

# GENERAL TERMS AND CONDITIONS OF CONTRACT FOR WORKS

These General Terms and Conditions of Contract are the standard commercial terms for **Southey** and govern the execution of all Works undertaken by them. These General Terms and Conditions of Contract are to be read with the **Tender** submitted by **Southey**.

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## 1. Definitions and Interpretation

- 1.1. The following words and expressions shall have the meaning ascribed to them below, unless the context otherwise provides:
- 1.1.1. “**Accepted Contract Amount**” means the **Estimated Contract Amount** accepted or deemed to be accepted by the **Employer** for the execution of the **Works** and the remedying of any **Defects**.
  - 1.1.2. “**Bill of Rates**” means the bill of rates relevant to the **Works** (if any), submitted by **Southey** with the **Tender**.
  - 1.1.3. “**Commencement Date**” means the date to be agreed to between the **Parties**.
  - 1.1.4. “**Conditions**” means these General Terms and Conditions of Contract.
  - 1.1.5. “**Contract**” means the **Tender**, the **Conditions**, and the further documents (if any) which are listed in the **Tender**.
  - 1.1.6. “**Contract Price**” means the **Accepted Contract Amount** which has been adjusted in accordance with the **Contract**.
  - 1.1.7. “**Cost**” means all expenditure properly incurred (or to be incurred) by **Southey**, whether on or off the **Site**, including overheads and similar charges, but does not include profit.
  - 1.1.8. “**Country**” means the country in which the **Site** is located, as specified in the **Tender**.
  - 1.1.9. “**Day**” means a calendar day.
  - 1.1.10. “**Defect**” means a defect, deficiency or damage which is due to, or attributable to **Southey’s** failure to comply with the **Specifications** and/or the **Scope of Works**.
  - 1.1.11. “**Defects Liability Period**” is the period stated in the **Tender** during which **Southey** is obliged to remedy **Defects**, and commences on the issue of the **Taking Over Notice**.
  - 1.1.12. “**Drawings**” means the drawings related to the **Works** (if any) provided by the **Employer** to **Southey**, and any **Variation** to such drawings.
  - 1.1.13. “**Employer**” means the person to whom **Southey** addresses its **Tender** and the legal successors in title to this person, but not (except with the consent of **Southey**) any assignee.
  - 1.1.14. “**Employer’s Liabilities**” means those matters listed in Clause 8 [**Employer’s Liabilities**].
  - 1.1.15. “**Employer’s Representative**” means the **Employer’s** representative appointed under Clause 4 [**Employer’s and Contractor’s Representatives**].
  - 1.1.16. “**Estimated Contract Amount**” means the estimated contract amount, which is based on the estimated quantities contained in the **Bill of Rates**, or the lump sum, as stipulated by **Southey** in its **Tender** for the execution of the **Works** and the remedying of any **Defects**.
  - 1.1.17. “**Facilities**” are the facilities and services to be provided by the **Employer** to **Southey** for the duration of the **Contract** and execution of the **Works**, listed in the **Tender**.
  - 1.1.18. “**Free Issue**” are all materials and personnel (if any) supplied by the **Employer** for the **Works**, at no expense to **Southey**.
  - 1.1.19. “**Force Majeure**” is as defined in Clause 18.1.
  - 1.1.20. “**Laws**” means all national (or provincial) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority of the Republic of South Africa, or the **Country**, as the case may be.

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- 1.1.21. “**Materials**” means the materials, supplies, grit, paint, and other materials used by **Southey** in the performance of the **Works**, intended to form or forming part of the permanent work and excludes the **Free Issue**.
- 1.1.22. “**Party**” means either the **Employer** or **Southey**, and “**Parties**” means both of them as the context requires.
- 1.1.23. “**Payment Claim**” means a claim for payment submitted by **Southey** in accordance with Sub-Clause 15.4.
- 1.1.24. “**Scope of Works**” means the scope of works as set out in the **Tender**.
- 1.1.25. “**Site**” means the places provided by the **Employer** where the **Works** are to be executed, and any other places specified in the **Contract** as forming part of the **Site**.
- 1.1.26. “**Southey**” means Southey Contracting (Pty) Ltd as more fully described in the **Tender**, and its legal successors in title.
- 1.1.27. “**Specifications**” means the document containing the **Employer’s** requirements in respect of materials and design to be carried out by **Southey**, if any, which document **Southey** has used to prepare the **Tender**, and any **Variation** to such document.
- 1.1.28. “**Southey’s Equipment**” means all apparatus, machinery, vehicles and other things required by **Southey** (or any **Subcontractor**) in order to execute the **Works** and includes, without limitation, scaffolding (if agreed to be provided by **Southey**), compressors, tools and temporary buildings.
- 1.1.29. “**Southey’s Representative**” means **Southey’s** representative appointed under Clause 4 [**Employer’s and Southey’s Representatives**].
- 1.1.30. “**Taking Over Notice**” the notice issued by the **Employer** to **Southey** in terms of Clause 11 [**Taking Over**].
- 1.1.31. “**Tax**” means valued-added tax, sales tax or any other statutory tax, duty or levy applicable by law in the **Country** or the **Republic of South Africa** and includes **Withholding Tax**.
- 1.1.32. “**Tender**” means **Southey’s** tender and all other documents which **Southey** submitted with its tender, and includes **Southey’s** quotations.
- 1.1.33. “**Time for Completion**” means the time for completing the **Works** as stated in the **Tender** (as may be extended under Sub-Clause 9.4), calculated from the **Commencement Date**.
- 1.1.34. “**Unforeseeable**” means not reasonably foreseeable to **Southey** at the date for submission of the **Tender**.
- 1.1.35. “**Variation**” means a change to the **Scope of Works**, **Specification** and / or **Drawings** which is instructed by the **Employer**.
- 1.1.36. “**Withholding Tax**” means the tax required to be withheld by the **Employer** in terms of the **Laws** of the **Country**, if applicable.
- 1.1.37. “**Works**” means the work and design (if any) as set out in the **Scope of Works**, to be performed by **Southey** including temporary work and any **Variation**.
- 1.2. The documents forming the **Contract** are to be taken as mutually explanatory of one another. The order of priority and interpretation of the documents shall as follows:
- 1.2.1. the latest **Tender**;
- 1.2.2. the **Conditions**;

