, the parties may by agreement make that part and the remaining part of the Equipment or work under the Contract Separable Portions.

If the parties cannot agree upon creation of Separable Portions, the Engineer may determine that respective parts shall be Separable Portions.

If using a Separable Portion that has reached Practical Completion, subject to Clause 17.2, the Purchaser shall not hinder the Contractor in the performance of the work under the Contract.

## **22.0 EXTENSIONS OF TIME**

### **22.1 Extensions of Time**

The Contractor shall take all reasonable steps to prevent and minimise delay.

Promptly upon it becoming evident to the Contractor that completion of the work under the Contract has been or is being delayed by any cause whatever, the Contractor shall:

- (a) immediately take all necessary measures towards the preservation of work in progress, the prevention of any accident and safekeeping of all material, equipment and facilities related to the work under the Contract and the Equipment, until resumption of work;
- (b) notify the Engineer of such interruption or suspension of work giving the cause and expected duration of such interruption or suspension;
- (c) implement any additional measures deemed necessary by the Engineer; and
- (d) submit to the Engineer a written report describing the cause, anticipated duration, as the case may be, and impact of the delay upon the contract program for the work under the Contract.

If the Contractor is or will be delayed in making Delivery of the Equipment or reaching Practical Completion by a cause described in the next paragraph and the delay is subsequent to the delays constituting the Variation Allowance in Clause 20.3, and, within fourteen (14) days after the delay first occurs, the Contractor gives the Engineer a written claim for an extension of time for Delivery or Practical Completion or Delivery and Practical Completion, the Contractor shall be entitled to an extension of time for Practical Completion.

The causes are:

- (a) Events occurring on or before the Date for Delivery which are beyond the reasonable control of the Contractor including but not limited to industrial disputes that are national or state wide but excluding any other industrial disputes;
- (b) events occurring on or before the Date for Practical Completion which are beyond the reasonable control of the Contractor which delay work on the critical path and which constitute:
  - (i) industrial disputes that are national or state wide but excluding any other industrial disputes; and
  - (ii) adverse weather conditions which prevent all work under the Contract from being carried out on the Site and differ materially from those weather conditions which could have been expected, based on a review of historical meteorological records for the Williamtown RAAF Base for the three (3) years immediately prior to the date of the Contract, and the Contractor doing all the things that it is deemed to have done under Clause 12;
- (c) any of the following events whether occurring before, on or after the Date for Delivery or the Date for Practical Completion which delay work on the critical path and which constitute:
  - (i) delays caused by:
    - the Purchaser;
    - the Engineer;
    - subject to Clause 17.9, the Purchaser's employees, consultants, other contractors or agents;
  - (ii) variations directed under Clause 20.1;
  - (iii) changes in the law;
  - (iv) directions by public authorities but not where the direction arose from the failure of the Contractor to comply with a requirement referred to in Clause 14.1; and
  - (v) any other cause which is expressly stated in the Contract to be a cause for extension of time for Practical Completion.

The notice shall specify the number of days extension of time claimed and shall include details of the delay and the cause.

In determining whether the Contractor is or will be delayed in making delivery or achieving Practical Completion regard shall not be had to:

- whether the Contractor can make delivery or reach Practical Completion by the due date without an extension of time;
- whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

The Contractor shall not be entitled to an extension of time:-

- (a) for any delay occurring more than 14 days prior to the date upon which the Contractor gives notice in writing to the Purchaser of a claim for extension of time; and
- (b) in respect of a delay caused by an event, other than a direction, act or omission of the Purchaser or the Engineer or the employees or agents of either, occurring after the Date for Delivery or the Date for Practical Completion in respect of which the extension is sought.

the Contractor is entitled to an extension of time the Engineer shall, within 14 days after receiving the notice of the number of days extension claimed, grant a reasonable extension of time. If within 14 days the Engineer does not grant the full extension of time claimed, the Engineer shall before the expiration of the 14 days give the Contractor notice in writing of the reason.

Notwithstanding that the Contractor is not entitled to an extension of time the Engineer may at any time before the issue of the Final Payment Certificate by notice in writing to the Contractor extend the time for delivery or for Practical Completion for any reason but cannot change the Earliest Date of Acceptance under Clause 21.1.

If the Contractor has paid or the Purchaser has deducted liquidated damages and the time for delivery or Practical Completion is extended, the Purchaser shall forthwith repay to the Contractor the liquidated damages paid or deducted in respect of the period up to and including the Date for Delivery or the Date for Practical Completion, as the case may be.

A delay by the Purchaser or failure of the Engineer to grant a reasonable extension of time shall not cause the time for delivery or Practical Completion, as the case may be, to be set at large but nothing in this paragraph shall prejudice any right of the Contractor to damages.

Notwithstanding any extension of the time for Practical Completion, whether under Clause 22.1, otherwise, the Contractor shall not be entitled to any compensation by the Purchaser in connection with any delay or disruption to the work under the Contract.

## **22.2 Condition Precedent to Extension of Time**

Notwithstanding the provisions of Clause 22.1, the Contractor shall not be entitled to any extension of time for Delivery or Practical Completion unless it shall have taken proper and reasonable steps both to preclude the occurrence of the cause of the delay and/or to avoid or minimise the consequences thereof.

