

**"DCT GDAŃSK" SPÓŁKA AKCYJNA**

**- and –**

**[CONTRACTOR]**

**eRTG CRANE SUPPLY CONTRACT**

**PORT OF GDAŃSK**

**DATED [ ]**

## TABLE OF CONTENTS

<b>CONTRACT AGREEMENT</b>		7
<b>GENERAL CONDITIONS</b>		10
1.1	DEFINITIONS	10
1.2	INTERPRETATION	15
1.3	COMMUNICATIONS	16
1.4	LAW AND LANGUAGE	16
1.5	PRIORITY OF DOCUMENTS	16
1.6	[NOT USED]	17
1.7	ASSIGNMENT	17
1.8	CARE AND SUPPLY OF DOCUMENTS	17
1.9	ERRORS IN THE EMPLOYER'S REQUIREMENTS	17
1.10	EMPLOYER'S USE OF CONTRACTOR'S DOCUMENTS	18
1.11	CONTRACTOR'S USE OF EMPLOYER'S DOCUMENTS	19
1.12	CONFIDENTIAL DETAILS	20
1.13	COMPLIANCE WITH LAWS	20
1.14	JOINT SEVERAL LIABILITY	20
1.15	ENTIRE AGREEMENT	20
<b>THE EMPLOYER</b>		21
2.1	RIGHT OF ACCESS TO THE SITE	21
2.2	PERMITS, LICENCES OR APPROVALS	21
2.3	EMPLOYER'S PERSONNEL	22
2.4	EMPLOYER'S FINANCIAL ARRANGEMENTS	22
2.5	EMPLOYER'S CLAIMS	22
<b>THE ENGINEER</b>		22
3.1	ENGINEER'S DUTIES AND AUTHORITY	22
3.2	DELEGATION BY THE ENGINEER	23
3.3	INSTRUCTIONS OF THE ENGINEER	24
3.4	REPLACEMENT OF THE ENGINEER	24
3.5	DETERMINATIONS	24
<b>THE CONTRACTOR</b>		24
4.1	CONTRACTOR'S GENERAL OBLIGATIONS	24
4.2	PERFORMANCE SECURITY, INTERIM BONDS AND DEFECTS LIABILITY SECURITY	25
4.3	CONTRACTOR'S REPRESENTATIVE	27
4.4	SUBCONTRACTORS	27
4.5	NOMINATED SUBCONTRACTORS	28
4.6	CO-OPERATION	28

4.7	[NOT USED]	29
4.8	SAFETY PROCEDURES	29
4.9	QUALITY ASSURANCE	29
4.10	DATA	29
4.11	SUFFICIENCY OF THE ACCEPTED CONTRACT AMOUNT	30
4.12 - 4.15	[NOT USED]	30
4.16	TRANSPORT OF EQUIPMENT AND GOODS	30
4.17	CONTRACTOR'S EQUIPMENT	31
4.18 - 4.19	[NOT USED]	31
4.20	EMPLOYER'S EQUIPMENT AND FREE-ISSUE MATERIAL	31
4.21	PROGRESS REPORTS AND CERTIFICATES	32
4.22	CO-OPERATION WITH LENDERS	33
4.23	[NOT USED].	33
4.24	MITIGATION OF COSTS AND DELAY	33
<b>DESIGN</b>		34
5.1	GENERAL DESIGN OBLIGATIONS	34
5.1A	EMPLOYER'S OTHER CONTRACTORS	34
5.2	CONTRACTOR'S DOCUMENTS	34
5.3	CONTRACTOR'S UNDERTAKING	36
5.4	TECHNICAL STANDARDS AND REGULATIONS	36
5.5	TRAINING	36
5.6	AS-BUILT DOCUMENTS	36
5.7	TECHNICAL DOCUMENTATION	37
5.8	DESIGN ERROR	37
<b>STAFF AND LABOUR</b>		37
6.1	ENGAGEMENT OF STAFF AND LABOUR	37
6.2	[NOT USED]	37
6.3	PERSONS IN THE SERVICE OF EMPLOYER	37
6.4	LABOUR LAWS	37
6.5	[NOT USED]	38
6.6	FACILITIES FOR STAFF AND LABOUR	38
6.7	HEALTH AND SAFETY	38
6.8	CONTRACTOR'S SUPERINTENDENCE	38
6.9	CONTRACTOR'S PERSONNEL	39
6.10	RECORDS OF CONTRACTOR'S PERSONNEL AND EQUIPMENT	39
6.11	DISORDERLY CONDUCT	39
<b>PLANT, MATERIALS AND WORKMANSHIP</b>		39
7.1	MANNER OF EXECUTION	39

7.2	SAMPLES	39
7.3	INSPECTION	40
7.4	TESTING	40
7.5	REJECTION	41
7.6	REMEDIAL WORK	41
7.7	OWNERSHIP OF EQUIPMENT, PLANT AND MATERIALS	42
7.8	[NOT USED]	42
<b>COMMENCEMENT, DELAYS AND SUSPENSION</b>		42
8.1	COMMENCEMENT OF WORK	42
8.2	TIME FOR COMPLETION	42
8.3	[NOT USED]	43
8.4	EXTENSION OF TIME FOR COMPLETION	43
8.5	[NOT USED]	43
8.6	[NOT USED]	43
8.7	DELAY DAMAGES	44
8.8	[NOT USED]	44
8.9	CONSEQUENCES OF SUSPENSION	44
8.10	PAYMENT FOR PLANT AND MATERIALS IN EVENT OF SUSPENSION	44
8.11	PROLONGED SUSPENSION	45
<b>TESTS ON COMPLETION</b>		45
9.1	CONTRACTOR'S OBLIGATIONS	45
9.2	DELAYED TESTS	45
9.3	RETESTING	46
9.4	FAILURE TO PASS TESTS ON COMPLETION	46
<b>EMPLOYER'S TAKING OVER</b>		46
10.1	TAKING OVER OF THE WORKS AND SECTIONS	46
10.1A	OWNERSHIP OF THE EQUIPMENT AND THE OPERATIONAL PERMIT	47
10.2	TAKING OVER OF PARTS OF THE WORKS	47
10.3	INTERFERENCE WITH TESTS ON COMPLETION	48
10.4	SURFACES REQUIRING REINSTATEMENT	48
<b>DEFECTS LIABILITY</b>		48
11.A1	CONTRACTOR'S WARRANTY	48
11.A2	DEFECTS IN THE WORKS	49
11.B	CONTRACTOR'S LIABILITY FOR DAMAGES	49
11.1	COMPLETION OF WORK AND REMEDYING DEFECTS	50
11.2	COST OF REMEDYING DEFECTS	50
11.3	EXTENSION OF WARRANTY PERIOD	50
11.4	FAILURE TO REMEDY DEFECTS	51

11.5	REMOVAL OF DEFECTIVE WORK	51
11.6	FURTHER TESTS	51
11.7	RIGHT OF ACCESS	52
11.8	CONTRACTOR TO SEARCH	52
11.9	PERFORMANCE CERTIFICATE	52
11.10	UNFULFILLED OBLIGATIONS	52
11.11	CLEARANCE OF SITE	53
11.12	[NOT USED]	53
<b>TEST AFTER COMPLETION</b>		53
12.1 - 12.4	[NOT USED]	53
<b>VARIATIONS AND ADJUSTMENTS</b>		53
13.1	RIGHT TO VARY	53
13.2	VALUE ENGINEERING	53
13.3	VARIATION PROCEDURE	54
13.4	PAYMENT IN APPLICABLE CURRENCIES	54
13.5	ADDITIONAL WORKS	54
13.6	DAYWORK	54
13.7	ADJUSTMENTS FOR CHANGES IN LEGISLATION	54
13.8	NO DOUBLE RECOVERY	55
<b>CONTRACT PRICE AND PAYMENT</b>		55
14.1	CONTRACT PRICE	55
14.2	[NOT USED]	55
14.3	APPLICATION FOR INTERIM PAYMENT CERTIFICATES	55
14.4	SCHEDULE OF PAYMENTS	56
14.5	[NOT USED]	56
14.6	ISSUE OF INTERIM PAYMENT CERTIFICATES	56
14.7	PAYMENT	57
14.8	DELAYED PAYMENT	57
14.9	[NOT USED]	57
14.10	STATEMENT AT COMPLETION	57
14.11	APPLICATION FOR FINAL PAYMENT CERTIFICATE	58
14.12	DISCHARGE	58
14.13	ISSUE OF FINAL PAYMENT CERTIFICATE	58
14.14	CESSATION OF EMPLOYER'S LIABILITY	59
14.15	CURRENCIES OF PAYMENT	59
<b>TERMINATION BY EMPLOYER</b>		59
15.1	NOTICE TO CORRECT	59
15.2	TERMINATION BY EMPLOYER	59

15.3	VALUATION AT DATE OF TERMINATION	61
15.4	PAYMENT AFTER TERMINATION	61
15.5	EMPLOYER'S ENTITLEMENT TO TERMINATION	61
<b>TERMINATION BY CONTRACTOR</b>		62
16.1	TERMINATION BY CONTRACTOR	62
16.2	CESSATION OF WORK AND REMOVAL OF CONTRACTOR'S EQUIPMENT	62
16.3	PAYMENT ON TERMINATION	62
<b>RISK AND RESPONSIBILITY</b>		62
17.1	INDEMNITIES	62
17.2	CONTRACTOR'S CARE OF THE WORKS	63
17.3	EMPLOYER'S RISKS	63
17.4	CONSEQUENCES OF EMPLOYER'S RISKS	64
17.5	INTELLECTUAL AND INDUSTRIAL PROPERTY RIGHTS	64
17.6	LIMITATION OF LIABILITY	65
<b>INSURANCE</b>		65
18.1	GENERAL OBLIGATIONS AND REQUIREMENTS	65
18.2	INSURANCES TO BE MAINTAINED BY THE EMPLOYER	66
18.3	INSURANCES TO BE MAINTAINED BY THE CONTRACTOR	66
18.4	ACTS OR OMISSIONS	67
<b>FORCE MAJEURE</b>		67
19.1	DEFINITION OF FORCE MAJEURE	67
19.2	NOTICE OF FORCE MAJEURE	68
19.3	DUTY TO MINIMISE DELAY	68
19.4	CONSEQUENCES OF FORCE MAJEURE	68
19.5	FORCE MAJEURE AFFECTING SUB-CONTRACTOR	69
19.6	OPTIONAL TERMINATION, PAYMENT AND RELEASE	69
19.7	[NOT USED]	70
<b>CLAIMS AND DISPUTES</b>		70
20.1	CONTRACTOR'S CLAIMS	70
20.2	SETTLEMENT OF DISPUTES	71
<b>CONFIDENTIALITY</b>		71
<b>SPARE PARTS</b>		71
<b>ANTI-CORRUPTION</b>		72
<b>PARTICULAR CONDITIONS</b>		73
ATTACHMENT A FORM OF PERFORMANCE SECURITY		76
ATTACHMENT B FORM OF INTERIM BOND		81
ATTACHMENT C PAYMENT SCHEDULE		85
ATTACHMENT D EMPLOYER'S REQUIREMENTS (TECHNICAL SPECIFICATION)		86

<b>ATTACHMENT E TEST ON COMPLETION</b>	<b>87</b>
<b>ATTACHMENT F TENDER</b>	<b>90</b>
<b>ATTACHMENT G LENDER DIRECT AGREEMENT</b>	<b>91</b>
<b>ATTACHMENT H EMPLOYER'S SAFETY PROCEDURES</b>	<b>92</b>

## CONTRACT AGREEMENT

This Contract Agreement has been made on [date] in [place]

### BETWEEN

- (1) **"DCT Gdańsk" S.A.** with its registered office in Gdańsk, address: ul. Kontenerowa 7, 80-601 Gdańsk, recorded in the business register kept by the District Court for Gdańsk-Północ in Gdańsk, Commercial Division VII of the National Court Register under number KRS 31077, share capital: PLN 65,500,000; NIP 2040000183; Regon 192967316, represented by:

and

- (2) **[Contractor]**

### WHEREAS

- (A) The Contractor is experienced in the design, manufacture, assembly, installation and commissioning of fully electrical rubber tyre gantry cranes.
- (B) The Employer wishes to purchase equipment and to procure the services of the Contractor in designing, assembling, and installing fifteen fully electrical rubber tyre gantry cranes at the Gdańsk Port, Poland.
- (C) The parties have agreed that the Contractor will supply, and the Employer will pay for, the Equipment (as defined in this Contract) and the Services (as defined in this Contract) on the terms and conditions set out in this Contract.

### IT IS AGREED:

1. In this Contract Agreement words and expressions shall have the same meanings as are respectively assigned to them in the Conditions of Contract hereinafter referred to.
2. The documents set out in sub-clause 1.5 of the Conditions shall be deemed to form and be read and construed as part of the Contract.
3. Subject to clause 5 of this Contract Agreement, in consideration of the payment to be made by the Employer to the Contractor as hereinafter mentioned, the Contractor hereby covenants with the Employer to design, execute and complete the Works and remedy any defects therein, in conformity with the provisions of the Contract.
4. The Employer hereby covenants to pay the Contractor, in consideration of the design, execution and completion of the Works and the remedying of defects therein, the fixed lump sum Contract Price at the times and in the manner prescribed by the Contract.
5. With the exception of sub-clauses 1.1 [*Definitions*], 1.2 [*Interpretation*], 1.4 [*Law and Language*], 4.2 [*Performance Security, Interim Bonds and Defects Liability Security*], 20 [*Claims and Disputes*], and 21 [*Confidentiality*] of the Conditions of Contract, the rights and obligations of the Parties under the Contract are conditional on satisfaction or waiver of the Condition Precedent and on the issue of a Notice to Proceed in relation to the Works. The Notice to Proceed may be issued by the Employer on or after the date on which the Condition Precedent has been satisfied or waived. In this Clause "Condition



Precedent" means delivery by the Contractor to the Employer of originals of the Performance Security, Interim Bond (in relation to the first payment in accordance with Attachment C to the General Conditions) and a Lender Direct Agreement duly executed by all Parties thereto (except the Employer and Lenders). If the Notice to Proceed has not been issued by 30 April 2015, either Party may by written notice to the other Party terminate the Contract (*odstąpić od*) by 31 May 2015 with no compensation being payable. The termination of the Contract shall be effective upon the receipt of the notice.

**In Witness** whereof the parties hereto have caused this Contract Agreement to be executed the day and year first written in accordance with their respective laws.

**EXECUTED** by DCT Gdańsk Spółka Akcyjna

acting by

**EXECUTED** by [ ]

acting by

## CONDITIONS OF CONTRACT

### GENERAL CONDITIONS

#### 1.1 Definitions

In the Conditions of Contract ("these Conditions"), which include Particular Conditions and these General Conditions, the following words and expressions shall have the meanings stated. Words indicating persons or parties include corporations and other legal entities, except where the context requires otherwise.

##### 1.1.1 The Contract

1.1.1.1 **"Appendix to Tender"** means the completed pages entitled appendix to tender which are attached to the Particular Conditions.

1.1.1.2 **"Contract"** means the Contract Agreement, the Letter of Tender, these Conditions, the Employer's Requirements, the Schedules, the Contractor's Specification and any further documents (if any) which are listed in these Conditions.

1.1.1.3 **"Contract Agreement"** means the contract agreement executed by the parties and dated [to insert].

1.1.1.4 **"Contractor's Specification"** means the Contractor's technical specification obtained by the Employer in the Tender.

1.1.1.5 **"Employer's Requirements"** means the "Rubber Tyre Gantry Crane. FULLY ELECTRICAL. Employer's Requirements. Technical Specifications", as set out in Attachment D to the Particular Conditions.

1.1.1.6 **"Letter of Tender"** means the document entitled letter of tender or similar, which was completed by the Contractor and includes the signed offer to the Employer for the Works.

1.1.1.7 **"Notice to Proceed"** means a notice to proceed issued by the Employer to the Contractor to proceed on the date stated in that notice. Such Notice to Proceed shall state on its face that it is a "Notice to Proceed".

1.1.1.8 **"Particular Conditions"** means the Particular Conditions attached to and forming part of these General Conditions.

1.1.1.9 **"Schedule of Guarantees"** and **"Schedule of Payments"** mean the documents so named (if any) which are comprised in the Schedules.

1.1.1.10 **"Schedules"** means the document(s) entitled schedules or attachments as included in the Contract. Such document may include data, lists and schedules of payments and/or prices.

1.1.1.10A **"Securities"** means the Performance Security, Defects Liability Security, Interim Bonds and the Lender Direct Agreement.

1.1.1.11 [Not used].

1.1.1.12 **"Tender"** means the Letter of Tender and all other documents which the Contractor submitted with the Letter of Tender, as included in the Contract.

## 1.1.2 Parties and Persons

- 1.1.2.1 **"Contractor"** means the person(s) named as contractor in the Appendix to Tender.
- 1.1.2.2 **"Contractor's Personnel"** means the Contractor's Representative and all personnel whom the Contractor utilises on Site, who may include the staff, labour and other employees of the Contractor and of each Subcontractor; and any other personnel assisting the Contractor in the execution of the Works.
- 1.1.2.3 **"Contractor's Representative"** means the person named by the Contractor in the Contract or appointed from time to time by the Contractor under sub-clause 4.3 [*Contractor's Representative*], who acts on behalf of the Contractor.
- 1.1.2.4 **"Employer"** means the person named as employer in the Appendix to Tender and the assigns and legal successors in title to this person.
- 1.1.2.5 **"Employer's Personnel"** means the Engineer, the assistants referred to in sub-clause 3.2 [*Delegation by the Engineer*] and all other staff, labour and other employees of the Engineer and of the Employer; and any other personnel notified to the Contractor, by the Employer or the Engineer, as Employer's Personnel.
- 1.1.2.6 **"Engineer"** means the person appointed by the Employer to act as the Engineer for the purposes of the Contract and named in the Appendix to Tender, or other person appointed from time to time by the Employer and notified to the Contractor under sub-clause 3.4 [*Replacement of the Engineer*].
- 1.1.2.7 **"FIDIC"** means the Fédération Internationale des Ingénieurs-Conseils, the international federation of consulting engineers.
- 1.1.2.8 **"Lenders"** means any persons from time to time who have committed to provide financing to or on behalf of the Employer or any agent or trustee for such persons.
- 1.1.2.8A **"Lenders' Representative"** means any person who is authorised to represent the Lenders in connection with this Contract.
- 1.1.2.9 **"Party"** means the Employer or the Contractor, as the context requires.
- 1.1.2.10 **"Port Authority"** means Zarząd Morskiego Portu Gdańsk S.A.
- 1.1.2.11 **"President"** means the person described as such in the Appendix to Tender.
- 1.1.2.12 **"Statutory Authority"** means any authority, including, but not limited to, the Technical Supervision Office (*Transportowy Dozór Techniczny*), Civil Aviation Office (*Urząd Lotnictwa Cywilnego*), Directorate of the Air Traffic Service of the Armed Forces of the Republic of Poland (*Szefostwo Służby Ruchu Lotniczego Sił Zbrojnych RP*) having jurisdiction in respect of the Works and/or the Site.
- 1.1.2.13 **"Subcontractor"** means any person named in the Contract as a subcontractor, or any person appointed as a subcontractor, for a part of the Works (including any supplier of Goods and any consultant or other person providing design or other professional services and whether appointed directly or indirectly at any tier) and the legal successors in title to each of these persons.

### 1.1.3 Dates, Tests, Periods and Completion

- 1.1.3.1 **"Base Date"** means 1 September 2014.
- 1.1.3.2 **"Commencement Date"** means the date stated in the Notice to Proceed.
- 1.1.3.3 **"day"** means a calendar day and **"year"** means 365 days.
- 1.1.3.4 **"Performance Certificate"** means the certificate issued under sub-clause 11.9 [*Performance Certificate*].
- 1.1.3.5 **"Taking-Over Certificate"** means a certificate issued under clause 10 [*Employer's Taking Over*].
- 1.1.3.6 **"Tests on Completion"** means the tests which are to be carried out under clause 9 [*Tests on Completion*] before the Works or a Section (as the case may be) are taken over by the Employer and which are set out in Attachment E to the Particular Conditions, or instructed as a Variation.
- 1.1.3.7 **"Time for Completion"** means the time for completing the Works or a Section (as the case may be) under sub-clause 8.2 [*Time for Completion*], as stated in the Particular Conditions (with any extension under sub-clause 8.4 [*Extension of Time for Completion*]), calculated from the Commencement Date.
- 1.1.3.8 **"Warranty Period"** means the periods stated in the Particular Conditions.

