

INGWE COLLIERIES LIMITED

GENERAL CONDITIONS OF CONTRACT 2004/1

C O N T E N T S

1. DEFINITIONS AND INTERPRETATION
2. CONTRACT DOCUMENTS
3. NOTICES
4. CONTRACT PRICE BASIS
5. EXTENT OF CONTRACT
6. VARIATIONS TO THE CONTRACT
7. VALUATION OF ADDITIONS OR OMISSIONS AND CLAIMS
8. ASSIGNMENT
9. SUB-CONTRACT
10. REMOVAL OF WORKMEN
11. PATENT RIGHTS, COPYRIGHTS AND ROYALTIES
12. DRAWINGS, SAMPLES AND PATTERNS
13. CONFIDENTIAL DOCUMENTS
14. MATERIALS AND WORKMANSHIP
15. INSPECTION, TESTING AND QUALITY CONTROL
16. MARKING OF MATERIALS, PLANT OR ARTICLES
17. TRANSPORT AND OTHER MISCELLANEOUS MATTERS
18. ACCESS TO SITE
19. FACILITIES FOR OTHER CONTRACTORS
20. SETTING OUT CONTRACT WORKS
21. SUPERINTENDENCE OF CONTRACT WORKS AND
ENGINEER'S INSTRUCTIONS
22. LIENS
23. ORDER OF EXECUTION OF CONTRACT WORKS
24. COMMENCEMENT OF CONTRACT WORKS
25. DATE/S OF COMPLETION
26. PENALTY FOR DELAY
27. POWER TO USE PARTIALLY COMPLETED CONTRACT WORKS
28. GUARANTEE AND/OR WARRANTY
29. EXTENSION OF TIME FOR VARIOUS CAUSES
30. TERMINATION, REMEDIES AND POWERS
31. PROPERTY IN PLANT MATERIALS OR ARTICLES
32. PROTECTION AND CARE OF CONTRACT WORKS
33. EXCEPTED RISKS
34. CONTRACTORS, LIABILITY & INDEMNITY
35. INSURANCE

36. SPECIAL RISKS
37. SETTLEMENT OF DISPUTES
38. STATUTORY LAWS AND REGULATIONS
39. SAFETY AND HEALTH
40. DEDUCTIONS FROM CONTRACT PRICE
41. LAW TO APPLY
42. INVOICING AND PAYMENT
43. CERTIFICATES OF COMPLETION OF WORK
44. SURETY FOR DUE PERFORMANCE
45. URGENT REPAIRS
46. LABOUR RETURNS
47. BOREHOLES, FOSSILS AND EXCAVATION
48. NIGHT, SUNDAY AND HOLIDAY WORK
49. ACCIDENTS TO BE REPORTED
50. EMPLOYEES ILLNESS OR INJURY
51. PROPRIETARY PRODUCTS
52. BLASTING AND USE OF EXPLOSIVES
53. PACKAGING AND SHIPPING
54. STANDING TIME
55. LOADING, TRANSLOADING AND UNLOADING
56. PRICE ADJUSTMENT
57. MODIFICATION OF CONTRACT
58. USE OF THE NAME OF BHP BILLITON
59. BLACK ECONOMIC EMPOWERMENT

1. **DEFINITIONS AND INTERPRETATION**

In the CONTRACT (as hereinafter defined) clause headings shall not be taken into consideration in the interpretation thereof, and, except where the context clearly indicates a contrary intention, words importing the singular also include the plural and vice versa, words importing the masculine also include the feminine and neuter and vice versa, the word "person" includes a company, close corporation and any other juristic person and partnership and any other body of persons (whether corporate or incorporate) and the following words and expressions shall bear the meanings ascribed to them hereunder:

- 1.1 "CONTRACT" means the document or any amendment thereof signed by or on behalf of the EMPLOYER for the execution of the CONTRACT WORKS as also all documentation referred to therein, to which reference may properly be made in order to ascertain the rights and obligations of the parties thereto.
- 1.2 "CONTRACTOR" means the person with whom the CONTRACT is concluded by or on behalf of the EMPLOYER and includes a Consortium of CONTRACTORS, the CONTRACTOR'S heirs, executors, administrators, trustees, judicial managers or liquidators as the case may be but not, except with the written consent of the EMPLOYER, any assignee of the CONTRACTOR.
- 1.3 "CONTRACT PRICE" means the price and/or rates stated in the CONTRACT as payable to the CONTRACTOR for the execution of the CONTRACT WORKS subject to such additions thereto or deductions therefrom as may be made in terms of the CONTRACT.
- 1.4 "CONTRACT WORKS" means all materials, plant, equipment, articles and other things to be supplied, delivered, erected, installed and/or all work and/or services and / or services purchased by the employer to be executed by the CONTRACTOR in accordance with the CONTRACT or any amendments thereto.
- 1.5 "CONSTRUCTIONAL PLANT" means all machines, appliances, devices or things of whatsoever nature required for the execution, completion, guarantee and/or warranty (if any) of the CONTRACT WORKS or TEMPORARY WORKS, but does not include materials or other items intended to form or forming a permanent part of the CONTRACT WORKS.
- 1.6 "DATE(S) OF COMPLETION" means the date(s) stipulated in the CONTRACT as being the date(s) by which the CONTRACT WORKS or any particular part thereof (as the case may be) shall be supplied, delivered, erected, installed, completed and ready for use to the satisfaction of the EMPLOYER and the ENGINEER.
- 1.7 "DRAWINGS" means the DRAWINGS referred to in the CONTRACT and/or in the Specifications and any modification of such DRAWINGS approved in writing by the ENGINEER and such other DRAWINGS as may from time to time be furnished or approved in writing by the ENGINEER.
- 1.8 "EMPLOYER" means the person on whose behalf the CONTRACT is concluded and includes the EMPLOYER'S heirs, executors, administrators, trustees, judicial managers or liquidators as the case may be but not, except with the written consent of the CONTRACTOR, any assignee of the EMPLOYER.
- 1.9 "ENGINEER" means the person designated in the SPECIAL CONDITIONS, appointed by the EMPLOYER to act as ENGINEER for the purposes of the CONTRACT.
- 1.10 "SITE" means the place on, under, over, in or through which the CONTRACT WORKS are to be executed by the CONTRACTOR in terms of the CONTRACT, together with so much of the area surrounding such place as the CONTRACTOR shall, with the consent of the ENGINEER, actually use in connection with the CONTRACT WORKS otherwise than merely for the purpose of access to such place.
- 1.11 "SPECIAL CONDITIONS" means any addition to, or departure from or amendment to these "General Conditions of Contract" as set out in the CONTRACT.

- 1.12 "SUB-CONTRACTOR" means any person named in the CONTRACT to execute any part of the CONTRACT WORKS or any person to whom any part of the CONTRACT has been sub-let with the consent in writing of the EMPLOYER and/or ENGINEER, and includes the SUB-CONTRACTOR'S heirs, executors, administrators, trustees, judicial managers or liquidators as the case may be, but not, except with the written consent of the EMPLOYER and/or ENGINEER, any assignee of the SUB-CONTRACTOR.
- 1.13 "TEMPORARY WORKS" means all TEMPORARY WORKS of every kind required for the execution, completion, maintenance or guarantee and/or warranty of the CONTRACT WORKS.

2. CONTRACT DOCUMENTS

- 2.1 Except to the extent otherwise provided by the CONTRACT, the provisions of these General Conditions of contract shall prevail over those of any other document forming part of the CONTRACT. Subject to the foregoing, the several documents forming the CONTRACT are to be taken as mutually explanatory and in the case of ambiguity or discrepancy, the same shall be explained and adjusted by the ENGINEER in accordance with the following:
- 2.1.1 In the event of conflict between the General Conditions and the SPECIAL CONDITIONS, the latter shall prevail.
- 2.1.2 In the event of conflict between the DRAWINGS and the Specifications, the latter shall prevail.
- 2.1.3 In the event of conflict or discrepancies between the DRAWINGS, those of later date shall prevail subject thereto that where the dates are the same those of larger scale shall prevail.
- 2.1.4 DRAWINGS and Specifications shall be interpreted in conformity with the General and SPECIAL CONDITIONS.
- 2.1.5 In the event of conflict between the ENGINEERING Specification and the Mechanical and Electrical Standards, the ENGINEERING Specification shall prevail.
- 2.2 The minutes of meetings, whether confirmed in writing by both parties or not, shall not in themselves constitute a variation of the CONTRACT.

3. NOTICES

- 3.1 All instructions, directions and notices from the EMPLOYER and/or ENGINEER to the CONTRACTOR, and all notices from the CONTRACTOR to the EMPLOYER and/or ENGINEER for the purposes of the CONTRACT shall be conveyed in writing and shall be deemed to have been duly served within seven days of the date of posting, and in proving such service it shall be sufficient to prove that the letter was properly addressed and posted.
- 3.2 The contract number, contract item number and job/item code numbers shall be quoted by the CONTRACTOR on all correspondence, notices or other documents of any description relating to the CONTRACT.

4. CONTRACT PRICE BASIS

- 4.1 The CONTRACTOR shall be deemed to have inspected the SITE and its surroundings and to have acquainted and satisfied himself as to every condition and circumstance which may affect or influence the CONTRACT PRICE, as to the possibility and manner of his executing the CONTRACT WORKS and as to the nature and circumstances of the SITE (including the sub-soil, if relevant to the execution of the CONTRACT WORKS) and of the nature and quantities of the work and materials required for the execution, completion, and guarantee of the CONTRACT WORKS.

Furthermore the CONTRACT PRICE shall be deemed to have been calculated according to the CONTRACTOR'S own estimation of the foregoing and shall fully compensate the

CONTRACTOR for all obligations, risks and contingencies relating to the execution, completion and guarantee of the CONTRACT WORKS and the compliance with the provisions of the CONTRACT. No payment in addition to the CONTRACT PRICE shall be made, except -

- 4.1.1 in terms of the CONTRACT, resulting from increases in certain costs as may be expressly provided for therein; or
 - 4.1.2 with the written consent thereto of the ENGINEER, resulting from variations to the design, quality or quantity of any part of the CONTRACT WORKS, or from the omission or substitution of any part of the CONTRACT WORKS, or from any discrepancy in DRAWINGS or between DRAWINGS and the specifications, or from the removal from the SITE of any material, plant, and/or equipment and the substitution of other material, plant and/or equipment therefor, or from the removal or re-execution of any work already executed, and then only to the extent of the amount provided in the CONTRACT or as agreed to in writing by the ENGINEER, as the case may be.
- 4.2 The EMPLOYER shall not be liable for any increase to the CONTRACT PRICE in terms of the CONTRACT (including, without limitation, those relating to escalation claims) unless and until a written claim in respect thereof -
- 4.2.1 has been submitted by the CONTRACTOR to the ENGINEER in a fully substantiated form together with supporting documents and calculations as well as such further documents and/or particulars as may be requested by the ENGINEER; and
 - 4.2.2 has been approved by the ENGINEER in the form of a written amendment to the CONTRACT PRICE prior to invoicing.
- 4.3 Any increased cost caused by or attributable to default by the CONTRACTOR or variations and/or escalation claims not duly authorised by the ENGINEER shall be for the account of the CONTRACTOR.
- 4.4 All costs incurred by the CONTRACTOR in preparing his claims shall be borne by the CONTRACTOR.
- 4.5 Unless otherwise agreed to, the CONTRACTOR shall at his own cost be responsible for the loading and offloading of materials and/or equipment transported to SITE.
- 4.6 The CONTRACT PRICE shall be deemed to fully compensate the CONTRACTOR for returning to SITE to complete those calibrations and tests for which the CONTRACTOR or his SUB-CONTRACTOR is responsible and which can be done only during actual operation of the CONTRACT WORKS.

5. **EXTENT OF CONTRACT**

- 5.1 The CONTRACTOR'S obligations under the CONTRACT comprise -
- 5.1.1 the fabrication, construction, erection, completion and commissioning as stated in the CONTRACT and where specified guarantee and/or warranty of the CONTRACT WORKS;
 - 5.1.2 the provision of all labour, materials, plant, articles, Constructional Plant, TEMPORARY WORKS and everything incidental thereto whether of a temporary or permanent nature required in terms of the CONTRACT;
 - 5.1.3 the provision of all CONSTRUCTIONAL PLANT and all materials, labour, haulage and power necessary to execute and complete the CONTRACT WORKS unless otherwise specified in the CONTRACT or agreed in writing by the ENGINEER;
 - 5.1.4 the proper fencing, guarding, lighting and watching of the CONTRACT WORKS on the SITE at his own expense.

- 5.2 The CONTRACTOR shall, where applicable, be responsible for receiving all equipment and materials supplied by the EMPLOYER as follows -
- 5.2.1 for equipment and materials delivered to SITE prior to the CONTRACTOR being on SITE the CONTRACTOR shall collect the equipment and materials from the EMPLOYER'S warehouse or stores; and/or
- 5.2.2 for equipment and material delivered while the CONTRACTOR is on SITE, the CONTRACTOR shall receive the equipment and materials directly from truck, railcar or whatever other means of delivery employed.
- 5.3 It shall be the responsibility of the CONTRACTOR to fully inspect all equipment and materials received for damage, missing components, non-compliance with specifications and/or other faults. The CONTRACTOR shall forthwith inform the ENGINEER in writing of any late deliveries of equipment which may result in delays in completing the CONTRACT WORKS.
- 5.4 The CONTRACTOR shall at all times perform in respect of the CONTRACT as an independent CONTRACTOR and not as an agent, representative, employee or partner of the EMPLOYER, and shall not incur any liability whatsoever on behalf of the EMPLOYER.

6. **VARIATIONS TO THE CONTRACT**

- 6.1 The CONTRACTOR shall not make any substitutions, variations or additions to or omissions from the CONTRACT WORKS without an amendment to the CONTRACT or by the prior written approval of the ENGINEER on the ENGINEER'S official "Contract Variation Instruction" (CVI) form.
- 6.1.1 The ENGINEER will supply a Contract Variation Instruction (CVI) Book which shall be available at all times at the SITE.
- 6.1.2 All instructions to the CONTRACTOR must be registered by means of an official CVI whether or not a financial change is involved.
- 6.1.3 The Contract Variation Instruction forms the basis of Contract Variation notice for design or field changes or extra work. It can be conditionally originated by the:
- (a) EMPLOYER
 - (b) ENGINEER
- CVI's will be prepared in a self-carbon book and the top white copy given to the CONTRACTOR.
- 6.1.4 The originator of a change or variation will notify the EMPLOYER/ENGINEER and provide him with all necessary details, drawings, specifications, etc.
- 6.1.5 The EMPLOYER/ENGINEER will initiate the execution of this change by the issue of a CVI to the CONTRACTOR and at that time will determine the maximum value of the CVI in conjunction with the CONTRACTOR.
- 6.1.6 The maximum value recorded on the CVI is estimated by the CONTRACTOR and approved by the EMPLOYER/ENGINEER, either through his judgement or after discussion with the CONTRACTOR. It is not intended at this stage that the EMPLOYER/ENGINEER in any way negotiates a price for the work. The maximum value is required to establish at which level approval is required for the work to proceed.
- 6.2 The ENGINEER shall be entitled, subject to the provisions of clause 7 hereof, from time to time during the execution of the CONTRACT by notice in writing to direct the CONTRACTOR to alter, amend, omit, add to, or otherwise vary any of the CONTRACT WORKS or their character, quality or kind and the CONTRACTOR shall carry out such variations and be bound by the conditions of the CONTRACT, so far as applicable, as though the said variations were stated in the specification and/or DRAWINGS.