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- 1.2.3. the **Bill of Rates**;
  - 1.2.4. the **Specifications**; and
  - 1.2.5. the **Drawings**.
  - 1.3. Words importing persons or parties shall include firms and organisations. Words importing singular or one gender shall include plural or the other gender where the context requires.
  - 1.4. Headings are to aid location of clauses only and are not to be taken into account in the context and interpretation of any clauses.
  - 1.5. The law applicable to this **Contract** is the law of the Republic of South Africa and the applicable language shall be English.
  - 1.6. This **Contract** is the entire contract between the **Parties** regarding the matters addressed in the **Contract**. No representations, terms, conditions or warranties not contained in this **Contract** shall be binding on the **Parties**. No agreement, or addendum varying, adding to, deleting or cancelling this **Contract**, including this Sub-Clause, shall be effective unless reduced to writing and signed by the **Parties**.
  - 1.7. Wherever provision is made for the giving or issue of any notice, instruction, or other communication by any person, unless otherwise specified, such communication shall be in writing, shall be in the English language and shall not be unreasonably withheld or delayed.
  - 1.8. A notice may be delivered by hand, sent by prepaid registered post, telefax or e-mail. Notice shall be presumed to have been duly given when:
    - 1.8.1. Delivered – on the date of delivery.
    - 1.8.2. Sent by registered post – 14 (fourteen) **Days** after posting.
    - 1.8.3. Sent by telefax – 1 (one) **Day** after transmission.
    - 1.8.4. Sent by e-mail – 1 (one) **Day** after transmission.
  - 1.9. The **Employer** chooses its *domicilium* where notices or processes arising out of or concerning this **Contract** may validly be delivered to and served on them, as its registered business address.
  - 1.10. **Southey** chooses its *domicilium*, at the address as stated in the **Tender**, where notices or processes arising out of, or concerning this **Contract**, may validly be delivered to and served on them.
  - 1.11. A **Party** may, at any time, by reasonable notice to the other **Party**, change its *domicilium*.
  - 1.12. No grant by either **Party** of any indulgence, condonation, waiver or allowance shall, in respect of any specific event or circumstance other than that in respect of which the grant was made, constitute a waiver of the rights of that **Party** in terms of the **Contract** or an estoppel of that **Party's** right to enforce the provisions of the **Contract**.

## **2. The Employer**

- 2.1. The **Employer** shall provide clear and unhindered access to, and possession of, the **Site**, suitable and available access routes to the **Site**, the **Facilities** and **Free Issue** to **Southey** for the duration of the **Contract**.
- 2.2. The **Employer** shall be responsible for maintenance of the access routes, provide the necessary signs and directions along the access routes, and shall obtain any permission which may be required from the relevant authorities for the use of routes, signs and directions.
- 2.3. The **Employer** shall, if requested by **Southey**, assist **Southey** in applying for permits, licences or approvals which are required by **Southey** to execute the **Works**. The **Employer** shall not

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unreasonably withhold or delay the issuing of any permits to work or similar requirement for **Southey's** personnel to gain access to the **Site**.

- 2.4. The **Employer** shall pay all **Tax**, fees, licenses, import duties and other charges incidental to and required in the execution of the **Works**.
- 2.5. **Southey** shall comply with all instructions given by the **Employer** in respect of **Variations** to the **Works** including the suspension of all or part of the **Works**.
- 2.6. The **Employer** may not assign any of its rights or obligations under this **Contract** unless agreed by **Southey**.

### **3. Southey**

- 3.1. **Southey** shall carry out the **Works** properly and in accordance with the **Contract**. **Southey** shall provide all supervision, labour, **Materials**, and **Southey's Equipment** which may be required, save for those excluded in the **Tender**.
- 3.2. **Southey** shall not subcontract the whole of the **Works**. **Southey** shall not subcontract any part of the **Works** without the consent of the **Employer**, which consent shall not be unreasonably withheld. **Southey** shall be relieved from performance and / or liability under the **Contract** for acts or omissions by its subcontractors.
- 3.3. **Southey** shall only be obliged to adhere to the working hours as set out in the **Tender** and the **Accepted Contract Amount** excludes overtime or weekends.

### **4. Employer's and Southey's Representatives**

- 4.1. The **Parties** shall appoint one of their personnel to act for it, and may appoint firms or individuals to carry out certain duties. Such appointees shall be notified by each **Party** to the other from time to time. The **Parties** shall notify each other of the delegated duties and authorities of the appointees.
- 4.2. The **Parties** shall be bound by the actions and conduct of their representatives.