## **22.3 Reduction in Time for Practical Completion**

Any reduction in the time for Practical Completion of the work under the Contract arising in connection with a variation shall be deal with as follows:

- (a) where a variation is likely to result in a reduction of the actual time required for the extension of the work under the Contract, the Engineer may by written notice request the Contractor agree the extent of any such reduction. Such notice shall detail the proposed variation and state the reduction time which the Engineer considers fair and reasonable;

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- (b) the Contractor, within ten (10) days after receiving such notice, shall inform the Engineer by written notice either that it agrees with the stated reduction or that it considers that reduction should be as stated in the Contractor's notice;
  - (c) where the Engineer and the Contractor have agreed the reduction in time, the Engineer shall adjust the Date for Practical Completion accordingly;
  - (d) where the Engineer and the Contractor have not agreed the reduction in time, and the Engineer nonetheless issues a direction in respect of the particular variation, the time for Practical Completion shall, subject to paragraph (e), be deemed reduced by the time stated in the Contractor's notice under paragraph (b) and the Engineer shall adjust the Date for Practical Completion accordingly; and
  - (e) where the Engineer and the Contractor have not agreed the reduction in time, and the Engineer nonetheless issues a direction in respect of the particular variation, the Engineer may at any time require that the reduction in time be treated as a dispute between the Purchaser and the Contractor and be resolved in accordance with Clause 31, provided that the Engineer, prior to or at the time of issuing such direction, shall give to the Contractor written notice of the intention to refer such question.

### **23.0 ACCEPTANCE OR REJECTION OF EQUIPMENT**

#### **23.1 Certificate of Acceptance or Advice of Non-Acceptance**

The Contractor shall not ship or otherwise consign the Equipment for delivery to the Purchaser without the Engineer's prior, written approval or prior, written notice of waiver of the requirement for approval. Breach of this condition will entitle the Engineer automatically to issue an Advice of Non-Acceptance under Clause 23.1. If the Equipment delivered by the Contractor to the Purchaser is substantially in accordance with the requirements of the Contract then within 28 days after:-

- (a) the date of delivery of the Equipment;
- (b) the completion of any tests which under the Contract are to be carried out before acceptance;
- (c) if for reasons beyond the control of the Engineer, the Purchaser and the Contractor it is not possible to determine whether the Equipment is or is not substantially in accordance with the requirements of the Contract, the date that it becomes possible to make the determination;
- (d) if the Contract provides for a Date for Practical Completion, the date that Practical Completion is reached;

whichever is the latest, the Engineer shall issue to the Purchaser and to the Contractor a Certificate of Acceptance.

If ownership of the Equipment has not already passed to the Purchaser, it will pass to the Purchaser when the Engineer issues the Certificate of Acceptance.

Equipment shall be deemed to be substantially in accordance with the requirements of the Contract even though there are minor omissions or minor defects in the Equipment which do not substantially affect normal use of the Equipment. The Engineer shall designate in the Certificate of Acceptance the omissions or defects of which the Engineer is aware. The Contractor shall proceed as speedily as practicable to make good omissions or defects.

If the Equipment delivered by the Contractor to the Purchaser is not substantially in accordance with the requirements of the Contract then within 28 days stated in the first paragraph of Clause 23.1 the Engineer shall issue to the Purchaser and the Contractor an Advice of Non-acceptance stating in writing the reasons why the Engineer considers that the Equipment is not substantially in accordance with the requirements of the Contract.

If the Engineer is unable to issue a Certificate of Acceptance or an Advice of Non-acceptance within 28 days of the date of delivery of the Equipment, the Engineer shall issue to the Purchaser and the Contractor a written statement of the reason.

#### **23.2 Contractor to Advise Action in Case of Non-acceptance**

Within 14 days after receipt of Advice of Non-acceptance the Contractor shall advise the Engineer in writing of what the Contractor is prepared to do. The Contractor shall indicate:-

- (a) whether the Contractor proposes to recover the Equipment and replace or correct it;
- (b) whether the Contractor proposes to correct the Equipment at the site where it is located and, if so, the nature of the work involved, the access which the Contractor will require and the disruption, if any, which might be caused to the Purchaser;
- (c) the times likely to be involved;
- (d) the compensation, if any, offered by the Contractor;
- (e) any other alternative which the Contractor offers.

#### **23.3 Purchaser's Decision on Contractor's Proposals**

Within 14 days of receipt of the Contractor's written offer under Clause 23.2 the Engineer on the Purchaser's behalf shall in writing to the Contractor either:-

- (a) accept the Contractor's offer;
- (b) give the Contractor a Notice of Rejection;
- (c) advise the Contractor that the Purchaser elects to accept the Equipment and claim damages.

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#### **23.4 Replacement or Correction by Contractor**

On receipt of a notice under Clause 23.3(a) the Contractor shall proceed promptly as agreed. If the Contractor recovers possession of Equipment belonging to the Purchaser the recovered Equipment shall remain the property of the Purchaser. If it is replaced with new Equipment then title to the new Equipment will pass to the Purchaser upon delivery of the new Equipment to the Purchaser and thereupon title to the recovered Equipment will pass to the Contractor.

For the purposes of Clause 21.1 (Time for Delivery and Liquidated Damages) and Clause 23.1 Equipment will not be deemed to have been delivered until:

- in the case where Equipment is recovered, the corrected or new Equipment is delivered to the Place for Delivery;
- in the case where Equipment is corrected at the premises of the Purchaser, the Contractor notifies the Engineer in writing that the work of correction is complete.

The procedures of Clause 23 shall then be followed with respect to the new or corrected Equipment.

