

SUBJECT TO LENDER COMMENTS

DRAFT: 29 SEPTEMBER 2015

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Engineering, Procurement, Construction Conditions of Contract
for a 3 x 350 MW (Gross) 981.5 MW (Net) Coal-Fired Power Plant
at Manda Bay, Lamu County, Kenya

Dated

Amu Power Company Limited

Sichuan Electric Design and Consulting Company Limited

Power Construction Corporation of China

Based under licence on the FIDIC "Silver Book" Conditions of Contract for EPC/Turnkey Projects, First Edition 1999

Contract Agreement

Dated

Between:

- (1) **Amu Power Company Limited** a limited liability company incorporated in the Republic of Kenya with its registered office at P.O. Box 61872 Nairobi 00200 Geminia Insurance Plaza, 4th Floor, Kilimanjaro Avenue, Upper Hill, Kenya (the **Employer**);
- (2) **Sichuan Electric Design and Consulting Company Limited** a limited liability company incorporated in the People's Republic of China with its registered address at Rooms No. 1, 2, 4, 7th Floor No. 27Jiangxi Street, Wuhou District, Chengdu City, Sichuan Province, People's Republic of China and is a company wholly owned by Power Construction Corporation of China (**SEDC**); and
- (3) **Power Construction Corporation of China** registered in the Republic of China with its registered address at No.22, Chegongzhuang West Road, Haidian District, Beijing, People's Republic of China (**PCCC**),

each of SEDC and PCCC are referred to together in this Contract as the **Contractor**, each of the Employer and the Contractor are referred to in this Contract as a **Party** and together, the **Parties**.

Recitals

- A The Employer is developing and financing a 3 x 350 MW (Gross), 981.5 MW (Net) supercritical, pulverized coal-fired power plant at Manda Bay, Lamu County, Kenya (the **Project**). The Employer has entered into the Power Purchase Agreement in relation to the Project with KPLC.
- B The Contractor has represented that it has the experience, expertise, capability and know how to carry out the Works in accordance with this Contract.
- C The Employer shall engage the Contractor to carry out the Works, and the Contractor agrees to carry out the Works, on the terms and conditions of this Contract.
- D The Contractor acknowledges that the Employer has entered into or will enter into Financing Agreements with Financing Parties for the financing of the Project including the Works.
- E The Employer desires that the Works should be executed by the Contractor, and has accepted a proposal by the Contractor for the design, engineering, procurement, construction, commissioning and testing of the Works in accordance with the Contract.

It is agreed

The Employer and the Contractor agree as follows:

1 Definitions

In this Contract Agreement words and expressions shall have the same meanings as are respectively assigned to them in the Conditions of Contract attached to this Contract Agreement.

2 Contract Documents

The following documents shall be deemed to form and be read and construed as part of the Contract:

- (a) this Contract Agreement;
- (b) the Conditions of Contract; and
- (c) the Schedules.

3 Primary Obligations

- 3.1 In consideration of the payments to be made by the Employer to the Contractor as referred to in Article 3.2, the Contractor hereby covenants with the Employer to design, manufacture, construct, commission, test and warrant the Works as set out in and in conformity with the provisions of the Contract.
- 3.2 The Employer hereby covenants to pay to the Contractor, in consideration of the design, manufacture, construction, commissioning and testing of the Works, the Contract Price at the times and in the manner prescribed by the Contract.

4 Counterparts

This Contract Agreement may be executed in any number of counterparts and by each of the Parties on separate counterparts each of which, when executed and delivered, shall be deemed to be an original, but all the counterparts together shall constitute one and the same Contract Agreement.

IN WITNESS whereof the parties hereto have caused this Contract Agreement to be executed and delivered the day and year first before written in accordance with their respective laws.

SIGNED by: _____ (authorised signatory)
_____ (print name)

duly authorised for and on behalf of the **Employer** in the presence of:

Witness:

_____ (signature)
_____ (print name)
_____ (print address)

SIGNED by: _____ (authorised signatory)

_____ (print name)

duly authorised for and on behalf of **SEDC** in the presence of:

Witness:

_____ (signature)

_____ (print name)

_____ (print address)

SIGNED by: _____ (authorised signatory)

_____ (print name)

duly authorised for and on behalf of **PCCC** in the presence of:

Witness:

_____ (signature)

_____ (print name)

_____ (print address)

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General Conditions

1 General Provisions

1.1 Definitions

In the Conditions of Contract (these **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.

Access Protocol means the document set out in Part [X] of Schedule [X].

Access Road means in relation to:

- (a) the deliveries via the Manda Bay Jetty, the route shown in [red] from the public highway to the Site as identified in Schedule 5 (Site); and
- (b) all other access requirements, the route shown in [green] from the public highway to the Site as identified in Schedule 5 (Site).