### **5. Design and Specifications**

- 5.1. The **Employer** shall provide **Southey** with the **Specifications** of the **Materials**. Any defects that arise as a result of such **Specifications**, are not **Defects** as defined in this **Contract** and the **Employer** shall not be entitled to require **Southey** to remedy such defects.
- 5.2. The **Employer** shall remain responsible for its design and the **Specifications**, and it shall also remain responsible for any infringement of any patent or copyright in respect of the same. **Southey** provides no warranty with regards to fitness for purpose in relation to such design and/or **Specifications**.

### **6. Intellectual Property Rights and Non Solicitation**

- 6.1. The intellectual property rights in the designs, calculations, drawings, non-exclusive licence to use all patents, trademarks, registered and unregistered design rights, copyrights, know-how and other intellectual property rights vested in **Southey**, and information provided by **Southey** to the **Employer** for use during the **Time for Completion**, or until the termination of the **Contract**, whichever is the earlier date, shall revert back to **Southey**.
- 6.2. Neither **Southey** nor the **Employer** shall employ, or seek to employ, personnel one from the other from the **Commencement Date** until 6 (six) months after the date of issue of the **Taking Over Notice**.

### **7. Confidentiality**

- 7.1. Unless otherwise provided for in the **Contract**, and with the exception of those matters set out in the Sub-Clause below, the **Parties** warrant that each shall keep confidential all matters relating to the **Contract**, and that the **Parties**, their employees, agents and servants shall not divulge or disclose to any organisation or any person any information, data, documents, secrets, dealings, transactions or affairs relating to or incidental to the **Contract**.
- 7.2. The obligation of confidentiality shall not apply to the following:
- 7.2.1. Any matter generally available in the public domain otherwise than as a result of a breach of this Clause;
  - 7.2.2. Any disclosure which may reasonably be required for the performance of that **Party's** obligations under the **Contract**;
  - 7.2.3. Disclosure of information which is required by statute, regulation or any other law;
  - 7.2.4. The provision of information to contractors, consultants, sub-contractors or suppliers for purposes of tendering or executing the **Contract**, provided that the obligations of confidentiality herein shall be imposed *mutatis mutandis* upon such consultants, sub-contractors or suppliers in their respective contracts; and
  - 7.2.5. The provision of information to any third person with the express written permission of the other **Party**.
- 7.3. The obligations of confidentiality herein shall continue in force upon and following the **Taking Over Notice** or termination of the **Contract** as the case may be, for a period of 3 (three) years.

## **8. Employer's Liabilities**

- 8.1. In this Contract, "**Employer's Liabilities**" mean:
- 8.1.1. use or occupation by the **Employer** of any part of the **Works**, except as may be specified in the **Contract**,
  - 8.1.2. design of any part of the **Works** and the provision of the **Specifications**, by the **Employer's** personnel or by others for whom the **Employer** is responsible,
  - 8.1.3. any operation of the forces of nature (including but not limited to the humidity factor, wind speed, rainfall and temperatures as set out in the **Tender**) affecting the **Site** and/or the **Works**,
  - 8.1.4. a suspension instructed by the **Employer** under Sub-Clause 2.5,
  - 8.1.5. any breach by the **Employer**,
  - 8.1.6. **Unforeseeable** physical obstructions or physical conditions other than climatic conditions, encountered on the **Site** during the performance of the **Works** and which **Southey** notified to the **Employer** within a reasonable time,
  - 8.1.7. any delay or disruption caused by any **Variation**,
  - 8.1.8. changes in legislation, **Laws** or enactments thereof, and/or changes to the **Employer's** policies and procedures, subsequent to the submission of the **Tender**,
  - 8.1.9. losses arising out of the **Employer's** right to have the permanent work executed on, over, under, in or through any land, and to occupy this land for the permanent work,
  - 8.1.10. damage which is an unavoidable result of **Southey's** obligations to execute the **Works** and to remedy any **Defects**,
  - 8.1.11. the simultaneous and/or parallel operation of plant or equipment by the **Employer** which disrupts **Southey**, including (without limitation) inadequate gas ventilation,

8.1.12. delay and defects related to the **Free Issue**.

8.2. Consequences of Employer's Liabilities

If **Southey** suffers a delay and / or incurs **Cost** as a direct result of the occurrence of any **Employer's Liability**, **Southey** shall give notice to the **Employer's Representative** and shall be entitled, subject to compliance with Sub-Clause 21.1, to an extension to the **Time for Completion** and / or payment of such **Cost**, together with reasonable profit.

8.3. If as a result of any the **Employer's Liabilities**, it is necessary to change the **Works**, this shall be dealt with as a **Variation**.

## 9. **Time for Completion**

9.1. **Southey** shall commence the **Works** on the **Commencement Date** and shall complete the **Works** within the **Time for Completion**.

9.2. Within a reasonable time after the **Commencement Date**, **Southey** shall submit to the **Employer** a programme for the **Works**.

9.3. Such programme shall include:

9.3.1. the order in which **Southey** intends to perform the **Works**; and

9.3.2. a supporting report which includes:

9.3.2.1. a general description of the methods which **Southey** intends to adopt in the performance of the **Works**; and

9.3.2.2. details showing **Southey's** reasonable estimate of the number of each class of personnel and each type of **Southey's Equipment**, required on the **Site** for each major stage.