- 6.3 The CONTRACTOR shall request the ENGINEER immediately for instructions if any contradictions, discrepancies, ambiguity or errors are found in the contract documents or in laying out the work or if supplementary instructions issued do not correspond with those contained in the contract documents or if omissions or other faults become evident. The CONTRACTOR shall not proceed with work affected thereby until supplementary instructions rectifying the situation have been issued by the ENGINEER. Should the CONTRACTOR fail to comply with these requirements, he shall be liable for any resulting circumstances, conditions or cost due to or arising from such failure.
- 6.4 The CONTRACTOR shall make reasonable modifications to the work called for in the DRAWINGS and specifications without extra compensation except where in the opinion of the ENGINEER the CONTRACTOR has or will actually incur additional cost.

7. VALUATION OF ADDITIONS OR OMISSIONS AND CLAIMS

- 7.1 In every case in which the CONTRACTOR has received any direction from the ENGINEER which either then or later will, in the opinion of the CONTRACTOR, involve an addition to or deduction from the CONTRACT PRICE, the CONTRACTOR shall advise the ENGINEER within 2 working days in writing to that effect. The ENGINEER shall be entitled at his discretion to require the CONTRACTOR not to commence any particular work until the parties have agreed upon any cost adjustment to be made as a result of any such addition or deduction.

The amount to be added to or deducted from the CONTRACT PRICE shall be ascertained and determined in accordance with the price and/or rates provided in the CONTRACT in so far as they may in the opinion of the ENGINEER be applicable. Should the ENGINEER be of the opinion that the price or rates provided in the CONTRACT are not applicable to the additional work concerned, or where no rates or prices are stated, then such amount shall be determined by the ENGINEER in consultation with the CONTRACTOR and should they disagree such disagreement shall be treated as a dispute and dealt with in terms of clause 37.

- 7.2 Where any work authorised by the ENGINEER is to be done on a daywork rates basis the CONTRACTOR shall submit each day's daywork sheets to the ENGINEER for his written approval within 24 hours of completion of that day's work, failing which the ENGINEER shall be entitled to refuse to accept those daywork sheets.
- 7.3 The CONTRACTOR shall submit to the ENGINEER once in every month a report giving full and detailed particulars of all claims for any additional expense arising during the preceding month to which the CONTRACTOR may consider himself entitled and shall thereafter submit a claim in terms of clause 4.2. No claim will be considered which has not been included in such report.

8. ASSIGNMENT

- 8.1 No cession, delegation or assignment of all or any of the rights and/or obligations of the CONTRACTOR in terms of the CONTRACT shall be of any force or effect unless and until the EMPLOYER shall have expressly consented thereto in writing, which consent may be refused without any reason being given therefor. The provisions of this clause shall also apply to any sale in execution of the CONTRACTOR'S right, title and interest in and to the CONTRACT.
- 8.2 Should the shares or member's interest in or control of the CONTRACTOR be transferred to persons who were not the shareholders, members or controllers of the CONTRACTOR when the CONTRACT was concluded on behalf of the CONTRACTOR or when the CONTRACTOR commenced execution of the CONTRACT WORKS (whichever is the earlier), the EMPLOYER shall be entitled to act mutatis mutandis in accordance with clause 30.1 hereof.

9. SUB-CONTRACT

- 9.1 The CONTRACTOR shall submit to the ENGINEER for his approval the names of any proposed SUB-CONTRACTORS and the CONTRACTOR shall not, without the written consent of the ENGINEER, enter into any sub-contract with any person for the execution of the CONTRACT WORKS or any part thereof or for the manufacture or supply of any of the materials to be used

in the CONTRACT WORKS other than for any part of the CONTRACT WORKS of which the manufacturers are named in the CONTRACT.

- 9.2 The ENGINEER shall, after advising the CONTRACTOR, be entitled to withhold approval of any proposed SUB-CONTRACTOR or to rescind approval of any SUB-CONTRACTOR with whom the ENGINEER may subsequently have reason to be dissatisfied, in which case the connection of such SUB-CONTRACTOR with the CONTRACT WORKS shall forthwith cease and he shall be bound to immediately withdraw from the CONTRACT WORKS.
- 9.3 The consent of the ENGINEER to the engagement of any SUB-CONTRACTOR shall not relieve the CONTRACTOR of his obligations under the CONTRACT or in any way affect the CONTRACTOR'S direct responsibility to the EMPLOYER nor shall it render the EMPLOYER in any way responsible or liable to such SUB-CONTRACTOR. However, in the event of the EMPLOYER taking the CONTRACT WORKS or any part thereof out of the CONTRACTOR'S hands because of the default or failure of the CONTRACTOR, the EMPLOYER shall be entitled, but not obliged, to take over any sub-contract between the CONTRACTOR and his SUB-CONTRACTOR in respect of any part of the CONTRACT WORKS at the same prices and/or rates and otherwise upon the terms and conditions as apply to such sub-contract.
- 9.4 All specialists, merchants, tradesmen and others executing any work or supplying any goods for which provisional or prime cost sums are included in the schedule of quantities, who may have been or be nominated or selected by the EMPLOYER or the ENGINEER and all persons to whom by virtue of the provisions of the CONTRACT, the CONTRACTOR is required to sub-let any work, shall, in the execution of such work or the supply of such goods, be deemed to be SUB-CONTRACTORS engaged by the CONTRACTOR and are herein referred to as nominated SUB-CONTRACTORS.
- 9.5 Unless otherwise stated, attendance upon nominated SUB-CONTRACTORS, etc. shall include for erection, use and maintenance of scaffolding and plant, taking delivery, unloading, getting in, storing, protecting from damage, hoisting, watching, lighting, making good in all trades, etc. as may be necessary. If the CONTRACTOR dismantles any scaffolding before any SUB-CONTRACTORS have completed their work, he shall, if so directed, re-erect same without charge.
- 9.6 The CONTRACTOR shall obtain all necessary particulars from all SUB-CONTRACTORS and specialists of all recesses, chases, sleeves, and other requirements so that they may be correctly incorporated in the CONTRACT WORKS in the first place. Should the Contractor fail to obtain such information and execute the work accordingly the cost of any alterations, cutting, etc. resulting from such failure shall be for his account.
- 9.7 The CONTRACTOR shall provide for each trade doing all necessary jobbing work and for attendance upon and making good after all other trades, including general attendance upon and making good after SUB-CONTRACTORS, and leave all perfect at completion.
- 9.8 In the event of the ENGINEER being satisfied that the CONTRACTOR has failed to make any payment due to a SUB-CONTRACTOR, the EMPLOYER shall be entitled to make such payment direct to the SUB-CONTRACTOR concerned and to deduct the amount so paid from any amounts owing to the CONTRACTOR, provided that where feasible the EMPLOYER shall consult with the CONTRACTOR before making such direct payment.
- 9.9 The provisions of the CONTRACT shall be applied mutatis mutandis to the SUB-CONTRACT between the CONTRACTOR and each SUB-CONTRACTOR to the CONTRACTOR. The CONTRACTOR hereby warrants and undertakes that all SUB-CONTRACTORS to the CONTRACTOR shall not breach and shall comply with all obligations of the CONTRACTOR in terms of the CONTRACT and that all the provisions of the CONTRACT relating to any such SUB-CONTRACTOR shall be expressly reflected in his respective Sub-Contract, which the ENGINEER shall be entitled to inspect before consenting thereto.

10. **REMOVAL OF WORKMEN**

- 10.1 The CONTRACTOR shall engage in and about the execution of the CONTRACT WORKS only such persons as are careful, competent and efficient in their several trades and callings, and

who are properly qualified and skilled to execute the CONTRACT WORKS. The ENGINEER shall be at liberty to object to and require the CONTRACTOR to remove from the CONTRACT WORKS forthwith any person employed by the CONTRACTOR in or about the execution of the CONTRACT WORKS, who in the opinion of the ENGINEER misconducts himself or is incompetent or negligent in the proper performance of his duties or contravenes or fails to comply with the provisions of any "Codes of Practice", policies and procedures or instructions in regard to safety applicable to the CONTRACT WORKS or the SITE. Such person shall not be again employed upon the CONTRACT WORKS without the permission of the ENGINEER.

11. **PATENT RIGHTS, COPYRIGHTS AND ROYALTIES**

- 11.1 The CONTRACTOR hereby indemnifies and shall hold the EMPLOYER harmless -
- 11.1.1 against all claims and legal proceedings for infringement and/or unauthorised use of any patent, copyright, design, trade-mark, trade name or any other intellectual property right arising out of the design, manufacture, construction or use of the CONTRACT WORKS or any part thereof or any CONSTRUCTIONAL PLANT, machine, work, material or article used for or in connection with the CONTRACT WORKS or TEMPORARY WORKS or any of them; and
- 11.1.2 against all legal costs and other expenses whatsoever in respect thereof which may be incurred by the EMPLOYER in resisting same and enforcing this indemnity.
- 11.2 Should any such claim succeed, the CONTRACTOR shall, at the cost of the CONTRACTOR, either acquire from the holder of the intellectual property right concerned, the right for the EMPLOYER to continue using the item concerned, or shall, if possible, modify same in a manner approved in writing so that it no longer infringes such right.
- 11.3 Except where stated to the contrary in the SPECIAL CONDITIONS, the CONTRACTOR shall pay all tonnage and other royalties, rent and other payments or compensation (if any) for obtaining any materials whatsoever required for the CONTRACT WORKS or TEMPORARY WORKS and do whatever is required to properly fulfill the CONTRACT.

12. **DRAWINGS, SAMPLES AND PATTERNS**

- 12.1 The CONTRACTOR shall at his expense unless otherwise stated in the SPECIAL CONDITIONS, submit to the ENGINEER for approval such general and detailed dimensioned DRAWINGS, samples or patterns of all the plant and items as reflected in the specification and of all plant and items as may be reasonably required to complete the CONTRACT WORKS to the satisfaction of the ENGINEER.
- 12.2 Before the separate parts of the CONTRACT WORKS are actually put in hand, the CONTRACTOR shall submit to the ENGINEER three paper copies of all approved working DRAWINGS suitable for microfilming, endorsed with the contract and job/item code number (where applicable).
- 12.3 At least one copy of every DRAWING relating to the CONTRACT WORKS shall be kept by the CONTRACTOR at the office of his head representative on the SITE and all such DRAWINGS shall be available at all times for the use of the EMPLOYER, the ENGINEER and any other person authorised by the ENGINEER.
- 12.4 The CONTRACTOR shall be responsible for any discrepancies, errors or omissions in the DRAWINGS and information supplied by him, whether they have been approved by the ENGINEER or not.
- 12.5 The CONTRACTOR shall at his own expense carry out any alteration or remedial work necessitated by reason of such discrepancies, errors, or omissions and modify the DRAWINGS and information accordingly, or if the same be done by or on behalf of the EMPLOYER, shall bear all costs reasonably incurred therein.

- 12.6 When any DRAWING has been approved in writing by the ENGINEER it shall not be departed from in any way except with the written consent of the ENGINEER.
- 12.7 Upon receipt of detail DRAWINGS for any work and before executing any work, the CONTRACTOR shall ascertain that the dimensions given on such DRAWINGS correspond with executed work which governs the sizes of work for which the details are given. Should a detail DRAWING not agree with executed work the DRAWING shall be immediately returned to the ENGINEER for amendment or clarification.
- 12.8 The mass reflected on the DRAWINGS is not to be taken as exact. The CONTRACTOR is required to make his own calculations of mass.
- 12.9 Where the EMPLOYER or the ENGINEER is required to issue detailed DRAWINGS, such DRAWINGS need not all be issued at the commencement of the CONTRACT and may be issued from time to time during execution of the CONTRACT WORKS. The CONTRACTOR shall give reasonable written notice to the ENGINEER of any such DRAWING or of any specification or other information which may be required to enable him to comply with his obligations in terms of the CONTRACT.
- 12.10 Unless otherwise agreed in writing the CONTRACTOR shall be entirely responsible for the preparation of his own material requirements for the completion of the CONTRACT WORKS.
- 12.11 Unless otherwise agreed in writing, the CONTRACTOR shall not be required to supply detailed manufacturing DRAWINGS or design calculations of his proprietary equipment being supplied in terms of the CONTRACT, but shall allow authorised representatives of the EMPLOYER to inspect such DRAWINGS and calculations at his offices at any mutually agreed time.
- 12.12 Where the CONTRACTOR is responsible for the supply of design and/or detail DRAWINGS he shall submit within six (6) weeks of the completion of the CONTRACT WORKS, reproducible up-dated copies of all such DRAWINGS either in full size or microfilm.
- 12.13 All dimensions, sizes and quantities shown on any DRAWINGS and/or mentioned in the specifications shall be given in Systeme Internationale (SI) metric units in accordance with the Measuring Units and National Measuring Standards Act (Act 76 of 1973 of the Republic of South Africa).
- 12.14 The CONTRACTOR shall obtain the ENGINEER'S written approval before commencing the work.

13. **CONFIDENTIAL DOCUMENTS**

- 13.1 All plans, DRAWINGS or designs supplied by the CONTRACTOR as part of his offer or in execution of the CONTRACT or supplied by the EMPLOYER or the ENGINEER as documents of the CONTRACT will remain the property of the party supplying such plans, DRAWINGS and designs and any information derived therefrom or otherwise communicated in connection with the CONTRACT, will be regarded by all parties as strictly confidential and shall not, without prior consent in writing of the party concerned, be published or disclosed to any other party. At the completion of the CONTRACT the CONTRACTOR shall return to the ENGINEER all copies of DRAWINGS provided under the CONTRACT.
- 13.2 The CONTRACTOR, if required, shall enter into a "Confidentiality Agreement" in accordance with the requirements of the EMPLOYER.