### 1.1.4 Money and Payments

- 1.1.4.1 **"Accepted Contract Amount"** means € (excluding Polish VAT).
- 1.1.4.2 [Not used].
- 1.1.4.3 **"Contract Price"** means the price defined in sub-clause 14.1 [*The Contract Price*] (excluding Polish VAT), and includes adjustments in accordance with the Contract.
- 1.1.4.4 **"Cost"** means all actual and demonstrable expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit.
- 1.1.4.4A **"Defects Liability Security"** means an on-demand performance bond for the Warranty Periods in the form substantially the same as the form of the Performance Security set out in Attachment A to the Particular Conditions.
- 1.1.4.5 **"Final Payment Certificate"** means the payment certificate issued under sub-clause 14.13 [*Issue of Final Payment Certificate*].
- 1.1.4.6 **"Final Statement"** means the statement defined in sub-clause 14.11 [*Application for Final Payment Certificate*].
- 1.1.4.7 **"Interim Bond"** means an on demand bond in the form set out in Attachment B to the Particular Conditions.
- 1.1.4.8 **"Interim Payment Certificate"** means a payment certificate issued under clause 14 [*Contract Price and Payment*], other than the Final Payment Certificate.
- 1.1.4.9 [Not used].

- 1.1.4.10 [Not used].
- 1.1.4.11 **"Payment Certificate"** means a payment certificate issued under clause 14 [*Contract Price and Payment*].
- 1.1.4.12 **"Performance Security"** means an on demand performance bond in the form set out in Attachment A to the Particular Conditions.
- 1.1.4.13 **"Statement"** means a statement submitted by the Contractor as part of an application, under clause 14 [*Contract Price and Payment*], for a Payment Certificate.

#### 1.1.5 Works and Goods

- 1.1.5.1 **"Contractor's Equipment"** means all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Contractor's Equipment excludes Temporary Works, Employer's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Equipment.
- 1.1.5.2 **"Equipment"** means fifteen rubber tyre gantry cranes (fully electrical) to be supplied by the Contractor in accordance with the Contract and as further defined in Attachment D and Attachment F to the Particular Conditions.
- 1.1.5.3 **"Goods"** means Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.
- 1.1.5.4 **"Materials"** means things of all kinds (other than Plant) intended to form or forming part of the Equipment, including the supply-only materials (if any) to be supplied by the Contractor under the Contract.
- 1.1.5.5 **"Plant"** means the apparatus, machinery and vehicles intended to form or forming part of the Equipment.
- 1.1.5.5A **"Project"** means the designing, assembling and installing Equipment on the Site as contemplated by the Contract.
- 1.1.5.6 **"Section"** means each individual crane forming part of the Equipment together with temporary and all other works and Services required to be performed in relation to each crane.
- 1.1.5.7 **"Services"** means the services to be provided by the Contractor under the Contract including, without limitation training of the Employer's Personnel.
- 1.1.5.8 **"Spare Parts"** means the spare parts (if any) listed in Attachment D to the Particular Conditions.
- 1.1.5.9 **"Temporary Works"** means all temporary works of every kind (other than Contractor's Equipment) required on Site for the delivery, off-loading, installation and commissioning of the Equipment and the remedying of any defects; the Temporary Works excludes any civil works and the like for the preparation of the installation site, access, etc., (other than Contractor's Equipment) which shall be carried out and completed by the Employer before the arrival of the Equipment in accordance with the Contract.
- 1.1.5.10 **"Works"** mean the Equipment and the Temporary Works, or either of them as appropriate.

## 1.1.6 Other Definitions

- 1.1.6.1 **"Approval"** means approval, notification, consent, permit, licence certificate and/or other authorisation, including Operational Permit.
- 1.1.6.2 **"Change in Law"** means a change in the Laws of the Country, including the introduction of new Laws and the repeal or modification of existing Laws.
- 1.1.6.3 **"Change in Standards"** means a change in the Country's technical standards, EU technical standards and other standards specified in the Employer's Requirements.
- 1.1.6.4 **"Contractor's Documents"** means the calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature (if any) supplied by the Contractor under the Contract; as described in sub-clause 5.2 [*Contractor's Documents*], including all intellectual property rights contained therein.
- 1.1.6.5 **"Country"** means Poland as the country in which the Site is located, where the Equipment is to be installed.
- 1.1.6.5A **"DCT Container Terminal"** means the existing terminal known as DCT Container Terminal 1, as well as the currently constructed terminal known as DCT Container Terminal 2, and includes all operations thereon and requirements for access and interconnection thereto.
- 1.1.6.6 **"Discipline"** means profession, trade or employment.
- 1.1.6.7 **"Employer's Equipment"** means the apparatus, machinery and vehicles (if any) made available by the Employer for the use of the Contractor in the execution of the Works, as stated in the Employer's Requirements; but does not include Plant which has not been taken over by the Employer.
- 1.1.6.8 **"Foreseeable Change in Law"** means a Change in Law that as at the date of the Contract:
- (a) had been published in a draft after the first reading in any chamber of the Polish parliament and is enacted after the date of the Contract in a form substantially the same as that contemplated in the form of the said draft;
  - (b) was at any other legislative stage in Poland, the European Union or European Community and is enacted after the date of the Contract in a form substantially the same as that contemplated by the form it was in at that legislative stage as at the date of the Contract;
  - (c) had been published in a draft statutory instrument or published in the Official Journal of the European Communities; or
  - (d) was a Change in Law of which the Contractor or any Subcontractor was aware was to be introduced;

provided that a reasonably competent and experienced contractor would have been aware such Change in Law was to be introduced and would have taken the Change in Law into account in pricing, constructing and/or carrying out its obligations under a comparable contract.

- 1.1.6.9 **"Foreseeable Change in Standards"** means a Change in Standards that as at the date of the Contract was a Change in Standards of which the Contractor or any Subcontractor was aware was to be introduced provided that a reasonably competent and experienced contractor would have been aware such Change in Standards was to be introduced and would have taken the Change in Standards into account in pricing, constructing and/or carrying out its obligations under a comparable contract.
- 1.1.6.10 **"Force Majeure"** is defined in clause 19 [*Force Majeure*].
- 1.1.6.11 **"Good Industry Practice"** means that degree of skill and judgement and the utilisation of practices, methods, techniques and standards that are generally expected of skilled and experienced firms in the civil construction industry and commonly used by such firms to design, manufacture, assemble, transport, deliver, off load, install, test and commission works similar in nature and extent to the Works in the EU.
- 1.1.6.12 **"Laws"** means all EU legislation, national (or state) legislation, Polish statutes, ordinances and other laws, including regulations and by-laws of any legally constituted public authority.
- 1.1.6.12A **"Lender Direct Agreement"** means agreement between the Parties and the Lenders in the form set out in Attachment G, subject to such amendments thereto as the Lenders may reasonably require and as are agreed by the Employer.
- 1.1.6.12B **"Operational Permit"** means an operational permit (*decyzja zezwalająca na eksploatację*) issued by the President of the Technical Supervision Office (*Transportowy Dozór Techniczny*) or other relevant Statutory Authority in respect of the Equipment or any part of the Works in respect of which such a permit is required pursuant to the applicable Laws.
- 1.1.6.13 **"Profit"** means 5% of Cost.
- 1.1.6.14 **"Site"** means the places which are to be constructed in accordance with the Construction Contract where the Equipment is to be installed and to which Goods are to be delivered, and any other places as may be specified in the Contract as forming part of the Site.
- 1.1.6.15 **"Unforeseeable"** means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.
- 1.1.6.16 **"Variation"** means any change to the Employer's Requirements or the Works, which is instructed or approved in writing as a variation under clause 13 [*Variations and Adjustments*].

## 1.2 Interpretation

In the Contract, except where the context requires otherwise:

- (a) words indicating one gender include all genders;
- (b) words indicating the singular also include the plural and words indicating the plural also include the singular;
- (c) provisions including the word "agree", "agreed" or "agreement" require the agreement to be recorded in writing;

- (d) "written" or "in writing" means hand-written, type-written, printed or electronically made, and resulting in a permanent record and duly signed by authorised representatives according to the general rules of Polish law; and
- (e) "include" and "including" mean including without limitation.

The marginal words and other headings shall not be taken into consideration in the interpretation of these Conditions.

### 1.3 **Communications**

Wherever these Conditions provide for the giving or issuing of approvals, certificates, consents, determinations, notices and requests, these communications shall be:

- (a) in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in the Appendix to Tender; and
- (b) delivered, sent or transmitted to the address for the recipient's communications as stated in the Appendix to Tender and copied to the Engineer. However:
  - (i) if the recipient or the Engineer gives notice of another address, communications shall thereafter be delivered accordingly; and
  - (ii) if the recipient has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued.

Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed. When a certificate is issued to a Party, the certifier shall send a copy to the other Party. When a notice is issued to a Party, by the other Party or the Engineer, a copy shall be sent to the Engineer or the other Party, as the case may be.

### 1.4 **Law and Language**

The Contract and all matters relating thereto shall be governed by and construed in accordance with Polish Law.

The language of communications shall be English.

### 1.5 **Priority of Documents**

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

- (a) The Contract Agreement;
- (b) These General Conditions;
- (c) Notice To Proceed;
- (d) The Particular Conditions (including Attachments);
- (e) The Employer's Requirements;
- (f) The Contractor's Specification; and

and any other documents forming part of this Contract.



If an ambiguity or discrepancy is found in the documents, the Engineer shall issue any necessary clarification or instruction (which, to avoid doubt, will not constitute a Variation).

1.6 [Not used]

### 1.7 **Assignment**

The Contractor shall not be permitted to assign the whole or any part of the Contract or any benefit or interest in or under the Contract without the prior written consent of the Employer.

The Contractor hereby agrees that the Employer's rights and obligations, title and interest resulting from the Contract (or any part thereof) may be assigned and transferred to any Lender without the consent of the Contractor and otherwise transferred as described in the Lender Direct Agreement. Save as aforesaid, the Employer may only assign the Employer's rights and obligations, title and interest resulting from the Contract (or any part thereof) with the prior written approval of the Contractor, such approval not to be unreasonably withheld or delayed.

### 1.8 **Care and Supply of Documents**

Each of the Contractor's Documents shall be in the custody and care of the Contractor, unless and until taken over by the Employer. Unless otherwise stated in the Contract, the Contractor shall supply to the Engineer, three copies of each of the Contractor's Documents.

The Contractor shall keep, on the Site, a copy of the Contract, publications named in the Employer's Requirements, the Contractor's Documents, and Variations and other communications given under the Contract. The Employer's Personnel shall have the right of access to all these documents at all reasonable times.

If a Party becomes aware of an error or defect of a technical nature in a document which was prepared for use in executing the Works, the Party shall promptly give notice to the other Party of such error or defect.

### 1.9 **Errors in the Employer's Requirements**

The Contractor shall (as between the Parties) be responsible for all divergences, differences, ambiguities, inconsistencies, errors and any other matters which could be interpreted as to be misleading or confusing in (or between) the Employer's Requirement and for any misunderstanding or incorrect information relied upon by the Contractor ("Errors").

The Engineer shall be entitled to resolve each Error by giving an explanation or instruction. If any such explanation or instruction causes delay or additional costs and/or other liability to the Contractor, this will be at the Contractor's risk, and will not be a Variation or otherwise give the Contractor any entitlement to an extension of time and/or compensation.

Without limiting the generality of any other provision of the Contract, the Contractor warrants and undertakes to the Employer that:

- (a) it has checked the Employer's Requirements for Errors; and
- (b) it has allowed within the Contract Price and the Time for Completion for the resolution of any such Errors.

The Contractor waives all and any claims against the Employer arising in relation to the circumstances described above, whether such claims would otherwise arise under the Contract or on the basis of any other principle or theory of law whatsoever.

#### 1.10 **Employer's Use of Contractor's Documents**

The Contractor transfers to the Employer the ownership title to any carriers on which the Contractor's Documents and other design documents made by (or on behalf of) the Contractor ("**Copyrighted Documents**") are fixed.

The Contractor undertakes to grant to the Employer a non-exclusive, transferrable, worldwide licence to use the economic copyrights to the Copyrighted Documents (and each and every work comprising the Copyrighted Documents) within the following fields of exploitation (the "**Fields of Exploitation**"):

- (a) recording;
- (b) reproduction using any technique, in particular using printing, reprographic and digital techniques, in a computer memory, and also producing 3D copies of the work with the use of any technique;
- (c) digitalisation, inputting and recording the Copyrighted Documents in the memory of a computer;
- (d) inputting into IT networks, in particular the Internet, in order to distribute (broadcast) the Copyrighted Documents through such networks, so that anybody can have access to them at the place and time of their choosing;
- (e) distribution of the Copyrighted Documents, in particular its display and making it publicly available to third parties at place and time of their choice, in particular in the mass media and on the Internet;
- (f) introducing copies of the Copyrighted Documents to trading;
- (g) lending the original Copyrighted Documents or copies thereof for use or leasing them;
- (h) using the Copyrighted Documents for developing project documentation, for the purposes of construction and extension of the Project;
- (i) using the Copyrighted Documents for the purposes of carrying out repair works in the Project, as well as maintaining the Project in the proper state of repair;
- (j) using the Copyrighted Documents for advertising, promotional and marketing purposes, in particular for the promotion of the activities of the Employer; and
- (k) using the Copyrighted Documents for the purpose of further amendments of any permit related to the Project

(the "**Licence**").

The Licence to use each work (*utwór*) that is a part of the Copyrighted Documents is granted automatically, by virtue of this Agreement, upon the delivery of a work to the Employer, without the need to make any separate declarations in this respect and shall be in force for unspecified period of time. The Contractor undertakes not to terminate the Licence within 20 years as of the Commencement Date; in the event of breach of this

undertaking and in any other event the notice period shall be 15 (fifteen) years effective at the end of a calendar year.

The Contractor gives the Employer its irrevocable consent and authorizes the Employer to give further consents to any amendments, alterations, modifications, translations and adaptations of the Copyrighted Documents and any documentation related to it (the "**Derivative Works**") and to use them in all the Fields of Exploitation and/or dispose of such Derivative Works.

The Contractor represents and undertakes to ensure that the enforcement of the terms of this clause does not violate any third party rights. The Contractor will use its best efforts to ensure the acquisition by the Employer of the rights specified above.

On the basis of Art. 392 of the Polish Civil Code, the Contractor releases the Employer from the obligation to make performances for third parties if any claims are raised against the Employer in connection with the violation of a copyright, patent, registered design, trade mark, trade name or other intellectual or industrial property right, if such claim or proceedings are related to the Copyrighted Documents.

The Contractor shall ensure that: (i) any individual who is an author of the Copyrighted Documents (the "**Author**") does not exercise his/her moral (*osobiste*) rights to the work in bad faith or in any other way that could be detrimental to the Employer's (or, as appropriate, its successor's or assignee's) interests connected with the completion, maintenance, repair, modernisation or alteration of the Project or further adaptations/developments of the Copyrighted Documents for the entire Licence term, and (ii) each Author grants the Employer (and any of its successors or assignees) consent to exercise of the moral (*osobiste*) right to the work on behalf of the Author, in particular to modify the work or any part thereof.

If any part of the Copyrighted Documents includes an invention, utility model, design, geographical indication, topography of integrated circuits or any other solution/technology protected by law, in particular by the Law of Industrial Property of 30 June 2000 (*Prawo własności przemysłowe*) or an international treaty, the Contractor should inform the Employer about that fact when delivering such Copyrighted Documents to the Employer.

The fee for the grant of the Licence (with respect to all Fields of Exploitation), the ownership title to the carriers on which the Copyrighted Documents is recorded, the granting of permits and consents and the performance of other obligations of the Contractor referred to in this clause is covered in full by the Contract Price. At the same time, the Contractor consents to the Employer's having the Copyrighted Documents and the Derivative Works at its disposal and using them within the scope provided for hereby without additional remuneration for the Contractor.

If the Contract is no longer binding for any reason, including, in particular, the termination of the Contract by either of the Parties, the Employer will retain all the rights acquired on the basis of this sub-clause 1.10. To avoid doubt, this sub-clause 1.10 [*Employer's Use of Contractor's Documents*] shall survive termination of the Contract.

Without prejudice to the generality of any other provision of the Contract, the Employer shall be entitled to assign and/or transfer all and any rights acquired on the basis of this sub-clause 1.10 to any Lender or pursuant to the terms of the Lender Direct Agreement.

#### 1.11 **Contractor's Use of Employer's Documents**

As between the Parties, the Employer shall retain the copyright and other intellectual property rights in the Employer's Requirements and other documents made by (or on behalf of) the Employer. The Contractor may, at its cost, copy, use, and obtain communication of these documents for the purposes of the Contract. They shall not,

without the Employer's consent, be copied, used or communicated to a third party by the Contractor, except as necessary for the purposes of the Contract.

#### 1.12 **Confidential Details**

The Contractor shall disclose all such confidential and other information as the Engineer may reasonably require in order to verify the Contractor's compliance with the Contract.

The Contractor shall treat the details of the Contract as private and confidential, except to the extent necessary to carry out obligations under it or to comply with applicable Laws. The Contractor shall not publish, permit to be published, or disclose any particulars of the Works in any trade or technical paper or elsewhere without the previous agreement of the Employer.

#### 1.13 **Compliance with Laws**

The Contractor shall, in performing the Contract, comply with all Approvals and applicable Laws, including requirements for CE marking of products confirming that a given product is assessed before being placed on the market and meets EU safety, health and environmental protection requirements. The Contractor shall give all notices and notifications to the Statutory Authorities, pay all taxes, duties and fees, and obtain all Approvals, including Operational Permit, as required by the Laws in relation to the design, execution and completion of the Works and the remedying of any defects; and the Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so. The Contractor shall promptly provide the Employer with copies of all such Approvals.

Notwithstanding the preceding paragraph, the Employer remains liable for all taxes, duties and fees payable in Poland in respect of the execution of the Works subject to and in accordance with sub-clause 14.1 [*Contract Price*].

#### 1.14 **Joint Several Liability**

If the Contractor constitutes (under applicable Laws) a joint venture, consortium or other unincorporated grouping of two or more persons:

- (a) these persons shall be deemed to be jointly and severally liable to the Employer for the performance of the Contract;
- (b) these persons shall notify the Employer of their leader who shall have authority to bind the Contractor and each of these persons; and
- (c) the Contractor shall not alter its composition or legal status without the prior consent of the Employer.

#### 1.15 **Entire Agreement**

The Contract and the Securities constitute the entire agreement between the Employer and the Contractor with respect to the subject matter of the Contract and supersede all prior commitments, arrangements, agreements and contracts (whether written or oral) made between the Parties with respect thereto prior to the date of execution of the Contract. The Employer and the Contractor acknowledge that neither:

- (a) has entered into this Contract in reliance upon any representation, warranty or undertaking of the other which is not expressly set out or referred to in the Contract; or

- (b) shall have any remedy in respect of misrepresentation or untrue statement made by the other which is not contained in this Contract nor for breach of warranty which is not contained in this Contract,

provided that this sub-clause shall not exclude any liability for, or remedy in respect of, fraud.

## **THE EMPLOYER**

### **2.1 Right of Access to the Site**

The Employer shall, subject to any requirements set out in the Employer's Requirements, any requirements of the Port Authority, any Statutory Authority or the harbour master, give the Contractor right of access to and possession of, all parts of the Site within the time (or times) stated in the Appendix to Tender, or such other times as agreed between the parties as required for the Contractor to carry out and complete the Works in accordance with the Contract. The right and possession may not be exclusive to the Contractor. If, under the Contract, the Employer is required to give (to the Contractor) possession of any foundation, structure, plant or means of access, the Employer shall do so in the time and manner stated in the Employer's Requirements. However, the Employer may withhold any such right or possession until the Performance Security has been received.

If no such time is stated in the Appendix to Tender, the Employer shall give the Contractor right of access to, and possession of, the Site within such times as may be required to enable the Contractor to proceed in accordance with the Contract.

If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to give any such right or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under sub-clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost plus Profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine these matters.

However, if and to the extent that the Employer's failure was caused by any error or delay by the Contractor, including an error in, or delay in the submission of, any of the Contractor's Documents, the Contractor shall not be entitled to such extension of time, Cost or Profit.

The Contractor (i) acknowledges that the Site is provided by the Employer to the Contractor under the Contract, for construction purposes; and (ii) hereby undertakes not to use the Site for any other purposes nor attempt to lease or sub-let the Site or any part thereof.

### **2.2 Permits, Licences or Approvals**

The Employer shall (where it is in a position to do so) provide reasonable assistance to the Contractor at the request of the Contractor:

- (a) by obtaining copies of the Laws of the Country which are relevant to the Contract but are not readily available; and

- (b) for the Contractor's applications for any permits, licences or other Approvals required by the Laws of the Country:
  - (i) which the Contractor is required to obtain under sub-clause 1.13 [*Compliance with Laws*];
  - (ii) for the delivery of Goods, including clearance through customs; and
  - (iii) for the export of Contractor's Equipment when it is removed from the Site.