9.3.3. The **Employer's Representative** shall approve or disapprove the program within 21 (twenty one) **Days** after receiving the program, failing which, the program shall be deemed to be accepted by the **Employer**.

9.3.4. Once approved, the **Parties** may rely on such program in planning their activities.

9.4. **Southey** shall be entitled to an extension to the **Time for Completion** if

9.4.1. it is or will be delayed by any of the **Employer's Liabilities**;

9.4.2. if it experiences delays due to reasons beyond its control.

9.5. If **Southey** fails to complete the **Works** within the **Time for Completion**, **Southey's** only liability to the **Employer** for such failure shall be to pay the penalty amount stated in the **Tender**, if applicable for each week, or part thereof (*pro rata*) for which it fails to complete the **Works**. The maximum penalty amount shall be limited to a total of 5% of the **Accepted Contract Amount**.

## 10. **Standing Time**

10.1. In addition to the provisions of Sub-Clause 9.4, claims involving standing time of any nature shall be dealt with in accordance with the provisions of this Clause.

10.2. **Southey** shall be entitled to be paid the **Cost** incurred due to standing time delays in circumstances where such **Cost** incurred during months where the provisions relating to the minimum monthly payment as provided for under Sub-Clause 15.16 does not apply.

10.3. In the event of standing time being incurred for reasons other than default of **Southey**, such delays shall be reported by **Southey** as soon as possible, verbally, to the **Employer** and thereafter confirmed in writing within 7 (seven) **Days**.

- 10.4. **Southey** shall ensure that time sheets reflecting the name, category and standing time rate of each employee, **Southey's Equipment** and the number of hours lost by each such employee are submitted each working day in respect of the previous working day to the **Employer**. Subject to Sub-Clause 10.2, time sheets shall be submitted with the relevant **Payment Claim**.
- 10.5. Delays arising from the following shall not qualify as standing time for the purposes of this Clause:
- 10.5.1. Delays amounting to less than 60 (sixty) minutes unless the total time lost due to repeated stoppages amounts to more than 60 (sixty) minutes in any 24 (twenty-four) consecutive hours from the commencement of such delay, in which case the delay shall be paid for the duration of such delay including the first 60 (sixty) minutes; or
- 10.5.2. Delays attributable to any form of neglect, or failure, on the part of **Southey**, **Subcontractors** or the employees thereof.

## **11. Taking Over**

- 11.1. **Southey** shall notify the **Employer** when it considers that the **Works** (or part thereof) are substantially complete in accordance with the **Contract** and ready for the **Employer** to take over. Within 7 (seven) **Days** of receiving this notice, the **Employer** shall inspect the **Works** (or part thereof) and shall issue a **Taking Over Notice** for the **Works** (or part thereof), failing which, the **Works** (or part thereof) will be deemed to be complete and ready for the **Employer** to take over and the **Employer** shall be deemed to have issued a **Taking Over Notice**.
- 11.2. In the event that the **Employer** is not satisfied that the **Works** (or part thereof) are substantially complete in accordance with the **Contract**, it shall issue precise instructions as to what work **Southey** is required to complete in order to issue a **Taking Over Notice**. **Southey** shall attend to carry out the instructions and upon completion of the instructions, the **Employer** shall immediately issue a **Taking Over Notice**.
- 11.3. The **Employer** shall take over the **Works** upon the issue of the **Taking Over Notice**. **Southey** shall complete any outstanding work and, subject to Clause 12 [*Remedying Defects*], clear the **Site**.
- 11.4. Upon the issuing of the **Taking Over Notice** the **Employer** shall be entitled to possession of the **Works** and the **Site** subject to **Southey's** lien or right of continuing possession and/or ownership of the **Works**.
- 11.5. Upon the issuing of the **Taking Over Notice**:
- 11.5.1. the responsibility for the **Works**, including risk of loss or damage to the **Works**, shall pass to the **Employer**, and
- 11.5.2. if performance security has been furnished by **Southey** to the **Employer**, such performance security shall be returned by the **Employer** to **Southey**.

## **12. Remedying Defects**

- 12.1. The **Employer** may at any time prior to the expiry of the **Defects Liability Period**, notify **Southey** of any **Defects**. **Southey** shall, subject to the provisions of Clause 5 [*Design and Specifications*], remedy at no cost to the **Employer** any **Defects**, excluding **Free Issue**. **Southey** may, in the event of any **Defect** being notified, require that an independent technical expert be appointed to determine the cause and responsibility for such defect. The **Parties** shall jointly appoint such independent technical expert and shall, subject to Clause 20 [*Claims, Disputes and Arbitration*], be bound by his / her findings.
- 12.2. The cost of remedying defects attributable to any other cause shall be valued as a **Variation**.

- 12.3. The **Employer** may give instruction as to the testing of any work. Unless as a result of any testing it is established that **Southey's** workmanship is not in accordance with the **Contract**, **Southey** shall be paid for such testing as a **Variation** in accordance with Clause 13 [*Variations*].