14. **MATERIALS AND WORKMANSHIP**

- 14.1 The CONTRACTOR hereby warrants:
 - 14.1.1 That the CONTRACT WORKS -
 - 14.1.1.1 shall comply strictly with the provisions of the CONTRACT (including the specifications and DRAWINGS) and the ENGINEER'S instructions;

14.1.1.2 shall be executed in a good, proper, safe and workmanlike manner, and, to the extent not stipulated in the CONTRACT, in accordance with recognized good practice;

14.1.1.3 shall be first class in every aspect; and

14.1.1.4 shall be free from defects in materials and workmanship and in any design, construction, ENGINEERING or technology provided by or on behalf of the CONTRACTOR;

14.1.2 that each item forming part of the CONTRACT WORKS supplied by or on behalf of the CONTRACTOR shall be new, unused and of the most suitable grade and the best of its respective kind for its intended purpose;

14.1.3 that each item forming part of the CONTRACT WORKS shall be fit for the purpose for which it is intended and shall operate properly and successfully at all capacities up to and including the maximum specified in the specifications without abnormal noise, heating, scoring of parts, wear and vibration; and

14.1.4 that an ample factor of safety shall be incorporated in the design of each item forming part of the CONTRACT WORKS.

14.2 Any part of the CONTRACT WORKS considered by the ENGINEER to be defective, or incorrectly or badly constructed, erected or installed shall, when instructed to do so by the ENGINEER, be substituted, altered or changed at the discretion of the ENGINEER by the CONTRACTOR at the CONTRACTOR'S sole expense.

15. **INSPECTION, TESTING AND QUALITY CONTROL**

15.1 The ENGINEER or such persons as he may appoint for the purpose, may inspect and test the work at all stages and shall have full power to reject all or any portion of the work that may be considered to be defective or inferior in quality, material, workmanship or design to that required by the CONTRACT. Any portion of the work so rejected shall be replaced immediately by the CONTRACTOR at his risk and expense unless, in the opinion of the ENGINEER, the work rejected can be so treated and repaired as to render it fit for incorporation in the CONTRACT WORKS, in which case the CONTRACTOR at his own risk and expense shall cause the said work to be dealt with in a manner approved by the ENGINEER. Any such work shall be re-submitted for inspection and test and shall immediately be replaced by the CONTRACTOR if not to the satisfaction of the ENGINEER. The CONTRACTOR shall at his risk and expense carry out such tests as are required by the ENGINEER to determine that the CONTRACT is being complied with. Failure by the ENGINEER or his appointee to avail himself of his rights in terms of this clause in regard to any work, shall not be construed as an approval by the ENGINEER of such work.

15.2 The CONTRACTOR shall pay all expenses incurred by the EMPLOYER in respect of any work or material rejected by reason of its being found to be defective, of inferior quality or otherwise unacceptable.

15.3 In the case of default on the part of the CONTRACTOR in fulfilling any obligation under 15.1, the EMPLOYER shall be entitled, after having given the CONTRACTOR written notice to such effect, to employ and pay other persons to carry out the same and all expenses consequent thereon or incidental thereto shall be borne by the CONTRACTOR and shall be recoverable from him by the EMPLOYER or may be deducted by the EMPLOYER from any monies due or which may become due to the CONTRACTOR.

15.4 The CONTRACTOR shall, if required by the ENGINEER in writing, search for the cause of any defect, imperfection or fault under the direction of the ENGINEER. Unless such defect, imperfection or fault is one for which the CONTRACTOR is liable under the CONTRACT, the cost of any work carried out by the CONTRACTOR in searching as aforesaid shall be borne by the EMPLOYER, but if such defect, imperfection or fault is one for which the CONTRACTOR is liable as aforesaid, the cost of any work carried out in searching as aforesaid shall be borne by

the CONTRACTOR and he shall in such case repair, rectify and make good such defect, imperfection or fault at his own expense in terms of clause 28 hereof.

- 15.5 No work shall be covered up or put out of view without the approval of the ENGINEER, and the CONTRACTOR shall afford full opportunity for the ENGINEER to examine and measure any work which is about to be covered up or put out of view and, where applicable, to examine foundations before permanent work is placed thereon. The CONTRACTOR shall give due notice to the ENGINEER whenever any such work or foundations is or are ready or about to be ready for the purposes aforesaid and the ENGINEER shall without unreasonable delay, unless he considers it unnecessary and advises the CONTRACTOR accordingly, attend to same for such purposes.
- 15.6 The CONTRACTOR shall uncover any part or parts of the CONTRACT WORKS or make openings in or through the same as the ENGINEER may from time to time direct and shall reinstate and make good such part or parts to the satisfaction of the ENGINEER. Should any such part or parts have been covered up or put out of view after compliance with the requirements of clause 15.5 hereof and are found to be executed in accordance with the Contract, then the expenses of uncovering, making openings in or through, reinstating and making good the same shall be borne by the EMPLOYER. In any other case all such expenses, including expenses incurred by a party performing such uncovering, reinstating and making good, shall be borne by the CONTRACTOR or shall be recoverable from the CONTRACTOR.

16. **MARKING OF MATERIALS, PLANT OR ARTICLES**

- 16.1 All materials, plant or articles forming or intended to form part of the CONTRACT WORKS shall, in addition to the CONTRACTOR'S own erection marks, be marked and/or securely fixed with waterproof labels by the CONTRACTOR in accordance with the marking instructions contained in the Contract.
- 16.2 Where materials, plant or articles forming or intended to form part of the CONTRACT WORKS are to be cleaned on SITE by sand or shot blasting or wire brushing or any other methods required by the EMPLOYER prior to protective coating by painting or other processes, the CONTRACTOR shall mark the said materials, plant or articles by punching, welding or other methods as may be directed by the ENGINEER so as to avoid obliteration in the process of the said cleaning.
- 16.3 The EMPLOYER shall not be liable for any damage loss or any other costs whatsoever arising from the CONTRACTOR'S failure to carry out the instructions for the marking of materials, plant or articles as contained in paragraphs 16.1 and 16.2 hereof.

17. **TRANSPORT AND OTHER MISCELLANEOUS MATTERS**

- 17.1 Unless specifically agreed to the contrary, the transporter of materials, plant and/or articles required for the execution of the CONTRACT WORKS or for the construction of any TEMPORARY WORKS shall be deemed to be the CONTRACTOR'S agent or SUB-CONTRACTOR. The CONTRACTOR and/or his transport agent or SUB-CONTRACTOR shall comply with and shall ensure compliance with all applicable laws and regulations, in particular the Road Transportation Act of 1977, as amended, or any law taking its place or any regulations promulgated in terms thereof.
- 17.2 The CONTRACTOR and his SUB-CONTRACTORS shall use every reasonable means to prevent any of the roads or bridges communicating with or on the route to the SITE from being damaged by abnormal loads or other extraordinary traffic and shall select routes, choose and use vehicles and restrict and distribute loads so that any such extraordinary traffic relating to the moving of plant and materials to and from the SITE shall be limited as far as is reasonably possible.
- 17.3 Should it be found necessary for the CONTRACTOR to move one or more loads of CONSTRUCTIONAL PLANT, machinery or pre-constructed units or parts of units of work over part of a road or bridge and the moving of such load will require special authorisation or exemption in terms of any statutory regulations relating to roads and road traffic, the

CONTRACTOR shall apply to the relevant authority for permission to move such load and shall not do so without such permission. Should conditions of any authorisation or exemption require the execution of protecting or strengthening works to any road or bridge the CONTRACTOR shall, before moving the load on to such road or bridge, give notice to the ENGINEER of the mass and other particulars of the load to be moved and his proposals for protecting or strengthening the said road or bridge.

The CONTRACTOR shall carry out such proposals or any modification thereof which the ENGINEER shall require unless there is an item or are items in the CONTRACT for the pricing by the CONTRACTOR of the necessary works for protecting or strengthening as aforesaid. The costs and expenses thereof shall be paid by the EMPLOYER to the CONTRACTOR.

- 17.4 If during the carrying out of the CONTRACT WORKS or at any time thereafter, the CONTRACTOR shall receive any claim in respect of damage to person to roads or bridges by reason of extraordinary traffic, he shall immediately report the same to the ENGINEER and thereafter the EMPLOYER shall negotiate the settlement of and pay all sums due in respect of such claims and shall indemnify the CONTRACTOR in respect thereof and in respect of all claims, demands, proceedings, damages, costs, charges and expenses in relation thereto, provided always that, if and so far as any such claims or part thereof shall in the opinion of the ENGINEER be due to any failure on the part of the CONTRACTOR to observe and perform his obligations under paragraph 17.2 or 17.3 of this clause, then the amount certified by the ENGINEER to be due to such failure shall be paid by the CONTRACTOR to the EMPLOYER.
- 17.5 Notwithstanding any consigning address stated in the Contract or subsequently given to the CONTRACTOR, it shall be the responsibility of the CONTRACTOR to deliver at his cost to the SITE all materials and/or plant and/or articles forming or intended to form part of the CONTRACT WORKS, TEMPORARY WORKS or CONSTRUCTIONAL PLANT.
- 17.6 The CONTRACTOR shall hold harmless and indemnify the EMPLOYER in respect of all claims, demands, proceedings, damages, costs, charges, penalties, fines, confiscation of vehicles plant and/or articles and any other expenses or costs whatsoever arising out of or in relation to the CONTRACTOR'S negligence or failure to comply with all or any of his obligations under clause 17 hereof.
- 17.7 All operations necessary for the execution of the CONTRACT WORKS and for the construction of any TEMPORARY WORKS shall, so far as compliance with the requirements of the CONTRACT directs, be carried out so as not to cause pollution or to interfere unnecessarily or improperly with the convenience of public or the access to the use and occupation of public or private roads, footpaths and properties, whether owned or controlled by the EMPLOYER or any other person.

18. **ACCESS TO SITE**

- 18.1 Access to the SITE or portions thereof shall be afforded by the EMPLOYER to the CONTRACTOR at such date or dates as may be reasonable and necessary for the proper execution, progress, guarantee and/or warranty of the CONTRACT WORKS.
- 18.2 During the execution of the CONTRACT WORKS no person other than the CONTRACTOR or his duly appointed representatives, SUB-CONTRACTORS and workmen shall be allowed to do work on the SITE, except with the special permission in writing of the EMPLOYER, but access to the CONTRACT WORKS shall at all times be accorded to the ENGINEER. Furthermore, the ENGINEER shall have access to all workshops and places where work is being prepared or where materials, manufactured articles and machinery are being obtained for the CONTRACT WORKS and the CONTRACTOR shall afford every facility for and every assistance in or in obtaining the right to such access.
- 18.3 The CONTRACTOR shall confine all operations, materials, plant, workmen and transport strictly to the CONTRACT WORKS area and to such areas as shall be allocated by the EMPLOYER for these purposes.

18.4 The CONTRACTOR shall exclude all unauthorised persons from the SITE and ensure that no workmen sleep or deposit kit on the CONTRACT WORKS area during execution of the CONTRACT WORKS.

18.5 The EMPLOYER reserves the right to prevent or restrict access of private vehicles to the SITE.

19. **FACILITIES FOR OTHER CONTRACTORS**

19.1 The CONTRACTOR shall, in accordance with the requirements of the ENGINEER, afford all reasonable facilities to and co-operate with any other CONTRACTORS and their workmen and workmen of the EMPLOYER and any other properly authorised person, authority or statutory body who may be employed in the execution, on or near the SITE, of any work not included in the CONTRACT or of any CONTRACT which the EMPLOYER may enter into in connection with or ancillary to the CONTRACT WORKS.

19.2 The CONTRACTOR shall provide any reasonable assistance required by the ENGINEER, the EMPLOYER and any consultant engaged by the EMPLOYER or the ENGINEER as and when required by them, including during the guarantee period for any purpose in connection with the CONTRACT WORKS.

20. **SETTING OUT CONTRACT WORKS**

20.1 Save to the extent as may otherwise be provided in the CONTRACT, the CONTRACTOR shall be responsible for the true and proper setting out of the CONTRACT WORKS and for the correctness of the position, levels, dimensions and alignment of all parts of the CONTRACT WORKS and for the provision of all necessary instruments, appliances and labour in connection therewith. Should, at any time during the progress of the CONTRACT WORKS, any error appear or arise in the position, levels, dimensions or alignment of any part of the CONTRACT WORKS the CONTRACTOR, on being required so to do by the ENGINEER, shall, at his own expense, rectify such error to the satisfaction of the ENGINEER unless such error is based on incorrect data supplied in writing by the ENGINEER in which case the expense of rectifying the same shall be borne by the EMPLOYER. The checking of any setting out or of any line or level by the ENGINEER shall not in any way relieve the CONTRACTOR of his responsibility for the correctness thereof and the CONTRACTOR shall carefully protect and preserve all bench-marks, sight-rails, pegs and other things used in setting out the CONTRACT WORKS.

21. **SUPERINTENDENCE OF CONTRACT WORKS AND ENGINEER'S INSTRUCTIONS**

21.1 During the execution of the CONTRACT WORKS on the SITE and until completion thereof, the CONTRACTOR shall keep on the SITE one experienced qualified competent head representative (approved of in writing by the ENGINEER, which approval may be withdrawn at any time) who shall superintend the execution of the CONTRACT WORKS, receive on behalf of the CONTRACTOR instructions and directions from the EMPLOYER and/or the ENGINEER and be responsible for the behaviour of the CONTRACTOR'S employees.

21.2 The CONTRACTOR shall execute and maintain the CONTRACT WORKS in strict accordance with the CONTRACT to the satisfaction of the ENGINEER and shall comply with and adhere strictly to the ENGINEER'S instructions on any matter within the scope of the CONTRACT (whether mentioned in the CONTRACT or not) and the ENGINEER may in his absolute discretion and from time to time issue further DRAWINGS, details and/or written instructions and/or directions and/or written explanations.

21.3 The CONTRACTOR shall attend such meetings as may be convened by the ENGINEER and/or the EMPLOYER and held on the SITE at regular intervals and at such other times as they may consider desirable.