#### **23.5 Removal of Rejected Equipment**

On receipt of a Notice of Rejection under Clause 23.3(b) the Contractor shall repay to the Purchaser all moneys which the Contractor has received from the Purchaser in relation to the rejected Equipment. Upon repayment of the moneys the Contractor shall own the rejected Equipment and shall remove it from the Purchaser's premises.

Subject to any provision of the Contract limiting the liability of the Contractor, the Purchaser shall have the right to recover from the Contractor any damages exceeding the amount repaid which the Purchaser suffers by reason of the failure of the Contractor to supply Equipment which is substantially in accordance with the requirements of the Contract.

#### **23.6 Purchaser Accepts Equipment and Damages**

If the Purchaser elects to accept Equipment which is not substantially in accordance with the requirements of the Contract, then ownership of the Equipment, if it has not already passed to the Purchaser will pass to the Purchaser upon delivery to the Contractor of the notice under Clause 23.3(c) and, subject to any provision of the Contract limiting the liability of the Contractor, the Purchaser shall have the right to recover from the Contractor damages which the Purchaser suffers by reason of the failure of the Contractor to supply Equipment which is substantially in accordance with the requirements of the Contract.

#### **23.7 Purchaser's Right to Use Equipment**

Without written approval of the Contractor the Purchaser shall not put the Equipment into service before issue of a Certificate of Acceptance in respect of the Equipment or an advice under Clause 23.3(c) that the Purchaser elects to accept the Equipment and claim damages.

#### **24.0 DEFECTS LIABILITY**

The Defects Liability Period stated in the Annexure shall commence on the date of issue of a Certificate of Acceptance. The Annexure may provide different Defects Liability Periods for different items.

At any time prior to the 14<sup>th</sup> day after the expiration of the Defects Liability Period the Engineer may direct the Contractor to rectify any omission or defect in the work under the Contract which exists at acceptance or becomes apparent prior to the expiration of the Defects Liability Period. The direction shall identify the omission or defect and state a date by which the Contractor must complete rectification. The direction may provide that in respect of the work of rectification there shall be a separate Defects Liability Period of a stated duration not exceeding the period stated in the Annexure. The separate Defects Liability Period shall commence on the date the Contractor completes the work of rectification. Clause 24 shall apply in respect of the work of rectification and the Defects Liability Period for that work.

If it is necessary for the Contractor to carry out rectification, the Contractor shall do so at times and in a manner which causes as little inconvenience to the Purchaser, Tomago Smelter and other contractors working on the Site, as is reasonably possible.

Further to the above:

- (a) The Contractor shall provide in favour of the Purchaser all guarantees and warranties set forth herein and/or implied by law in respect of the work under the Contract and shall ensure that the Purchaser has the benefit of all guarantees or warranties obtained by the Contractor from any supplier, subcontractor or other person for work under the Contract and such guarantees and warranties shall be applicable for the full duration of the Defects Liability Period.
- (b) The Contractor warrants that during a Defects Liability Period the work under the Contract or a Separable Portion, as the case may be, including all design, material and workmanship for which the Contractor is responsible, shall comply with the Contract and further guarantees that it shall remedy any defects, omissions or failures which develop or become apparent under proper use during a Defects Liability Period and perform any necessary tests, irrespective of whether or not the remedy of the defect, omission or failure is made after expiration of the Defects Liability Period for that part of the work under the Contract to which the defect, omission or failure relates.
- (c) Pursuant to the above warranty, the Contractor guarantees that, after receipt of notice from the Purchaser or the Engineer, it shall promptly repair or replace, at the Purchaser's or Engineer's option, any omissions or deviations from the Contract or any defective materials or workmanship, including all work of removal, and that such repairs, tests or replacement shall comply with the Contract. The aforesaid work shall be accomplished at no cost to the Purchaser.

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- (d) If any such omission or defects, or any such deviation, defective materials or workmanship is not remedied within the time, if any, specified in the notice by the Purchaser or the Engineer, the Purchaser or Engineer may perform such remedial work as may be necessary, including all work of removal, engineering, procurement and refabrication and testing, and the cost of all such remedial work shall be a debt due to the Purchaser by the Contractor and may be recovered under Clause 26.4. Such remedial work undertaken by the Engineer shall be without prejudice to any other rights that the Purchaser may have against the Contractor in respect of deviations from the Contract and design, materials or workmanship.

## **25.0 EXAMINATION AND TESTING**

### **25.1 Engineer May Order Tests**

At any time prior to the issue of the Final Payment Certificate the Engineer may direct that any materials or work under the Contract be tested. The Contractor shall provide such assistance and samples and make accessible such parts of the work under the Contract as may be required. On completion of the tests the Contractor shall make good the work under the Contract so that it fully complies with the Contract. The Engineer's approval or failure to test, approve or disapprove any part of the work under the Contract shall not prejudice the right of the Purchaser subsequently to disapprove or reject any part of the work under the Contract or to exercise any rights it has under the Contract or otherwise with respect to the work under the Contract, and shall not relieve the Contractor of any of its obligations under the Contract or entitle the Contractor to any extension of time or extra costs or increase to the Contract Sum, other than under Clause 25.7.

### **25.2 Covering Up of Work**

The Engineer may direct that any part of the work under the Contract shall not be covered up or made inaccessible without the Engineer's prior approval.