### **13. Variations**

- 13.1. Variations may be initiated by way of instruction of the **Employer's Representative** or by a request for a proposal. Subject to Sub-Clause 12.2, no **Variation** shall be valid after the issue of a **Taking Over Notice**.
- 13.2. Variation Procedure
- 13.2.1. If the **Employer's Representative** requests a proposal prior to instructing a **Variation**, **Southey** shall respond in writing as soon as practicable submitting:
- 13.2.1.1. a description of the proposed work to be performed and a program for its execution;
  - 13.2.1.2. **Southey's** proposal for any necessary modifications to the program submitted in accordance with Sub-Clause 9.2; and
  - 13.2.1.3. **Southey's** proposal for a valuation of the **Variation**.
- 13.2.2. The **Employer's Representative** shall, after receiving such proposal, respond with approval, disapproval or comments. **Southey** shall not delay any other work whilst awaiting a response.
- 13.2.3. Each instruction to execute a **Variation** with any requirements for the recording of costs shall be issued by the **Employer's Representative** to **Southey**, who shall acknowledge receipt.
- 13.3. **Variations** shall be valued as follows:
- 13.3.1. at a lump sum price agreed between the **Parties**, or
  - 13.3.2. where appropriate, at rates in the **Contract**, or
  - 13.3.3. in the absence of appropriate rates, at daywork rates set out in the **Tender** for which **Southey** shall keep records of hours of labour and **Southey's Equipment** and **Materials** used.
- 13.4. Employer's Policies and Procedures
- 13.4.1. **Southey** will only be bound to follow the **Employer's** policies and procedures if the Employer has made **Southey** aware of them and afforded **Southey** an opportunity to inspect same prior to submission of the **Tender**.
- 13.4.2. **Southey** has only made allowance in its **Tender** for attendance of a reasonable number of management meetings.
- 13.5. Adjustment for Changes in Legislation and Changes in the Employer's policies and Procedures
- 13.5.1. The **Contract Price** shall be adjusted to take account of any increase or decrease in **Cost** resulting from a change in:
- 13.5.1.1. the applicable **Laws** or in the judicial or official governmental interpretation of such **Laws**;
  - 13.5.1.2. the **Employer's** policies and procedures (including the number of management meetings required),  
made after the date of submission of the **Tender**.

13.5.2. If **Southey** suffers a delay and / or incurs **Cost** as a result of these changes, **Southey** shall give notice to the **Employer's Representative** and shall be entitled, subject to compliance with Sub-Clause 21.1 to an extension to the **Time for Completion** and /or payment of such **Cost**, together with reasonable profit.

#### **14. Measurement**

- 14.1. The **Works** shall be measured and valued for payment in accordance with this Clause and the **Tender**.
- 14.2. Where the **Contract Price** is a lump sum, such lump sum shall be measured and valued for payment in accordance with a lump sum payment schedule agreed between the **Parties** in writing.
- 14.3. Where a **Bill of Rates** has been included in the **Contract**, the following provisions shall apply:
- 14.3.1. **Southey** shall measure the **Works** executed monthly;
- 14.3.2. Measurement shall be made of the net actual quantity of each item of the executed **Works**; and
- 14.3.3. The method of measurement shall be in accordance with the **Tender**.
- 14.4. Whenever the **Employer's Representative** requires any part of the **Works** to be measured, reasonable notice shall be given to **Southey's Representative**, who shall:
- 14.4.1. promptly assist the **Employer's Representative** in making the measurement; and
- 14.4.2. supply any particulars requested by the **Employer's Representative**.

#### **15. Contract Price and Payment**

- 15.1. The **Works** shall be valued as provided for in this Clause, subject to Clause 13 [*Variations*].
- 15.2. If applicable, the **Employer** shall pay **Southey** an advance payment for the percentage amount of the **Accepted Contract Amount**, as stated in the **Tender**, for which **Southey** in return shall provide an advance payment guarantee for the equivalent sum.
- 15.3. **Southey** shall be entitled to be paid at monthly intervals upon submission of a **Payment Claim**:
- 15.3.1. the value of the **Works** executed as determined in terms of Clause 14, and
- 15.3.2. the value of **Materials** delivered to the **Site**.
- 15.4. **Southey** shall submit each month to the **Employer** a **Payment Claim** showing:
- 15.4.1. the value of all **Works** performed since the submission of the last **Payment Claim**, or in the case of the first **Payment Claim**, since the **Commencement Date**; and
- 15.4.2. the cumulative total of the value of the previous **Payment Claims**.
- 15.5. Within 7 (seven) **Days** of receiving the **Payment Claim**, the **Employer's Representative** shall certify any amounts due to **Southey** in terms of the **Payment Claim**. In the event of the **Employer** disputing any amount(s) claimed by **Southey**, the **Employer's Representative** shall notify **Southey** of such amounts together with reasons. The **Employer's Representative** shall certify all undisputed amounts.
- 15.6. Payment shall be in the currency stated in the **Tender**. **Southey** shall not be liable for any fluctuations in international foreign exchange rates.
- 15.7. The **Employer** shall pay to **Southey** the amounts certified in each **Payment Claim** within 21 (twenty one) **Days** after the **Employer's Representative** certifies such amount.