22. **LIENS**

- 22.1 The CONTRACTOR hereby waives all and any rights of lien, retention and possession for payment of monies in terms of the CONTRACT or for compensation for improvements or for any other cause whatsoever which, but for this clause, the CONTRACTOR would have had in respect of the CONTRACT WORKS or any part thereof and in respect of any DRAWINGS, and shall procure that each SUB-CONTRACTOR engaged by the CONTRACTOR does so as well.
- 22.2 The CONTRACTOR shall ensure that all materials, articles, equipment, services and labour used by or supplied by the CONTRACTOR and his SUB-CONTRACTORS in executing the CONTRACT WORKS are timeously and promptly paid for, and shall at his own expense keep the CONTRACT WORKS and the EMPLOYER'S property free of any lien and right of retention or possession arising from the supply of any such materials, articles, equipment, services and labour. Should the CONTRACTOR fail to do so, and further fail to do so within 7 days of receiving written notice by or on behalf of the EMPLOYER requiring it to do so, the EMPLOYER may do so and recover all costs incurred in doing so from the CONTRACTOR.

23. **ORDER OF EXECUTION OF CONTRACT WORKS**

- 23.1 Within two weeks of receiving instructions from the ENGINEER to proceed with the execution of the CONTRACT, the CONTRACTOR shall, if required, submit to the ENGINEER for his approval a programme in the form required by the ENGINEER showing the order of procedure and method in which he proposes to execute the CONTRACT WORKS, and shall, whenever required by the ENGINEER, furnish for his information particulars in writing of the CONTRACTOR'S arrangements for the execution of the TEMPORARY WORKS and the CONTRACT WORKS and the provision of CONSTRUCTIONAL PLANT. The order in which the CONTRACT WORKS are to be executed shall be subject to the approval of and/or alteration by the ENGINEER.

The submission to and approval by the ENGINEER of such programme or the furnishing of such particulars shall not relieve the CONTRACTOR of any of his duties or responsibilities under the CONTRACT. Failure to provide an acceptable programme shall constitute a breach of the CONTRACT and progress payments if called for will be withheld until such programme has been submitted to the ENGINEER.

- 23.2 The ENGINEER may from time to time, by notice in writing, require the CONTRACTOR to proceed with the execution of the CONTRACT WORKS in such order as the ENGINEER may deem necessary and may reasonably alter the order of or suspend or postpone the CONTRACT WORKS or any part thereof.
- 23.3 In the event of any suspension or postponement of the CONTRACT WORKS or any part thereof, the DATE OF COMPLETION of the CONTRACT WORKS or such part thereof as may have been suspended or postponed, shall, if necessary, be extended to such later date or dates as the ENGINEER shall decide to be reasonable, having regard to the period of such suspension or postponement.
- 23.4 The CONTRACTOR shall be responsible for co-coordinating the whole of the CONTRACT WORKS, including work done by SUB-CONTRACTORS, and for conferring and making arrangements with all concerned to ensure proper co-ordination between all parties and for the timeous and efficient execution of the CONTRACT WORKS.
- 23.5 The CONTRACTOR shall execute and complete the CONTRACT WORKS in such stages or in such portions and at such times as the ENGINEER may require and he shall give beneficial occupation to the EMPLOYER of such completed portions of the CONTRACT WORKS where requested to do so.
- 23.6 In addition to the above the whole of the materials, plant and labour to be provided by the CONTRACTOR and the mode, manner and speed of execution and (where specified) maintenance of the CONTRACT WORKS are to be of a kind and conducted in a manner approved of by the ENGINEER. Should the ENGINEER at any time be of the opinion that the rate of progress of the CONTRACT WORKS or any part thereof is too slow to ensure the completion of the CONTRACT WORKS or any part thereof by the prescribed time for completion or as provided for in the CONTRACTOR'S approved programme, he may notify the CONTRACTOR in writing and the CONTRACTOR shall thereupon, with the approval of the

ENGINEER, take such steps as may be necessary in the opinion of the ENGINEER to expedite progress so as to complete the CONTRACT WORKS by the prescribed time of completion.

If the work is not being carried on by day and by night and the CONTRACTOR requests permission to work by night as well as by day then, if the ENGINEER grants such permission, the CONTRACTOR shall not be entitled to any additional payment for so doing. All work at night shall be carried out without unreasonable disturbance. The CONTRACTOR shall indemnify the EMPLOYER from and against any liability for damages on account of noise or other disturbance created while carrying out the work and from and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in regard or in relation to such liability.

24. **COMMENCEMENT OF CONTRACT WORKS**

24.1 The CONTRACTOR shall commence the CONTRACT WORKS within fourteen days from date of the CONTRACT or receipt of instructions from the ENGINEER to proceed with the execution of the CONTRACT whichever is the earlier and shall expeditiously proceed with the same and without delay except as may be expressly sanctioned or ordered by the ENGINEER or be wholly beyond the CONTRACTOR'S control.

25. **DATE/S OF COMPLETION**

25.1 The CONTRACTOR acknowledges that time is of the essence of the CONTRACT, and undertakes to complete the CONTRACT WORKS or any portion thereof as required by the ENGINEER to the satisfaction of the EMPLOYER and ENGINEER by the DATE/S OF COMPLETION stated in the CONTRACT and/or agreed programme or within any extended time's agreed to in terms of clauses 23, 27 or 29 hereof and confirmed in writing by the issue of an amendment to the CONTRACT.

26. **PENALTY FOR DELAY**

26.1 Should the CONTRACTOR fail to complete the CONTRACT WORKS or any part thereof within the time prescribed therefor under clause 25 hereof or extended time granted in terms of clauses 23, 27 or 29 hereof, then the CONTRACTOR shall pay to the EMPLOYER the sum stated in the CONTRACT as penalty for time which shall elapse between the date prescribed in clause 25 hereof or extended time as the case may be and the actual DATE OF COMPLETION of the CONTRACT WORKS. The EMPLOYER may without prejudice to any other method of recovery deduct the amount of such penalty from any monies in his hands due or which may become due to the CONTRACTOR. The payment or deduction of such penalty shall not relieve the CONTRACTOR from his obligations to complete the CONTRACT WORKS or from any of his obligations and liabilities under the CONTRACT or at law.

26.2 Should the CONTRACTOR fail to complete the Works or part thereof by or before the date of completion stated in the CONTRACT, the CONTRACTOR shall be liable to pay the EMPLOYER a sum of money equal to 1% (one per cent) of that part of the CONTRACT PRICE which is properly attributable to such portion of the Works as cannot in consequence of the said failure be put to full beneficial use by the aforesaid completion date for each week of delay from such completion date to the actual date of completion, provided that the penalty shall in no case exceed 10% (ten per cent) of the total CONTRACT PRICE.

26.3 Should, before the completion of the whole of the CONTRACT WORKS, any part thereof be certified by the ENGINEER as completed or be used by the EMPLOYER as envisaged in clause 27 hereof, then the penalty for delay for any period of delay after such certification or use shall be reduced in the proportion which the value of the part so certified bears to the value of the whole of the CONTRACT WORKS.

26.4 Notwithstanding the foregoing it is expressly agreed by the CONTRACTOR that in the event of the damages which the EMPLOYER may sustain as a result of delayed completion as aforesaid being likely, in the opinion of the EMPLOYER, to exceed the stipulated penalty, the EMPLOYER may, as provided for in the Conventional Penalties Act, No. 15 of 1962, or any law taking its

place claim the amount of damages actually sustained instead of enforcing the penalty stipulation. In such event the EMPLOYER shall be entitled, pending the establishment of damages, to withhold payment to the CONTRACTOR of any monies due to the CONTRACTOR up to an amount equal to the EMPLOYER'S estimate of his damages.

27. **POWER TO USE PARTIALLY COMPLETED CONTRACT WORKS**

27.1 Should the EMPLOYER at any time after the DATE OF COMPLETION of any part of the CONTRACT WORKS decide that such part though not completed can be used without material damage thereto the EMPLOYER may without prejudice to its rights under clause 30 hereof, on giving the CONTRACTOR seven days notice in writing of his intention so to do, use such part in a reasonable and proper manner. Such use shall be at the CONTRACTOR'S risk (except so far as concerns EMPLOYER'S liabilities to workmen employed by the EMPLOYER) until such part shall be completed in accordance with the provisions of the CONTRACT. Provided always that, if such use shall materially hinder or delay the completion of any part of the CONTRACT WORKS, the CONTRACTOR shall be allowed such reasonable extension (if any) of the DATE OF COMPLETION of such other part as the ENGINEER shall determine.

28. **GUARANTEE AND/OR WARRANTY**

28.1 The CONTRACTOR guarantees the CONTRACT WORKS and each part thereof against defective materials, poor workmanship or faulty design other than design produced by the ENGINEER, fair wear and tear as determined by the ENGINEER excluded, for the period stated in the SPECIAL CONDITIONS of CONTRACT after the issue of a "Certificate of Completion" by the ENGINEER during which period the CONTRACTOR shall be required to replace and/or repair or make good at his own expense to the satisfaction of the ENGINEER any defects or damage due to such defective materials poor workmanship and/or faulty design and/or any damage to any portion of the CONTRACT WORKS.

28.2 In addition, the CONTRACTOR undertakes to extend to the EMPLOYER all guarantees and warranties given to the CONTRACTOR on all components of the CONTRACT WORKS not manufactured by the CONTRACTOR.

28.3 For the same guarantee period referred to above the CONTRACTOR warrants that the CONTRACT WORKS shall be fit for the purpose for which intended in respect of state, condition and quality.

28.4 In order to avail himself of his rights under this clause, the EMPLOYER shall notify the CONTRACTOR in writing without unreasonable delay, of any defects or non compliance envisaged in clause 28.1 hereof which have appeared and shall give the CONTRACTOR every reasonable opportunity of inspecting and remedying them.

28.5 Should the CONTRACTOR fail to fulfill his obligations under this clause or fail to proceed with due diligence after being required so to do, or after a reasonable time fails to make the CONTRACT WORKS perform as warranted, the EMPLOYER may proceed to do or have done by outside CONTRACTORS the necessary work at the CONTRACTOR'S risk and expense but without prejudice to any other rights which the EMPLOYER may have against the CONTRACTOR in respect of any such failure.

28.6 A fresh guarantee period equal to and upon the same terms applicable to that stated in the SPECIAL CONDITIONS shall apply to that portion of the CONTRACT WORKS supplied in replacement of any defective or damaged portion or portions renewed in pursuance of this clause. This period shall commence from written acceptance by the ENGINEER/EMPLOYER of the remedial work concerned.

28.7 Nothing in this clause shall be construed as a limitation of any rights to which the EMPLOYER may be entitled by virtue of any common law warranty against latent defects or otherwise.

29. **EXTENSION OF TIME FOR VARIOUS CAUSES**

- 29.1 Should the completion of the CONTRACT WORKS or any part thereof be delayed as a consequence of:-
- 29.1.1 Fires or accidents in the CONTRACTOR'S premises or on the SITE not occasioned by any willful and/or negligent act and/or omission on the part of the CONTRACTOR and/or his SUB-CONTRACTORS or his servants or agents,
 - 29.1.2 war or civil commotion,
 - 29.1.3 strikes or lock-outs or any combination of workmen usually employed by the CONTRACTOR, which strikes, lock-outs or combination of workmen shall not in the opinion of the ENGINEER be attributable to the default or wrongful act or omission of the CONTRACTOR,
 - 29.1.4 unusual inclemency of weather at the SITE or affecting the transit of any part of the CONTRACT WORKS thereto, based on the average rainfall over the last 15 years as recorded by the Weather Bureau at its official measuring station nearest the SITE of the CONTRACT WORKS,
 - 29.1.5 alterations, amendments, additions or variations (excluding alterations, etc. required as a result of a default of the CONTRACTOR), made with the consent of the ENGINEER and/or in terms of ENGINEER'S instructions as expressly provided for in the CONTRACT,
 - 29.1.6 delays in excess of the period of consecutive hours per week stated under clause 4 of the SPECIAL CONDITIONS, the CONTRACTOR shall immediately, upon occurrence of such alleged cause of delay, give notice thereof in writing to the ENGINEER to allow him the opportunity to investigate and if required, take remedial action whereupon the ENGINEER may extend the relevant DATE OF COMPLETION to such date as he shall decide to be reasonable.
- 29.2 The CONTRACTOR shall not be entitled to any such extension of the DATE OF COMPLETION unless the CONTRACTOR has submitted to the ENGINEER his claim for extension of time within 28 days of the occurrence concerned together with complete details thereof.
- 29.3 The CONTRACTOR shall have no claim against the EMPLOYER for damages, payment or compensation in respect of delay and/or disorganisation of work arising from any occurrence mentioned in clause 29.1 hereof, except where such is elsewhere expressly provided for and stated in the CONTRACT.

30. **TERMINATION, REMEDIES AND POWERS**

- 30.1 Should the CONTRACTOR die or his estate be sequestrated, (whether provisionally or finally, or whether voluntarily or compulsorily) or the CONTRACTOR publish a notice of surrender or apply to court for the acceptance of the surrender of his estate as insolvent or make an arrangement with, composition or assignment in favour of his creditors or agree to execute the CONTRACT under a committee of inspectors of his creditors or (being a company) be placed under judicial management or in liquidation, whether provisionally or finally or whether voluntarily or compulsorily (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or should the CONTRACTOR assign the CONTRACT or any part thereof without the prior written consent of the EMPLOYER or should execution be levied against any of the CONTRACTOR'S property or should the CONTRACTOR dispose of his business to which the CONTRACT relates or should the CONTRACTOR dispose of any of his assets except in the ordinary, normal and regular course of his business, or should the ENGINEER certify in writing to the EMPLOYER that in his opinion the CONTRACTOR -
- 30.1.1 has abandoned the CONTRACT or breached any terms and conditions of the CONTRACT, or
 - 30.1.2 without reasonable excuse has failed to commence with the CONTRACT WORKS in terms of clause 24 hereof, or