### 2.3 Employer's Personnel

The Employer shall be responsible for ensuring that the Employer's Personnel and the Employer's other contractors on the Site:

- (a) co-operate with the Contractor's efforts under sub-clause 4.6 [*Co-operation*]; and
- (b) take actions similar to those which the Contractor is required to take under subparagraphs (a), (b) and (c) of sub-clause 4.8 [*Safety Procedures*].

### 2.4 Employer's Financial Arrangements

The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with clause 14 [*Contract Price and Payment*]. If the Employer intends to make any material change to its financial arrangements, the Employer shall give notice to the Contractor with detailed particulars.

### 2.5 Employer's Claims

Without prejudice to any rights the Employer may have under any Law:

- (a) if the Employer considers himself to be entitled to any payment under any clause of these Conditions and/or to any extension of the Warranty Period, the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under sub-clause 4.20 [*Employer's Equipment and Free-Issue Material*], or for other services requested by the Contractor;
- (b) the notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Warranty Period shall be given before the expiry of such period;
- (c) the particulars shall specify the clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract; and
- (d) this amount may be included in a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate in accordance with this sub-clause.

## THE ENGINEER

### 3.1 Engineer's Duties and Authority

The Employer shall appoint the Engineer who shall carry out the duties assigned to him in the Contract. The Engineer's staff shall include suitably qualified engineers and other professionals who are competent to carry out these duties.

The Engineer shall have no authority to amend the Contract.

The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. The Engineer is required to obtain the approval of the Employer before exercising its authority in relation to the following:

- (a) sub-clause 8.4 [*Extension of Time for Completion*];
- (b) sub-clause 13.1 [*Right to Vary*]; and
- (c) clause 20 [*Claims and Disputes*].

Except as otherwise stated in these Conditions:

- (d) whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer;
- (e) the Engineer has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract; and
- (f) any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Engineer (including absence of disapproval) shall not relieve the Contractor from any responsibility it has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances.

### 3.2 **Delegation by the Engineer**

The Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation. These assistants may include a resident engineer, and/or independent inspectors appointed to inspect and/or test items of Plant and/or Materials. The assignment, delegation or revocation shall be in writing and shall not take effect until copies have been received by both Parties. However, unless otherwise agreed by both Parties, the Engineer shall not delegate the authority to determine any matter in accordance with sub-clause 3.5 [*Determinations*].

Assistants shall be suitably qualified persons, who are competent to carry out these duties and exercise this authority, and who are fluent in the language for communications defined in sub-clause 1.4 [*Law and Language*].

Each assistant, to whom duties have been assigned or authority has been delegated, shall only be authorised to issue instructions to the Contractor to the extent defined by the delegation. Any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by an assistant, in accordance with the delegation, shall have the same effect as though the act had been an act of the Engineer. However:

- (a) any failure to disapprove any work, Plant or Materials shall not constitute approval, and shall therefore not prejudice the right of the Engineer to reject the work, Plant or Materials;

- (b) if the Contractor questions any determination or instruction of an assistant, the Contractor may refer the matter to the Engineer, who shall promptly confirm, reverse or vary the determination or instruction.

### **3.3 Instructions of the Engineer**

Subject to sub-clause 3.1 the Engineer may issue to the Contractor (at any time) instructions which may be necessary for the execution of the Works and the remedying of any defects, all in accordance with the Contract. The Contractor shall only take instructions from the Engineer, or from an assistant to whom the appropriate authority has been delegated under this clause. If an instruction constitutes a Variation, clause 13 [*Variations and Adjustments*] shall apply.

The Contractor shall comply with the instructions given by the Engineer or delegated assistant, on any matter related to the Contract. These instructions shall be given in writing.

### **3.4 Replacement of the Engineer**

If the Employer intends to replace the Engineer, the Employer shall, not less than 14 days before the intended date of replacement, give notice to the Contractor of the name, and address of the intended replacement Engineer.

### **3.5 Determinations**

Subject to sub-clause 3.1 whenever these Conditions provide that the Engineer shall proceed in accordance with this sub-clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a determination of what the Engineer considers to be fair in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under clause 20 [*Claims and Disputes*].

## **THE CONTRACTOR**

### **4.1 Contractor's General Obligations**

The Contractor shall design, execute and complete the Works and shall remedy any defects, including:

- (a) designing, manufacturing, constructing the Equipment;
- (b) transporting, delivering and off loading the Goods and the Equipment on Site;
- (c) erecting, assembling, installing in the final working position, testing and commissioning the Equipment;
- (d) providing operating and maintenance manuals as specified in Employer's Requirements
- (e) providing training as specified in Employer's Requirements,

in accordance with Good Industry Practice and in accordance with the Contract.

When completed, the Works shall comply with the performance and other criteria as defined in the Contract.



Forthwith upon the date stated in a Notice to Proceed, the Contractor shall proceed promptly, diligently and efficiently with the design, execution and completion of the Works.

The Contractor shall provide the Plant and Contractor's Documents specified in the Contract, and all Contractor's Personnel, Goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for the design, execution and completion of the Works and the remedying of defects.

The Works shall include any work which is necessary to satisfy the Employer's Requirements, Contractor's Specification and Schedules, or is implied by the Contract, and all works which (although not mentioned in the Contract) are necessary for stability or for the completion, or safe and proper operation, of the Works.

The Contractor shall be responsible for the adequacy, stability and safety of all Site operations, of all methods of construction and of all the Works.

#### **4.2 Performance Security, Interim Bonds and Defects Liability Security**

The Contractor shall have delivered to the Employer as a Condition Precedent the duly executed Performance Security and the Interim Bond (the latter in relation to the first payment only in accordance with Attachment C).

Notwithstanding any other provision of the Contract, compliance with this sub-clause 4.2 is a condition precedent to the Contractor's entitlement to receive any payment from the Employer under the Contract and no payment shall be due or payable until this condition is satisfied. In particular, the Contractor shall deliver to the Employer Interim Bonds in relation to all subsequent payments to be made by the Employer in accordance with Attachment C as a condition precedent to receive such payments.

Each of the Performance Security, Defects Liability Security and the Interim Bond shall be:

- (a) duly executed and enforceable;
- (b) in the amount and currency stated in respect of the relevant bond in Attachment C to the Particular Conditions; and
- (c) issued by an international bank acceptable to the Employer and whose long-term debt has the following minimum rating from at least two (1) of the three (3) listed rating agencies:
  - (i) A- from Standard & Poor's;
  - (ii) A3 from Moody's; and/or
  - (iii) A- from Fitch.

The Performance Security shall initially be for the amount of ten per cent (10%) of the Accepted Contract Amount. The Interim Bonds shall be for the amounts of payments specified in Attachment C. The Defects Liability Security shall be for the amount of five per cent (5%) of the Contract Price.

If, in accordance with the Contract, the Contract Price is:

- (d) adjusted in aggregate so that it is greater than the Accepted Contract Amount by an amount which exceeds five per cent (5%) of the Accepted Contract Amount; or

- (e) (if an increased Performance Security has previously been provided under this sub-clause) increased from time to time in aggregate by more than five per cent (5%) of the Contract Price by reference to which the face value of the previously adjusted Performance Security was calculated,

then the Contractor shall deliver to the Employer a duly executed Performance Security for the amount of ten per cent (10%) of the Contract Price as so adjusted or increased, and otherwise satisfying the requirements of this sub-clause. On receiving the replacement Performance Security, the Employer shall return the previously provided security to the Contractor within 14 days.

The Contractor shall ensure that:

- (f) the Performance Security remains valid and enforceable until the date being not earlier than 30 days after the issue of the final Taking Over Certificate for the whole of the Works.
- (g) that the Defects Liability Security is valid and enforceable until the Contractor has become entitled to receive the Performance Certificate plus additional 15 days.
- (h) the Interim Bond remains valid and enforceable until the date being not earlier than 30 days after the issue of the final Taking Over Certificate for the whole of the Works.

The Contractor shall deliver the Defects Liability Security within 7 days after the issue of the final Taking Over Certificate for the whole of the Works, in which case the Employer shall return the Performance Security to the Contractor within 7 days of the date of receipt of the Defects Liability Security. Failure to deliver the Defects Liability Security on time shall authorise the Employer to call the entire amount of the Performance Security and keep it as cash deposit in lieu of the Defects Liability Security.

If the Performance Security, the Defects Liability Security or the Interim Bond will, in accordance with its terms, expire at a time when this sub-clause requires the Contractor to ensure that it remains valid and enforceable, the Contractor shall, not less than 28 days prior to the expiry of the Performance Security, the Defects Liability Security or the Interim Bond (as applicable), deliver to the Employer a duly executed Performance Bond, Defects Liability Security or Interim Bond (as applicable) for the same amount as the bond being replaced, and otherwise satisfying the requirements of this sub-clause 4.2. On receiving the replacement bond the Employer shall return the relevant previously provided bond to the Contractor within fourteen (14) days.

If the Contractor fails to provide the Employer with a replacement bond when required under this sub-clauses 4.2 the Employer may immediately call the outstanding balance of the relevant bond and hold the same as security for compliance by the Contractor with its obligations and liabilities under the Contract. The Employer may make deductions against amounts so held in respect of any claim it would have been entitled to bring in relation to the bond which should have been provided until the bond is provided (whereupon the Employer shall return the remaining balance without any interest to the Contractor).

Each bond shall be returned to the Contractor immediately after it expires in accordance with its terms, save where there are pending claims (including previously notified claims) at such date, in which case it shall be returned following final determination and (if applicable) payment of such claims.

#### 4.3 Contractor's Representative

The Contractor shall appoint the Contractor's Representative and shall give him all authority necessary to act on the Contractor's behalf under the Contract.

Unless the Contractor's Representative is named in the Contract, the Contractor shall, prior to the Commencement Date, submit to the Engineer for consent the name and particulars of the person the Contractor proposes to appoint as Contractor's Representative. If consent is withheld or subsequently revoked, or if the appointed person fails to act as Contractor's Representative, the Contractor shall similarly submit the name and particulars of another suitable person for such appointment.

The Contractor shall not, without the prior consent of the Engineer, revoke the appointment of the Contractor's Representative or appoint a replacement.

The whole of the Contractor's Representative's time shall be given to directing the Contractor's performance of the Contract. If the Contractor's Representative is to be temporarily absent during the execution of the Works a suitable replacement person shall be appointed, subject to the Engineer's prior consent, and the Engineer shall be notified accordingly.

The Contractor's Representative shall, on behalf of the Contractor, receive instructions under sub-clause 3.3 [*Instructions of the Engineer*].

The Contractor's Representative:

- (a) may delegate any powers, functions and authority to any competent person, and may at any time revoke the delegation; and
- (b) shall appoint a delegate to direct the Contractor's performance of the Contract at the Contractor's factory (or at other places where Works are being executed) for periods during which the Contractor's Representative is at the Site and Works are being executed at the Contractor's factory (or at other places).

Any delegation or revocation shall not take effect until the Engineer has received prior notice signed by the Contractor's Representative, naming the person and specifying the powers, functions and authority being delegated or revoked.

The Contractor's Representative and all these persons shall be fluent in the language for communications defined in sub-clause 1.4 [*Law and Language*].

#### 4.4 Subcontractors

The Contractor shall not subcontract the whole of the Works. Appointment of any Subcontractor of the construction works is subject to the Employer's approval (*inter alia* in accordance with article 647<sup>1</sup> of the Civil Code) based on the draft agreement with Subcontractor of the construction works or agreement with Subcontractor of the construction works coming into force upon approval of such agreement by the Employer. Such powers of approval may at the option of the Employer be delegated to the Engineer, subject to delivery to the Contractor of written notice of the fact and terms of any such delegation.

The Contractor shall be responsible for the acts or defaults of any Subcontractor, its agents or employees, as if they were the acts or defaults of the Contractor. Unless otherwise stated in the Particular Conditions:

- (a) the Contractor shall not be required to obtain consent to suppliers of Materials, or to a subcontract for which the Subcontractor is named in the Contract;
- (b) the prior consent of the Engineer shall be obtained to other proposed suppliers of Materials or Subcontractors; and
- (c) the Contractor shall give the Engineer not less than 28 days' notice of the intended date supply of Materials, the commencement of each Subcontractor's work, and of the commencement of such work on the Site, or at other places where Works are being executed by the Contractor.

Each subcontract shall include provisions, which will entitle the Employer to the assignment of rights and obligations under any subcontract in the following circumstances:

- (a) if a Subcontractor undertook (towards the Contractor) in respect of the work executed, Material and Plant installed and/or services supplied by such Subcontractor, any continuing obligation extending for a period exceeding that of the Warranty Period applicable to the Project, but only in relation to the benefit of such obligation for the outstanding duration thereof; and
- (b) in the event of termination of the Contract under sub-clause 15.2 [Termination by Employer].

The Contractor hereby consents to the assignment of rights and obligations as contemplated in this sub-clause. The Employer may exercise the above assignment of rights and obligations at any time. Such assignment will come into force automatically 7 days after receipt of the notice of assignment by the Contractor and Subcontractor. The fee for the above assignment is included in the Contract Price.

On the basis of Art. 392 of the Civil Code, the Contractor releases the Employer from the obligation to make performances for any Subcontractors of the construction works if any claims are raised against the Employer in connection with the non-payment of their fee or other breach of subcontract by the Employer or its Subcontractors of the construction works.

#### 4.5 **Nominated Subcontractors**

In this sub-clause, "nominated Subcontractor" means a Subcontractor whom the Engineer, under clause 13 [*Variations and Adjustments*], instructs the Contractor to employ as a Subcontractor. The Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Engineer as soon as practicable, with supporting particulars.

#### 4.6 **Co-operation**

The Contractor shall, as specified in the Contract or as instructed by the Engineer, allow appropriate opportunities for carrying out work to:

- (a) the Employer's Personnel;
- (b) any other contractors employed by the Employer;
- (c) the personnel of any legally constituted public authorities; and
- (d) the Port Authority and the personnel of any legally constituted public authorities (including the Polish Police, Customs and Excise Department and Border Control),

who may be employed in the execution, on or near the Site, of any work not included in the Contract.

Any such instruction shall constitute a Variation if and to the extent that it causes the Contractor to incur Unforeseeable Cost. Services for these personnel and other contractors may include the use of Contractor's Equipment, Temporary Works or access arrangements which are the responsibility of the Contractor.

The Contractor shall be responsible for its construction activities on the Site, and shall co-ordinate its own activities with those of other contractors to the extent (if any) specified in the Employer's Requirements.

If, under the Contract, the Employer is required to give to the Contractor possession of any foundation, structure, plant or means of access in accordance with Contractor's Documents, the Contractor shall submit such documents to the Engineer in the time and manner stated in the Employer's Requirements.

4.7 [Not used]

#### 4.8 **Safety Procedures**

The Contractor shall:

- (a) comply with all applicable safety regulations according to Attachment H;
- (b) take care for the safety of all persons entitled to be on the Site;
- (c) use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger to these persons;
- (d) provide fencing, lighting, guarding and watching of the Works until completion and taking over under clause 10 [*Employer's Taking Over*]; and
- (e) provide any Temporary Works (including roadways, footways, guards and fences) which may be necessary, because of the execution of the Works, for the use and protection of the public and of owners and occupiers of adjacent land.

#### 4.9 **Quality Assurance**

The Contractor shall institute a quality assurance system to demonstrate compliance with the requirements of the Contract. The system shall be in accordance with the details stated in the Contract. The Engineer shall be entitled to audit any aspect of the system.

Details of all procedures and compliance documents shall be submitted to the Engineer for information before each design and execution stage is commenced. When any document of a technical nature is issued to the Engineer, evidence of the prior approval by the Contractor himself shall be apparent on the document itself.

Compliance with the quality assurance system shall not relieve the Contractor of any of its duties, obligations or responsibilities under the Contract.

#### 4.10 **Data**

The Employer shall have made available to the Contractor for his information, prior to execution of this Contract, all relevant data in the Employer's possession relating to the Laws, procedures and labour practices of the Country. The Contractor shall be responsible for interpreting all such data.

To the extent which was practicable (taking account of cost and time), the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Tender or Works. In particular, the Contractor acknowledges that it is satisfied that the Site, if constructed substantially in accordance with the design for the Site set out in the Construction Contract, will be suitable and sufficient for the purpose of installing, commissioning and operating the Equipment. In defending any claim made by the Employer in relation to any defects occurring in or arising out of or in connection with the operation of the Works, the Contractor shall not be entitled to raise any argument connected with the adequacy of the Site. Without limiting the foregoing, the Employer shall use its best efforts to provide the Contractor with additional data, if reasonably required, subject to any confidentiality obligations on the part of the Employer.

#### 4.11 **Sufficiency of the Accepted Contract Amount**

The Contractor shall be deemed to:

- (a) have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount; and
- (b) have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters referred to in sub-clause 4.10 [*Data*] (including the design for the Site set out in the Construction Contract) and any further data relevant to the Contractor's design.

Unless otherwise stated in the Contract, the Accepted Contract Amount covers all the Contractor's obligations under the Contract (including those under Provisional Sums, if any) and all things necessary for the proper design, execution and completion of the Works and the remedying of any defects.

4.12 - 4.15 [Not used]

#### 4.16 **Transport of Equipment and Goods**

The Equipment will be delivered by the Contractor in reasonable number of shipments. The shipment is to be delivered in accordance to Tender and Employer's Requirements and must comprise all Goods necessary for the erection, installation, testing, commissioning and operation of the delivered Equipment or Section.

Unless otherwise stated in the Particular Conditions:

- (a) the Contractor shall give the Engineer and the Employer not less than 14 days notice of the date on which the Contractor intends to enter into any charterparty for the shipment of any Goods to the Site, such notice to include the value of the Goods and/or Equipment being shipped;
- (b) the Contractor shall give the Engineer not less than 14 days' notice of the date on which the Equipment, any Plant or a major item of other Goods will be delivered to the Site;
- (c) the Contractor shall be responsible for packing, loading, transporting, receiving, unloading, storing and protecting all Goods and/or Equipment and other things required for the Works; and
- (d) the Contractor shall indemnify and hold the Employer harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting

from the transport of Goods and/or Equipment, and shall negotiate and pay all claims arising from their transport, excluding claims in relation to consequential damages.

The first notice given by the Contractor in accordance with paragraph (b) above shall not be earlier than three months prior to the anticipated date of arrival.

The Contractor must immediately notify the Employer in writing should the anticipated date of arrival change, such notice to set out the new anticipated arrival date. Thereafter, this paragraph will continue to apply in respect of the new anticipated arrival date.

The Employer shall promptly advise the Contractor whether it is ready to accept delivery of the Goods and/or Equipment at the Site on such date or whether the Goods and/or Equipment are to be delivered into storage on such date, whether the date for delivery is to be delayed and/or whether it requires to inspect the Goods prior to despatch. If the Employer notifies the Contractor that the Goods are to be delivered into storage (or does not accept delivery at the Site on the agreed date) then the Contractor shall arrange for storage following despatch until delivery to the Site. Subject to the following paragraph, the Contractor shall be entitled to claim from the Employer Costs which are limited to such storage costs as are incurred by the Contractor (but excluding insurance which shall be payable in addition) and which are certified by the Engineer.

Notwithstanding the preceding paragraph, if the Employer gives the Contractor not less than 2 months notice prior to the date on which any Goods, Materials and/or Equipment are to arrive at the Site for delivery, that it will be unable to accept delivery of such Goods, Materials or Equipment on the said date, the Contractor shall store the Goods, Materials and/or Section and/or Equipment for 3 months free of charge and thereafter at the Employer's expense.

#### 4.17 **Contractor's Equipment**

The Contractor shall be responsible for all Contractor's Equipment. The Contractor's Equipment shall be deemed to be exclusively intended for the execution of the Works.

4.18 - 4.19 [Not used]

#### 4.20 **Employer's Equipment and Free-Issue Material**

The Employer shall make the Employer's Equipment (if any) available for the use of the Contractor in the execution of the Works in accordance with the details, arrangements and prices stated in the Employer's Requirements. Unless otherwise stated in the Employer's Requirements:

- (a) the Employer shall be responsible for the Employer's Equipment, except that
- (b) the Contractor shall be responsible for each item of Employer's Equipment whilst any of the Contractor's Personnel is operating it, driving it, directing it or in possession or control of it.

The appropriate quantities and the amounts due (at such stated prices) for the use of Employer's Equipment shall be agreed or determined by the Engineer in accordance with sub-clause 2.5 [*Employer's Claims*] and sub-clause 3.5 [*Determinations*]. The Contractor shall pay these amounts to the Employer.

The Employer shall supply, free of charge, the "free-issue materials" (if any) in accordance with the details stated in the Employer's Requirements. The Employer shall,

at its risk and cost, provide these materials at the time and place specified in the Contract. The Contractor shall then visually inspect them, and shall promptly give notice to the Engineer of any shortage, defect or default in these materials. Unless otherwise agreed by both Parties, the Employer shall immediately rectify the notified shortage, defect or default.