Advance Payment means the advance payment provided for in Schedule 4 (Milestone Payment Schedule) which is to be paid in accordance with Sub-Clause 14.2 [Advance Payment].

Advance Payment Bond means the advance payment bond as required in the form set out in Schedule 28 (Advance Payment Bond).

Affiliate means any person or legal entity who directly or indirectly controls or is controlled by or is under common control with, the Employer or the Contractor or within the same "group" (as defined under section 474 of the Companies Act 2006).

Anti-Corruption Laws and Regulations means all applicable Laws relating to corruption or bribery.

Authorisation means any approval, consent, license, permit, authorisation or other permission to be granted by a governmental authority required for the enforcement of rights or performance of obligations under any Project Agreement, Financing Agreement and/or the Project, and including any approval required to be given by the Energy Regulatory Commission.

Back-Up Metering Equipment means the equipment for check metering and monitoring the output of the Facility to be provided by and installed by the Contractor and transferred to the Employer pursuant to Schedule [X].

Black Start Test means the test specified in Part [X] of Schedule 8 (Tests for Completion - Performance, Reliability and Emissions Testing Requirements).

Change in Tax means the adoption, promulgation, bringing into effect, repeal, expiration, revocation, amendment, reinterpretation by a Governmental Authority, change in application from the provisions of the relevant legislation, change in interpretation or modification of any Laws, relating to any Taxes which differs from any Laws relating to any Taxes in effect on the Contract Date pursuant to the Laws of the Country, excluding any Taxes imposed in respect of the income of employees of the Contractor.

Change in Tax Cap has the meaning given to it in Sub-Clause 13.6.2 [Change in Tax].

Coal Receiving and Handling Facilities means the coal receiving and handling facilities specified in Part [X] of Schedule [X] which are to be procured by the Employer.

Coal Receiving and Handling Facilities Contractor means the contractor engaged by the Employer to design, construct and commission the Coal Receiving and Handling Facilities.

Coal Receiving and Handling Facilities Site means the place where the Coal Receiving and Handling Facilities are located, as described in Part [X] of Schedule [X].

Commencement Date means the date notified under Sub-Clause 8.1 [Commencement of Works], unless otherwise defined in the Contract Agreement.

Commercial Operation Date means in respect of a Unit, the date notified as such by the Contractor in accordance with Clause 9.8.2 [Unit Commercial Operations Tests].

Commissioning means the conduct of the relevant Tests on Completion to put a Unit, Metering System, KETRACO Connection Facilities, Seller's Connection Facilities or the Facility (as the case may be) into operation.

Commissioning Date means in respect of:

- (a) the first Unit, the date specified in the Programme (including any extension thereof) as the target date for the start of Commissioning of the relevant Unit, or such earlier date as the Contractor may specify by notice given to the Employer and KPLC not less than one hundred (100) days before such earlier date subject to the Employer's and KPLC's agreement to such earlier date which agreement shall not be unreasonably withheld or delayed; and
- (b) the second and third Units, the date notified by the Contractor in accordance with Sub-Clause 9.8.1 [Unit Commercial Operation Tests].

Conditions Precedent means the conditions identified in Sub-Clause 1.6 [Contract Date and Conditions Precedent].

Confidential Information has the meaning given thereto in Sub-Clause 1.9.1 [Confidentiality].

Contract means the Contract Agreement, these Conditions, Schedules 1 to [46] and the further documents (if any) which are listed in the Contract Agreement.

Contract Agreement means the contract agreement signed by the Parties to which these Conditions are attached.

Contract Date means the date that the Contract Agreement is signed and dated by the Parties.

Contracted Capacity means:

- (a) at the Contract Date, 3 x 350 MW (gross), 981.5 MW (net);

- (b) at the Full Commercial Operation Date, the Contracted Capacity certified by the Independent Engineer pursuant to Sub-Clause 9.9.1 [Facility Commercial Operations Tests and Performance Guarantee Tests].

Contracted Capacity Test means the test of the normal full load capacity of the Facility carried out in accordance with the requirements of Section [] of Part [] of Schedule [].

Contractor means the person(s) named as contractor in the Contract Agreement and the legal successors in title to this person(s).

Contractor Authorisations means those Authorisations to be obtained by the Contractor as set out in Schedule 11 (Authorisations and Taxes (Employer and Contractor)).

Contractor Taxes means all Taxes that are levied:

- (a) on the Offshore Portion:
- (i) outside of the Country on all items, Goods, services and fees; and
 - (ii) in the Country, including customs agent's fees, but otherwise excluding taxes, duties and fees on the importation of the Offshore Portion;
- (b) on the Onshore Portion in the Country, including customs agents' fees, freight charges and taxes levied thereon but excluding value added tax on the Onshore Portion Contract Sum; and
- (c) any other Taxes of any nature other than the Employer Taxes.