### **25.3 Who Conducts Tests**

Tests shall be conducted as provided in the Contract or by the Engineer or a person (which may include the Contractor) nominated by the Engineer.

### **25.4 Notice of Tests**

Before conducting a test under the Contract the Engineer or the Contractor shall give reasonable notice in writing to the other of the time, date and place of the test. If the other does not then attend, the test may nevertheless proceed. However, where the test is scheduled in the Scope of Work, the Contractor shall give the Engineer at least ten (10) days written notice of the time, date and place of the test. Where the Engineer does not then attend, the test may not proceed without the Engineer's prior, written consent.

### **25.5 Procedure if Tests Delayed**

Without prejudice to any other rights or remedies under the Contract, if the Contractor or the Engineer delays in conducting a test, the other, after giving reasonable notice in writing of his intention to do so, may conduct the test.

### **25.6 Results of Tests**

Results of tests shall be promptly made available by each party to the other and to the Engineer.

### **25.7 Costs of Testing**

Costs of and incidental to testing shall be valued under Clause 20.2 and shall be borne by the Purchaser or paid by the Purchaser to the Contractor unless:

- (a) the Contract provides that the Contractor shall bear the costs or the test is one which the Contractor was required to conduct other than pursuant to a direction under Clause 25.1;
- (b) the test shows that the material or work is not in accordance with the Contract;
- (c) the test is in respect of work under the Contract, covered up or made inaccessible without the Engineer's prior approval where such was required;
- (d) the test is consequent upon a failure of the Contractor to comply with a requirement of the Contract.

Where the extra costs are not to be borne by the Purchaser, they shall be borne by the Contractor or paid by the Contractor to the Purchaser on demand.

## **26.0 PAYMENT**

### **26.1 Payment Claims, Payment Certificates and Time for Payment**

The Contractor shall:

- (a) at the times for payment claims stated in the Annexure;
- (b) within seven (7) days after the latest of the dates in paragraphs (a) to (d) of Clause 23.1; and
- (c) within the time provided by Clause 28 for the Final Payment Claim,

deliver to the Engineer claims for payment, in a form approved by the Engineer, with the number of copies required by the Engineer, supported by evidence of the amount due to the Contractor and such information as the Engineer may reasonably require.

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Claims for payment shall show separately, applicable tax and duty and attach supporting documentation in respect thereof, failing which the Contractor shall not be entitled to payment in respect of that tax or duty.

Claims for payment shall include all amounts then due in the Contractor's opinion under the Contract or for breach thereof. If the Contractor fails to claim under the Contract or for breach thereof in accordance with Clause 26.1, the Contractor shall give the Engineer written notice and state the reasons therefore. Where the claim is for an alleged breach, full details of the claim shall be submitted within twenty eight (28) days after the submission of the claim or the written notice of failure to claim.

The Engineer shall within:

- 14 days after receipt of a claim for payment under paragraphs (a) or (c) of Clause 26.1; and
- 21 days after the receipt of the claim for payment under paragraph (b) of Clause 26.1 upon the date of issue of the Certificate of Acceptance under Clause 23.1 whichever is the later,

issue to the Purchaser and to the Contractor a payment certificate stating the payment which, in the opinion of the Engineer, is to be made by the Purchaser to the Contractor. The Engineer shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. Delays in receiving claims in accordance with this clause, and claims received which have errors or omissions, will entitle the Engineer to delay issuing the payment certificate without loss of any discount privilege otherwise available to the Purchaser. All discount periods governed by payment will begin on the date the Engineer receives the claim in accordance with this clause and without any error or omission.

The Purchaser shall within the period stated in the Annexure and if no period is stated in the Annexure, then within 14 days after receipt by the Purchaser of the Engineer's payment certificate, pay to the Contractor the amount due to the Contractor and shall with the payment provide written particulars on how the payment was calculated.

Payment of moneys shall not be evidence of the value of work or an admission of liability or that work has been executed satisfactorily but shall be a payment on account only.

#### **26.2 The Calculation of Payment**

The amount due to the Contractor at the time for a payment claim shall be the value of the work carried out by the Contractor in performance of the Contract to that time together with any moneys due under the provision of the Contract or for breach by the Purchaser of the Contract, less:

- (a) amounts already paid under the Contract;
- (b) amounts which the Purchaser is entitled to deduct under Clause 26.3 and 26.4.

#### **26.3 Retention Moneys**

The Purchaser may deduct from moneys otherwise due to the Contractor amount up to the limit of the percentages, if any, stated in the Annexure of much of the value of the respective items stated in the Annexure as is included in the calculation of a payment.

#### **26.4 Set Offs by the Purchaser**

Without limiting the Purchaser's rights under any other provision in the Contract, any moneys due from the Contractor to the Purchaser under or by virtue of any provision of the Contract may be deducted by the Purchaser from any moneys which may be or become payable to the Contractor by the Purchaser and, if those moneys are insufficient, the Purchaser can have recourse to retention moneys and, if they are insufficient, to security under the Contract. Nothing in this clause shall affect the rights of the Purchaser to recover from the Contractor the whole of the debt or any balance that remains owing after such deductions.

#### **26.5 Protection of Purchaser's Interest**

If the Contractor claims payment for Equipment or a part thereof, the Engineer may direct the Contractor to:

- establish that ownership of the Equipment or part has passed to the Purchaser or will upon the making of the progress payment pass to the Purchaser and that the Equipment or part is properly stored, labelled the property of the Purchaser and insured as required under Contract;

or in respect of Equipment or part in the course of manufacture;

- provide additional security in one of the forms provided by Clause 5.3 in an amount equal to the value to be included in the payment in respect of the Equipment or part.