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- 15.8. **Southey** shall retain ownership of all **Materials** until paid for in full by the **Employer**.
- 15.9. The **Employer** shall not withhold payment of any certified amount from **Southey** for any reason whatsoever. Similarly, the **Employer** has no right to set off any monies which it claims are due to it, from the certified amount or otherwise.
- 15.10. **Southey** shall be entitled to interest at the rate stated in the **Tender** for each **Day** the **Employer** fails to pay within the prescribed payment period.
- 15.11. The **Bill of Rates** shall be subject to an annual escalation as set out in the **Tender**. The base date to be utilised shall be the date of the **Tender**.
- 15.12. If retention is applicable in terms of the **Tender** then the **Employer** shall not deduct any monies from the monthly payments to **Southey** and **Southey** shall furnish a retention guarantee in lieu of the **Employer** deducting retention.
- 15.13. Within 28 (twenty eight) **Days** of the **Taking Over Notice** or termination of the **Contract** **Southey** shall submit a final account to the **Employer** together with any documentation reasonably required to ascertain the final **Contract Price**.
- 15.14. Within 28 (twenty eight) **Days** after the submission of this final account, the **Employer** shall certify and pay to **Southey** any amount due. If the **Employer** disagrees with any part of **Southey's** final account, he shall specify its reasons for disagreement when making payment.
- 15.15. The **Bill of Rates** shall, in addition to adjustments thereto pursuant to the **Contract**, be subject to adjustment and escalation based on the following:
- 15.15.1. The SEIFSA escalation clauses and indices set out in the **Tender**;
- 15.15.2. Foreign currency exchange rate adjustment calculated at each monthly statement in respect to the breakdown of the **Estimated Contract Amount** into foreign currencies and base rates as set out in the **Tender**.
- 15.16. Minimum Monthly Payment
- It is specifically agreed that the **Employer** shall, for the duration of the execution of the **Works**, require **Southey** to perform at least the quantity of **Works** as contained in the **Tender** ("**Guaranteed Quantity of Works**"). Should the quantity of **Works** fall below such **Guaranteed Quantity of Works** for any specific month, **Southey** shall be entitled to at least the minimum monthly payment as set out in the **Tender** ("**Minimum Monthly Payment**"), notwithstanding the actual quantity of the **Works** performed. Such **Minimum Monthly Payment** shall cover **Southey's** monthly overhead costs.

## **16. Default and Termination**

- 16.1. If the **Employer** fails to certify and pay in accordance with the **Contract**, or is, despite a written complaint, in breach of the **Contract**, **Southey** may give notice referring to this Sub-Clause stating the default. If the default is not remedied within 7 (seven) **Days** after the **Employer's** receipt of this notice, **Southey** may suspend the execution of all or parts of the **Works**.
- 16.2. Without prejudice to **Southey's** right to suspend the **Contract** under Sub-Clause 16.1, if the default is not remedied by the **Employer** within 14 (fourteen) **Days** after receipt of the notice, **Southey** may terminate the **Contract** forthwith.
- 16.3. If a **Party** is declared insolvent under any applicable law, the other **Party** may by notice terminate the **Contract** immediately.
- 16.4. Upon termination **Southey** shall demobilise from the **Site** and shall be entitled to payment of the unpaid balance of the value of the **Works** executed and of the **Materials** reasonably delivered to the **Site**, adjusted by the following:

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- 16.4.1. any sums to which **Southey** is entitled under Sub-Clause 8.2;
- 16.4.2. if **Southey** has terminated under Sub-Clause 16.2 above, **Southey** shall be entitled to the **Cost** of its suspension and demobilisation together with a sum equivalent to 10% (ten percent) of the value of those parts of the **Works** not executed at the date of termination.
- 16.5. The net balance due shall be paid within 28 (twenty eight) **Days** of the submission of a final account submitted in accordance with Sub-Clause 15.13.
- 16.6. If **Southey** breaches any material provision of the **Contract** and fails to comply with a written notice from the **Employer** requiring **Southey** to remedy that breach within 14 (fourteen) **Days** after receipt of the notice, the failure by **Southey** to remedy such breach within such period shall entitle the **Employer** to terminate the **Contract**. In this event, the only liability for payment which the **Employer** shall have to **Southey**, will be the unpaid balance of the value of the **Works** executed and of the **Materials** reasonably delivered to the **Site**, which shall be paid within 28 (twenty eight) **Days** of the submission of a final account in accordance with Sub-Clause 15.13.
- 16.7. **Southey** shall be entitled to terminate the **Contract** for convenience by giving the **Employer** 30 (thirty) days prior written notice, without attracting any liability with regards to such termination.
- 16.8. Any other clauses that by their nature indicate that they are intended to survive termination, shall remain valid and applicable notwithstanding that the **Contract** may have been terminated for any reason.

## **17. Risk and Responsibility**

- 17.1. **Southey** shall take full responsibility for the care of the **Works** from the date upon being given access under Sub-Clause 2.1 until the date of the **Taking Over Notice**. Responsibility shall then pass back to the **Employer**. If any loss or damage happens to the **Works** during the above period, **Southey** shall, subject to the provisions of Clause 8 [*Employer's Responsibilities*] rectify such loss or damage so that the **Works** conform to the **Contract**.
- 17.2. Except in cases of wilful misconduct or criminal negligence:
- 17.2.1. **Southey** shall not be liable to the **Employer** whether in contract, delict or otherwise, for any indirect or consequential loss or damage, loss of use, loss of production, or loss of profits or interest costs, and
- 17.2.2. the aggregate liability of **Southey** to the **Employer**, whether under the **Contract**, in delict or otherwise, shall not exceed 10% (ten percent) of the **Accepted Contract Amount**.