After this visual inspection, the free-issue materials shall come under the care, custody and control of the Contractor. The Contractor's obligations of inspection, care, custody and control shall not relieve the Employer of liability for any shortage, defect or default not apparent from a visual inspection.

#### 4.21 **Progress Reports and Certificates**

Unless otherwise stated in the Particular Conditions, monthly progress reports shall be prepared by the Contractor and submitted to the Engineer in three copies and the electronic version sent to the Engineer with a copy to the Employer. The first report shall cover the period up to the end of the first calendar month following the Commencement Date. Reports shall be submitted monthly thereafter, each within 7 days after the last day of the period to which it relates.

Reporting shall continue until the Contractor has completed all work which is known to be outstanding at the completion date stated in each Taking-Over Certificate for the Works.

Each report shall include:

- (a) charts and detailed descriptions of progress, including each stage of design, Contractor's Documents, procurement, manufacture, delivery to Site, construction, erection, testing, commissioning and trial operation; correlated with the payment milestones defined in the Payment Schedule (Attachment C).
- (b) photographs showing the status of manufacture and of progress on the Site;
- (c) for the manufacture of each main item of Plant and Materials, the name of the manufacturer, manufacture location, percentage progress, and the actual or expected dates of:
  - (i) commencement of manufacture;
  - (ii) Contractor's inspections;
  - (iii) Tests; and
  - (iv) shipment and arrival at the Site;
- (d) the details described in sub-clause 6.10 [*Records of Contractor's Personnel and Equipment*];
- (e) copies of quality assurance documents, test results and certificates of Materials;
- (f) list of Variations, notices given under sub-clause 2.5 [*Employer's Claims*] and notices given under clause 20 [*Claims and Disputes*];
- (g) safety statistics, including details of any hazardous incidents and activities relating to environmental and/or social impacts or incidents and public relations; and



- (h) comparisons of actual and planned progress, with details of any events or circumstances which may jeopardise the completion in accordance with the Contract, and the measures being (or to be) adopted to overcome delays.
- (i) an updated risk register.

The Contractor shall notify the Engineer not less than 14 days prior to the date when, in the Contractor's opinion, it will become entitled to apply for payment in respect of payments described in the payment schedule set out in Attachment C to the Particular Conditions. Such notice will identify the:

- (j) date upon which the Contractor expects to become entitled to apply for the relevant payment; and
- (k) the place or places the Engineer may attend in order to satisfy himself that the Contractor has become entitled to apply for the relevant payment.

The Engineer shall attend the place or places identified in the notice and, if satisfied that the Contractor is entitled to apply for the relevant payment, issue a certificate to that effect.

If, following attendance at the place or places identified in the Contractor's notice, the Engineer reasonably determines that the Contractor is not entitled to apply for the relevant payment, the Cost of the Engineer attending such place or places shall be borne by the Contractor.

#### **4.22 Co-operation with Lenders**

The Contractor and the Employer agree to negotiate with each other in good faith concerning any reasonable amendment or addition to the Contract requested by the Lenders' Representative on behalf of the Lenders in connection with any financing or refinancing of the Works or the Equipment. At the conclusion of such negotiations agreed amendments (if any) shall be evidenced by written amendment to the Contract.

The Contractor shall furnish such information, consents, certifications, legal opinions related to its corporate authorisation and capacity and other documents as may be reasonably requested by the Lenders' Representative on behalf of the Lenders for its sole use in connection with any financing or refinancing of the Works or Equipment.

Notwithstanding any other provision of the Contract (or waiver of any condition precedent), compliance with this sub-clause 4.22 is a condition precedent to the entitlement of the Contractor to receive any payment from the Employer under the Contract and no payment shall be due or payable until this condition is satisfied.

The Contractor shall from time to time enter into other agreements, substantially in the same form as the Lender Direct Agreement, subject to such amendments thereto as the Lenders may reasonably require and as are agreed by the Employer for the purpose of refinancing or the further financing of the Works or the Equipment or any part thereof.

4.23 [Not used].

#### **4.24 Mitigation of Costs and delay**

The Contractor shall use all reasonable endeavours to:

- (a) mitigate the Costs which the Contractor is entitled to claim under the Contract; and

- (b) minimise the impact of any delay for which the Contractor is entitled to claim an extension of time.

## **DESIGN**

### **5.1 General Design Obligations**

The Contractor shall carry out, and be responsible for, the design of the Works. The Contractor is fully aware of the Employer's design requirements in relation to the Equipment including the key dimensions, runway span, runway height differential, and design wind speeds and the purpose for which the Equipment will be used.

The Contractor acknowledges that the design, which shall include any modifications to the design, may be required to be submitted to any Statutory Authority as may be required for any Approvals before it can be implemented. If any Statutory Authority refuses its agreement and acceptance of the design, the Contractor shall not implement the design and shall re-submit the design until the Port Authority and/or the Statutory Authority has agreed and accepted the revised design. The Contractor shall not be entitled to claim any extension of time and/or Cost incurred in connection with the submission or re-submission of the design to the Port Authority and/or any Statutory Authority or any condition imposed by such authority as a condition of grant.

Design shall be prepared by qualified designers who are engineers or other professionals who comply with the criteria (if any) stated in the Contract. Unless otherwise stated in the Contract, the Contractor shall submit to the Engineer for consent the name and particulars of each proposed designer and design Subcontractor. The Contractor warrants that it, its designers and design Subcontractors have the experience and capability necessary for the design. The Contractor undertakes that the designers shall be available to attend discussions with the Engineer and/or representatives of any Statutory Authority at all reasonable times, until the expiry date of the relevant Warranty Period.

The Contractor shall be deemed to have scrutinised the Employer's Requirements, prior to the date of the Contract, (including design criteria and calculations, if any). The Contractor shall take responsibility for and warrant to the Employer any works of design or specification of the Works contained in the Employer's Requirements as if such works had been carried out by the Contractor pursuant to the Contract.

#### **5.1A Employer's Other Contractors**

The Contractor acknowledges that the Employer may be undertaking other construction works on the Site or on land adjoining the Site which works may include (but not be limited to) the development, construction, commissioning, operation and exploitation of a port facility at the Site. The Contractor shall not impede any contractors engaged or authorised by the Employer to carry out such works and shall not interfere with the access of the other contractors as is required for the other contractors to carry out their works.

### **5.2 Contractor's Documents**

The Contractor's Documents shall comprise the technical documents specified in the Employer's Requirements, documents required to satisfy all regulatory approvals, and the documents described in sub-clause 5.6 [*As-Built Documents*] and sub-clause 5.7 [*Operation and Maintenance Manuals*]. Unless otherwise stated in the Employer's Requirements, the Contractor's Documents shall be written in the language for communications defined in sub-clause 1.4 [*Law and Language*].

The Contractor shall prepare all Contractor's Documents, and shall also prepare any other documents necessary to instruct the Contractor's Personnel. The Employer's Personnel shall have the right to inspect the preparation of all these documents, wherever they are being prepared.

If the Employer's Requirements describe the Contractor's Documents which are to be submitted to the Engineer for review and/or for approval, they shall be submitted accordingly, together with a notice as described below. In the following provisions of this sub-clause, (i) "review period" means the period required by the Engineer for review and (if so specified) for approval, and (ii) "Contractor's Documents" exclude any documents which are not specified as being required to be submitted for review and/or for approval.

Unless otherwise stated in the Employer's Requirements, each review period shall not exceed 21 days, calculated from the date on which the Engineer receives a Contractor's Document and the Contractor's notice. This notice shall state that the Contractor's Document is considered ready, both for review (and approval, if so specified) in accordance with this sub-clause and for use. The notice shall also state that the Contractor's Document complies with the Contract, or the extent to which it does not comply.

The Engineer may, within the review period, give notice to the Contractor that a Contractor's Document fails (to the extent stated) to comply with the Contract. If a Contractor's Document so fails to comply, it shall be rectified, resubmitted and reviewed (and, if specified, approved) in accordance with this sub-clause, at the Contractor's cost.

For each part of the Works, and except to the extent that the prior approval or consent of the Engineer shall have been obtained:

- (a) in the case of a Contractor's Document which has (as specified) been submitted for the Engineer's approval:
  - (i) the Engineer shall give notice to the Contractor that the Contractor's Document is approved, with or without comments, or that it fails (to the extent stated) to comply with the Contract;
  - (ii) execution of such part of the Works shall not commence until the Engineer has approved the Contractor's Document; and
  - (iii) the Engineer shall be deemed to have approved the Contractor's Document upon the expiry of the review periods for all the Contractor's Documents which are relevant to the design and execution of such part, unless the Engineer has previously notified otherwise in accordance with sub-paragraph (i);
- (b) execution of such part of the Works shall not commence prior to the expiry of the review periods for all the Contractor's Documents which are relevant to its design and execution;
- (c) execution of such part of the Works shall be in accordance with these reviewed (and, if specified, approved) Contractor's Documents; and
- (d) if the Contractor wishes to modify any design or document which has previously been submitted for review (and, if specified, approval), the Contractor shall immediately give notice to the Engineer. Thereafter, the Contractor shall submit revised documents to the Engineer in accordance with the above procedure.

If the Engineer instructs that further Contractor's Documents are required, the Contractor shall prepare them promptly.

Any such approval or consent, or any review (under this sub-clause or otherwise), shall not relieve the Contractor from any obligation or responsibility.

### 5.3 **Contractor's Undertaking**

Unless otherwise stated in the Employer's Requirements the Contractor undertakes that the design, the Contractor's Documents, the execution and the completed Works will be in accordance with:

- (a) Laws in the Country in so far as these laws are consistent with EU Legislation; and
- (b) the documents forming the Contract, as altered or modified by Variations.

### 5.4 **Technical Standards and Regulations**

The design, the Contractor's Documents, the execution and the completed Works shall comply with standards specified in the Employer's Requirements, EU technical standards, EU building, construction and environmental Laws, and EU Laws applicable to the product being produced from the Works, and other applicable Laws.

All these Laws shall, in respect of the Works and each Section, be those prevailing when the Works or Section are taken over by the Employer under clause 10 [*Employer's Taking Over*]. References in the Contract to published standards shall be understood to be references to the edition applicable on the date of this Contract, unless stated otherwise.

If changed or new applicable standards come into force in the Country after the date of this Contract, the Contractor shall give notice to the Engineer and (if appropriate) submit proposals for compliance. In the event that:

- (a) the Engineer determines that compliance is required; and
- (b) the proposals for compliance constitute a variation,

then the Engineer shall initiate a Variation in accordance with clause 13 [*Variations and Adjustments*].

The Contractor shall not be entitled to any modification to the programme or any adjustment to the Contract Price or other relief or compensation in respect of any Foreseeable Change in Standards.

### 5.5 **Training**

The Contractor shall carry out the training of Employer's Personnel in the operation and maintenance of the Works and the Equipment immediately before issue of the Taking-Over Certificate in respect of [the Works or Section].

Any training conducted by the Contractor shall be in accordance with Employer's Requirements. Such training shall be of a sufficient standard and content to give the Employer's Personnel the sufficient skills and knowledge to pass any licensing or other tests required by the Laws of the Country.

### 5.6 **As-Built Documents**

The Contractor shall prepare, and keep up-to-date, a complete set of "as-built" records of the execution of the Works, showing the exact as-built locations, sizes and details of the work as executed and which shall include a "history file" including design calculations and certain certification and anything else required to meet the CE Marking requirement. These records shall be kept (i) prior to the Contractor being given access to the Site, at the Contractor's factory in **[to insert]**; and (ii) upon being given access to the Site, on the Site and shall be used exclusively for the purposes of this sub-clause. Two copies shall be supplied to the Engineer prior to the commencement of the Tests on Completion.

In addition, the Contractor shall supply to the Engineer as-built drawings of the Works, showing all Works as executed, and submit them to the Engineer for review under sub-clause 5.2 [*Contractor's Documents*]. The Contractor shall obtain the consent of the Engineer as to their size, the referencing system, and other relevant details.

Prior to the issue of any Taking-Over Certificate, the Contractor shall supply to the Engineer the specified numbers and types of copies of the relevant as-built drawings, in accordance with the Employer's Requirements. The Works shall not be considered to be completed for the purposes of taking-over under sub-clause 10.1 [*Taking Over of the Works and Sections*] until the Engineer has received these documents.

#### **5.7 Technical Documentation**

Prior to commencement of the Tests on Completion, the Contractor shall supply to the Engineer the technical documentation as specified in the Employer's Requirements.

The Works or Section shall not be considered to be completed for the purposes of taking-over under sub-clause 10.1 [*Taking Over of the Works and Sections*] until the Engineer has received the technical documentation as defined in this sub-clause 5.7, the "history file" including design calculations and certain certification as well as any other documents required to meet the CE Marking requirements.

#### **5.8 Design Error**

If errors, omissions, ambiguities, inconsistencies, inadequacies or other defects are found in the Contractor's Documents, they and the Works shall be corrected at the Contractor's cost, notwithstanding any consent or approval under this clause.

### **STAFF AND LABOUR**

#### **6.1 Engagement of Staff and Labour**

Except as otherwise stated in the Employer's Requirements, the Contractor shall make arrangements for the engagement of all staff and labour, local or otherwise, and for their payment, housing, feeding and transport if required.

#### **6.2 [Not used]**

#### **6.3 Persons in the Service of Employer**

The Contractor shall not recruit, or attempt to recruit, staff and labour from amongst the Employer's Personnel.

#### **6.4 Labour Laws**

The Contractor shall comply with all the relevant labour Laws applicable to the Contractor's Personnel, including Laws relating to their employment, health, safety, welfare, immigration and emigration, and shall allow them all their legal rights.

The Contractor shall require its employees to obey all applicable Laws, including those concerning safety at work.

6.5 [Not used]

#### 6.6 **Facilities for Staff and Labour**

Except as otherwise stated in the Employer's Requirements, the Contractor shall provide and maintain all necessary accommodation and welfare facilities for the Contractor's Personnel if required. The Contractor shall also provide facilities for the Employer's Personnel as stated in the Employer's Requirements.

The Contractor shall not permit any of the Contractor's Personnel to maintain any temporary or permanent living quarters within the structures forming part of the Equipment.

#### 6.7 **Health and Safety**

The Contractor shall at all times take all reasonable precautions to maintain the health and safety of the Contractor's Personnel. In collaboration with local health authorities, the Contractor shall ensure that medical staff, first aid facilities, sick bay and ambulance service shall be available at the Site and at any accommodation for Contractor's and Employer's Personnel, and that suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics.

The Contractor shall appoint an accident prevention officer at the Site, responsible for maintaining safety and protection against accidents. This person shall be qualified for this responsibility, and shall have the authority to issue instructions and take protective measures to prevent accidents. Throughout the execution of the Works, the Contractor shall provide whatever is required by this person to exercise this responsibility and authority.

The Contractor shall send, to the Engineer, details of any accident as soon as practicable after its occurrence. The Contractor shall maintain records and make reports concerning health, safety and welfare of persons, and damage to property, as the Engineer may reasonably require.

#### 6.8 **Contractor's Superintendence**

Throughout the design and execution of the Works, and as long thereafter as is necessary to fulfil the Contractor's obligations, the Contractor shall provide all necessary superintendence to plan, arrange, direct, manage, inspect and test the work.

Superintendence shall be given by a sufficient number of persons having adequate knowledge of the language for communications (defined in sub-clause 1.4 [*Law and Language*]) and of the operations to be carried out (including the methods and techniques required, the hazards likely to be encountered and methods of preventing accidents), for the satisfactory and safe execution of the Works.

A reasonable proportion of the Contractor's superintending staff shall have a working knowledge of the English language or the Contractor shall have a sufficient number of

competent interpreters available on Site during all working hours. At least one of the Contractor's superintending staff on Site must be fluent in speaking English and Polish.

#### 6.9 **Contractor's Personnel**

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

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

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

#### 6.10 **Records of Contractor's Personnel and Equipment**

The Contractor shall submit, to the Engineer, details showing the number of each class of Contractor's Personnel and of each type of Contractor's Equipment on the Site. Details shall be submitted each calendar month, in a form approved by the Engineer, until the Contractor has completed all work which is known to be outstanding at the completion date stated in each Taking-Over Certificate for the Works.

#### 6.11 **Disorderly Conduct**

The Contractor shall at all times take all reasonable precautions to prevent any unlawful, riotous or disorderly conduct by or amongst the Contractor's Personnel, and to preserve peace and protection of persons and property on and near the Site.

### **PLANT, MATERIALS AND WORKMANSHIP**

#### 7.1 **Manner of Execution**

The Contractor shall carry out the manufacture of Plant, the production and manufacture of Materials, and all other execution of the Works:

- (a) in the manner (if any) specified in the Contract;
- (b) in a proper workmanlike and careful manner, in accordance with Good Industry Practice; and
- (c) using properly equipped facilities and non-hazardous Materials, except as otherwise specified in the Contract.

#### 7.2 **Samples**

The Contractor shall submit the following samples of Materials, and relevant information, to the Engineer for review in accordance with the procedures for Contractor's Documents described in sub-clause 5.2 [*Contractor's Documents*]:

- (a) manufacturer's standard samples of Materials and samples specified in the Contract, all at the Contractor's cost; and
- (b) additional samples instructed by the Engineer as a Variation.

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

### 7.3 Inspection

The Employer's Personnel, the Port Authority and the Lenders' Representative shall at all reasonable times:

- (a) have full access to all Contractor's Documents, Works, parts of the Site and to all places from which natural Materials are being obtained; and
- (b) during design, production, manufacture and construction (at the Site and elsewhere), be entitled to examine, inspect, measure and test the materials and workmanship, and to check the progress of manufacture of Plant and design, production and manufacture of Materials.

The Contractor shall give the Employer's Personnel, the Port Authority and the Lenders' Representative full opportunity to carry out these activities, including providing files, access, facilities, permissions and safety equipment. No such activity shall relieve the Contractor from any obligation or responsibility.

The Contractor shall give notice to the Engineer whenever any work, including design, is ready and before it is approved by the Contractor for manufacturing, covered up, put out of sight, or packaged for storage or transport. The Engineer shall then either carry out the review, examination, inspection, measurement or testing without unreasonable delay, or promptly give notice to the Contractor that the Engineer does not require to do so. If the Contractor fails to give the notice, it shall, if and when required by the Engineer, recall the process, uncover the work and thereafter reinstate and make good, all at the Contractor's cost. No such activity shall relieve the Contractor from any obligation or responsibility.

### 7.4 Testing

The Plant and Materials will be mechanically and electrically tested as part of the Contractor's works, all at the Contractor's cost, at the Contractor's and/or any supplier's premises prior to despatch or at external laboratories selected by the Engineer. The Employer shall be entitled to send representatives to attend such a test (and any other tests which the parties may agree will be performed) or to view the manufacture of the Plant and/or Materials at any time reasonably acceptable to both parties but satisfactory completion will not constitute acceptance by the Employer nor relieve the Contractor of any obligation or liability. Any component of the Works tested prior to delivery shall be returned to pristine (taking account of the nature of the tests undertaken) condition prior to shipment to the Employer.

The Plant and Materials will be prepared for despatch in accordance with Good Industry Practice and will be delivered in a pristine condition.

All Plant, Materials and/or Equipment will be delivered to the Site with carriage and insurance paid by the Contractor in accordance with DDP Incoterms 2010 until it is offloaded at the Site and tested and commissioned and the final Taking-Over Certificate has been issued.



The remaining provisions of this sub-clause shall apply to all tests specified in the Contract.

The Contractor shall provide all designs, apparatus, assistance, documents and other information, electricity, equipment, fuel, consumables, instruments, labour, materials, and suitably qualified and experienced staff, as are necessary to carry out the specified tests efficiently including test certificates for all lifting equipment for the legal operation of the Works in the EU to be provided in the English language and in the format required in the EU. The Contractor shall agree, with the Engineer, the time and place for the specified testing of any Plant, Materials and other parts of the Works.

The Engineer may, under clause 13 [*Variations and Adjustments*], vary the location or details of specified tests, or instruct the Contractor to carry out additional tests. If these varied or additional tests show that the tested Plant, Materials or workmanship is not in accordance with the Contract, the cost of carrying out this Variation shall be borne by the Contractor, notwithstanding other provisions of the Contract.

The Engineer shall give the Contractor not less than 48 hours' notice of the Engineer's intention to attend the tests. If the Engineer does not attend at the time and place agreed, the Contractor may proceed with the tests, unless otherwise instructed by the Engineer, and the tests shall then be deemed to have been made in the Engineer's presence.

If the Contractor suffers delay and/or incurs Cost from complying with these instructions or as a result of a delay for which the Employer is responsible, the Contractor shall give notice to the Engineer and shall be entitled subject to clause 20 [*Claims and Disputes*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under sub-clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost plus Profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine these matters.