- 30.1.3 having commenced with the execution of the CONTRACT WORKS failed to proceed with the CONTRACT WORKS or any part thereof with due diligence, or
- 30.1.4 has failed to remove material from the SITE or to pull down and replace work within 14 days after receiving written notice from the ENGINEER that such material or work has been condemned and rejected by the ENGINEER under these conditions, or
- 30.1.5 is not executing the CONTRACT WORKS in accordance with the CONTRACT, or is persistently or flagrantly neglecting to carry out his obligations in terms of the CONTRACT, or
- 30.1.6 has contrary to the CONTRACT or to the detriment of good workmanship or in defiance of the ENGINEER'S instructions to the contrary sub-let any part of the CONTRACT, or
- 30.1.7 has assigned the CONTRACT or any part thereof without the written consent of the EMPLOYER, the EMPLOYER may, without prejudice to any other rights or remedies of the EMPLOYER and after giving seven (7) days notice in writing to the CONTRACTOR, enter upon the SITE and expel the CONTRACTOR therefrom without thereby terminating the CONTRACT or releasing the CONTRACTOR from any of his obligations or liabilities under the CONTRACT or affecting the rights and powers conferred on the EMPLOYER or the ENGINEER by the CONTRACT, may arrange with the sureties to or may himself complete the CONTRACT WORKS or may employ any other contractor or persons to complete the CONTRACT WORKS, and the sureties, the EMPLOYER or such other contractor or person may use for such completion so much of the CONSTRUCTIONAL PLANT, TEMPORARY WORKS and materials on the SITE which has been deemed to become the property of the EMPLOYER under clause 31 hereof as he or they may think proper and the EMPLOYER may at any time sell any of the said CONSTRUCTIONAL PLANT, TEMPORARY WORKS and unused materials and apply the proceeds of such sale in or towards the satisfaction of any sums due or which may become due to him from the CONTRACTOR under the CONTRACT.
- 30.2 The ENGINEER shall, as soon as may be practicable after any such entry and expulsion by the EMPLOYER, fix and terminate ex parte or by or after reference to the parties or after such investigation or enquiries as he may think fit to make or institute and shall certify what amount (if any) had at the time of such entry and expulsion been reasonably earned by or would reasonably have accrued to the CONTRACTOR in respect of work then actually done by him under the CONTRACT and what was the value of any unused or partially used materials, any CONSTRUCTIONAL PLANT and any TEMPORARY WORKS upon the SITE which have been deemed to become the property of the EMPLOYER under clause 31 hereof.
- 30.3 Should the EMPLOYER enter and expel the CONTRACTOR in terms of clause 30.1 hereof, he shall not be liable to make any payment or further payment to the CONTRACTOR until completion of the entire CONTRACT WORKS or the expiration of the guarantee, as the case may be, and the costs of completion and (where specified) guarantee and/or warranty, penalty (if any) and all other expenses incurred by the EMPLOYER have been ascertained and the amount thereof certified by the ENGINEER. The CONTRACTOR shall then be entitled to receive only such sum or sums (if any) as the ENGINEER may certify would have been due to him upon due completion by him of the CONTRACT WORKS after deducting the aforesaid certified amount. But should such amount exceed the sum which would have been payable to the CONTRACTOR on due completion of the CONTRACT WORKS by him then the CONTRACTOR shall upon demand pay to the EMPLOYER the amount of such excess and it shall be deemed a debt due by the CONTRACTOR to the EMPLOYER and shall be recoverable accordingly.
- 30.4 Should the CONTRACTOR –
- 30.4.1 pay, give or lend or offer to pay, give or lend any money, gifts or other valuable consideration whether by way of commission, gratuity or otherwise to any person in the employ of INGWE or any company controlled or administered by INGWE or the EMPLOYER; and/or

- 30.4.2 be involved in illegal or unethical actions or commit any crime whatsoever on the EMPLOYER'S premises or in connection with the performance of this CONTRACT; and/or
- 30.4.3 contravene any of the EMPLOYER'S standards, procedures, rules or instructions regarding security, health and safety or the provisions of clause 39,

the EMPLOYER shall without prejudice to any of the EMPLOYER'S other rights under the CONTRACT and irrespective of any other remedy which might be available to the EMPLOYER under any of the provisions of the CONTRACT or in law be entitled to -

- forthwith cancel and terminate the CONTRACT and any other CONTRACTS in force between the CONTRACTOR and the EMPLOYER, without payment of any compensation to the CONTRACTOR for any damages whatsoever including loss of business and/or profits resulting from such cancellation.
- 30.5 The EMPLOYER may at any time at its absolute discretion terminate the CONTRACT for any reason other than the default of the CONTRACTOR by written notice to the CONTRACTOR, whereupon the CONTRACTOR shall stop the execution of the CONTRACT WORKS as at the date specified in such notice except insofar as may be necessary to carry out such termination and take any other action towards termination of the CONTRACT WORKS which the ENGINEER may direct. On such termination the EMPLOYER shall pay to the CONTRACTOR the value of completed work, priced in accordance with the schedule of rates, where applicable, or the value of completed work and any additional amounts as determined by the ENGINEER mutatis mutandis in accordance with clause 36.5 hereof, but always subject thereto that the CONTRACTOR shall not be entitled to any compensation or payment for any consequential loss or damage whatsoever, including, but not limited to, loss of profits or loss of contracts, due to or resulting from such termination.
- 30.6 Should the Contract be entered into for an indefinite period, either the Seller or the Purchaser shall be entitled to terminate the Contract at any time by giving the other not less than three (3) months written notice thereof.

31. **PROPERTY IN PLANT MATERIALS OR ARTICLES**

31.1 For the purpose of this clause -

31.1.1 the expression "CONSTRUCTIONAL PLANT" shall be deemed to include TEMPORARY WORKS but to exclude vehicles engaged in transporting any plant, equipment or materials to or from the SITE;

31.1.2 the expression "Hired Plant" shall mean any CONSTRUCTIONAL PLANT for the purpose of the CONTRACT held by the CONTRACTOR under any agreement for the hire thereof;

31.1.3 the expression "Hire Purchase Plant" shall mean any CONSTRUCTIONAL PLANT for the purpose of the CONTRACT held by the CONTRACTOR under any installment sale agreement.

31.2 All CONSTRUCTIONAL PLANT and materials owned by the CONTRACTOR or by any company in which the CONTRACTOR has a controlling interest shall, when brought on to the SITE (or in the case of Hire Purchase Plant upon its becoming the property of the CONTRACTOR), immediately be deemed to become the property of the EMPLOYER.

31.3 The CONTRACTOR shall, upon request therefor by the ENGINEER at any time, notify the ENGINEER in writing of all Hired Plant or Hire Purchase Plant and of the name and address of the owner thereof.

31.4 The EMPLOYER shall, in order to avoid seizure by the owner of any Hired Plant or Hire Purchase Plant, be entitled to pay to such owner the amount of any overdue installment or other sum payable under any agreement for hire or purchase thereof and in the event of his doing so,

any amount so paid by him shall be a debt due by the CONTRACTOR to the EMPLOYER and may be deducted by the EMPLOYER from any monies due or that may become due to the CONTRACTOR under the CONTRACT or may be recovered by the EMPLOYER from the CONTRACTOR at law.

- 31.5 Subject to clause 31 hereof and to any other provision of the CONTRACT whereby ownership may pass earlier, the CONTRACTOR hereby warrants and undertakes that unencumbered beneficial ownership of each item forming part of the CONTRACT WORKS supplied by or on behalf of the CONTRACTOR shall pass to the EMPLOYER upon the incorporation thereof into the CONTRACT WORKS.
- 31.6 No CONSTRUCTIONAL PLANT or materials or any part thereof shall be removed from the SITE without the prior written consent of the ENGINEER in each instance, which consent shall not be unreasonably withheld where the same is no longer immediately required for the purposes of completion of the CONTRACT WORKS but the EMPLOYER shall permit the CONTRACTOR the exclusive use of all such CONSTRUCTIONAL PLANT, equipment and materials in and for the completion of the CONTRACT WORKS until the occurrence of any event which entitles the EMPLOYER to expel the CONTRACTOR from the SITE and proceed with the completion of the CONTRACT WORKS.
- 31.7 Upon removal from the SITE of any such CONSTRUCTIONAL PLANT or materials as have been deemed to have become the property of the EMPLOYER under clause 31.2 hereof with consent as aforesaid, the property therein shall be deemed to vest in the CONTRACTOR. Upon completion of the CONTRACT WORKS the property in the remainder of such CONSTRUCTIONAL PLANT and materials as aforesaid shall, subject to the provisions of clause 30 hereof, be deemed to revert in the CONTRACTOR who shall forthwith remove the same from the SITE together with any Hire Purchase Plant. Should the CONTRACTOR fail to remove any CONSTRUCTIONAL PLANT or materials as aforesaid or any Hired Plant or Hire Purchase Plant within such reasonable time after completion of the CONTRACT WORKS as may be allowed by the ENGINEER then the EMPLOYER may -
- 31.7.1 sell any such CONSTRUCTIONAL PLANT and material aforesaid;
- 31.7.2 return any Hired Plant or Hire Purchase Plant at the CONTRACTOR'S expense to the person from whom same was hired or purchased by the CONTRACTOR;
- 31.7.3 after deducting from any proceeds of such sale the cost, charges and expenses of and in connection with such sale and/or return aforesaid, pay the balance thereof (if any) to the CONTRACTOR, provided that should the proceeds of any such sale be insufficient to meet all such costs, charges and expenses, the excess shall be a debt due by the CONTRACTOR to the EMPLOYER and shall be deductible or recoverable by the EMPLOYER accordingly as aforesaid.
- 31.8 The EMPLOYER shall not at any time be liable for any loss of or damage to any of the CONSTRUCTIONAL PLANT or materials which have been deemed to become the property of the EMPLOYER under clauses 30 or 31.2.
- 31.9 The CONTRACTOR shall, when entering into any sub-contract for the execution of any part of the CONTRACT WORKS, incorporate in such sub-contract (by reference or otherwise) the provisions of clause 31 hereof in relation to CONSTRUCTIONAL PLANT and materials, Hired Plant and Hire Purchase Plant brought on to the SITE by the SUB-CONTRACTOR concerned.
- 31.10 The operation of the preceding clauses 31.1 to 31.9 inclusive shall not be deemed to imply any approval by the ENGINEER of the materials or other matters referred to therein, nor shall it prevent the rejection of any such materials at any time by the ENGINEER.

32. PROTECTION AND CARE OF CONTRACT WORKS

- 32.1 The CONTRACTOR shall take all precautions requisite for the protection of life and property on or about or in connection with the CONTRACT WORKS until the EMPLOYER shall take over the CONTRACT WORKS and the CONTRACTOR shall hand over the CONTRACT WORKS in a safe condition. From the commencement to the completion of the CONTRACT WORKS the

CONTRACTOR shall be exclusively and fully responsible for the care of the CONTRACT WORKS and of all TEMPORARY WORKS.

Should any damage, loss or injury occur to the CONTRACT WORKS or to any part thereof or to any TEMPORARY WORKS from any cause whatsoever (save and except the Excepted Risks as defined in clause 33 hereof), the CONTRACTOR shall at his own cost repair and make good the same so that, upon completion, the CONTRACT WORKS shall be in good order and condition and in conformity in every respect with the requirements of the CONTRACT and the ENGINEER'S instructions. Should any such damage, loss or injury result exclusively from any of the Excepted Risks the CONTRACTOR shall, if and to the extent required by the ENGINEER and subject always to the provisions of clause 36 hereof, repair and make good the same as aforesaid at the cost of the EMPLOYER.

- 32.2 The CONTRACTOR shall also be liable for any damage, loss or injury to the CONTRACT WORKS caused by and attributable to him in the course of any operations carried out by him for the purpose of complying with his obligations under Clause 28 (Guarantee and/or Warranty) hereof.
- 32.3 The CONTRACTOR shall allow fires only in such places as are approved by the ENGINEER. Any workmen lighting fires in an unauthorised place shall immediately be removed from the EMPLOYER'S premises and shall not be permitted to return to the said premises without the written permission of the ENGINEER and/or EMPLOYER.
- 32.4 The CONTRACTOR shall protect the CONTRACT WORKS from all storms and from surface and subterranean water, provide all necessary temporary drains, trenches, piping, eaves, gutters, downpipes, etc., and other requisite protection from inclement weather to the whole or any part of the CONTRACT WORKS; provide and maintain all necessary temporary protection of finished and/or existing work liable to be damaged during the progress of the CONTRACT WORKS by properly covering up, isolating, etc., as required. The CONTRACTOR shall be liable for any damage which may occur and shall make good the same at his own expense.
- 32.5 The CONTRACTOR shall be responsible for and shall make good at his own expense any building, wall, fence, road, kerb, path, garden, sewer, pipe, cable and any other existing structure, work or thing interfered with, damaged or removed during the execution of the CONTRACT WORKS and shall leave these in the same condition as they were before commencement of the CONTRACT WORKS.
- 32.6 During the execution of the CONTRACT WORKS and upon completion thereof the CONTRACTOR shall at his own expense remove from the SITE and properly dispose of all rubbish, surplus excavated material, debris and unused material arising from or attributable to the CONTRACTOR'S and his SUB-CONTRACTOR'S operations. Upon completion of the CONTRACT WORKS the CONTRACTOR shall ensure that the SITE and the vicinity thereof are left clear, clean and tidy and ready for use to the satisfaction of the EMPLOYER.
- 32.7 Trees, shrubs, etc shall not be removed, cut back or disturbed in any way without the prior written approval of the ENGINEER and the CONTRACTOR shall protect same from damage.

33. **EXCEPTED RISKS**

- 33.1 For the purpose of the CONTRACT the "Excepted Risks" are war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power or a cause solely due to use or occupation by the EMPLOYER of any portion of the CONTRACT WORKS in respect of which a "Certificate of Completion" as defined in clause 43, has been issued or a cause solely due to the ENGINEER'S design of the CONTRACT WORKS or to any act or omission of the EMPLOYER, the ENGINEER or any other contractor (not being a SUB-CONTRACTOR to the CONTRACTOR) and all of which are herein collectively referred to as the "Excepted Risks".

34. **CONTRACTORS, LIABILITY AND INDEMNITY**

- 34.1 The CONTRACTOR shall (except if and to the extent provided otherwise) indemnify the EMPLOYER and keep him indemnified against all losses and claims for injuries or damage to any person or property whatsoever (including surface or other damage to land or crops not being on the SITE suffered by tenants or occupants) which may arise out of or in connection with the construction and guarantee and/or warranty of the CONTRACT WORKS and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto.
- 34.2 In the event that any person is injured or killed in the execution of the CONTRACT WORKS in circumstances where such injury or death results in a **SIMRAC** levy being imposed on the EMPLOYER in terms of Chapter 35 of the Regulations promulgated in terms of the Minerals Act of 1991 or any act taking its place, the CONTRACTOR shall be liable to the EMPLOYER for an amount equal to the total amount of the levy that will be payable by the EMPLOYER as a result thereof. For the purposes of this clause, the CONTRACTOR shall be liable for the acts or omissions, negligent or otherwise, of his SUB-CONTRACTOR/S. The total levy payable by the CONTRACTOR shall be calculated at the then ruling levy applicable at the mine of the EMPLOYER where the incident occurred. Such amount shall be payable on demand or may be deducted from the monies due to the CONTRACTOR as a lump sum payment, at the discretion of the EMPLOYER.
- 34.3 Such amount shall be payable on demand or shall be deducted from any monies due to the CONTRACTOR as a lump sum one-off payment.