## **18. Force Majeure**

- 18.1. Definition of Force Majeure
- 18.1.1. In this clause, "**Force Majeure**" means an exceptional event or circumstance:
- 18.1.1.1. which is beyond a Party's control;
- 18.1.1.2. which such Party could not reasonably have provided against before entering into the Contract;
- 18.1.1.3. which, having arisen, such Party could not reasonably have avoided or overcome; and
- 18.1.1.4. which is not substantially attributable to the other Party;
- 18.1.1.5. which does not include market conditions of any kind;
- 18.1.2. and provided that the provisions of Sub-Clauses 18.1.1.1 to 18.1.1.5 above are satisfied, includes, *inter alia*:

- 18.1.2.1. war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- 18.1.2.2. rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
- 18.1.2.3. riot, commotion, disorder, strike or lockout by persons, including illegal action by **Southey's** Personnel and other employees of **Southey** and Sub-Contractors, regardless of how they arise,
- 18.1.2.4. munitions of war, explosive materials, ionising radiation or contamination by radioactivity, except as may be attributable to **Southey's** use of such munitions, explosives, radiation or radioactivity,
- 18.1.2.5. natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity;
- 18.1.2.6. work stoppages not due to the fault of **Southey**; and
- 18.1.2.7. power cuts.

## 18.2. Notice of **Force Majeure**

18.2.1. In the event that a **Party** is prevented from performing any of its obligations under the **Contract** by **Force Majeure**, such **Party** shall give notice to the other **Party** of the event or circumstance constituting the **Force Majeure**. The notice shall be given within 7 (seven) **Days** after the **Party** became aware, or should have become aware, of the relevant event constituting **Force Majeure**.

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

## 18.3. Compensation during period of **Force Majeure**

If a notice of **Force Majeure** is provided by a **Party** to the other **Party** in terms of this clause, notwithstanding that such notice may have been provided by **Southey** to the **Employer**, the **Employer** shall pay to **Southey**, for the period of during which a **Party** is excused from performance of its obligations in terms of the **Contract**, any standing time in terms of Clause 10 [*Standing Time*].

## 18.4. Mitigation

Each Party shall at all times use all reasonable efforts to minimize any delay in the performance of the, and cost to, the Contract as a result of Force Majeure.

## 18.5. Termination for **Force Majeure**

18.5.1. In the event that a **Force Majeure** continues to affect the performance of the **Works** for a continuous period of 90 (ninety) **Days**, either **Party** may terminate the **Contract** by serving notice on the other **Party**. In this event, the termination shall take effect 7 (seven) **Days** after the notice is given.

18.6. After termination, **Southey** shall be entitled to payment of the unpaid balance of the value of the **Services** executed and of the **Materials** delivered to the **Site**, adjusted by the following:

18.6.1. any sums to which **Southey** is entitled under Sub-Clause 8.2,

18.6.2. the **Cost** of its suspension and demobilisation,

18.6.3. any sums to which the **Employer** is entitled.

18.7. The net balance due shall be paid within 28 (twenty eight) **Days** of the notice of termination.

- 18.8. Where the **Site** is are located outside the borders of the Republic of South Africa the **Employer** shall be responsible for any costs incurred by **Southey** in evacuating its personnel and **Southey's Equipment**, including the cost of all **Material** and **Southey's Equipment** that **Southey** is unable to repatriate, where in the opinion of **Southey**, the country's political or civil situation has become unstable or unsafe to continue with the **Works**. **Southey** shall be entitled to repatriate personnel and equipment immediately upon notice to the **Employer**.

## **19. Insurance**

- 19.1. The **Employer** indemnifies **Southey** against any loss in respect of claims from other parties arising out of or due to the execution of the **Works** or occupation of the site by **Southey** consequent upon:
- 19.1.1. Death or bodily injury or illness of any person, or
  - 19.1.2. Physical loss and damage to any property other than the **Works**.
- 19.2. The **Employer** shall be at risk for:
- 19.2.1. The cost of making good physical loss and repairing damage to the **Works** subject to Sub-Clause 19.6 below, including existing buildings and the contents thereof; or
  - 19.2.2. The support of structures being altered or added to.
- 19.3. **Southey** shall in all circumstances be at risk for and shall, prior to commencing the **Works**, effect and thereafter maintain the following insurances:
- 19.3.1. Workman's Compensation; and
  - 19.3.2. **Southey's Equipment** insurance for which **Southey** shall in all circumstances be at risk for loss or damage.
- 19.4. The **Employer** shall take out:
- 19.4.1. Sufficient public liability insurance to insure the interests of both **Parties**;
  - 19.4.2. Sufficient contract works insurance which shall be in the joint names of the **Employer** and **Southey**. Where applicable such amount shall include existing buildings and their contents.
- 19.5. The insurances are to remain in force from the date on which **Southey** takes occupation of the **Site** until the **Taking Over Notice** is given or the termination date.
- 19.6. Where loss and damage to the works in terms of Sub-Clause 19.2.1 above is due to **Southey's** negligence **Southey** shall be liable for such loss and damage. Such liability shall not exceed the insurance deductible stated in the **Tender** in any particular instance.
- 19.7. **Southey** shall take out insurances in respect of its employees as are required by **Law**.
- 19.8. The **Party** responsible for taking out insurances in terms of the **Contract** shall provide documentary evidence that such insurances are in force to the other **Party** before **Site** handover, or as otherwise agreed between the **Parties** in writing.