The Contractor shall promptly forward to the Engineer duly certified reports of the tests. When the specified tests have been passed, the Engineer shall endorse the Contractor's test certificate, or issue a certificate to him, to that effect. Without prejudice to the Contractor's obligation to satisfy the Tests on Completion, if the Engineer has not attended the tests, he shall be deemed to have accepted the readings as accurate.

## 7.5 **Rejection**

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

If the Engineer requires this Plant, Materials, design or workmanship to be retested, the tests shall be repeated under the same terms and conditions. If the rejection and retesting cause the Employer to incur additional costs, the Contractor shall subject to sub-clause 2.5 [*Employer's Claims*] pay these costs to the Employer.

## 7.6 **Remedial Work**

Notwithstanding any previous test or certification, the Engineer may instruct the Contractor to:

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

The Contractor shall comply with the instruction within a reasonable time, which shall be the time (if any) specified in the instruction, or immediately if urgency is specified under sub-paragraph (c).

If the Contractor fails to comply with the instruction, the Employer shall be entitled to employ and pay other persons to carry out the work. Except to the extent that the Contractor would have been entitled to payment for the work, the Contractor shall subject to sub-clause 2.5 [*Employer's Claims*] pay to the Employer all costs arising from this failure.

#### **7.7 Ownership of Plant and Materials**

Unless otherwise stated in the Contract, each item of Equipment, Plant and Materials or Contractor's Documents shall, to the extent consistent with the Laws of the Country, become the property of the Employer at the date of the relevant Taking-Over Certificate,

following which (if requested by the Employer, or if the Plant, Materials and/or Equipment is being delivered into storage) the Contractor shall affix thereto (and shall procure that Subcontractors shall affix thereto) plates supplied by the Employer stating that it is the owner thereof.

#### **7.8 [Not used]**

### **COMMENCEMENT, DELAYS AND SUSPENSION**

#### **8.1 Commencement of Work**

From the Commencement Date, the Contractor shall proceed promptly, diligently and efficiently with the design and manufacture and assembly of the Equipment and with the performance of the Works and the Services.

#### **8.2 Time for Completion**

The Contractor shall complete the whole of the Works, and each Section (if any), within the Time for Completion for the Works or Section (as the case may be), including:

- (a) achieving the passing of the Tests on Completion; and
- (b) completing all work which is stated in the Contract as being required for the Works or Section to be considered to be completed for the purposes of taking-over under sub-clause 10.1 [*Taking Over of the Works and Sections*]; and
- (c) all inspections, certificates and/or other Approvals required by Contract, Law and/or Statutory Authorities relating to safety and/or occupation and/or use of the Equipment and/or the Works (including the Operational Permit) have been

satisfactorily completed, achieved and obtained (as appropriate), without derogation and without onerous conditions and are final.

8.3 [Not used]

#### 8.4 **Extension of Time for Completion**

The Contractor shall be entitled subject to this sub-clause 8.4 [*Extension of Time for Completion*] to an extension of the Time for Completion if and to the extent that completion for the purposes of sub-clause 10.1 [*Taking Over of the Works and Sections*] is delayed by any of the following causes (and would not otherwise have been delayed):

- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under sub-clause 13.3 [*Variation Procedure*]);
- (b) a cause of delay giving an entitlement to extension of time under a sub-clause of these Conditions; or
- (c) any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site.

and the Contractor's entitlement shall be adjusted accordingly to the extent that it has failed to meet these requirements. For the avoidance of doubt, the Contractor shall not be entitled to claim any Costs or extension of time or other relief or compensation for using Prudent Practices, and any grant of an extension of time does not confer or imply the existence of any right of the Contractor to receive compensation from the Employer.

The Contractor shall not be entitled to an extension of time in the circumstances of (a) to (c) above to the extent that the delay is attributable to any breach of the Contract, neglect or failure by the Contractor or any Subcontractor.

No circumstance other than as set out in sub-paragraphs (a) to (c) above and subject always to sub-paragraphs (1) to (3) above will give the Contractor any entitlement to an extension of any Time for Completion.

If the Contractor considers himself to be entitled to any extension of the Time for Completion under this sub-clause, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 14 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 14 days, the Time for Completion shall not be extended and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this sub-clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

Upon receiving a notice given by Contractor in accordance with this sub-clause, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine the extension (if any) of the Time for Completion (before or after its expiry) to which the Contractor is entitled under the Contract.

8.5 [Not used]

8.6 [Not used]

## 8.7 Contractual Penalties

If the Contractor fails to comply with sub-clause 8.2 [*Time for Completion*], the Contractor shall be subject to sub-clause 2.5 [*Employer's Claims*] pay contractual penalties to the Employer for this default. These contractual penalties shall be in the amount stated in the Particular Conditions. However, the total amount due under this sub-clause shall not exceed the maximum amount of contractual penalties stated in the Particular Conditions.

These contractual penalties shall be the only damages due from the Contractor for such default, other than in the event of termination under sub-clause 15.2 [*Termination by Employer*] prior to completion of the Works. These damages shall not relieve the Contractor from its obligation to complete the Works, or from any other duties, obligations or responsibilities which it may have under the Contract.

## 8.8 Suspension of Work

The Engineer may at any time instruct the Contractor to suspend progress of part or all of the Works. During such suspension, the Contractor shall protect, store and secure such part or the Works against any deterioration, loss or damage.

The Engineer may also notify the cause for the suspension. If and to the extent that the cause is notified and is the responsibility of the Contractor, sub-clauses 8.9 [*Consequences of Suspension*], 8.10 [*Payment for Plant and Materials in Event of Suspension*] and 8.11 [*Prolonged Suspension*] shall not apply.

## 8.9 Consequences of Suspension

If the Contractor suffers delay and/or incurs Cost from complying with the Engineer's instructions under sub-clause 8.8 [*Suspension of Work*] and/or from resuming the work, the Contractor shall give notice to the Engineer and shall be entitled subject to sub-clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under sub-clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost, which shall be added to the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine these matters.

The Contractor shall not be entitled to an extension of time for, or to payment of the Cost incurred in, making good the consequences of the Contractor's faulty design, workmanship or materials, or of the Contractor's failure to protect, store or secure in accordance with sub-clause 8.8 [*Suspension of Work*].

## 8.10 Payment for Plant and Materials in Event of Suspension

The Contractor shall be entitled to payment of the value (as at the date of suspension) of Plant and/or Materials which have not been delivered to Site, if:

- (a) the work on Plant or delivery of Plant and/or Materials has been suspended for more than 28 days; and
- (b) the Contractor has protected, stored, secured and marked the Plant and/or Materials as the Employer's property in accordance with the Engineer's instructions.

## 8.11 Prolonged Suspension

If the suspension under sub-clause 8.8 [*Suspension of Work*] has continued for more than 120 days, the Contractor may request the Engineer's permission to proceed. If the Engineer does not give permission within 28 days after being requested to do so, the Contractor may, by giving notice to the Engineer, treat the suspension of any part of the Works as an omission under clause 13 [*Variation and Adjustments*] of the affected part of the Works. If the suspension affects the whole of the Works, the Contractor may give notice of termination under sub-clause 16.2 [*Termination by Contractor*]. The rights of the Contractor to terminate the Contract under this Sub-Clause 8.11 shall be subject to the terms of the Lender Direct Agreement.

## TESTS ON COMPLETION

### 9.1 Contractor's Obligations

The Contractor shall carry out the Tests on Completion in accordance with this clause and sub-clause 7.4 [*Testing*], after providing the documents in accordance with sub-clause 5.6 [*As-Built Documents*] and sub-clause 5.7 [*Operation and Maintenance Manuals*]. For the avoidance of doubt, the Contractor shall give access to the Lenders' Representative for the purpose of witnessing the Tests on Completion.

The Contractor shall give to the Engineer not less than 7 days' notice of the date after which the Contractor will be ready to carry out each of the Tests on Completion. Unless otherwise agreed, Tests on Completion shall be carried out within 14 days after this date, on such day or days as the Engineer shall instruct.

Unless otherwise stated in the Particular Conditions, the Tests on Completion shall be carried out in the following sequence:

- (a) pre-commissioning tests, which shall include the appropriate inspections, crawling motions and ("dry" or "cold") functional tests to demonstrate that each Section and/or each item of Plant can safely undertake the next stage, (b);
- (b) commissioning tests, which shall include the specified full-speed operational tests to demonstrate that the Works or Section can be operated safely and as specified, under all available operating conditions; and
- (c) trial operation, which shall demonstrate that the Works or Section perform reliably and in accordance with the Contract. During trial operation, when the Works are operating under stable conditions, the Contractor shall give notice to the Engineer that the Works are ready for any other Tests on Completion, including performance tests to demonstrate whether the Works conform with criteria specified in the Employer's Requirements and with the Schedule of Guarantees.

Trial operation shall not constitute a taking-over under clause 10 [*Employer's Taking Over*]. Unless otherwise stated in the Particular Conditions, any product produced by the Works during trial operation shall be the property of the Employer.

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

### 9.2 Delayed Tests

If the Tests on Completion are being unduly delayed by the Employer, sub-clause 7.4 [*Testing*] (eighth paragraph) or sub-clause 10.3 [*Interference with Tests on Completion*] shall be applicable.

If the Tests on Completion are being unduly delayed by the Contractor, the Engineer may by notice require the Contractor to carry out the Tests within 14 days after receiving the notice: The Contractor shall carry out the Tests on such day or days within that period as the Contractor may fix and of which it shall give notice to the Engineer.

If the Contractor fails to carry out the Tests on Completion within the period of 14 days, the Employer's Personnel may proceed with the Tests at the risk and cost of the Contractor. The Tests on Completion shall then be deemed to have been carried out in the presence of the Contractor and the results of the Tests shall be accepted as accurate.

### 9.3 **Retesting**

If the Works, or a Section, fail to pass the Tests on Completion, sub-clause 7.5 [*Rejection*] shall apply, and the Engineer or the Contractor may require the failed Tests, and Tests on Completion on any related work, to be repeated under the same terms and conditions.

### 9.4 **Failure to Pass Tests on Completion**

If the Works, or a Section, fail to pass the Tests on Completion repeated under sub-clause 9.3 [*Retesting*] the Engineer shall be entitled to:

- (a) order further repetition of Tests on Completion under sub-clause 9.3;
- (b) if the failure deprives the Employer of substantially the whole benefit of the Works or Section, reject the Works or Section (as the case may be), in which event the Employer shall have the same remedies as are provided in clause 11.A2 [*Defects in the Works*]; or
- (c) issue a Taking-Over Certificate, if the Employer so requests.

In the event of sub-paragraph (c), the Contractor shall then proceed in accordance with all other obligations under the Contract, and the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Employer as a result of this failure. Unless the relevant reduction for this failure is stated (or its method of calculation is defined) in the Contract, the Employer may require the reduction to be (i) agreed by both Parties (in full satisfaction of this failure only) and paid before this Taking-Over Certificate is issued, or (ii) determined and paid under sub-clause 2.5 [*Employer's Claims*] and sub-clause 3.5 [*Determinations*]. For the avoidance of doubt the failure of any part of the Works to pass the Tests on Completion shall not prevent the Employer taking over for use any part of the Works which has passed the Tests on Completion and is available for commercial operation by the Employer, but the final payment under the Contract will not be made until all the Works has successfully passed the Tests on Completion and the final Taking-Over Certificate has been issued.

## **EMPLOYER'S TAKING OVER**

### 10.1 **Taking Over of the Works and Sections**

Except as stated in sub-clause 9.4 [*Failure to Pass Tests on Completion*], the Works or Section (as the case may be) shall be taken over by the Employer when (i) the Works or the relevant Section have been completed in accordance with the Contract, including the matters described in sub-clause 8.2 [*Time for Completion*] with exception to the

Operational Permit; (ii) with exception to the Operational Permit as stated in sub-clause 10.1A [*Ownership of the Equipment and the Operational Permit*], the Works or the relevant Section conform to all Approvals and have been inspected and approved by or on behalf of the relevant Statutory Authority; and, except as allowed in sub-paragraph (a) below, (iii) all other conditions to the issuance of a Taking Over Certificate stated in the Contract have been met, and (iv) a Taking-Over Certificate for the Works or the relevant Section has been issued, or is deemed to have been issued in accordance with this sub-clause.

The Contractor may apply by notice to the Engineer for a Taking-Over Certificate not earlier than 14 days before the Works will, in the Contractor's opinion, be complete and ready for taking over. If the Works are divided into Sections, the Contractor may similarly apply for a Taking-Over Certificate for each Section.

The Engineer shall, within 14 days after receiving the Contractor's application:

- (a) issue the Taking-Over Certificate to the Contractor, stating the date on which the Works or Section were completed in accordance with the Contract, except for any minor outstanding work and defects which will not substantially affect the use of the Works or Section (either until or whilst this work is completed and these defects are remedied); or
- (b) reject the application, giving reasons and specifying the work required to be done by the Contractor to enable the Taking-Over Certificate to be issued. The Contractor shall then complete this work before issuing a further notice under this sub-clause.

If the Engineer fails either to issue the Taking-Over Certificate or to reject the Contractor's application within the period of 14 days, and if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Taking-Over Certificate shall be deemed to have been issued on the last day of that period.

#### **10.1A Ownership of the Equipment and the Operational Permit**

Each item of the Equipment shall become the property of the Employer upon the issue or deemed issue (as the case may be) of the Taking-Over Certificate by the Engineer in accordance with sub-clause 10.1 [*Taking Over of the Works and Sections*]. Immediately after the Taking-Over Certificate has been issued, or is deemed to have been issued in accordance with sub-clause 10.1 [*Taking Over of the Works and Sections*] the Contractor shall take all actions aimed at obtaining final Operational Permits with respect to all Equipment. The Works shall not be deemed completed within the Time for Completion for the Works unless the Contractor obtains all Operational Permits required under the Contract.

#### **10.2 Taking Over of Parts of the Works**

The Engineer may, at the sole discretion of the Employer, issue a Taking-Over Certificate for the Equipment or any Section.

The Employer shall not use any part of the Works (other than for training, any temporary measure or other use which is either specified in the Contract or agreed by both Parties) unless and until the Engineer has issued a Taking-Over Certificate for this part. However, if the Employer does use any part of the Works before the Taking-Over Certificate is issued (other than for training, any temporary measure or other use which is either specified in the Contract or agreed by both Parties):

- (a) the part which is used shall be deemed to have been taken over as from the date on which it is used;
- (b) the Contractor shall cease to be liable for the care of such part as from this date, when responsibility shall pass to the Employer; and
- (c) if requested by the Contractor, the Engineer shall issue a Taking-Over Certificate for this part.

After the Engineer has issued a Taking-Over Certificate for a part of the Works, the Contractor shall be given the earliest opportunity to take such steps as may be necessary to carry out any outstanding Tests on Completion. The Contractor shall carry out these Tests on Completion as soon as practicable before the expiry date of the relevant Warranty Period.

If the Contractor incurs Cost as a result of the Employer taking over and/or using a part of the Works prior to the issue of a Taking-Over Certificate (other than for training, any temporary measure or other use which is either specified in the Contract or agreed by both Parties), the Contractor shall (i) give notice to the Engineer and (ii) be entitled subject to clause 20 [*Claims and Disputes*] to payment of any such Cost plus Profit, which shall be included in the Contract Price. After receiving this notice, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine this Cost and Profit.

For the avoidance of doubt, the Employer accessing the Site or any part of the Works or permitting another party to do so in accordance with the Contract shall not constitute 'use' for the purposes of this sub-clause.

### 10.3 Interference with Tests on Completion

If the Contractor suffers delay or is prevented, for more than 14 days, from carrying out the Tests on Completion by a cause for which the Employer is responsible and/or incurs Cost as a result of this delay in carrying out the Tests on Completion, the Contractor shall give notice to the Engineer and shall be entitled subject to clause 20 [*Claims and Disputes*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under sub-clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost plus Profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine these matters.

### 10.4 Surfaces Requiring Reinstatement

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

## DEFECTS LIABILITY

### 11.A1 Contractor's Warranty

In addition to any other warranties expressed by Laws and/or in this Contract, the Contractor warrants (*udziela gwarancji*) that the Works and the Equipment:



- (a) will on the issue of a Taking-Over Certificate in respect of any Section or in respect of the Works and by the expiry of the Warranty Period (or as soon as practicable thereafter) be of satisfactory quality and conform to the requirements of the Works as set out in the Contract;
- (b) will on the issue of a Taking-Over Certificate in respect of any Section or in respect of the Works and by the expiry of the Warranty Period (or as soon as practicable thereafter) correspond with the description of the Works set out in this Contract;
- (c) do not and will not at any time infringe any intellectual property rights (whether patent, copyright, design right, know-how or otherwise) of any third party and that the Contractor has and will have all rights, licenses and permissions necessary to enable it to manufacture and supply the Equipment and perform the Services, and to enable the Employer to utilise the Equipment in the manner contemplated by this Contract. The Contractor will indemnify the Employer for any costs, loss and expense arising from any such infringement or allegation of infringement; and
- (d) in the event that any third party alleges that the use of the Equipment constitutes an infringement of that party's intellectual property rights, the Contractor at its own cost will defend such claim or proceedings arising out of such claim or alleged infringement and take full control and responsibility for the same, including taking such action as is reasonably necessary to enable the Employer to continue to use the Equipment, provided that the Employer gives such support and assistance as the Contractor may reasonably require. The Contractor will indemnify the Employer for any costs, loss and expense arising from any such infringement or allegation of infringement or related claim or proceeding.

#### 11.A2 **Repair and Replacement of Parts**

Without prejudice to sub-clause 11.1, in the event that during the Warranty Period:

- (a) any defect appears in any part or parts of the Works, or the Works fail to operate in accordance with the Employer's Requirements and/or the Contractor's Specification; or
- (b) any claim arises out of an alleged infringement of intellectual property rights in respect of any part or parts of the Works,

the Contractor undertakes, as soon as practicable but not later than within 7 days of a notice given by the Employer/Engineer to the Contractor, with due regard for the nature and extent of the non-performance or defect or alleged infringement and for the circumstances in general, to replace the relevant part or parts free of charge, and to deliver or repair the same at the Contractor's expense at the Site provided that any such repairs or replacements shall be made without prejudice to the Employer's other rights and remedies.

Notwithstanding any other provisions of the Contract, if a defect is of a type preventing or materially restricting handling operations, the Employer shall be entitled to immediately undertake rectification works at the Contractor's risk and expense. The Employer shall notify the Contractor about the fact and use only original Spare Parts.

#### 11.B **Contractor's Liability for Damages**

The Contractor's warranties referred to in clause 11.A [*Contractor's Warranty*] shall not exclude or limit the Contractor's liability for damages arising from the Contractor's non-

performance or default performance of the Contract. Regardless and independently to its rights referred to in clause 11.A [*Contractor's Warranty*] the Employer shall be entitled to damages on regular basis of the Law of the Country any time the Employer finds its rights referred to in clause 11.A [*Contractor's Warranty*] to be not sufficient. The same shall apply to latent defects in the Works, which may appear after the lapse of the respective Warranty Period.

#### 11.1 **Completion of Work and Remedying Defects**

In order that the Works and Contractor's Documents, shall be in the condition required by the Contract (fair wear and tear excepted) by the expiry of the Warranty Period (or as soon as practicable thereafter), the Contractor shall:

- (a) complete any work which is outstanding on the date stated in a Taking-Over Certificate within such reasonable time as is instructed by the Engineer (and, in any case, prior to the expiry of the Warranty Period);
- (b) execute all work required to remedy defects or damage, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Warranty Period for the Works or Section (as the case may be).

If a defect appears the Employer shall notify the Contractor accordingly.

#### 11.2 **Cost of Remedying Defects**

All work referred to in clause 11.A2 [*Repair and Replacement of Parts*] and sub-clause 11.1 [*Completion of Work and Remedying Defects*] shall be executed at the risk and cost of the Contractor, if and to the extent that the work is attributable to:

- (a) the design of the Works, other than a part of the design for which the Employer is responsible (if any);
- (b) Equipment, Plant, Materials or workmanship not being in accordance with the Contract;
- (c) improper operation or maintenance which was attributable to matters for which the Contractor is responsible (under sub-clauses 5.5 to 5.7 or otherwise); or
- (d) failure by the Contractor to comply with any other obligation.

If and to the extent that such work is attributable to any other cause, the Contractor shall be notified by (or on behalf of) the Employer, and sub-clause 13.3 [*Variation Procedure*] shall apply.

#### 11.3 **Extension of Warranty Period**

The Employer shall be entitled subject to sub-clause 2.5 [*Employer's Claims*] to an extension of the Warranty Period if and to the extent that one or more items of the Works cannot be used for the purposes for which they are intended by reason of a defect or damage.

Where the Contractor performs any works or repairs or replaces any parts pursuant to clauses 11.A2 or 11.1, the Warranty Period in respect of such work or part only shall expire on the later of:

- (a) 12 months after the completion of such work or replacement of such part; and

- (b) the normal expiration of the Warranty Period in relation to the work or part.