35. **INSURANCE**

- 35.1 The EMPLOYER, without in any way limiting the CONTRACTOR'S obligations, liabilities and responsibilities under this CONTRACT, shall in the joint names of the EMPLOYER and the CONTRACTOR including SUB-CONTRACTORS effect insurance (subject to the usual terms, exceptions and conditions) in respect of:
- 35.1.1 The CONTRACT WORKS, in terms of which the EMPLOYER, CONTRACTOR and SUB- CONTRACTORS are indemnified during the execution of the CONTRACT WORKS as well as during any period of guarantee and/or warranty for loss or damage as defined arising in respect of the CONTRACT WORKS and the TEMPORARY WORKS including all materials brought on to the SITE to the full value thereof, but excluding all CONSTRUCTIONAL PLANT, tools and equipment owned, hired or used by the CONTRACTOR or his employees, or any SUB-CONTRACTOR or his employees. Provided that without limiting the CONTRACTOR'S obligations and responsibilities as aforesaid, nothing in this clause contained shall render the EMPLOYER liable to insure against the necessity for the repair replacement or reconstruction of any work constructed with materials or workmanship not in accordance with the requirements of the CONTRACT.
- 35.1.2 Legal liability for accidental death of or injury to third parties and loss of or damage to third party property arising out of and occurring during the execution of the CONTRACT WORKS and/or TEMPORARY WORKS.
- 35.1.3 Riot, covering both political and other riot, to be issued by the South African Special Risks Assurance Association, limited to RSA.
- 35.2 The EMPLOYER shall not be liable for or in respect of any damages or compensation payable at law in respect or in consequence of accident or injury to any workman or other person in the employment of the CONTRACTOR or any SUB-CONTRACTOR, save and except an accident or injury resulting from any act or default of the EMPLOYER, his agent or servants. The CONTRACTOR shall indemnify the EMPLOYER and keep him indemnified against all such damages and compensation (save and except as aforesaid) and against all claims, demands, proceedings, costs, charges and expenses whatsoever in respect thereof or in relation thereto.
- 35.3 The CONTRACTOR shall insure against liability referred to in sub-clause 35.2 above with an insurer and on terms approved by the EMPLOYER (which approval shall not be unreasonably withheld) and shall continue such insurance during the whole of the time that any persons are employed by him on the CONTRACT and/or TEMPORARY WORKS and shall, when required,

produce to the ENGINEER such policy of insurance and the receipt for payment of the current premium. Provided always that in respect of any persons employed by any SUB-CONTRACTOR, the CONTRACTOR'S obligation to insure as aforesaid under this sub-clause shall be satisfied if the SUB-CONTRACTOR shall have insured against liability in respect of such persons in such manner that the EMPLOYER is indemnified under the policy but the CONTRACTOR shall require such SUB-CONTRACTOR to produce to the ENGINEER, when required, such policy of insurance and the receipt for payment of the current premium. Furthermore, the CONTRACTOR shall comply with the provisions of:

- (a) Compensation for Occupational Injuries and Diseases Act, 1993, as amended, or re-enacted.
 - (b) The Unemployment Insurance Act, 1966, as amended, or re-enacted.
- 35.4 The EMPLOYER shall pay all premiums and stamp duty in connection with the insurance effected by the EMPLOYER and the CONTRACTOR shall not include in the CONTRACT PRICE any cost for this insurance.
- 35.5 The CONTRACTOR shall be responsible for the payment of any deductible applicable in respect of insurances arranged by the EMPLOYER in terms of clause 35.1 above. Any amount which becomes payable as a result of a claim against the insurance policy effected by the EMPLOYER in terms of clause 35.1.1 shall be paid nett of any deductible to the EMPLOYER and shall be utilised towards making good any loss or damage forming the subject of the claim.
- 35.6 In the event of any occurrence which is likely to give rise to a claim under the insurances arranged by the EMPLOYER, the CONTRACTOR/SUB-CONTRACTORS shall -
- 35.6.1 in addition to any statutory requirements and/or other requirements contained in the GENERAL and SPECIAL CONDITIONS of CONTRACT immediately notify the ENGINEER and the EMPLOYER'S insurance brokers by telephone giving the circumstances, nature and an estimate of the loss or damage.
 - 35.6.2 immediately complete a claim advice form available from the EMPLOYER'S Administration Manager/Secretary's office and request him to submit it without delay to the EMPLOYER'S insurance broker.
 - 35.6.3 not negotiate the settlement of any claims with the insurers except through the EMPLOYER'S Administration Manager/Secretary which claims shall be paid out direct to the EMPLOYER.
- 35.7 The CONTRACTOR shall be free to effect at his own cost any additional insurance which he deems necessary in his own interest to cover loss or damage not insured in terms of the insurance effected by the EMPLOYER. The EMPLOYER however reserves the right to call for full information regarding any such additional insurance in order to ensure that unnecessary insurance has not been effected.
- 35.8 Where the CONTRACT involves manufacturing and/or fabrication of the CONTRACT WORKS at premises other than the SITE, the CONTRACTOR shall satisfy the EMPLOYER that such works and all materials for incorporation in the said works are adequately insured during manufacture and/or fabrication until delivered to SITE. In the event of the EMPLOYER having an insurable interest in such works during manufacture or fabrication then such interest shall be noted by endorsement to the relevant policies of insurance.
- 35.9 The CONTRACTOR shall give all notices and observe all conditions and requirements of all insurances applicable to this CONTRACT. Should the CONTRACTOR fail to comply with these provisions he shall be responsible for all expenses or losses incurred by the EMPLOYER as a result thereof.
- 35.10 Notwithstanding the provisions for insurance contained in this clause the risk, obligations, liabilities and responsibilities in the CONTRACT WORKS shall remain with the CONTRACTOR for the duration of the CONTRACT and as appropriate for the period of guarantee and/or warranty.

36. **SPECIAL RISKS**

- 36.1 Should during the currency of the CONTRACT there be an outbreak of war (whether war is declared or not) in any part of the world which in the opinion of the ENGINEER materially prejudicially affects the execution of the CONTRACT WORKS, the CONTRACTOR shall, unless and until the CONTRACT is terminated in terms of this clause, use his best endeavours to complete the execution of the CONTRACT WORKS, provided always that the EMPLOYER shall be entitled at any time after such outbreak of war to terminate the CONTRACT by giving notice in writing to the CONTRACTOR and upon such notice being given, the CONTRACT shall (except for the rights of the parties under this clause and the operation of clause 37 hereof) terminate but without prejudice to the rights of either party in respect of any antecedent breach or claim in terms of the CONTRACT.
- 36.2 Should the CONTRACT be terminated under the provisions of clause 36.1 hereof, the CONTRACTOR shall with all reasonable despatch remove from the SITE all CONSTRUCTIONAL PLANT and shall give similar facilities to his SUB-CONTRACTORS to do so.
- 36.3 Unless and until the CONTRACT is terminated as aforesaid, the CONTRACTOR shall be entitled to reimbursement of any increased cost of or incidental to the execution of the CONTRACT WORKS (other than such as may be attributable to the cost of reconstructing work condemned under the provisions of the CONTRACT), which is attributable to or consequent upon or the result of the said outbreak of war provided that the CONTRACTOR shall, as soon as any such increase of cost shall come to his knowledge, forthwith notify the ENGINEER thereof in writing.
- 36.4 Should a state of emergency be declared by the Government or riot, commotion or disorder outside the control of the CONTRACTOR occur which shall materially disrupt the supply of labour or materials for a continuous period of at least thirty days during the currency of the CONTRACT, the CONTRACTOR shall be entitled to terminate the CONTRACT by notice in writing to the EMPLOYER unless the EMPLOYER shall have agreed in writing to bear any resultant additional costs involved in continuing the execution of the CONTRACT WORKS.
- 36.5 Should the CONTRACT be terminated in terms of this clause the CONTRACTOR shall be paid by the EMPLOYER (insofar as such amounts or items shall not already have been covered by payments on account made to the CONTRACTOR) for all work executed prior to the date of termination at the rates and prices provided in the CONTRACT, where applicable or the value of work completed as determined by the ENGINEER and in addition -
- 36.5.1 the amounts payable in respect of any preliminary items to the extent that the work or service comprised therein has been carried out or performed and a proper proportion as certified by the ENGINEER of any such items or work or service which has been partially carried out or performed;
- 36.5.2 the cost of materials or goods reasonably ordered for the CONTRACT WORKS or TEMPORARY WORKS which shall have been delivered to the CONTRACTOR or in respect of which the CONTRACTOR is legally liable to accept delivery. Such materials or goods shall become the property of the EMPLOYER upon such payment being made by him;
- 36.5.3 a sum to be certified by the ENGINEER being the amount of any expenditure reasonably incurred by the CONTRACTOR in the expectation of completing the whole of the CONTRACT WORKS in so far as such expenditure shall not have been covered by the payments in clause 36.5.1 and 36.5.2 hereof;
- 36.5.4 the reasonable cost of removing CONSTRUCTIONAL PLANT from the SITE or such balance as is outstanding at the date of termination;
- 36.5.5 should the CONTRACT be terminated in terms of clause 36.1 hereof, any additional sum payable under the provisions of clause 36.3 hereof.

37. **SETTLEMENT OF DISPUTES**

37.1 Save as may otherwise be provided in the CONTRACT, should any dispute or difference of any kind whatsoever arise between the EMPLOYER (or the ENGINEER on his behalf) and the CONTRACTOR in respect of the CONTRACT or the execution of the CONTRACT WORKS (whether during the progress or after completion thereof or after the termination, abandonment or breach of the CONTRACT), it may be referred upon the demand of either the EMPLOYER or the CONTRACTOR without legal representation to a mediator agreed upon by them, or failing such agreement within 10 days of such referral being demanded, appointed at the request of either party by the Chairman for the time being of the Johannesburg Bar Council (or in his absence, by the Vice-Chairman for the time being thereof) for his opinion.

Each of the parties shall be represented by one of its directors, officers or employees who shall not be a practising attorney or advocate. The provisions of the Arbitration Act, 1965 (as amended, or any law enacted in its place) shall not apply thereto,

save that the mediator shall have the same powers as are conferred upon an arbitrator thereunder. The mediator shall within his absolute discretion determine whether the referral to him shall be made in the form of written or oral representations and otherwise upon the procedures applicable thereto, provided that he shall consult the parties and may be guided by their common reasonable desire in this regard. The mediator shall as soon as is reasonably possible express a written opinion on the matter (stating his reasons therefor) and furnish each of the EMPLOYER, the ENGINEER and the CONTRACTOR with a copy thereof by hand or by registered post. The charges of the mediator shall be borne and paid equally by the parties upon demand therefor by him. Any other costs incurred by either party in connection with the mediation shall be borne and paid by such party.

Should either the EMPLOYER or the CONTRACTOR be dissatisfied with or unwilling to accept such opinion, then that party shall, within 28 days after receiving such written opinion, give written notice to this effect to the other party, failing which such opinion shall be final and binding upon the parties, may be made an order of court at the instance of either party and shall be carried forthwith into effect.

37.2 Subject to clause 37.3.6.1 hereof, neither the EMPLOYER nor the CONTRACTOR shall commence legal proceedings in a court of law against the other in respect of any dispute or difference described in clause 37.1 hereof unless and until such dispute or difference has been referred to mediation in terms of clause 37.1 hereof and either -

37.2.1 a period of 28 days has elapsed since such party received the written opinion referred to therein and the written notice referred to in the last paragraph of clause 37.1 hereof has been duly given; or

37.2.2 the mediator has failed to furnish such opinion within 60 days after completion of the submission of the representations of both parties to him,

(whichever shall occur first) and furthermore in either case 10 days has elapsed since the party commencing such proceedings has given written notice to the other of its intention to do so.

37.3 Notwithstanding anything to the contrary herein contained -

37.3.1 the EMPLOYER and the CONTRACTOR may at any time refer any dispute or difference described in clause 37.1 hereof to arbitration upon such terms and conditions as may be agreed by them in writing;

37.3.2 the expressed opinion of the mediator shall not prejudice the rights of the parties in any manner whatsoever should they subsequently proceed to a court of law or to arbitration or like proceedings for determination;

37.3.3 no decision given by the ENGINEER shall disqualify him from giving evidence in any proceedings envisaged in clause 37.3.2 hereof, and the court or arbitrator in such proceedings shall have full power to open up, review and revise any decision, opinion, instruction, direction, certificate or valuation of the ENGINEER or the mediator described in clause 37.1 hereof unless the

CONTRACT expressly states that the decision in question of the ENGINEER shall be final and binding upon the parties;

37.3.4 the CONTRACTOR shall not, except with the written consent thereto of the ENGINEER, delay the execution of the CONTRACT WORKS by reason of any dispute or difference described in clause 37.1 hereof, and shall proceed diligently therewith, and shall unless otherwise ordered by a court of law or by an arbitrator, abide by the opinion of the mediator described in clause 37.1 hereof;

37.3.5 no dispute shall be referred to a court of law, or subject to clause 37.3.6.1 hereof, arbitration in terms hereof (except in the case of a dispute relating to the withholding by the EMPLOYER of any payment or the withholding of any portion of any retention monies to which the CONTRACTOR claims to be entitled or as to the exercise of the ENGINEER'S or the EMPLOYER'S powers under clause 30 hereof) until after the completion of the CONTRACT WORKS unless with the written consent of the EMPLOYER and the CONTRACTOR.

37.3.6 the provisions of this clause 37 -

37.3.6.1 shall not preclude any party from applying to a court of competent jurisdiction for an interdict or urgent relief;

37.3.6.2 shall continue to be binding upon the parties to the CONTRACT notwithstanding any cancellation or termination thereof, or the death, insolvency or liquidation of any party; and

37.3.6.3 are excluded from the rest of the CONTRACT.

38. **STATUTORY LAWS AND REGULATIONS**

38.1 The CONTRACTOR shall give all notices and pay all fees and at his own cost obtain all permits, licences and certificates required to be given, paid or obtained by any Act of Parliament, Ordinance or any Regulations or Bye-Laws of any local or other statutory authority in relation to the execution of the CONTRACT WORKS or of any TEMPORARY WORKS and by the rules and regulations of the EMPLOYER and all persons whose property or rights are or may be affected in any way by the CONTRACT WORKS or any TEMPORARY WORKS. The CONTRACTOR shall comply strictly with the provisions of any Act of Parliament, Ordinance and the Regulations or Bye-Laws of any local or other statutory authority which may be applicable to the CONTRACT WORKS or to any TEMPORARY WORKS or the execution thereof and with such safety standards and procedures, rules, regulations and instructions of the EMPLOYER and the ENGINEER and all persons whose property and/or rights may be affected in any way by the execution of the CONTRACT WORKS and shall keep the EMPLOYER indemnified against all penalties and liability of every kind for breach of or non-compliance with any such Act, Ordinance, Regulation or Bye-Law, safety standards and procedures, rules, regulations or instructions.