If the Contractor fails to comply with the direction, the Purchaser shall not be bound to make the payment. In respect of Equipment to be imported into Australia, ownership of Equipment shall pass to the Purchaser on receipt by the Engineer or an agent of the Engineer of clean on board bills of lading drawn or endorsed to the order of the Purchaser, appropriate insurance certificates and Customs invoices.

If it is provided in the Contract that Equipment must pass tests or be insured or that some other requirement must be fulfilled before a payment or a payment exceeding a certain amount is made then, notwithstanding the provisions of Clause 26.2, effect shall be given to the provision.

If the Contractor provides additional security under Clause 26.5, the provisions of Clause 5 shall apply in respect of the additional security and the Purchaser shall release the additional security upon issue of the Certificate of Acceptance in respect of the Equipment.

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## **27.0 INTEREST ON OVERDUE PAYMENTS**

If any moneys due to either party remain unpaid after the date upon which or the expiration of the period within which they should have been paid then interest shall be payable thereon from but excluding the date upon which or the expiration of the period within which they should have been paid to and including the date upon which the moneys are paid. The rate of interest shall be the prescribed in the Annexure and if no rate is prescribed the rate shall be 18 percent per annum. Interest shall be compounded at six monthly intervals.

## **28.0 FINAL PAYMENT CLAIM AND FINAL PAYMENT CERTIFICATE**

Within 28 days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Engineer a final payment claim and endorse it "Final Payment Claim".

The Contractor shall include in that claim all moneys which the Contractor then considers to be due from the Purchaser under or arising out of the Contract or any alleged breach thereof or on any other basis whatever in connection with the work under the Contract.

After the expiration of the period for lodging a final payment claim any claim which the Contractor should have made against the Purchase and has not made shall be barred.

Within 20 days after receipt of the Contractor's final payment claim the Engineer shall issue to the Contractor and to the Purchaser a final payment certificate endorsed "Final Payment Certificate". In the Certificate the Engineer shall certify the amount which in the Engineer's opinion is finally due from the Purchaser to the Contractor or from the Contractor to the Purchaser under or arising out of the Contract or any alleged breach thereof.

As a condition precedent to the release to the Contractor of any retention moneys or security then held by the Purchaser, the Contractor shall execute a Release to the Purchaser and Engineer in the form attached hereto from all claims, demands, debts, accounts, actions and proceedings arising under or by virtue of the Contract or out of its performance. Within fourteen (14) days after receipt of the Release, the Purchaser shall release to the Contractor all retention moneys or security then held by the Purchaser.

## **29.0 PAYMENT OF WORKERS AND SUBCONTRACTORS**

With each claim for payment under Clause 26.1, the Contractor shall, give the Purchaser a statutory declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts attested to, that:-

- (a) all workers who have at any time been engaged on work under the Contract have been paid all moneys payable to them, whether by the Contractor or a subcontractor, in respect of their employment on the work under the Contract;
- (b) all subcontractors of the Contractor have been paid all moneys payable to them in respect of work under the contract for the period of the claim for payment, showing the names of all such subcontractors;
- (c) all suppliers of the Contractor have been paid all moneys payable to them in respect of the work under the Contract for the period of the claim for payment, showing the names of all such suppliers, and
- (d) in the event that any subcontractor or supplier has not been paid all moneys claimed by it for the period of the claim for payment then the Contractor shall include the following information in the statutory declaration in respect of such subcontractor or supplier:
  - (i) the name of the subcontractor or supplier;
  - (ii) the amount claimed by the subcontractor or supplier;
  - (iii) the date and amount of each payment made to the subcontractor or supplier for the period of the claim for payment; and
  - (iv) the reason for the non-payment.

If the Contractor fails to provide the statutory declaration, the Purchaser may withhold payment of moneys due to the Contractor until the statutory declaration is received.

At the request of the Contractor and out of moneys payable to the Contractor the Purchaser may on behalf of the Contractor make payments directly to a worker or subcontractor.

If the Contractor provides satisfactory proof of the maximum amount which may be payable to workers and subcontractors, the suspension of payment shall not apply to amounts in excess of the maximum amount.

If a worker, subcontractor or supplier obtains a court order in respect of moneys referred to in the first paragraph of this clause, and produces to the Purchaser the court order and a statutory declaration that it remains unpaid, the Purchaser may pay the amount of the order, and costs included in the order, to the worker, subcontractor or supplier and the amount paid shall be a debt due from the Contractor to the Purchaser.

After the making of a sequestration order or a winding up order in respect of the Contractor, the Purchaser shall not make any payment to a worker or subcontractor without the concurrence of the official receiver or trustee of the estate of the bankrupt or the liquidator as the case may be.

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### **30.0 DEFAULT OR INSOLVENCY**

#### **30.1 Preservation of other Rights**

If a party breaches or repudiates the Contract, nothing in Clause 30 shall prejudice the right of the other party to recover damages or exercise any other right.

#### **30.2 Default by the Contractor**

If the Contractor commits a substantial breach of contract and the Purchaser considers that damages may not be adequate remedy, the Purchaser may give the Contractor a written notice to show cause.