The Warranty Period in relation to the repaired and/or replaced article, product, material or equipment shall recommence from the moment of the completion of such repair or replacement.

Notwithstanding any other provision of this sub-clause 11.3, any Warranty Period, if extended, shall not exceed a period equal to twice the duration of the original period.

#### 11.4 **Failure to Remedy Defects**

If the Contractor fails to comply with any of its obligations under sub-clause 11.A2 or 11.1 (the "**Remedial Work**") within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the Remedial Work is to be performed. The Contractor shall be given reasonable notice of this date.

If the Contractor fails to perform the Remedial Work by this notified date and such Remedial Work was to be executed at the cost of the Contractor under sub-clause 11.2 [Cost of Remedying Defects], the Employer may (at his option):

- (a) carry out the work himself or by others, in a reasonable manner and at the Contractor's cost, but the Contractor shall have no responsibility for this work; and the Contractor shall subject to sub-clause 2.5 [Employer's Claims] pay to the Employer the costs reasonably incurred by the Employer in remedying the defect or damage;
- (b) require the Engineer to agree or determine a reasonable reduction in the Contract Price in accordance with sub-clause 3.5 [Determinations]; or
- (c) if the defect or damage deprives the Employer of substantially the whole benefit of the Works or any major part of the Works, terminate the Contract. Without prejudice to any other rights, under the Contract or otherwise, the Employer shall then be entitled to recover all sums paid for the Works, plus financing costs and the cost of dismantling the same, clearing the Site and returning Plant and Materials to the Contractor.

#### 11.5 **Removal of Defective Work**

If the defect or damage cannot be remedied expeditiously on the Site and the Employer gives consent, the Contractor may remove from the Site for the purposes of repair such items of Plant as are defective or damaged. This consent may require the Contractor to increase the amount of the Performance Security by the full replacement cost of these items, or to provide other appropriate security.

#### 11.6 **Further Tests**

If the work of remedying any defect or damage may affect the performance of the Works, the Engineer may require the repetition of any of the tests described in the Contract, including Tests on Completion. The requirement shall be made by notice within 28 days after the defect or damage is remedied.

These tests shall be carried out in accordance with the terms applicable to the previous tests, except that they shall be carried out at the risk and cost of the Party liable, under sub-clause 11.2 [*Cost of Remedying Defects*], for the cost of the remedial work.

### 11.7 **Right of Access**

Until the Performance Certificate has been issued, the Contractor shall have the right of access to all parts of the Works and to records of the operation and performance of the Works, except as may be inconsistent with the Employer's reasonable security or on-Site construction restrictions, provided that the Contractor shall give the Employer not less than 3 days' notice of any such access.

When exercising its right of access to the Works and/or the Site, the Contractor shall comply with any requirements or restrictions in relation to accessing the Site including border guard controls, customs controls and the requirements of the harbour master and the Port Authority, shall cooperate with such other contractors as may be present on or near the Site and shall use all reasonable endeavours to avoid interfering with any works being conducted by such contractors, the activities of the Employer and the operation of the DCT Container Terminal facilities. The Contractor shall procure that its Subcontractors comply with the provisions of this sub-clause 11.7.

The Contractor shall provide reasonable prior notice to the Employer of any requirement for such access and shall, when accessing the Works pursuant to this sub-clause, cooperate reasonably with the Employer and use reasonable endeavours to ensure that it does not in any way impede the Employer's on-going operations in the DCT Container Terminal, the Works or otherwise the Site.

### 11.8 **Contractor to Search**

The Contractor shall, if required by the Engineer, search for the cause of any defect, under the direction of the Engineer. Unless the defect is to be remedied at the cost of the Contractor under sub-clause 11.2 [*Cost of Remedying Defects*], the Cost of the search plus Profit shall be agreed or determined by the Engineer in accordance with sub-clause 3.5 [*Determinations*] and shall be included in the Contract Price.

### 11.9 **Performance Certificate**

Performance of the Contractor's obligations shall not be considered to have been completed until the Engineer has issued the Performance Certificate to the Contractor, stating the date on which the Contractor completed its obligations under the Contract.

The Engineer shall issue the Performance Certificate within 28 days after the latest of the expiry dates of the Warranty Periods, or as soon thereafter as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects. A copy of the Performance Certificate shall be issued to the Employer.

Only the Performance Certificate shall be deemed to constitute acceptance of the Works.

### 11.10 **Unfulfilled Obligations**

After the Performance Certificate has been issued, each Party shall remain liable for any breach of the Contract and for the fulfilment of any obligation which remains unperformed at that time. For the purposes of determining the nature and extent of a breach or unperformed obligations, the Contract shall be deemed to remain in force.

### 11.11 Clearance of Site

Upon receiving the Performance Certificate, the Contractor shall remove any remaining Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works from the Site.

If all these items have not been removed within 28 days after the Employer receives a copy of the Performance Certificate, the Employer may sell or otherwise dispose of any remaining items. The Employer shall be entitled to be paid the costs incurred in connection with, or attributable to, such sale or disposal and restoring the Site.

If these moneys are less than the Employer's costs, the Contractor shall pay the outstanding balance to the Employer.

11.12 [Not used]

## TEST AFTER COMPLETION

12.1 – 12.4 [Not used]

## VARIATIONS AND ADJUSTMENTS

### 13.1 Right to Vary

Variations may be initiated by the Engineer at any time prior to issuing the final Taking-Over Certificate for the Works, either by an instruction or by a request for the Contractor to submit a proposal. A Variation shall not comprise the omission of any work which is to be carried out by others.

The Contractor shall execute and be bound by each Variation without any change to the amounts payable under the Contract or any extension to the Time for Completion, unless the Contractor:

- (a) gives notice (within 7 days of the instruction or request from the Engineer) to the Engineer stating (with supporting particulars) that (i) the Contractor cannot readily obtain the Goods required for the Variation, (ii) it will reduce the safety or suitability of the Works, or (iii) it will have an adverse impact on the achievement of the Schedule of Guarantees. Upon receiving this notice, the Engineer shall cancel, confirm or vary the instruction; or
- (b) gives notice (within 14 days of the instruction from the Engineer) to the Engineer stating that the Variation will result in an incremental cost or delay to the Contractor, such notice to include a proposal in accordance with sub-clause 13.3 [*Variation Procedure*] for carrying out the Variation, in which case, the second, third and fourth paragraphs of sub-clause 13.3 [*Variation Procedure*] shall apply.

### 13.2 Value Engineering

The Contractor may, at any time, submit to the Engineer a written proposal which (in the Contractor's opinion) will, if adopted, (i) accelerate completion, (ii) reduce the cost to the Employer of executing, maintaining or operating the Works, (iii) improve the efficiency or value to the Employer of the completed Works, or (iv) otherwise be of benefit to the Employer.

The proposal shall be prepared at the cost of the Contractor and shall include the items listed in sub-clause 13.3 [*Variation Procedure*].

### 13.3 Variation Procedure

If the Engineer requests a proposal, prior to instructing a Variation, the Contractor shall respond in writing as soon as practicable, either by giving reasons why it cannot comply (if this is the case) or by submitting:

- (a) a description of the proposed design and/or work to be performed and a programme for its execution;
- (b) the Contractor's proposal for any necessary modifications to the time for performance of the Works as required by the Contract and to the Time for Completion; and
- (c) the Contractor's proposal for adjustment to the Contract Price.

The Engineer shall, as soon as practicable after receiving such proposal (under sub-clause 13.2 [*Value Engineering*] or otherwise), respond with approval, disapproval or comments. The Contractor shall not delay any work whilst awaiting a response.

Each instruction to execute a Variation, with any requirements for the recording of Costs, shall be issued by the Engineer to the Contractor, who shall acknowledge receipt.

Upon instructing or approving a Variation, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine adjustments to the Contract Price, the payment schedule set out in Attachment C to the Particular Conditions and the Time for Completion. These adjustments shall include Profit, and shall take account of the Contractor's submissions under sub-clause 13.2 [*Value Engineering*] if applicable.

Notwithstanding any other provision of this clause 13, the Contractor shall not be entitled to any extension of time or any additional Cost in respect of a Variation to the extent that such Variation is necessary due to any breach of the Contract by, or act or omission of, the Contractor.

### 13.4 [Not used]

### 13.5 Additional Works

If the Employer requests the Contractor to provide additional works or services which are not either envisaged by, or ancillary to the Works to be provided under, this Contract then the Contractor shall comply with any such request as if such request were a Variation instruction and the provisions of this clause 13 [*Variations and Adjustments*] shall apply accordingly.

### 13.6 [Not used]

### 13.7 Adjustments for Changes in Legislation

The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a Change in Law, save for any Foreseeable Change in Law made after the Base Date, which materially affect the Contractor in the performance of obligations under the Contract.

If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of such Changes in Law made after the Base Date, the Contractor shall give notice to the Engineer and shall be entitled subject to clause 20 [*Claims and Disputes*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under sub-clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost, which shall be included in the Contract Price,

provided that the Contractor shall not be entitled to claim any Costs or extension of time or other relief or compensation in respect of any Foreseeable Change in Law.

After receiving this notice, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine these matters.

### 13.8 **No double Recovery**

Notwithstanding any other provision of this Contract, the Contractor shall not be entitled to recover compensation or make a claim under this Contract or any other agreement in relation to the Works in respect of any cost, loss, expense or liability that it has incurred (or any failure of the other party) to the extent that it has already been compensated in respect of that cost, loss, expense or liability or failure pursuant to this Contract or otherwise.

## **CONTRACT PRICE AND PAYMENT**

### 14.1 **Contract Price**

Unless otherwise stated in the Particular Conditions:

- (a) the Contract Price shall be the lump sum Accepted Contract Amount and be subject to adjustments in accordance with the Contract;
- (b) the Contractor shall pay all local and other taxes, import duties, VAT, duties and fees required to be paid by him in respect of executing the Works in accordance with DDP Incoterms 2010;

### 14.2 **[Not used].**

### 14.3 **Application for Interim Payment Certificates**

The Contractor shall submit a Statement in six copies to the Engineer after the end of the period of payment stated in the Contract (if not stated, after the end of each month), in a form approved by the Engineer, showing in detail the amounts to which the Contractor considers himself to be entitled, together with supporting documents which shall include the relevant report on progress, and in respect of payments 2, 3 and 4 (as those payments are described in the payment schedule set out in Attachment C to the Particular Conditions), the relevant certificate issued by the Engineer issued in accordance with sub-clause 4.21 [*Progress Reports*], as well as the statements issued by each Subcontractor performing construction works and confirming that no amounts are overdue from the Contractor as of the date of the issue of the statement.

The Statement shall include the following items, as applicable, in the sequence listed:

- (a) the contract value of the Works executed and the Contractor's Documents produced up to the end of the payment period (including Variations but excluding items described in sub-paragraphs (b) to (e) below);
- (b) any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with sub-clause 13.7 [*Adjustments for Changes in Legislation*];

- (c) any amounts to be added for the payment by the Contractor of any taxes, duties and fees payable in Poland in respect of the execution of the Works in accordance with sub-clause 14.1 [*Contract Price*];
- (d) any other additions or deductions which may have become due under the Contract or otherwise, including those under clause 20 [*Claims and Disputes*]; and
- (e) the deduction of amounts certified in all previous Interim Payment Certificates.

When submitting a Statement the Contractor shall also submit an invoice (such invoice to be in a form that is satisfactory to the Employer (acting reasonably) in respect of the amount claimed. Such invoice shall also include where any payment made pursuant to this Contract is subject to the addition of VAT details of the VAT payable at the rate currently in force at the date the invoice is submitted. Any such invoice shall include, where VAT is payable, the EU VAT numbers of both the Contractor and the Employer. For the avoidance of doubt any VAT payable shall be settled by the Employer.

#### 14.4 **Schedule of Payments**

Unless otherwise stated in the payment schedule set out in Attachment C to the Particular Conditions:

- (a) the instalments quoted in the payment schedule set out in Attachment C to the Particular Conditions shall be the contract values for the purposes of subparagraph (a) of sub-clause 14.3 [*Application for Interim Payment Certificates*]; and
- (b) if these instalments are not defined by reference to the actual progress achieved in executing the Works, and if actual progress is found to be less than that on which the payment schedule set out in Attachment C to the Particular Conditions was based, then the Engineer may proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine revised instalments, which shall take account of the extent to which progress is less than that on which the instalments were previously based.

14.5 [Not used]

#### 14.6 **Issue of Interim Payment Certificates**

No amount will be certified or paid until the Employer has received and approved the Performance Security and the relevant Interim Bonds required to be submitted by the Contractor in accordance with clause 4.2 [*Performance Security, Interim Bonds and Defects Liability Security*]. Thereafter, the Engineer shall, within 14 days after receiving a Statement and supporting documents, issue to the Employer an Interim Payment Certificate which shall state the amount which the Engineer determines to be due in accordance with the Contract, with supporting particulars.

However, prior to issuing a Taking-Over Certificate for the Works, the Engineer shall not be bound to issue an Interim Payment Certificate in an amount which would (after any deductions) be less than the minimum amount of Interim Payment Certificates (if any) stated in the Appendix to Tender. In this event, the Engineer shall give notice to the Contractor accordingly.

An Interim Payment Certificate shall not be withheld for any other reason, although:



- (a) if anything supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed; and/or
- (b) if the Contractor was or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed.

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or satisfaction.

#### 14.7 **Payment**

The Employer shall pay to the Contractor amounts determined by the Engineer to be due to the Contractor and set out in a Payment Certificate issued in accordance with sub-clause 14.6 [*Issue of Interim Payment Certificates*], less any sums which the Employer is required to withhold by Law.

Payment of the amount due shall be made in EUR into the bank account, nominated by the Contractor. The final date for payment of an amount due shall be 28 days following the approval and issue of the relevant Interim Payment Certificate.

#### 14.8 **Delayed Payment**

If the Contractor does not receive payment in accordance with sub-clause 14.7 [*Payment*], of amounts determined by the Engineer to be due to the Contractor and set out in a Payment Certificate issued in accordance with sub-clause 14.6 [*Issue of Interim Payment Certificates*] (except for deductions in accordance with sub-clause 2.5 [*Employer's Claims*], sub-clause 14.7 [*Payment*] or otherwise permitted by the Contract), the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the final date for payment of the unpaid amount, as specified in sub-clause 14.7 [*Payment*].

Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the rate of three point seven five percent above the average 3 month EURIBOR rate as at the final date for payment of the amount due, both before and after any judgment or award (the "Interest Rate"). Such interest rate payments shall be made in Euros.

The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy.

#### 14.9 [Not used]

#### 14.10 **Statement at Completion**

Within 84 days after receiving the final Taking-Over Certificate for the Works, the Contractor shall submit to the Engineer six copies of a Statement at completion with supporting documents, in accordance with sub-clause 14.3 [*Application for Interim Payment Certificates*], showing:

- (a) the value of all work done in accordance with the Contract up to the date stated in the final Taking-Over Certificate for the Works;

- (b) any further sums which the Contractor considers to be due; and
- (c) an estimate of any other amounts which the Contractor considers will become due to him under the Contract. Estimated amounts shall be shown separately in this Statement at completion.

The Engineer shall then certify in accordance with sub-clause 14.6 [*Issue of Interim Payment Certificates*].

#### 14.11 **Application for Final Payment Certificate**

Within 56 days after receiving the Performance Certificate, the Contractor shall submit, to the Engineer, six copies of a draft final statement with supporting documents showing in detail in a form approved by the Engineer:

- (a) the value of all work done in accordance with the Contract; and
- (b) any further sums which the Contractor considers to be due to him under the Contract or otherwise.

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Engineer may reasonably require and shall make such changes in the draft as may be agreed between them. The Contractor shall then prepare and submit to the Engineer the final statement as agreed. This agreed statement is referred to in these Conditions as the "Final Statement".

However if, following discussions between the Engineer and the Contractor and any changes to the draft final statement which are agreed, it becomes evident that a dispute exists, the Engineer shall deliver to the Employer (with a copy to the Contractor) an Interim Payment Certificate for the agreed parts of the draft final statement. Thereafter, if the dispute is finally resolved under clause 20 [*Claims and Disputes*], the Contractor shall then prepare and submit to the Employer (with a copy to the Engineer) a Final Statement.

#### 14.12 **Discharge**

When submitting the Final Statement, the Contractor shall submit a written discharge which confirms that the total of the Final Statement represents full and final settlement of all moneys due to the Contractor under or in connection with the Contract. This discharge may state that it becomes effective when the Contractor has received the Performance Security and the outstanding balance of this total in which event the discharge will be effective on such date.

#### 14.13 **Issue of Final Payment Certificate**

Within 28 days after receiving the Final Statement and written discharge in accordance with sub-clause 14.11 [*Application for Final Payment Certificate*] and sub-clause 14.12 [*Discharge*] the Engineer shall issue to the Employer, the Final Payment Certificate which shall state:

- (a) the amount which is finally due; and
- (b) after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled, the balance (if any) due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be.

If the Contractor has not applied for a Final Payment Certificate in accordance with sub-clause 14.11 [*Application for Final Payment Certificate*] and sub-clause 14.12 [*Discharge*] the Engineer shall request the Contractor to do so. If the Contractor fails to submit an application within a period of 28 days, the Engineer shall issue the Final Payment Certificate for such amount as he fairly determines to be due.

#### 14.14 Cessation of Employer's Liability

The Employer shall not be liable to the Contractor for any matter or thing under or in connection with the Contract or execution of the Works, except to the extent that the Contractor shall have included an amount expressly for it:

- (a) in the Final Statement and also
- (b) (except for matters or things arising after the issue of the Taking-Over Certificate for the Works) in the Statement at completion described in sub-clause 14.10 [*Statement at Completion*].

However, this sub-clause shall not limit the Employer's liability under its indemnification obligations, or the Employer's liability in any case of fraud, deliberate default or reckless misconduct by the Employer.

#### 14.15 Currencies of Payment

The Contract Price shall be paid in EUR.

### TERMINATION BY EMPLOYER

#### 15.1 Notice to Correct

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

#### 15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract (*odstąpić od*) at any time by [30 September 2019], if the Contractor:

- (a) fails to comply with sub-clause 4.2 [*Performance Security, Interim Bonds and Defects Liability Security*] or with a notice under sub-clause 15.1 [*Notice to Correct*];
- (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of its obligations under the Contract;
- (c) without reasonable excuse fails:
  - (i) to proceed with the Works in accordance with clause 8 [*Commencement, Delays and Suspension*], or
  - (ii) to comply with a notice issued under sub-clause 7.5 [*Rejection*] or sub-clause 7.6 [*Remedial Work*], within 28 days after receiving it;
- (d) subcontracts the whole of the Works or assigns the Contract without the required agreement;

- (e) stops fulfilling its payment obligations, becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with its creditors, or carries on business under a receiver, trustee or manager for the benefit of its creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events;
- (f) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:
  - (i) for doing or forbearing to do any action in relation to the Contract, or
  - (ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract,

or if any of the Contractor's Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (f). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination;
- (g) [Not used];
- (h) has failed and/or will fail in the reasonable opinion of the Employer, (to be notified to the Contractor by the Employer at least 7 days prior to any notice of termination and to be confirmed by the Engineer pursuant to sub-clause 3.5 if disputed by the Contractor prior to any termination notice) to maintain satisfactory progress such that the Contractor will be unable to attain completion of the Works and each Section by the date by which contractual penalties due under sub-clause 8.7 [*Contractual Penalties*] will reach an amount in aggregate which equals the maximum amount of contractual penalties stated in the Particular Conditions;
- (i) fails to deliver to the Employer a replacement bond in accordance with the requirements in sub-clause 4.2 in any circumstance in which it is required to provide a replacement bond pursuant to sub-clause 4.2;
- (j) becomes liable to the Employer pursuant to this Contract for an amount or amounts which (in the aggregate) equal or exceed the limit on the Contractor's liability applicable under sub-clause 17.6.

In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of sub-paragraph (e) or (f), the Employer may by notice terminate the Contract immediately.

The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use its best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may either:

- (k) complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor; or
- (l) reject all of the Works and, without limitation to any other rights the Employer may have, claim a refund of all amounts paid to the Contractor under the Contract.

The Employer shall then give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

### 15.3 Valuation at Date of Termination

As soon as practicable after a notice of termination under sub-clause 15.2 [*Termination by Employer*] has taken effect, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.

### 15.4 Payment after Termination

After a notice of termination under sub-clause 15.2 [*Termination by Employer*] has taken effect, the Employer may:

- (a) proceed in accordance with sub-clause 2.5 [*Employer's Claims*];
- (b) withhold further payments to the Contractor until the costs of design, execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established; and/or
- (c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under sub-clause 15.3 [*Valuation at Date of Termination*]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

### 15.5 Employer's Entitlement to Termination

The Employer shall be entitled to terminate the Contract (*odstąpić od*) by [30 September 2019], at any time for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect 28 days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Security and the Interim Bonds. The Employer shall not terminate the Contract under this sub-clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor.