Furthermore, the CONTRACTOR in compliance with his obligations under this clause and before employing any persons for work on SITE, shall ascertain from the EMPLOYER the extent to which the CONTRACT WORKS shall be subject to the requirements of the Occupational Diseases in Mines and Works Act No. 78 of 1973, (as amended) or any law promulgated in its place and the Regulations promulgated in terms thereof. Thereafter, the CONTRACTOR in terms of such Act and Regulations, shall ensure that for the duration of the execution and construction until completion of the CONTRACT WORKS and expiry of the guarantee and/or warranty period all persons employed by him and his SUB-CONTRACTORS for work on SITE are medically examined and issued with the prescribed certificate of fitness.

All labourers persons employed by the CONTRACTOR for work on the SITE may by arrangement with the EMPLOYER be medically examined and issued with a certificate of fitness by the EMPLOYER'S own medical officer, free of charge.

In complying with this clause the CONTRACTOR shall take specific note of:-

- (a) The Minerals Act 1991
- (b) The Occupational Health and Safety Act 1993
- (c) The Mine Health and Safety Act 1996
- (d) The National Water Act 1998
- (e) The National Environmental Management Act 1998
- (f) The Labour Relations Act 1996
- (g) The Basic Conditions of Employment Act 1998

And all other legislation that may be relevant to the performance of its obligations in terms of this CONTRACT.

- 38.2 The EMPLOYER and/or ENGINEER shall at all times be entitled to satisfy themselves that all measures in respect of "Safety and Health" to be complied with by the CONTRACTOR and/or SUB-CONTRACTORS in terms of clause 38.1 hereof are complied with in all respects, without thereby relieving the CONTRACTOR and/or SUB CONTRACTOR from or limiting their liabilities and responsibilities in terms of the CONTRACT.

39. **SAFETY AND HEALTH**

- 39.1 Notwithstanding anything else contained in the CONTRACT, the prevention of accidents, safety performance and adherence to sound and safe work standards and practices are essential requirements of this CONTRACT and the CONTRACTOR shall during the execution of the CONTRACT WORKS co-operate with the EMPLOYER and the ENGINEER in all respects in the EMPLOYER'S quest to prevent accidents and improve its safety performance. In this respect the CONTRACTOR and all his employees shall, while on SITE or involved in the execution of the CONTRACT WORKS, strictly adhere to all applicable safety and health requirements of Statutes, Ordinances, Bye-Laws and Regulations as well as the EMPLOYER'S Codes of Practice, Policies, Procedures and Standards, including, but not limited to, the BHP Billiton HSEC Management Standards and the BHP Billiton Fatal Risks Protocols relating to safety and health applicable to the SITE and/or the CONTRACT WORKS. The CONTRACTOR shall ensure that it, its employees, representatives and/or agents comply with the duties and obligations placed on CONTRACTORS in terms of these documents. On request by the CONTRACTOR, the EMPLOYER shall make copies of the relevant Codes of Practice, Policies, Procedures and/or Standards available to the CONTRACTOR.
- 39.2 Without limiting its duties or liabilities in any way, whether such duties arise ex lege, ex contractu or by operation of any law, the CONTRACTOR shall comply with the duties set out herein.
- 39.3 In terms of the Mine Health and Safety Act No. 29 of 1996 ("MHSA") any CONTRACTOR who:
- 39.3.1 Designs, manufacturers, repairs, imports or supplies any articles for use at a mine, is required to ensure, as far as is reasonably practical:
 - (a) that the articles are safe and without risk to health and safety when used properly; and
 - (b) that any article complies with all of the requirements in terms of the MHSA.
 - 39.3.2 Erects or installs any article for use at a mine must ensure, as far as is reasonably practicable, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health and safety when used properly.
 - 39.3.3 Designs, manufactures, erects or installs any article for use at a mine must ensure, as far as is reasonably practicable, that ergonomic principles are considered and implemented during design, manufacture, erection or installation.
 - 39.3.4 Designs, or constructs a building or structure, including a temporary structure for use at the mine, must ensure, as far as is reasonably practicable, that the design or as per MHSA and the construction process is safe and without risk to health and safety when used properly.

39.3.5 Manufactures, imports or supplies any hazardous substance for use at a mine must:

- (a) ensure, as far as is reasonably practicable that the substance is safe and without risk to health and safety when used, handled, processed, stored or transported at a mine in accordance with the information provided by the CONTRACTOR;
- (b) provide adequate information about:
 - (i) the use of the substance;
 - (ii) the risks to health and safety associated with the substance;
 - (iii) any restriction or control on the use, transport and storage of the substance, including but not limited to exposure limits;
 - (iv) safety precautions to ensure that the substance is without risk to health or safety;
 - (v) the procedure to be followed in the case of an accident involving excessive exposure to the substance, or any other emergency involving the substance;
 - (vi) the disposal of used containers in which the substance has been stored and any waste involving that substance;
 - (vii) ensure that the information provided by the CONTRACTOR complies with the provisions of the Hazardous Substances Act, 15 of 1973.

39.3.6 In terms of the Occupational Health and Safety Act, 85 of 1993 ("OHS Act"), any CONTRACTOR:

39.3.6.1 who designs, manufacturers, imports, sells or supplies any article for use at work shall ensure, as far as is reasonably practicable, that the article is safe and without risk to health and properly used and that it complies with all prescribed requirements;

39.3.6.2 who erects or installs any article for use at work or on any premise shall ensure, as far as is reasonably practical, that nothing about the manner in which it is erected or installed makes it unsafe or creates a risk to health when properly used;

39.3.6.3 who manufactures, imports, sells or supplies any substance for use at work shall:

- a) ensure, as far as is reasonably practical, that the substance is safe and without risk to health when properly used; and
- b) take such steps as may be necessary to ensure that information is available with regard to the use of the substance at work, the risk to health and safety associated with that substance, the conditions necessary to ensure that the substance will be safe and without risks to health when properly used and the procedures to be followed in the case of an accident involving such substance.

39.4 The CONTRACTOR acknowledges that it knows and understands the duties set out above. No terms of this agreement shall be construed as an assumption by the EMPLOYER of any of the CONTRACTOR'S duties.

- 39.5 In terms of Section 37(2) of the OHSA (if applicable), the CONTRACTOR hereby agrees that the EMPLOYER is relieved of any and all of its liabilities in terms of Section 37(1) of the OHSA in respect of any acts or omissions of the CONTRACTOR, and the CONTRACTOR'S employees, agents or SUB-CONTRACTORS to the extent permitted by the OHSA.
- 39.6 The CONTRACTOR undertakes to comply with all of the provisions of the MHSA or the OHSA (whichever is applicable) in relation to persons employed by the EMPLOYER, and any other person (third parties).
- 39.7 The CONTRACTOR undertakes that it will comply with all of the provisions of the MHSA or the OHSA (whichever is applicable) in respect of its own employees and SUB-CONTRACTORS.
- 39.8 Without detracting from the generality of the above, and without limiting its liability in any way, the CONTRACTOR undertakes to ensure that it and its employees, agents and SUB-CONTRACTORS will at all times comply with any conditions, codes of practice or any other provisions of a like nature which may be specified by the EMPLOYER from time to time, or any instructions, orders, prohibition, exemption certificate etc., issued in terms of the MHSA or the OHSA.
- 39.9 All work performed and/or articles/substances supplied for and on behalf of the EMPLOYER or on or at the EMPLOYER'S premises, must be performed under close supervision and to ensure compliance with this agreement, and the MHSA or the OHSA (whichever is applicable). The CONTRACTOR warrants that the person so appointed is suitably qualified and trained to understand the risks and hazards associated with any work performed or articles/substances supplied by the CONTRACTOR, and to ensure compliance with this agreement, and the MHSA or the OHSA (whichever is applicable).
- 39.10 The CONTRACTOR undertakes that it, and its employees and/or SUB-CONTRACTORS, will comply with all reasonable instructions regarding health and safety which the EMPLOYER, or its nominee may from time to time stipulate.
- 39.11 The CONTRACTOR shall ensure that all the provisions in terms of the MHSA or the OHSA relating to personal protective equipment shall be complied with.
- 39.12 The CONTRACTOR shall ensure that the provisions of Section 21 of the MHSA or Section 10 of the OHSA (whichever is applicable) are complied with at all times. The CONTRACTOR warrants that no unsafe equipment, machinery articles or substances will be (used) "supplied" in the case of supplier by the CONTRACTOR, its employees or SUB-CONTRACTORS, whilst performing work and/or supplying articles/substances in terms of this agreement.
- 39.13 The CONTRACTOR warrants that its employees, and SUB-CONTRACTORS are suitably qualified, trained and experienced to render the services required in this contract.
- 39.14 Notwithstanding the provisions of this agreement, the EMPLOYER retains any interests in any investigation and/or enquiry conducted in terms of the MHSA or the OHSA or any other investigations which may be conducted in terms of the MHSA or the OHSA or any other investigations which may be conducted into any incident.
- 39.15 Where the CONTRACTOR, any of its employees, agents or SUB-CONTRACTORS, is found to be incompetent, or behaves in a manner which endangers, or potentially endangers the health or safety of any employees or other person, such person shall not be allowed to perform any work, and/or render services in terms of this agreement.
- 39.16 The CONTRACTOR is deemed to have knowledge of the EMPLOYER'S health and safety structures, and agrees to elect a health and safety representative ;to participate in such health and safety structures, if requested to do so by the EMPLOYER.
- 39.17 The CONTRACTOR shall ensure that any SUB-CONTRACTORS employed by it comply with the provisions set out in this clause.
- 39.18 The CONTRACTOR shall be deemed to have full knowledge of the work and/or articles/substances supplied in terms of this agreement, and the implications or potential implications on the health and/or safety of employees and other persons. The CONTRACTOR

shall, prior to conducting any work and/or supplying any articles/substance in terms of this agreement, conduct a risk assessment to the satisfaction of the EMPLOYER. The results of such risk assessment shall be provided, in writing, to the EMPLOYER prior to but not less than 7 days before the work and/or supply of articles/substances in terms of this agreement.

40. **DEDUCTIONS FROM CONTRACT PRICE**

40.1 The EMPLOYER shall, without prejudice to or limitation of any of its other rights or remedies, be entitled from time to time to set-off and deduct all amounts owed by the CONTRACTOR to the EMPLOYER in connection with the CONTRACT from any amounts due or owing by the EMPLOYER to the CONTRACTOR in connection with the CONTRACT.

41. **LAW TO APPLY**

41.1 The CONTRACT shall in all respects be construed in accordance with the Law of the Republic of South Africa and any difference which may arise between the EMPLOYER and the CONTRACTOR in regard to the CONTRACT shall be resolved in the Republic of South Africa.

42. **INVOICING AND PAYMENT**

42.1 Waybills or such other documents as may be required by the CONTRACT shall accompany every delivery and shall include such information as may be specified in the CONTRACT.

42.2 VAT invoices, bearing the CONTRACT number, Delivery Instruction number and such information as may be specified in the CONTRACT, shall be forwarded to the EMPLOYER as early as possible after rendering the Services, to reach the EMPLOYER by not later than the 25th of the month in order to qualify for payment by the end of the following month. Payment of invoices received after the 25th of a month may be deferred without prejudice to the EMPLOYER's right to deduct any settlement discount stipulated in the CONTRACT.

42.3 Notwithstanding that provision may be made in the CONTRACT for rendering of the Services to be effected by the CONTRACTOR's sub-contractor or representatives, invoices shall nevertheless be forwarded in accordance with clause 42.2 above.

43.4 Statements, in duplicate, recording all transactions up to the 25th of the month, shall be forwarded so as to reach the EMPLOYER by not later than the 10th of the following month.

43.5 Unless otherwise stipulated in the CONTRACT, all Services rendered and in respect of which VAT invoices have been properly submitted, shall be paid for by the end of the following month.

43. **CERTIFICATES OF COMPLETION OF WORK**

43.1 As soon as, in the opinion of the ENGINEER, the CONTRACT WORKS shall have been completed for all practical purposes and shall have satisfactorily passed any final test which may be prescribed by the CONTRACT, the ENGINEER shall, on receiving from the CONTRACTOR a written undertaking acceptable to the ENGINEER to finish any outstanding work within such reasonable time during the period of guarantee and/or warranty as the ENGINEER shall specify, issue a "Certificate of Completion" in respect of the CONTRACT WORKS and the period of guarantee and/or warranty of the CONTRACT WORKS shall commence from the date of such Certificate, provided that the ENGINEER may issue such a Certificate with respect to any part of the CONTRACT WORKS before the completion of the whole of the CONTRACT WORKS and shall, upon the written application of the CONTRACTOR, issue such Certificate with respect to any substantial part of the CONTRACT WORKS which has been both completed to the satisfaction of the ENGINEER and occupied or used by the EMPLOYER.

43.2 When any such Certificate is issued in respect of a part of the CONTRACT WORKS such part shall be considered as completed and the period of guarantee and/or warranty of such part shall commence from the date of such Certificate, provided that a "Certificate of Completion" issued

in accordance with the foregoing provisions in respect of any part of the CONTRACT WORKS occupied and used as aforesaid shall not be deemed to certify completion of any ground or surfaces requiring reinstatement, unless such Certificate shall expressly so state.

43.3 The CONTRACT shall not be considered as completed until a "Final Certificate" shall have been signed by the ENGINEER and delivered to the CONTRACTOR stating that the CONTRACT WORKS have been completed and (where specified) maintained to his satisfaction. The "Final Certificate" shall be issued by the ENGINEER on the expiration of the period of guarantee and/or warranty, provided that the issue of the "Final Certificate" shall not be a condition precedent to payment to the CONTRACTOR of the retention money in accordance with clause 42 where such retention is applicable.

43.4 Notwithstanding the issue of the Final Certificate, the CONTRACTOR and the EMPLOYER shall remain liable for the fulfilment of any obligation incurred under the provisions of the CONTRACT prior to the issue of the Final Certificate which remains unperformed at the time such Certificate is issued, and for the purposes of determining the nature and extent of any such obligations the CONTRACT shall be deemed to remain in force between the parties thereto.

44. **SURETY FOR DUE PERFORMANCE**

44.1 If required by the EMPLOYER, the CONTRACTOR shall, to the satisfaction of the ENGINEER, provide a suretyship or suretyships issued by a banking or insurance institution(s) registered in the Republic of South Africa approved of by the ENGINEER for the due and proper performance by the CONTRACTOR of all his obligations in terms of the CONTRACT.