Substantial breaches include but are not limited to:

- (a) suspension of work, in breach of Clause 17.1;
- (b) failing to proceed with due expedition and without delay, in breach of Clause 17.1;
- (c) failing to use the materials or standards of workmanship required by the Contractor, in breach of Clause 4;
- (d) failing to produce evidence of insurance, in breach of Clause 16.4; and
- (e) unreasonably interfering with or disrupting, delaying or hindering the operation of the Tomago Smelter or any part of it or failing to cooperate with other contractors on the Site or to integrate its work with their work, in breach of Clause 17.9.

#### **30.3 Requirements of a Notice by the Purchaser to Show Cause**

A notice under Clause 30.2 shall:

- (a) state that it is a notice under Clause 30 of the General Conditions of Contract;
- (b) specify the alleged substantial breach;
- (c) require the Contractor to show cause in writing why the Purchaser should not exercise a right referred to in Clause 30.4;
- (d) specify the time and date by which the Contractor must show cause (which time shall not be less than 7 clear days after the notice is given to the Contractor);
- (e) specify the place at which cause must be shown.

#### **30.4 Rights of Purchaser**

If by the time specified in a notice under Clause 30.2 the Contractor fails to show reasonable cause why the Purchaser should not exercise a right referred to in Clause 30.4, the Purchaser may by notice in writing to the Contractor:

- (a) take out of the hands of the Contractor the whole or part of the work remaining to be completed; or
- (b) terminate the Contract.

Upon giving a notice under Clause 30.2 the Purchaser may suspend payments to the Contractor until the expiration of the earlier of:

- (i) the date upon which the Contractor shows reasonable cause;
- (ii) the date upon which the Purchaser takes action under Clause 30.4(a) or (b);
- (iii) the date which is 7 days after last day for showing cause in the notice under Clause 30.2.

If the Purchaser exercises the right under Clause 30.4(a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 30.6.

#### **30.5 Procedure When the Purchaser Takes Over Work**

If the Purchaser takes work out of the hands of the Contractor under Clause 30.4(a) the Purchaser shall complete that work and the purchaser may without payment of compensation take possession of such of the Constructional Plant and other things on or in the vicinity of the Site as are owned by the Contractor and are reasonably required by the Purchaser to facilitate completion of the work.

If the Purchaser takes possession of Constructional Plant or other things, the Purchaser shall maintain the Constructional Plant and, subject to Clause 30.6, on completion of the work the Purchaser shall return to the Contractor the Constructional Plant and any things taken under this clause which are surplus.

#### **30.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor**

When work taken out of the hands of the Contractor under Clause 30.4(a) is completed the Engineer shall ascertain the cost incurred by the Purchaser in completing the work and shall issue a Certificate certifying the amount.

If the cost incurred by the Purchaser is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be debt due from the Contractor to the Purchaser. If the cost incurred by the Purchaser is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Purchaser.



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If the Contractor is indebted to the Purchaser, the Purchaser may retain Constructional Plant or things taken under Clause 30.5 until the debt is met. If after reasonable notice, the Contractor fails to pay the debt, the Purchaser may sell the Constructional Plant or things and apply the proceeds to satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor.

### **30.7 Default of the Purchaser**

If the Purchaser commits a substantial breach of contract and the Contractor considers the damages may not be adequate remedy, the Contractor may give the Purchaser a notice to show cause.

Substantial breaches include but are not limited to:

- (a) failing to make a payment, in breach of Clause 26.1;
- (b) failure by the Engineer to issue a Certificate of Acceptance or Advice of Non-acceptance, in breach of Clause 23;
- (c) failing to produce evidence of insurance, in breach of Clause 16.2.

### **30.8 Requirements of a Notice by the Contractor to Show Cause**

A notice under Clause 30.7 shall:-

- (a) state that it is a notice under Clause 30 of the General Conditions of Contract;
- (b) specify the alleged substantial breach;
- (c) require the Purchaser to show cause in writing why the Contractor should not exercise a right referred to in Clause 30.9;
- (d) specify the time and date by which the Purchaser must show cause (which shall not be less than 7 clear days after the notice is given to the Purchaser);
- (e) specify the place at which cause must be shown.

### **30.9 Rights of Contractor**

If by the time specified in a notice under Clause 30.7 the Purchaser fails to show reasonable cause why the Contractor should not exercise a right referred to in Clause 30.9, the Contractor may by notice in writing to the Purchaser suspend the execution of the whole or any part of the work under the Contract.

The Contractor shall lift the suspension if the Purchaser remedies the breach but if the Purchaser fails to remedy the breach within 28 days after service of the notice under Clause 30.9, or, if the breach is not capable of remedy, fails to make other arrangement to the reasonable satisfaction of the Contractor, the Contractor may by notice in writing to the Purchaser terminate the Contract.

The Contractor shall be entitled to recover from the Purchaser any damages flowing from the suspension.

### **30.10 Right of the Parties on Termination**

If the Contract is terminated under Clause 30.4(b) or Clause 30.9 the rights and liabilities of the parties shall be the same as they would be at common law if the defaulting party had wrongfully repudiated the contract and the other party had elected to treat the Contract as at an end and recover damages.