After this termination, the Contractor shall proceed in accordance with sub-clause 16.2 [*Cessation of Work and Removal of Contractor's Equipment*] and shall be paid in accordance with sub-clause 19.6 [*Optional Termination, Payment and Release*].

## **TERMINATION BY CONTRACTOR**

### **16.1 Termination by Contractor**

The Contractor shall be entitled to terminate the Contract (*odstąpić od*) at any time by [30 September 2019], if the Employer becomes bankrupt or insolvent or goes into liquidation or is in material breach of its contractual obligations regarding late payments for a period exceeding 90 days.

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

### **16.2 Cessation of Work and Removal of Contractor's Equipment**

After a notice of termination under sub-clause 15.5 [*Employer's Entitlement to Termination*], sub-clause 16.1 [*Termination by Contractor*] or sub-clause 19.5 [*Force Majeure Affecting Subcontractor*] has taken effect, the Contractor shall promptly:

- (a) cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works;
- (b) hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment; and
- (c) remove all other Goods from the Site, except as necessary for safety, and leave the Site.

### **16.3 Payment on Termination**

After a notice of termination under sub-clause 16.1 [*Termination by Contractor*] has taken effect, the Employer shall promptly:

- (a) return the Performance Security and the Interim Bonds to the Contractor;
- (b) pay the Contractor in accordance with sub-clause 19.6 [*Optional Termination, Payment and Release*]; and
- (c) pay to the Contractor in full and final satisfaction of all and any other claims whatsoever (including in respect of loss of profit) an amount equal to one per cent (1%) of the balance of the Contract Price after deducting all other amounts previously paid or payable by the Employer under the Contract (including under sub-clause 19.6) and failure of the Employer to pay on time shall be subject to sub-clause 14.8.

The rights of the Contractor to terminate the Contract under this clause 16 shall be subject to the terms of the Lender Direct Agreement.

## **RISK AND RESPONSIBILITY**

### **17.1 Indemnities**

The Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

- (a) bodily injury, sickness, disease or death, of any person whatsoever arising out of or in the course of or by reason of the design, execution and completion of the Works and the remedying of any defects, unless attributable to any negligence,

wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents;

- (b) damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss:
  - (i) arises out of or in the course of or by reason of the design, execution, delivery, completion and commissioning of the Works and the remedying of any defects, and/or
  - (ii) is attributable to any negligence, wilful act or breach of the Contract by the Contractor, the Contractor's Personnel, their respective agents, or anyone directly or indirectly employed by any of them; and
- (c) without limiting the generality of the foregoing, any damage to the quay or any other parts of the DCT Container Terminal caused by the Contractor.

The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents.

## 17.2 Contractor's Care of the Works

The Contractor shall take full responsibility for the care of the Works, Equipment and Goods from the Commencement Date until the Taking-Over Certificate is issued (or is deemed to be issued under sub-clause 10.1 [*Taking Over of the Works and Sections*]) for the Works and final Operational Permits are obtained under sub-clause 10.1A [*Ownership of the Equipment and the Operational Permit*], when responsibility for the care of the Works shall pass to the Employer.

After responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed.

If any loss or damage happens to the Works, Goods or Contractor's Documents during the period when the Contractor is responsible for their care, from any cause not listed in sub-clause 17.3 [*Employer's Risks*], the Contractor shall rectify the loss or damage at the Contractor's risk and cost, so that the Works, Equipment, Goods and Contractor's Documents conform with the Contract.

The Contractor shall be liable for any loss or damage caused by any actions performed by the Contractor after a Taking-Over Certificate has been issued. The Contractor shall also be liable for any loss or damage which occurs after a Taking-Over Certificate has been issued and which arose from a previous event for which the Contractor was liable.

## 17.3 Employer's Risks

The risks referred to in sub-clause 17.4 below are:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country;

- (c) riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (d) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity;
- (e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- (f) use or occupation by the Employer of any part of the Equipment, except as may be specified in the Contract;
- (g) Design of any parts of the Works by the Employer's Personnel or by others for whom the Employer is responsible, if any; and
- (h) any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventive precautions but only outside the Site.

#### 17.4 **Consequences of Employer's Risks**

If and to the extent that any of the risks listed in sub-clause 17.3 above results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Engineer and shall rectify this loss or damage to the extent required by the Engineer.

If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Engineer and shall be entitled subject to clause 20 [*Claims and Disputes*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under sub-clause 8.4 [*Extension of Time for Completion*]; and
- (b) payment of any such Cost, which shall be included in the Contract Price. In the case of sub-paragraphs (f) and (g) of sub-clause 17.3 [*Employer's Risks*], Profit on the Cost shall also be included.

After receiving this further notice, the Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine these matters.

#### 17.5 **Intellectual and Industrial Property Rights**

In this sub-clause, "infringement" means an infringement (or alleged infringement) of any patent, registered design, copyright, trade mark, trade name, trade secret or other intellectual or industrial property right relating to the Works; and "claim" means a claim (or proceedings pursuing a claim) alleging an infringement.

Whenever a Party does not give notice to the other Party of any claim within 28 days of receiving the claim, the first Party shall be deemed to have waived any right to indemnity under this sub-clause.

The Employer shall indemnify and hold the Contractor harmless against and from any claim alleging an infringement which is or was:

- (a) an unavoidable result of the Contractor's compliance with the Employer's Requirements; or



- (b) a result of any Works being used by the Employer:
  - (i) for a purpose other than that indicated by, or reasonably to be inferred from, the Contract, or
  - (ii) in conjunction with any thing not supplied by the Contractor, unless such use was disclosed to the Contractor prior to the date of this Contract or is stated in the Contract.

The Contractor shall indemnify and hold the Employer harmless against and from any other claim which arises out of or in relation to (i) the Contractor's design, manufacture, construction or execution of the Works, (ii) the use of Contractor's Equipment, or (iii) the proper use of the Works.

If a Party is entitled to be indemnified under this sub-clause, the indemnifying Party may (at its cost) conduct negotiations for the settlement of the claim, and any litigation or arbitration which may arise from it. The other Party shall, at the request and cost of the indemnifying Party, assist in contesting the claim. This other Party (and its Personnel) shall not make any admission which might be prejudicial to the indemnifying Party, unless the indemnifying Party failed to take over the conduct of any negotiations, litigation or arbitration upon being requested to do so by such other Party.

#### 17.6 **Limitation of Liability**

Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under sub-clause 16.3 [*Payment on Termination*] and sub-clause 17.1 [*Indemnities*].

The total liability of the Contractor to the Employer, under or in connection with the Contract, shall not exceed the sum stated in the Particular Conditions.

This sub-clause shall not apply to and shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.

### **INSURANCE<sup>1</sup>**

#### 18.1 **General Obligations and Requirements**

In this clause "insuring Party" means, for each type of insurance, the Party responsible for effecting and maintaining the insurance specified in the relevant sub-clause.

The relevant insuring Party shall, within 30 days of the Commencement Date, submit to the other Party:

- (c) evidence that the insurances described in this clause have been effected; and
- (d) scope of the certificates of insurance described in sub-clauses 18.2 and 18.3(a).

The insurances required by sub-clause 18.3 shall be effected with insurers of good reputation and good financial standing.

Each Party shall comply with the conditions stipulated in each of the insurance policies.

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<sup>1</sup> To be verified by DCT's insurance broker and might be modified at the later stage.

Unless otherwise more specifically stated in the Contract the insurances to be upon the customary and usual terms prevailing for the time being in the insurance market. Each Party shall satisfy itself as to the scope and adequacy of the insurances provided by the other Party.

If the insuring Party fails to effect or keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence in accordance with this sub-clause, the other Party may (at its option and without prejudice to any other right or remedy) effect insurance for the relevant coverage – at reasonable premiums - and pay the premiums due. The insuring Party shall pay the amount of these premiums to the other Party, and the Contract Price shall be adjusted accordingly.

Nothing in this clause limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of Contract or otherwise.

Any amounts not insured or not recovered from insurers whether as excesses carried under the policies of insurance or otherwise shall be borne by the Contractor or the Employer in accordance with their respective responsibilities under clause 17.

Each party shall produce to the other upon written request any information reasonably required by the other Party's insurers.

#### **18.2 Insurances to be maintained by the Employer**

Without limiting the liability of the Contractor under this Contract, the Employer shall:

- (a) effect third party liability insurance in the name of Employer against liability for loss, damage, death or bodily injury which may occur to any physical property or to any person as a result of any operations as a terminal operator and/or any other operations of the Employer in the amount of at least EUR 10 million. For the avoidance of doubt such insurance shall not extend to liability arising from the ownership or operation of marine vessels.

#### **18.3 Insurances to be maintained by the Contractor**

Without prejudice to the liability of the Contractor under this Contract, the Contractor shall:

- (a) insure the Contractor's Equipment for not less than the full replacement cost;
- (b) not used
- (c) effect and maintain insurance against Contractor's liability for claims, damages, losses and expenses (including legal fees and expenses) arising from injury, sickness, disease or death of any person employed by the Contractor
- (d) insure the Works at the Site in the names of the Contractor, for not less than the full reinstatement cost. The insurance shall be effective from the Commencement Date of the installation on site until the Taking-Over Certificate is issued (or deemed to be issued under sub-clause 10.1 [*Taking Over of the Works and Sections*]) for the Works. Such insurance shall contain deductibles no greater than EUR 170,000 each and every loss;;
- (e) effect marine transit insurance including loading and unloading risks in the name of the Contractor, in an amount not less than the full reinstatement cost of those items of Goods being shipped by or on behalf of the Contractor. The insurance to attach from commencement of transit until delivery to the Site, include the Institute Cargo War and Strikes clauses and have a deductible that does not exceed EUR

150,000 each loss. To the extent that the risk of loss or damage to the Goods being shipped is according to sub-clauses 17.2 and 17.3 with the Employer, the Employer and the Lenders shall be included as a named insured under such marine transit insurance and - to such extent - such marine transit insurance shall provide that all monies due under such marine transit insurance shall be paid to the Employer unless otherwise directed by the Lenders appointed agent or trustee;

- (f) effect third party liability insurance in respect of the Contractor's operations at the Site in the names of Contractor, against the Contractor's and its sub-contractor's liability for loss, damage, death or bodily injury which may occur to any physical property (but excluding the Works and Contractor's Equipment) or to any person (but excluding liabilities insured under sub-clause 18.3 (c)) in the amount of EUR 20 million with a deductible that does not exceed EUR 500,000 per occurrence . The insurance shall be effective from the Commencement Date of the installation on site until the Taking-Over Certificate is issued (or deemed to be issued under sub-clause 10.1 [*Taking Over of the Works and Sections*] ) for the Works. For the avoidance of doubt such insurance shall not extend to liability arising from the ownership or operation of marine vessels; and
- (g) effect and maintain such other insurances in compliance with prevailing legislation.

#### 18.4 Acts or Omissions

The Parties shall not do any act or omit to do anything that may cause any of the policies of insurance maintained in accordance with the Contract or otherwise in connection with the Works to be rendered void.

### FORCE MAJEURE

#### 19.1 Definition of Force Majeure

In this clause, "Force Majeure" means an exceptional event or circumstance:

- (a) which is beyond a Party's control;
- (b) which such Party could not reasonably have provided against before entering into the Contract;
- (c) which, having arisen, such Party could not reasonably have avoided or overcome; and
- (d) which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- (iii) riot, commotion, disorder, general strike (including a general strike concerning a given sector of business) or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;

- (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; and
- (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

Provided that Force Majeure shall not include:

- (vi) strike or lockout by the Contractor's employees or other personnel of the Contractor or Subcontractors;
- (vii) mechanical or electrical breakdown or failure of equipment, machinery or plant owned or operated by either Party, unless itself caused by an event of Force Majeure;
- (viii) any failure by the Contractor to obtain an Approval which is the Contractor's responsibility to obtain under the Contract; or
- (ix) unavailability of, or increase in the cost of or price charged by, materials or suppliers.

## 19.2 **Notice of Force Majeure**

If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

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

Notwithstanding any other provision of this clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.

## 19.3 **Duty to Minimise Delay**

Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure.

A Party shall give notice to the other Party when it ceases to be affected by the Force Majeure.

## 19.4 **Consequences of Force Majeure**

If the affected party is affected by a Force Majeure for a continuous period of 3 months (or for periods which, when aggregated over any period of 6 months totals 3 months) then the other party shall be entitled to terminate by notice in writing to the affected party. In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with sub-clause 16.2 [Cessation of Work and Removal of Contractor's Equipment] and shall be paid in accordance with sub-clause 19.6 [Optional Termination, Payment and Release].

All dates or times for performance of any obligations shall to the extent that the performance obligations concerned are affected by Force Majeure be extended by a

period equal to the period for which such Force Majeure exists. For the avoidance of doubt the occurrence of an event of Force Majeure shall be excused from the performance of its obligations for as long as the event of Force Majeure subsists, but shall not under any circumstances be entitled to any costs or increase in the Contract Price.

#### **19.5 Force Majeure Affecting Subcontractor**

If any Subcontractor is entitled under any contract or agreement relating to the Works to relief from force majeure on terms additional to or broader than those specified in this clause 19, such additional or broader force majeure events or circumstances shall not excuse the Contractor's non-performance or entitle him to relief under this clause.

In the event that delivery to the Contractor of components of the Works provided by any suppliers or Subcontractors is delayed due to Force Majeure affecting the suppliers or Subcontractors respectively for more than two months, and such delay is beyond the control of the Contractor, the Employer may, upon written notice to Contractor, request that the Contractor substitute another entity to provide the components and/or services provided by relevant suppliers or Subcontractors, respectively. The Employer and the Contractor shall discuss such request in good faith with a view to agreeing on the replacement supplier or Subcontractor. The Contract Price shall not change in the event of a replacement of any supplier or Subcontractor save that the Contract Price shall be reduced by the full amount of any reduction in the price of the relevant part of the Works obtained from an alternative supplier or Subcontractor.

#### **19.6 Optional Termination, Payment and Release**

Where a provision of this Contract requires the Contractor to be paid in accordance with this sub-clause 19.6 [*Optional Termination, Payment and Release*], the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;
- (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in its country (or to any other destination at no greater cost); and
- (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

The Employer shall not be liable to pay the Contractor any other compensation, and the Payment Certificate represents full and final settlement of all moneys due to the Contractor under or in connection with the Contract.

The rights of the Contractor to terminate the Contract under this sub-clause 19.6 shall be subject to the terms of the Lender Direct Agreement.

19.7 [not used].

## **CLAIMS AND DISPUTES**

### **20.1 Contractor's Claims**

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any clause of these Conditions or otherwise in connection with the Contract the Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim together with an explanation of the basis of its claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this sub-clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all us relevant to such event or circumstance at the same time as it notifies the Engineer of its claim.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this sub-clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- (a) this fully detailed claim shall be considered as interim;
- (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
- (c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 56 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the

Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with sub-clause 3.5 [*Determinations*] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with sub-clause 8.4 [*Extension of Time for Completion*], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other sub-clause which may apply to a claim. If the Contractor fails to comply with this or another sub-clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this sub-clause.

## 20.2 Settlement of Disputes

The Parties will settle any disputes resulting from the execution and performance of the Contract amicably by negotiations held for a period of 30 (thirty) days from a Party's receiving from the other Party written notice of a dispute that has arisen.

If the dispute will not be resolved by the Parties within the above period, any such dispute arising out of or in connection with this Contract including any question regarding its existence, construction, validity or termination shall be referred to and finally resolved by arbitration under the International Chamber of Commerce in Paris ("ICC") Arbitration Rules (the "Arbitration Rules") in effect on the date of entering into this arbitration clause.

The place of arbitration shall be Warsaw, Poland. The arbitration tribunal shall apply Polish law. The language to be used in the arbitration proceedings shall be English.

The Arbitration Tribunal shall be composed of three (3) arbitrators of whom the claimant and the respondent each shall select one in accordance with the Arbitration Rules. The two thus named arbitrators shall select a third arbitrator to serve as presiding arbitrator of the Arbitration Tribunal.

If any arbitrator is not named within the time limits specified in the Arbitration Rules, the appointment shall be made by the International Court of Arbitration.

## **CONFIDENTIALITY**

21.1 Save as may reasonably be necessary in the proper performance of its duties or as may be required by applicable legislation, the Contractor shall not during its engagement or at any time after its expiry or termination for any reason disclose to any person or otherwise make use of any confidential information of which it has or may in the course of its engagement become possessed relating to the Employer, the project or this Agreement, nor shall it disclose to any person whatsoever anything relating to the Employer without the prior written authority of the Employer. The restriction shall continue to apply, without limitation in time, unless and until such information comes properly into the public domain through no fault of the Contractor.

## **SPARE PARTS**

22.1 The Contractor shall deliver to the Employer at the Site no later than the date of Taking Over and as a pre-condition to Completion of the Works the Spare Parts listed in Employer's Requirements. This supply shall be included in the Contract Price.

**ANTI-CORRUPTION**

23.1 The Parties agree that they shall, and that any party retained by any Party shall, comply with all applicable laws prohibiting public corruption and commercial bribery.

Executed by the Employer acting by

Executed by the Contractor acting by



## PARTICULAR CONDITIONS

clause	Subject	
1.1.3.7	Time for Completion	<p>Time for Completion shall be <b>19 months and 15 calendar days</b> from the Commencement Date as stated in the Notice to Proceed with respect to at least nine rubber tyre gantry cranes (fully electrical) and <b>21 months</b> from the Commencement Date as stated in the Notice to Proceed with respect to remaining rubber tyre gantry cranes (fully electrical)</p> <p>Bidder is invited to propose own delivery schedule with reasonable number of shipments however requirements set out in part V. Facility readiness of the technical specification (Employer's requirements) constituting Attachment D must be taken into account.</p> <p>Notwithstanding the above, Equipment shall not be delivered before 3 May 2016.</p>
1.1.3.8	Warranty Period	<p>(a) In the case of any defect in the Works (other than those defects described in paragraphs (b) and (c) below), including any defect appearing in any part or parts of the electrical and mechanical components or the electrical and mechanical components failing to operate in accordance with the Contract, in each case the period commencing on the date on which the Works (or part thereof) was completed in accordance with the Contract as set out in the relevant Taking-Over Certificate until the date which is <b>[to insert]</b> months after the date of issue of the final Taking-Over Certificate and obtaining the Operational Permits.</p> <p>(b) In the case of any defect appearing in any part or parts of the crane structure and corrosion</p>

protection system, or the crane structure and corrosion protection system failing to operate in accordance with the Contract, in each case the period commencing on the date on which the Works (or part thereof) was completed in accordance with the Contract as set out in the relevant Taking-Over Certificate until the date which is **[to insert]** months after the date of issue of the final Taking-Over Certificate and obtaining the Operational Permits.

- (c) In the case of any legal defect appearing with regard to any Goods delivered by the Contractor under the Contract – including in particular any part or parts of the Plant, Equipment or Spare Parts – as well as in case of any legal defect concerning or appearing from the Works performed by the Contractor under the Contract, including in particular any claim of a third party arising out of an alleged breach of intellectual property rights or breach of any other third party right or title, in each case the Warranty Period shall continue until **[to insert]** months after the date the Employer discovered or learned about the defect or claim, however, not later than by **[to insert]**. The Employer shall be obliged to notify such a defect or claim to the Contractor without any extra delay; in case the Employer is sued before any court or arbitration due to a legal defect as defined here-in-above, the warranty period shall not begin earlier than the date of the respective court verdict or arbitration award becomes final and enforceable.

3.1 Requirements for exercising a specified authority. N/A

8.7	Contractual penalties.	<p>No contractual penalties for the first 2 (two) weeks of delay.</p> <p>Contractual penalties in the weekly rate of 0.5% of the Contract Price if the delay exceeds 2 (two) weeks and is less than 6 (six) weeks.</p> <p>Contractual penalties in the weekly rate of 1% of the Contract Price if the delay exceeds 6 (six) weeks.</p> <p>The daily rate of contractual penalties shall be calculated by dividing the weekly rate by seven (7). Maximum amount of contractual penalties: 10% of Contract Price.</p>
11.3	Extension of Warranty Period	<b>12 months</b>
14.1	Provisions for Measurement and Evaluation.	Not required
17.6	Limitation of Liability.	Contract Price.
	Appendix to Tender.	See Attached

**ATTACHMENT A<sup>2</sup>**  
**FORM OF PERFORMANCE SECURITY**

**THIS BOND** is dated the [ ]

Between [•] of [•] (hereinafter called the "**Beneficiary**") of the one part (which expression shall include its successors in title, transferees and assigns), and [•] of [•] (hereinafter called the "**Bank**") of the other.