## **20. Ethics, Gifts and Favours**

- 20.1. Each **Party** represents and warrants to the other **Party**, that it shall act only on the basis of utmost good faith and trust between them and with the highest regard to business ethics during the conclusion, in the execution and in the performance of any of its obligations in terms of the **Contract**. Should the **Employer**, its officers, employees, contractors, suppliers, agents, representatives or sub-contractors commit any act contrary to the foregoing and such act compromise, purports to, or may compromise such relationship, or which is contrary to

**Southey's** commercial ethics with which the **Employer** declares itself to be fully familiar with, then **Southey** shall be entitled, notwithstanding any other provisions of the **Contract**, to terminate the **Contract** with immediate effect.

- 20.2. The **Employer** represents and warrants to **Southey** that none of their, or their respective personnel have made or offered with respect to the matters that are subject of the **Contract**:
- 20.2.1. any compensation, commission, agency fee, introduction fee, payment, gift, promise or advantage to a third party where such payment or advantage would violate the Laws; or
- 20.2.2. any compensation, commission, agency fee, introduction fee, payment, gift, promise or advantage to a third party that is based or calculated on any capital employed, cost incurred, cash flow, revenue, or profit earned or estimated to be earned or generated by a **Party** in respect of the **Contract**.

## **21. Claims, Disputes and Arbitration**

### 21.1. **Southey's** Claims

- 21.1.1. If **Southey** considers himself to be entitled to any extension to the **Time for Completion** and / or additional payment, under any clause of the **Contract** or otherwise in connection with the **Contract**, **Southey** shall give notice to the **Employer's Representative**, describing the event or circumstance giving rise to the claim.
- 21.1.2. **Southey** shall keep such contemporary records as may be necessary to substantiate any claim, either on the **Site** or at any other location acceptable to the **Employer's Representative**. **Southey** shall permit the **Employer's Representative** to inspect all these records, and shall submit copies to the **Employer's Representative** upon request.
- 21.1.3. As soon as is practicable after submitting the notice referred to above, **Southey** shall send to the **Employer's Representative** a fully detailed claim which includes full supporting particulars of the basis of the claim, the calculation of the extension to the **Time for Completion** and of the additional payment claimed.
- 21.1.4. After the **Employer's Representative** has received the claim from **Southey**, the **Employer's Representative** shall make a determination in respect of **Southey's** entitlement or otherwise, to claim an extension to the **Time for Completion** and / or additional payment. **Southey** shall give effect to the determination unless and until revised under Sub-Clause 21.2.3 below.

### 21.2. Disputes

- 21.2.1. In the event that either **Party** is dissatisfied with a determination of the **Employer's Representative** given in accordance with the provisions of the **Contract**, or any dispute or difference arises between **Southey** and the **Employer** out of or in connection with this **Contract**, that **Party** may give to the other **Party** a notice of dissatisfaction in respect of the **Employer's Representative's** determination, or a notice of dispute. Such notice of dissatisfaction or notice of dispute shall make express reference to this Sub-Clause and shall be given as soon as reasonably possible after the date of the **Employer's Representative's** determination or the manifestation of the dispute, as the case may be.
- 21.2.2. Where a notice has been given under Sub-Clause 21.2.1, above, both **Parties** shall attempt to settle the dispute amicably before the commencement of adjudication. However, unless both **Parties** agree otherwise, adjudication may be commenced on or after the 28<sup>th</sup> (twenty eighth) **Day** after the day on which the notice was given, even if no attempt at amicable settlement has been made.

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- 21.2.3. The dispute shall be referred by either **Party** to adjudication in accordance with the rules of adjudication attached to the FIDIC "Short Form of Contract" First Edition 1999 (the "**Rules**"). The adjudicator shall be any person agreed between the **Parties**. In the event of disagreement, the adjudicator shall be appointed by the then current chairperson of the Association of Arbitrators (South Africa).
- 21.2.4. The adjudicator's decision shall be binding on the **Parties** who shall give effect to it without delay unless and until an arbitrator revises the decision.

### 21.3. Arbitration

- 21.3.1. If a **Party** is dissatisfied with the decision of the adjudicator or if no decision is given within the time set out in the **Rules**, that **Party** may give notice of dissatisfaction referring to this Sub-Clause within 28 (twenty eight) **Days** of receipt of the decision or the expiry of the date for the decision. If no notice of dissatisfaction is given within the specified time, the adjudicator's decision shall become final and binding on the **Parties**.
- 21.3.2. A dispute which has been the subject of a notice of dissatisfaction, referred to in Sub-Clause 21.3.1 shall be finally settled by arbitration in accordance with this Sub-Clause. Such arbitration shall be conducted by a single arbitrator. In the absence of agreement, the arbitrator shall be designated by the then current chairperson of the Association of Arbitrators (South Africa).
- 21.3.3. Unless otherwise agreed by the **Parties** in writing:
- 21.3.4. The arbitration proceedings shall be held at Johannesburg, the Republic of South Africa and shall be conducted under the then current rules of the Association of Arbitrators (South Africa);
- 21.3.5. the arbitration proceedings shall be conducted as expeditiously as possible but the time period provided for in Section 23(a) of the Arbitration Act No. 42 of 1965 shall not apply thereto;
- 21.3.6. the decision of the arbitrator shall be final and binding and there shall be no right of appeal.
- 21.3.7. the obligations of the **Parties** and **Employer's Representative** shall not be altered by reason of any adjudication and/or arbitration being conducted during the execution of the **Works**.