### **30.11 Insolvency**

If:-

- (a) a party informs the other party in writing or creditors generally that the party is insolvent;
- (b) a party commits an act of bankruptcy;
- (c) a bankruptcy petition is presented against a party;
- (d) a party is made bankrupt;
- (e) a meeting of creditors of a party is called with a view to:
  - entering a scheme of arrangement or composition with creditors; or
  - placing the party under official management;
- (f) a party enters a scheme of arrangement or composition with creditors;
- (g) a resolution is passed at a meeting of creditors to place a party under official management;
- (h) a party is placed under official management;
- (i) a receiver of the property or part of the property of a party is appointed;
- (j) an application is made to a court for the winding up of a party;
- (k) a winding up order is made in respect of a party;
- (l) execution is levied against a party by creditors, debenture holders or trustees or under a floating charge;

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- where the other party is the Purchaser, the Purchaser may, without giving a notice to show cause, exercise the right under Clause 30.4(a);
  - where the other party is the Contractor, the Contractor may without giving a notice to show cause, exercise the right under Clause 30.9.

The rights given by Clause 30.11 are in addition to any other rights and may be exercised notwithstanding that there has been no breach of contract. The rights in Clause 30.11 are subject to any limitations under the Bankruptcy Act or any other act.

### **31.0 DISPUTES**

#### **31.1 Submission to the Engineer**

In the event of any dispute of difference arising between the Purchaser and the Contractor as to the work under the Contract or the construction of the Contract or as to any matter or thing of whatever nature arising thereunder or in connection therewith then:-

- (a) Each party shall furnish in writing to the Engineer details of that party's claim or, where the other party is the claimant, the reasons for rejecting the other party's claim, and shall request the Engineer to make a decision under Clause 31;
- (b) Within 28 days after receipt from each party of the information referred to in Clause 31.1(a), the Engineer shall give each party a written decision on the dispute.

Notwithstanding the existence of a dispute, each party shall continue to perform the Contract. In particular, the Contractor shall continue with the work and the Purchaser shall continue to comply with Clause 26.1.

#### **31.2 Alternative Dispute Resolution**

If either party is dissatisfied with the decision of the Engineer or the Engineer fails to make a decision within 28 days or the party required by Clause 31.1(a) to furnish to the Engineer reasons for rejecting the other party's claim fails to provide the reasons within 28 days after request by the other party to do so, the parties shall then employ alternative dispute resolution procedures in a good faith attempt to resolve the dispute. The procedure may include negotiation, discussions, mediation, conciliation or mini-trial and, if the parties agree to do so, the assistance of a mediator nominated by The Australian Commercial Disputes Centre. It shall be commenced by written notice by each party to the other designating a person with the appropriate authority to be its representative in negotiations concerning the dispute.

#### **31.3 Arbitration**

If, after twenty (20) days from the date of receipt of the last of the notices referred to in Clause 31.2, the dispute has not been settled, either party may:

- (a) deposit with the New South Wales Chapter of the Institute of Arbitrators, Australia the sum of twenty thousand dollars (\$20,000) by way of security for costs of the arbitration proceedings; and
- (b) by written notice to the other party, terminate the procedure in Clause 31.2, provide evidence that it has made the deposit referred to in Clause 31.1(a), and require that the dispute be referred to arbitration.

Such dispute (unless meanwhile settled) shall upon receipt by the other party of the notice given under Clause 31.3(b) be referred to arbitration pursuant to the succeeding clause of this Clause 31. The parties shall request The Institute to deposit any sum held by it in an interest bearing deposit, such interest earned to be paid at the discretion of the arbitrator. The venue of the arbitration shall be in Sydney.

#### **31.4 Identity of Arbitrator**

Any arbitration under this clause shall be effected:

- (a) by a single arbitrator agreed upon in writing between the parties; and
- (b) failing such agreement within ten (10) days after receipt by the other party of the notice given under Clause 31.3, by a single arbitrator selected by the President or Acting President for the time being of the NSW Chapter of The Institute of Arbitrators, Australia.

#### **31.5 Rules of Evidence and Representation**

With respect to any arbitration:

- (a) the rules of evidence shall apply; and
- (b) either party may be represented by a duly qualified legal practitioner or other representative.

#### **31.6 Security**

The arbitrator shall have the power from time to time to make any order in relation to the provision of further security for the costs of the arbitration proceedings and to direct the manner in which any security for costs of the arbitration proceedings shall be applied.

#### **31.7 Consolidation of Disputes**

An any such arbitration proceedings, either party may raise by way of a further claim, set-off, defence or cross-claim and subject to any conditions as to costs or otherwise that may be imposed by the arbitrator, any dispute whatever relating to the construction of the Contract or as to any matter or thing of whatever nature arising thereunder or in connection therewith and whether or not a notice of dispute as referred to in Clause 31.1 in respect thereof has been given.

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### **31.8 Costs**

The costs of a submission, reference and award under this clause and the apportionment thereof shall be in the discretion of the said arbitrator.

### **31.9 Proceeding with the Work Under the Contract**

Notwithstanding the foregoing provisions of this clause, the Contractor shall, if the work under the Contract (including the making good of any defects) has not been completed, at all times (subject as otherwise may be provided for in the Contract) proceed without delay to continue to execute the work under the Contract and in so doing shall comply with all instructions of the Engineer provided that the same shall not touch upon or involve the subject nature of the dispute in respect of which notice has been given under Clause 31.1.

If one party has overpaid the other, whether pursuant to an Engineer's Certificate or not and whether under a mistake of law or fact, the Arbitrator may order repayment together with interest.