44.2 Such suretyship(s) -

44.2.1 shall continue to be binding notwithstanding any variations, alterations or extensions of time in respect of the CONTRACT which may be made, given, conceded or agreed in terms of the CONTRACT;

44.2.2 shall be in the form annexed to the CONTRACT; and

44.2.3 shall remain valid until 30 days have elapsed after the issue of the "Certificate of Completion" by the ENGINEER in terms of the CONTRACT, and the cost of procuring, preparing, completing and stamping such instrument(s) shall be borne and paid by the CONTRACTOR.

44.3 Should the CONTRACTOR fail to furnish the suretyship(s) to be furnished in terms of clause 41.1 hereof within 14 (fourteen) days after the CONTRACT has been entered into and further fail to furnish same within 7 (seven) days after receiving written notice by or on behalf of the EMPLOYER requiring the same to be furnished, the EMPLOYER may at his option and without prejudice to any other rights or remedies he may have by reason thereof, terminate the CONTRACT forthwith by notice in writing to the CONTRACTOR, and the EMPLOYER shall thereupon not be liable for any claim by the CONTRACTOR in respect of anything then already done or furnished, or in respect of any other matter or thing whatsoever in connection with the CONTRACT, but the EMPLOYER shall be entitled to be reimbursed by the CONTRACTOR for all expenses properly incurred by the EMPLOYER in obtaining new tenders.

45. **URGENT REPAIRS**

45.1 Should, by reason of any accident or failure or other event occurring to or in connection with the CONTRACT WORKS or any part thereof, either during the execution of the CONTRACT WORKS or during the guarantee and/or warranty period any remedial or other work or repair in the opinion of the ENGINEER be urgently necessary and the ENGINEER is satisfied that the CONTRACTOR after having been instructed accordingly in writing is unable or unwilling at once to do such work or repair, the EMPLOYER may by his own or other workmen do such work or repair as the ENGINEER may consider necessary. Should the work or repair so done by the EMPLOYER be work which in the opinion of the ENGINEER, the CONTRACTOR was liable to do at his own expense under the CONTRACT, all costs and charges properly incurred by the EMPLOYER in so doing shall on demand be paid by the CONTRACTOR to the EMPLOYER or

may be deducted by the EMPLOYER from any monies due or which may become due to the CONTRACTOR.

46. **LABOUR RETURNS**

46.1 The CONTRACTOR shall, if required by the ENGINEER, deliver to the ENGINEER or at his office returns in such form and at such intervals as the ENGINEER may prescribe, showing in detail the numbers of the several classes of labour from time to time employed by the CONTRACTOR on the SITE and such information relating to CONSTRUCTIONAL PLANT as the ENGINEER may require.

47. **BOREHOLES, FOSSILS AND EXCAVATION**

47.1 Should at any time during the execution of the CONTRACT WORKS the ENGINEER require the CONTRACTOR to make boreholes or to carry out exploratory excavation, such requirement shall be ordered in writing and shall be deemed to be an addition ordered in terms of clause 6 hereof unless a provisional sum in respect of such anticipated work shall have been included in the schedule of quantities.

47.2 All fossils, coins, articles of value or antiquity and structures and other remains or things of geological or archaeological interest discovered on the SITE shall, as between the EMPLOYER and the CONTRACTOR, be deemed to be the absolute property of the EMPLOYER and the CONTRACTOR shall take reasonable precautions to prevent his workmen or any other persons from removing or damaging any such article or thing and shall immediately upon discovery thereof and before removal, acquaint the ENGINEER of such discovery and carry out at the expense of the EMPLOYER the ENGINEER'S orders as to the disposal of the same.

48. **NIGHT, SUNDAY AND HOLIDAY WORK**

48.1 None of the permanent works shall be carried on outside the normal working hours on Monday to Saturday of any week or on any special non-working days unless-

48.1.1 the ENGINEER'S permission in writing is obtained, or

48.1.2 provision is specifically made for it in the CONTRACT, or

48.1.3 it is customary and has been agreed by the ENGINEER to carry out the work in question by rotary or double shifts, or

48.1.4 work is unavoidable or absolutely necessary for the saving of life or property or for the safety of the CONTRACT WORKS, in which case the CONTRACTOR shall immediately advise the ENGINEER.

48.2 Sufficient notice shall be given to the ENGINEER whenever the CONTRACTOR proposes to carry on work outside normal working hours in accordance with this clause, due regard being had to the circumstances.

49. **ACCIDENTS TO BE REPORTED**

49.1 In addition to any statutory obligations, the CONTRACTOR shall report every accident to the ENGINEER immediately, whether such accident is in respect of damage to the CONTRACT WORKS or to persons, property or things. The report shall be in writing and shall contain full details of the occurrence. The ENGINEER shall have the right to make all and any enquiries either on the SITE of the CONTRACT WORKS or elsewhere as to the cause and results of any such accident and the CONTRACTOR shall give the ENGINEER full facilities for carrying out such enquiries.

50. **EMPLOYEES ILLNESS OR INJURY**

50.1 Should the CONTRACTOR'S employees become ill or be injured on the SITE through any cause whatsoever, including assault, the EMPLOYER shall in no way be responsible or liable and reserves the right to arrange for such medical, surgical and hospital services as he considers necessary and the CONTRACTOR undertakes and agrees to pay all expenses thereby incurred. Should any person engaged by the CONTRACTOR on the SITE contract any illness or disease during the course of the CONTRACT, the CONTRACTOR shall notify the EMPLOYER immediately and the EMPLOYER shall have the right to detain such person in hospital at the CONTRACTOR'S expense.

51. **PROPRIETARY PRODUCTS**

51.1 Where the CONTRACTOR takes delivery of, handles, stores, uses, applies and/or fixes any proprietary product, he shall do so in strict accordance with the manufacturer's instructions or as directed by and after consultation with the manufacturer's authorised representative.

52. **BLASTING AND USE OF EXPLOSIVES**

52.1 The CONTRACTOR shall not carry out any blasting operations without the prior written authority of the ENGINEER and any blasting shall be done in strict conformity with the latest Government Laws and Regulations.

52.2 The CONTRACTOR hereby indemnifies the EMPLOYER against any claims for damage to property or for death of or injury to persons on or in the proximity of the SITE from any cause whatsoever arising out of the use of explosives.

52.3 The CONTRACTOR shall be held solely responsible for whatever may occur through the use of explosives.

52.4 No claims for extras whatsoever will be entertained and no extension of time will be allowed should the CONTRACTOR be prohibited by order of the Police, a court of law or other competent authority from using explosives, pneumatic drills or other noisy or dangerous means of executing the CONTRACT WORKS.

53. **PACKAGING**

53.1 The CONTRACTOR shall ensure that components and auxiliary equipment are properly packaged or crated appropriate to the form of transport to ensure arrival at their destination in an acceptable state and where applicable for standing in coastal weather conditions. The CONTRACTOR shall be liable for damage or expense due to faulty, or lack of, packaging.

54. **STANDING TIME**

54.1 Standing time will only be considered when work is suspended by the written order of the ENGINEER unless such suspension is otherwise provided for in the CONTRACT or necessary for proper execution of the works or for the safety of the works or any part thereof or if services to be provided by the EMPLOYER are not made available or are disrupted.

The CONTRACTOR shall not be entitled to recover any standing costs unless they provide full details of the resources affected in writing to the ENGINEER within twenty-four hours of the ENGINEER'S order or the onset of the service disruption.

54.2 The CONTRACTOR shall in addition, not be entitled to any such standing time claim, unless the CONTRACTOR has submitted to the ENGINEER, his fully substantiated and evaluated claim, in writing, within 28 (twenty eight) days of the occurrence.

54.3 Standing time will also not be considered when the work is suspended as a result of inclement weather or due to any default or breach of CONTRACT on the part of the CONTRACTOR.

Standing time for service disruption will be calculated from the receipt of written notification to the ENGINEER.

- 54.4 Standing time of less than five hours for Constructional Plant and labour shall in all cases be for the CONTRACTOR'S account but thereafter the full standing time in hours excluding the first five hours of each occurrence, shall be for the EMPLOYER'S account subject to such standing time being fully substantiated and contractually valid.

55. **LOADING, TRANSLOADING AND UNLOADING**

55.1 The CONTRACTOR shall make his own arrangements for the loading, transloading and unloading of all goods to be transported and unless otherwise specified in the CONTRACT, all goods will be at the CONTRACTOR's risk from the time of loading until the goods shall have been off-loaded and taken receipt by the EMPLOYER.

55.2 The EMPLOYER may, in its entire discretion, assist the CONTRACTOR by making unskilled labour available for loading and unloading operations, but the EMPLOYER shall not thereby assume any responsibility whatsoever for any loss or damage caused to any of the goods during such loading and unloading operations.

56. **PRICE ADJUSTMENT**

56.1 No Contract Price adjustment shall be effective until accepted in writing by the Head of Procurement. Claims for Contract Price adjustments will be considered, without any obligation to agree thereto, provided that:

56.1.1 Such claims are submitted in writing to the Head of Procurement at least sixty (60) days prior to the proposed date of adjustment by the CONTRACTOR, supported by such documentary evidence as may be required by the EMPLOYER, it being clearly understood that the sixty(60) days period will only commence when the required documentary evidence has been submitted to the satisfaction of the Head of Procurement;

56.1.2 The EMPLOYER shall have the right itself or through its duly authorised agents to audit the books of account of the CONTRACTOR in order to consider such Contract Price adjustment and the CONTRACTOR agrees to furnish all such information as may be required for this purpose;

56.1.3 In the event of a Contract Price adjustment being agreed to by the Head of Procurement, no such adjustment shall be applied by the CONTRACTOR to any Delivery Instruction that was given prior to the effective date of adjustment.

56.2 Should the CONTRACTOR request a Contract Price increase, the EMPLOYER shall be entitled to call for tenders to supply the Services concerned and should more favourable prices be obtained upon terms and conditions (other than the Contract Price) similar to those contained in the CONTRACT, the Purchaser shall be entitled, but not obliged, to terminate the Contract by giving thirty (30) days written notice thereof to the CONTRACTOR. Neither party shall have any claim of whatsoever nature against the other by reason of such termination.

56.3 Notwithstanding anything to the contrary contained in the CONTRACT, final acceptance of any claim by the CONTRACTOR for a Contract Price adjustment shall be in the sole discretion of the Head of Procurement. Should the Head of Procurement and the Contractor fail to reach agreement on any adjustment of the Contract Price, the EMPLOYER shall be entitled, but not obliged, to terminate the Contract after giving thirty (30) days written notice to the CONTRACTOR of its intention to do so. Neither party shall have any claim of whatsoever nature against the other by reason of such termination.

56.4 Subject thereto that such claim is submitted to the CONTRACTOR in writing at least sixty (60) days prior to the proposed date of adjustment, the Purchaser shall have the right, at any time, to claim a Contract Price reduction from the CONTRACTOR. Should the parties fail to reach an agreement for a Contract Price reduction, the Purchaser shall be entitled, but not obliged, to

terminate the CONTRACT by giving thirty (30) days written notice thereof to the CONTRACTOR. Neither party shall have any claim of whatsoever nature against the other by reason of such termination.

56.5 Should the CONTRACT be terminated in terms of either clause 56.2, 56.3 or 56.4, the CONTRACTOR shall be obliged to continue rendering the Services during the thirty (30) day notice period.

57. **MODIFICATION OF CONTRACT**

57.1 No modification, variation or waiver of any provision of the CONTRACT, or consent to any departure there from, shall in any way be of any force or effect unless confirmed in writing by the Head of Procurement and then such modification, variation, waiver and consent shall be effective only in the specific instance and for the purpose and to the extent for which it is made or given.

57.2 Should the CONTRACT or any modification(s) thereof not be acceptable to the CONTRACTOR, the CONTRACTOR shall not commence with the execution thereof and shall, within seven (7) days of receipt thereof, advise the Head of Procurement to such effect by letter, Telefax (confirmed by dispatch of the original thereof by post) or by returning same to the Head of Procurement.

58. **USE OF THE NAME BHP BILLITON**

58.1 In signing this CONTRACT the SELLER / CONTRACTOR specifically acknowledges and agrees that it will not use the name of BHP Billiton, Ingwe Collieries Limited or any of its operating mines or other entities in any publication, media release of whatsoever nature without written permission first having been obtained from the Manager: Procurement.

59. **BLACK ECONOMIC EMPOWERMENT**

59.1 The CONTRACTOR undertakes to promote Black Economic Empowerment ("BEE") initiatives subject to the EMPLOYER'S satisfaction having regard to the EMPLOYER'S definition of Black Economic Empowerment as set out below. The CONTRACTOR shall keep the EMPLOYER informed on a regular basis of the progress being made in regard to the BEE initiatives and shall have a BEE partner in place within 12 months of the commencement date of this contract. Failure to comply with the requirements of this clause shall constitute a material breach of the contract and the EMPLOYER shall be entitled to act in terms of clause 30 of the General Terms and Conditions of Contract.

59.1.1 The accreditation and classifications in terms of a BEE status will only be accepted if the South African Mining Preferential Procurement Forum (SAMPPF) conducts the assessment. (The vendor must pay the assessment costs)

59.1.2 The contact person at SAMPPF is Herman Kirstein Phone: +27(0)12 993-4312 / Fax: +27(0)12 998-1703 assessed at your own cost

59.2 **CLASSIFICATIONS IN THE ACCREDITATION PROCESS**

Specific definitions and classifications will be applied during the accreditation processes contained in the Mining Charter and BEE Commission report and every member will incorporate some, or all of these definitions and classifications into their procurement policies and/or procedures.

59.2.1 **BEE Core Components**

The core elements of BEE is:

- Direct empowerment through ownership and control of enterprises and assets.
- Human resource development and employment equity.
- Indirect empowerment through preferential procurement and enterprise development.
- CSI
- HDSA

59.2.2 HDSA Supplier

Empowering supplier

A supplying company that has embarked on a measurable Affirmative Procurement and BEE Programme of its own, i.e. in terms of employment equity, skills transfer and buying from BEE's.

Black influenced

A "Black influenced company/joint venture/partnership" is one that is more than 5% and up to 25% owned and managed by Blacks. Ownership refers to economic interest.

Black empowered

A "Black empowered company/joint venture/partnership" is one that is at more than 25% and up to 50% owned and managed by Blacks. Ownership refers to economic interest.

Black owned

A "Black company/joint venture/partnership" is one that is more than 50.1% owned and managed by Blacks. Ownership refers to economic interest.

Engendered

An "Engendered owned company" is one that is at least 30% owned and managed by women. Ownership refers to economic interest. Management refers to executive directors, senior and middle management.