**Whereas** by a contract (the "**Contract**") entered into or to be entered into between the Beneficiary and [•] (the "**Contractor**"), particulars of which are set out in Annexure 1, the Contractor has agreed with the Beneficiary to carry out and complete certain works (the "**Works**") upon and subject to the terms and conditions therein contained.

**Whereas** the Bank has agreed, at the request of the Contractor, to enter into this on-demand Bond in favour of the Beneficiary.

**The Employer and the Bank agree** as follows:

1. In this Bond words and expressions, if not otherwise defined, shall have the meanings (if any) given to them in the Contract and:

"Bond Amount" means the amount specified in Annexure 1.

"Business Day" means a day other than Saturday or Sunday on which banks generally are open for inter-bank business in [ ]/or a public holiday in [ ].

"Expiry Date" means the expiry dated specified in Annexure 1.

"Maximum Bond Amount" means EUR[•]<sup>3</sup>.

2. The Bank hereby irrevocably and unconditionally undertakes to pay to the Beneficiary upon the Business Day immediately following the Business Day on which it receives a written demand from the Beneficiary in accordance with clause 4 below an amount equal to the lesser of:

- (a) the amount specified in such demand; and
- (b) the Maximum Bond Amount less the aggregate of all sums previously paid under this Bond; and
- (c) the Bond Amount.

3. The Bank's obligation to make payments under this Bond shall arise on receipt of a demand made in accordance with provisions of this Bond without any further proof or condition and without any right of deduction, set-off or counterclaim, and the Bank shall not be required or permitted to make any other investigation or enquiry.

4. The Beneficiary may make one or more demands hereunder. Each demand shall be:

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<sup>2</sup> All bonds are subject to further change due to specific requirements of the issuing bank or other financial institution however each change is subject to Employer's approval.

<sup>3</sup> Insert original Bond Amount in figures.

- (a) substantially in the form set out in Annexure 2 (amended to insert the relevant details); and
- (b) delivered to the Bank on a Business Day and during normal banking hours at its offices specified in clause 10 below (or such other office of the Bank in [specify city or town] as the Bank may from time to time notify to the Beneficiary).

5. The maximum aggregate liability of the Bank under this Bond shall not exceed the Maximum Bond Amount.

6. This Bond is irrevocable. It will take effect on the date hereof and (unless previously cancelled by the written agreement of the Bank and the Beneficiary) will expire on the earliest of:

- (a) the Expiry Date; and
- (b) the date on which all payments made under this Bond shall equal the Bond Amount.

The expiry of the Bond under clause 6 above shall not affect or discharge the liability of the Bank to make payment of any demand made or any potential demand notified in accordance with the provisions of clauses 2 and 4 on or before the Expiry Date.

7. All payments to be made by the Bank under this Bond shall be made to the account specified in the relevant demand and within one Business Day immediately following the date of each demand becoming effective in accordance with clause 4, failing which interest shall accrue daily on the unpaid balance at a rate of [five (5)%] above the base lending rate from time to time of [*insert relevant reference bank*] until payment is made in full by the Bank.

8. The Beneficiary may assign, charge or transfer its rights and benefits under this Bond, without the consent of the Bank:

- (a) to any party to whom the Beneficiary's rights or benefits under the Contract have been assigned, charged or otherwise transferred (including by way of security and/or by way of re-assignment on redemption by or to the Beneficiary); and/or
- (b) to any company which is a member of the same group of companies as the Beneficiary; and/or
- (c) (where the Beneficiary is a trustee or agent for any person or person providing finance in relation to the Works) to any successor or replacement trustee or agent.

The Bank shall be notified of any such assignment or transfer in writing. Until any such notice has been delivered to the Bank, the Bank shall not be required to recognise any such assignee as entitled to issue a demand under this Bond.

The Bank may not assign, charge or transfer its rights or benefits under this Bond.

9. Subject to this Bond, a notice under or in connection with this Bond (a "Notice") (other than demands made under clauses 2 and 4):

- (a) shall be in writing;
- (b) shall be in the [English] language; and
- (c) shall be delivered personally or sent by first class post (and air mail if overseas) or by facsimile transmission to the party due to receive the Notice to the address specified in clause 10

or to another address specified by that party by not less than seven (7) days' written notice to the other party received before the Notice was despatched.

10. The address referred to in clause 9 is:

(a) In the case of the Bank:

Address:

[Fax:]

Marked for the attention of [insert person's name/title]

[and a copy to

Address:

[Fax:]

Marked for the attention of [insert person's name/title]]

(b) In the case of the Beneficiary:

Address:

[Fax:]

Marked for the attention of [insert person's name/title].

11. All payments under this Bond shall be made free and clear of any withholding or deduction on account of tax or otherwise.

12. This Bond and all non-contractual obligations arising from or connected with it are governed by [English] law.

13. The courts of [England] have exclusive jurisdiction to settle any dispute arising from or connected with this Bond (a "Dispute") (including a dispute regarding the existence, validity or termination of this Bond or the consequences of its nullity)<sup>4</sup>.

14. The parties agree that the courts of [England] are the most appropriate and convenient courts to settle any Dispute and that they will not argue to the contrary.

15. This clause is for the benefit of the Beneficiary only. Notwithstanding clause 13, the Beneficiary is not prevented from taking proceedings relating to a Dispute in any other court with jurisdiction. To the extent allowed by law, the Beneficiary may take concurrent proceedings in any number of jurisdictions.

16. Except as provided in this Bond, a person who is not a party to this Bond has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Bond (or any re-enactment or remaking thereof).

This Bond is delivered as a deed on the date written at the start of this Bond.

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<sup>4</sup> To be confirmed

## ANNEXURE 1

### Contract Particulars

Date:

Between:

Subject:

Contract Price:

### Bond Particulars

**Expiry Date:**

**Bond Amount:**

## ANNEXURE 2

### Form of Demand

To: [insert details of the Bank]

Dear Sirs

**Re: Performance Security dated [ ] issued by [ ] Bank in favour of [the Beneficiary] ("the Bond")**

We hereby demand the amount of [ ] under the Bond.

Payment should be made to Account Number [ ], designated [ ] at [ ].

Yours faithfully

for and on behalf of

[the Beneficiary]

[director, attorney or authorised signatory]

### SIGNATURE PAGE

Executed as a deed by )  
[insert name of company] )

\_\_\_\_\_ Signature of Director

\_\_\_\_\_ Name of Director

Executed as a deed by \_\_\_\_\_ )  
[insert name of company] \_\_\_\_\_ )

\_\_\_\_\_ Signature of Director

\_\_\_\_\_ Name of Director



**ATTACHMENT B<sup>5</sup>**  
**FORM OF INTERIM BOND**

**THIS BOND** is made the [ ]

Between [•] of [•] (hereinafter called the "Beneficiary") of the one part (which expressions shall include its successors in title, transferees and assigns) and [•] of [•] (hereinafter called the "Bank") of the other.

**Whereas** by a contract (the "Contract") entered into or to be entered into between the Beneficiary and [•] (the "Contractor"), particulars of which are set out in Annexure 1, the Contractor has agreed with the Beneficiary to carry out and complete certain works (the "Works") upon and subject to the terms and conditions therein contained.

**Whereas** the Bank has agreed, at the request of the Contractor, to enter into this on-demand Bond in favour of the Beneficiary.

**The Employer and the Bank agree** as follows:

1. In this Bond words and expressions, if not otherwise defined, shall have the meanings (if any) given to them in the Contract and:

"Bond Amount" means the amount specified in Annexure 1.

"Business Day" means a day other than Saturday or Sunday on which banks generally are open for inter-bank business in []/or a public holiday in [].

"Expiry Date" means the expiry date specified in Annexure 1.

2. The Bank hereby irrevocably and unconditionally undertakes to pay to the Beneficiary upon the Business Day immediately following the Business Day on which it receives a written demand from the Beneficiary in accordance with clause 4 below an amount equal to the lesser of:

- (a) the amount specified in such demand; and
- (b) the Bond Amount less the aggregate of all previous payments made under this Bond.

3. The Bank's obligation to make payments under this Bond shall arise on receipt of a demand made in accordance with provisions of this Bond without any further proof or condition and without any right of deduction, set-off or counterclaim, and the Bank shall not be required or permitted to make any other investigation or enquiry.

4. The Beneficiary may make one or more demands hereunder. Each demand shall be:

- (a) substantially in the form set out in Annexure 2; and
- (b) delivered to the Bank on a Business Day and during normal banking hours at its offices specified in clause 8 below (or such other office of the Bank in [*specify city or town*] as the Bank may from time to time notify to the Beneficiary).

The maximum aggregate liability of the Bank under this Bond shall not exceed the Bond Amount.

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<sup>5</sup> All bonds are subject to further change due to specific requirements of the issuing bank or other financial institution however each change is subject to Employer's approval.

5. This Bond is irrevocable. It will take effect on the date hereof and (unless previously cancelled by the written agreement of the Bank and the Beneficiary) will expire on the earliest of:

- (a) the Expiry Date; and
- (b) the date on which all payments made under this Bond shall equal the Bond Amount.

The expiry of the Bond under clause 5(a) above shall not affect or discharge the liability of the Bank to make payment of any demand made or any potential demand notified in accordance with the provisions of clauses 2 and 4 on or before the Expiry Date.

6. All payments to be made by the Bank under this Bond shall be made to the account specified in the relevant demand and within one Business Day immediately following the date of each demand becoming effective in accordance with clause 4, failing which interest shall accrue daily on the unpaid balance at a rate of [five (5)%] above the base lending rate from time to time of [*insert relevant reference bank*] until payment is made in full by the Bank.

7. The Beneficiary may assign, charge or transfer its rights and benefits under this Bond, without the consent of the Bank:

- (a) to any party to whom the Beneficiary's rights or benefits under the Contract have been assigned, charged or otherwise transferred (including by way of security and/or by way of re-assignment on redemption by or to the Beneficiary); and/or
- (b) to any company which is a member of the same group of companies as the Beneficiary; and/or
- (c) (where the Beneficiary is a trustee or agent for any person or person providing finance in relation to the Works) to any successor or replacement trustee or agent.

The Bank shall be notified of any such assignment or transfer in writing. Until any such notice has been delivered to the Bank, the Bank shall not be required to recognise any such assignee as entitled to issue a demand under this Bond.

The Bank may not assign, charge or transfer its rights or benefits under this Bond.

8. Subject to this Bond, a notice under or in connection with this Bond (a "Notice") (other than demands made under clauses 2 and 4):

- (a) shall be in writing;
- (b) shall be in the English language; and
- (c) shall be delivered personally or sent by first class post (and air mail if overseas) or by facsimile transmission to the party due to receive the notice to the address specified in clause 9 or to another address specified by that party by not less than seven (7) days' written notice to the other party received before the Notice was despatched.

9. The address referred to in clause 8 is:

- (a) In the case of the Bank:

Address:

[Fax:]

Marked for the attention of [*insert person's name/title*]

[and a copy to

Address:

[Fax:]

Marked for the attention of [insert person's name/title]]

(b) In the case of the Beneficiary:

Address:

[Fax:]

Marked for the attention of [insert person's name/title].

10. All payments under this Bond shall be made free and clear of any withholding or deduction on account of tax or otherwise.

11. This Bond and all non-contractual obligations arising from or connected with it are governed by [English] law.

12. The courts of [England] have exclusive jurisdiction to settle any dispute arising from or connected with this Bond (a "Dispute") (including a dispute regarding the existence, validity or termination of this Bond or the consequences of its nullity).

13. The parties agree that the courts of [England] are the most appropriate and convenient courts to settle any Dispute and that they will not argue to the contrary.

14. This clause is for the benefit of the Beneficiary only. Notwithstanding clause 12, the Beneficiary is not prevented from taking proceedings relating to a Dispute in any other court with jurisdiction. To the extent allowed by law, the Beneficiary may take concurrent proceedings in any number of jurisdictions.

15. Except as provided in this Bond, a person who is not a party to this Bond has no right to enforce any term of this Bond.

This Bond is delivered as a deed on the date written at the start of this Bond.

**ANNEXURE 1**

**Contract Particulars**

Date:

Between:

Subject:

Contract Price:

**Bond Particulars**

**Expiry Date** [.]

**Bond Amount** [.]

**ANNEXURE 2**

**Form Of Demand**

To: [insert details of the Bank]

Dear Sirs

**Re: the Interim Bond dated [ ] issued by [ ] Bank in favour of [*the Beneficiary*] ("the Bond")**

[I][We] hereby demand the amount of EUR[ ] under the Bond.

Payment should be made to Account Number [ ] Sort Code [ ], designated or named [ ] at [ ] Bank [*address*].

Yours faithfully

for and on behalf of

[*the Beneficiary*]

**SIGNATURE PAGE**

Executed as a deed by )

[insert name of company] )

\_\_\_\_\_ Signature of Director

\_\_\_\_\_ Name of Director

Executed as a deed by )

[insert name of company] )

\_\_\_\_\_ Signature of Director

\_\_\_\_\_ Name of Director

**ATTACHMENT C**  
**PAYMENT SCHEDULE**

1. Payment Schedule

<b>No.</b>	<b>Amount</b>	<b>When due</b>
1	10% of the Contract value	Once the Notice to Proceed is issued and Performance Security as well as the Interim Bond with respect to the first payment is delivered
2	40% of the Contract value	Upon the receipt of all structural steel by the Contractor and commencement of cranes' fabrication confirmed by the Engineer (proportionally to each crane, e.g. if the cranes' fabrication confirmed by the Engineer relates to three cranes the Employer shall pay 3/15 of 40% of the Contract value) as well as Interim Bond with respect to the this payment is delivered
3	30% of the Contract value	After delivery of the cranes comprising not less than all goods necessary for the selected Bidder to erect, install and commission the cranes (proportionally to each crane) as well as Interim Bond with respect to the this payment is delivered
4	10% the Contract value	After the issue Taking-Over Certificate (proportionally to each crane)
5	10% the Contract value	After delivery to the Employer all necessary valid approvals of Statutory Authorities (proportionally to each crane)

2. Performance Security and Interim Bonds

<b>Security</b>	<b>Amount due</b>	<b>Currency</b>
Performance Security	10% of the Accepted Contract Amount	EUR
First Interim Bond	10% of the Contract Price	EUR
Second Interim Bond	40% of the Contract Price to be provided with the second Application for Interim Payment Certificate	EUR
Third Interim Bond	30% of the Contract Price to be provided with the third Application for Interim Payment Certificate	EUR
Defects Liability Security	5% of the Contract Price	EUR

**ATTACHMENT D**  
**EMPLOYER'S REQUIREMENTS (TECHNICAL SPECIFICATION)**

**ATTACHMENT E**  
**TEST ON COMPLETION**

**1. Test Programme**

The Contractor will prepare a testing programme which will adequately demonstrate the compliance of the crane with the Employer's Requirements. The Contractor will submit to The Engineer checklists for the tests. These tests will be witnessed by The Engineer or his Representative at The Engineer's option and the Employer at his own discretion. However, The Engineer's witnessing of tests and acceptance of the equipment does not limit the Contractor's responsibility.

The test programme will be submitted to The Engineer not less than 30 working days prior to Taking-Over.

**Passing the Tests on Completion**

In order to pass the Tests on Completion, the Works must comply with the Employer's Requirements and must operate in accordance with Good Industry Practice, to the reasonable satisfaction of the Engineer and all technical supervision regulations to which the Works are required to comply in accordance with the Laws of the Country, such compliance being certified or otherwise will be confirmed in writing by the relevant Statutory Authority.

**2. Responsibility**

Final adjustments and field testing will be done under the direct supervision of the Contractor's Site Manager and the responsibility for this work will not be assigned to any other party.

**3. System Tests**

- 3.1. Demonstration of functionality of Crane Management System, including
  - a. wireless connection to the computers located in the offices of the technical department
  - b. Reading of all required or promised data both wireless and inside E-house
  - c. creating reports both wireless and inside E-house
- 3.2. Functioning of the fault finding and crane operating parameters recorder (black box)
- 3.3. Demonstration of diagnostic tools and Software.

**4. Field Tests**

Operational tests shall include but not be limited to the following:

- 4.1. Demonstration of function of all interlocks and limit switches.
- 4.2. Anti-collision system tests
- 4.3. Demonstration of brake torques and testing for thermal capacity. Each main hoist brake is to stop and hold the rated load from the maximum specified speeds with no regenerative or dynamic braking.
- 4.4. Demonstration of emergency stops including wireless E-stop under operating conditions.
- 4.5. Demonstration of each spreader function, including proper coiling of the spreader umbilical cable.
- 4.6. Verification of mating of trolley crane rails, distances between rails under full load and without load, between the rails and trolley wheel flanges and side safety plate
- 4.7. Demonstration of storm lock pins, including interlocks.
- 4.8. Demonstration of trim and skew function, with both empty spreader and rated load.
- 4.9. Verification that lighting levels meet the specification.
- 4.10. Measurement and recording of operating pressures of each hydraulic unit, if applicable.
- 4.11. Connection and disconnection of power supply plug
- 4.12. Operation of audible and visual movement alarms.

- 4.13. Verification that all reducers are correctly filled with oil and that all bearings, pins and couplings are greased and seals are properly retained.
- 4.14. Demonstration of auxiliary equipment, including:
  - a. anemometer and repeating alarm,
  - b. load weighing system
  - c. communications systems
  - d. CCTV
  - e. air conditioning and heating systems, etc.
- 4.15. Demonstration of additional options, if applicable:
  - a. Automated positioning system
  - b. Automated system preventing spreader collision
  - c. Semi automation of operations
  - d. Evacuation
  - e. Functionality of upgraded operator cabin
  - f. Automatic greasing of hoist ropes
- 4.16. Operator's digital panel with display
- 4.17. Security system against the unauthorized crane usage

## 5. Motion Tests

Tests demonstrating that speed performance criteria conform with the Employer's Requirements.

Measurement and recording of current and voltage readings for the following motions.

Recordings to be presented in a clear format for the Employer's retention.

### 5.1. Main Hoist

- a. Verification, when spotting the hoist, that there is no lowering of the rated load at the start of hoisting or raising of the empty spreader on start of lowering.
- b. Hoisting with rated load at full speed into slow-down and stop.
- c. Lowering with rated load at full speed into slow-down and stop.
- d. Hoisting with empty spreader at full speed into slow-down and stop.
- e. Lowering with empty spreader at full speed into slow-down and stop.

### 5.2. Trolley

- a. Travelling on stack with rated load at full speed into slow-down and stop.
- b. Travelling out of stack with rated load at full speed into slow-down and stop.

### 5.3. Operation of gantry long travel motion through the entire length of travel in both directions.

Check for:

- a. Travelling left without load.
  - b. Travelling right without load.
  - c. smooth operation throughout with DGPS
  - d. smooth operation throughout without DGPS
  - e. smooth and accurate laying of the power supply cable
  - f. Wheel turning and locking positions
- 5.4. Operation on auxiliary diesel generator set
- a. Changing the line
  - b. Hoisting and lowering with full load and empty
  - c. Wheel turning and locking positions
- 5.5. Measurement of maximum speeds and accelerations of all motions under all specified load conditions. If no tolerance is specified, the speeds and accelerations quoted in the contract will be regarded as minima.
- 5.6. Demonstration of crawling moves
- 5.7. Demonstration of remote control of the crane in service mode



## **6. Overload static and dynamic tests**

### **7. Travel Limit Tests**

With an empty spreader, run all motions to their extremes of travel at full speed, depending solely on the limit switches to slow and stop each motion.

### **8. Durability Test**

The crane will be operated with a mix of loaded and unloaded boxes using a defined typical duty cycle. This duty cycle will simulate the operation of working a ship and will include gantry travel at intervals. The test will last for 24 hours and the crane must not be unavailable for more than 30 minutes in total during this period. The last two hours of operation must be completely trouble-free.

### **9. Other tests to demonstrate that all criteria specified in the Employer's requirements are fulfilled as well as any other tests that the Engineer may reasonably require.**

**ATTACHMENT F**

**TENDER**

**ATTACHMENT G**  
**LENDER DIRECT AGREEMENT**

**ATTACHMENT H**  
**EMPLOYER'S SAFETY PROCEDURES**

Separate set of documents comprising of:

1. Instruction of pre-entry procedure for Contractors and Inspectors cooperating in projects carried out by the Project Management Department at DCT Gdansk S.A.
2. DCT\_DOC\_SC\_79.04\_Safety-guidelines
3. DCT\_SOP\_SC\_20.01\_Explosive objects
4. DCT\_SOP\_SC\_23.03\_Conditions of providing services in DCT
5. DCT\_SOP\_SC\_23.03\_Agreement on cooperation between employers
6. DCT\_SOP\_SC\_24.01\_Near Miss Situation Report
7. DCT\_SOP\_SC\_24.01\_Procedure for reporting near miss incidents and detected hazards
8. DCT\_SOP\_SC\_25.01\_Procedure for performance of fire hazardous works