### **32.0 LIMITATION OF LIABILITY**

#### **32.1 Care of Equipment**

Irrespective of whether property therein has passed to the Purchaser, the Equipment and all parts thereof remain at the risk of the Contractor until delivered to the Purchaser. Unless otherwise specified in the Contract or in the Annexure, upon delivery of the Equipment or a part thereof to the Purchaser the Equipment or the part, as the case may be, shall be at the risk of the Purchaser.

#### **32.2 General Limitations of Liability**

Except to the extent that the party liable is entitled to be indemnified under a policy of insurance effected pursuant to the requirements of the Contract, the liability of each party is limited as provided in the Annexure.

The limitation of liability does not apply to:

- (a) liability to account for security (Clause 5);
- (b) liability to pay interest under Clause 27;
- (c) liability out of which by law the party liable cannot contract;
- (d) liability for infringement of patent, copyright, registered design, trademark or name, copyright or other protected rights;
- (e) liquidated damages under Clause 21.1 and 21.2;
- (f) liability to pay the Contract Sum, cost adjustment (rise and fall) and the value of variations to the work;
- (g) any other liability specifically excluded by the Contract from the effect of this clause;

and amounts payable in respect thereof shall not be included in the limit.

Except as provided in the preceding paragraph, the limitation of liability:-

- (a) applies to all liability whatsoever arising under or out of or in the course of the Contract or the performance thereof or in any way related thereto;
- (b) includes but is not limited to negligence, fraud misrepresentation or other tort or a party, or the servants or agents of a party;
- (c) includes but is not limited to damages for breach of contract or arising out of repudiation, rescission or termination of the Contract;
- (d) applies irrespective of the nature of the cause of action including but not limited to breach of contract, tort, quasi-contract, breach of a statutory duty and statutory liability.

The provisions of this clause continue to apply notwithstanding:

- (a) fundamental breach;
- (b) breach of a fundamental term;
- (c) rescission, repudiation or termination for any reason; or
- (d) frustration;

whether deliberate, unintentional or by operation of law.

### **33.0 TERMINATION BY THE PURCHASER**

The Purchaser may terminate the Contract at any time by giving the Contractor fifteen (15) days written notice of its intention to do so.

Upon receipt by the Contractor of such notice, the Contractor shall comply forthwith with any and all reasonable directions given by the Purchaser regarding the cessation of work and shall not place any further order, nor enter into any further agreements in relation to work under the Contract, or part thereof, as the case may be. Further, the Contractor, if required by the Purchaser, shall assign or cancel any order or agreement and do all things possible to reduce any expense or cost consequent upon the termination and otherwise take all action relating to the termination which the Purchaser may require.

Upon termination under this clause, the Purchaser shall pay the Contractor:

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- (a) for work executed prior to the date of termination, less any payments previously made for that work;
  - (b) the cost of materials reasonably ordered by the Contractor for the work under the Contract, which the contractor is legally liable to accept, plus the Contractor's reasonable costs of transportation to Site but only if the materials become the property of the Purchaser upon payment;
  - (c) all retention moneys and security;
  - (d) the actual and reasonable cost of removal of Constructional Plant; and
  - (e) the reasonable cost of return to their place of recruitment of the Contractor's employees engaged in the work under the Contract at the date of termination,

but the Contractor shall not be entitled to any lost profit or any other compensation and shall submit its claim for payment as a progress claim under Clause 26.1.

The Purchaser may exercise its powers under this Clause 33 notwithstanding any default by the Purchaser or any right which the Contractor may have generally or under the Contract to terminate the Contract or give a notice to show cause under Clause 30.

#### **34.0 WAIVER OF CONDITIONS**

None of the terms and conditions of the Contract shall be varied, waived, discharged or released either at law or in equity except with the Purchaser's prior, written consent.

It is understood and agreed that any delay, waiver or omission by the Purchaser to exercise any right or power arising from any breach or default by the Contractor of any of the terms, provisions or covenants of the Contract shall not be construed to be a waiver by the Purchaser of any subsequent breach or default of the same or other terms, provisions or covenants on the part of the Contractor.

#### **35.0 LIMITATION ON PURCHASER'S LIABILITY**

The Purchaser shall not be liable upon any claim by the Contractor in respect of any matter in connection with the work under the Contract unless a claim, together with the full particulars thereof, is lodged in writing with the Engineer within the period specified in the Contract or, where a period is not specified, not later than fourteen (14) days after the date of occurrence of the event or circumstances on which the claim is based.

#### **36.0 PARENT COMPANY GUARANTEE**

Where the Contractor is a corporation that is a subsidiary of or related to another corporation, the Contractor, if so directed by the Engineer, shall lodge with the Engineer a guarantee from that other Corporation (the "Parent Company") for the performance of the obligations and the discharge of the liabilities of the Contractor under the Contractor in the form attached to these General Conditions of Contract, duly executed by the Parent Company.

For the purpose of this clause:

- (a) a corporation is a subsidiary of another corporation if, under the law of the country, state or territory in which the first mentioned corporation is incorporated or registered, it is or is deemed to be, for the purposes of that law, a subsidiary of that other corporation; and
- (b) a corporation is related to another corporation if, under the law of the country, state or territory in which the first mentioned corporation is incorporated or registered, it and the other corporation are deemed to be, for the purposes of that law, related to each other.

The guarantee referred to in the preceding subclause shall be lodged by the Contractor with the Engineer within twenty eight (28) days after the Date of Acceptance of Tender. Failure to lodge this guarantee within this period will constitute a breach pursuant to Clause 30.