Contractor's Documents means the calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature supplied by the Contractor under the Contract; as described in Sub-Clause 5.2 [Contractor's Documents].

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, Plant, Materials and any other things intended to form or forming part of the Permanent Works.

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.

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.

Contract Price means the agreed amount stated in the Contract Agreement for the design, execution and completion of the Works and the remedying of any defects, and includes adjustments (if any) in accordance with the Contract.

Cost means all 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.

Country means the Republic of Kenya.

Day means a calendar day and **year** means 365 days.

Defects Notification Period means the period commencing on the date on which the Works are complete and ending:

- (a) eighteen (18) months after Take-Over in respect of the design and works relating to the installation of:
 - (i) steam boilers;
 - (ii) steam turbine generators;
 - (iii) main step-up transformers;
 - (iv) coal mills;
 - (v) forced draft fans;
 - (vi) induced draft fans;
 - (vii) desalination plant;
 - (viii) high pressure valves in the boiler with a diameter of at least 100mm; and
 - (ix) switchgear rated at 6.6kV and above.
- (b) twelve (12) months after Take-Over in respect of all other parts of the Works.

Designated Party means any person:

- (a) whose name is published in any resolution of or list issued by the GOK or the United Nations designating such person as a terrorist or a terrorist organisation;
- (b) whose assets are blocked, frozen or ordered forfeited by the GOK or the United Nations as a direct consequence of:
 - (i) that person being a terrorist or belonging to a terrorist organisation;
 - (ii) the violation of applicable Law pertaining to money laundering or international anti-terrorism laws;
- (c) who is or was found guilty (without the right of further appeal) or against whom a final judgment or order was entered or whose assets were seized, blocked, frozen or ordered forfeited as a consequence of any proceedings relating to:
 - (i) the violation of Law pertaining to money laundering;
 - (ii) the violation of Anti-Corruption Laws and Regulations; or
 - (iii) the violation of United Nations sanctions,

and in respect of whom information relating to that person's guilt, final judgement, order or seizure of assets is publicly available or has been notified to the Contractor by the Employer.

Direct Agreement means the agreement to be entered into between the Employer, Contractor and the Financing Parties under which the Financing Parties may exercise step-in rights in respect of this Contract in the form set out in Schedule 45 (Form of Direct Agreement).

Effective Date has the meaning given to it under the Power Purchase Agreement.

Employer means the person named as employer in the Contract Agreement and the legal successors in title to this person.

Employer Authorisations means those Authorisations to be obtained by the Employer as set out in Schedule 11 (Authorisations and Taxes (Employer and Contractor)) together with any other Authorisations as required in addition to the Contractor Authorisations.

Employer Taxes means:

- (a) any taxes, duties and fees (excluding any customs agents' fees) levied by the authorities of the Country on the importation of the Offshore Portion; and
- (b) value added tax or equivalent sales tax upon submission by the Contractor of a valid value added tax or equivalent Statement in relation to the Onshore Portion Contract Sum; and
- (c) the construction levy imposed by the National Construction Authority of the Country.

Employer's Personnel means the Employer's Representative, the assistants referred to in Sub-Clause 3.2 [Other Employer's Personnel] and all other staff, labour and other employees of the Employer and of the Employer's Representative; and any other personnel notified to the Contractor, by the Employer or the Employer's Representative, as Employer's Personnel.

Employer's Representative means the person named by the Employer in the Contract or appointed from time to time by the Employer under Sub-Clause 3.1 [The Employer's Representative], who acts on behalf of the Employer

Employer's Requirements means the document entitled employer's requirements, as appended to the Contract at Schedule 1 (Employer's Requirements) and any additions and modifications to such document in accordance with the Contract. Such document specifies the purpose, scope, and/or design and/or other technical criteria, for the Works.

Environmental Performance Tests means the tests specified in Part [X] of Schedule 8 (Tests for Completion - Performance, Reliability and Emissions Testing Requirements).

Expert means a person appointed in accordance with the provisions of Sub-Clause 20.3 [Expert Determination].

Facility means the coal fired power station, capable of 3 x 350 MW (gross), 981.5 MW (net) of capacity including the Units, Seller's Connection Facilities and the Metering System , as described in Part [X] of Schedule [X].

Facility Commercial Operations Tests means the Reliability Run Test, the Contracted Capacity Test, the Unit Trip Test, the Environmental Performance Tests and the Black Start Test.

FIDIC means the Fédération Internationale des Ingénieurs-Conseils, the international federation of consulting engineers.

Final Statement means the statement defined in Sub-Clause 14.11 [Application for Final Payment].

Financing Agreements means the loan and security agreements entered into by the Employer with the Financing Parties to finance or refinance the Project.

Financing Parties means any banks, other financial institutions and/or other lenders, together with any agent or trustee for any such persons and any hedging counterparty, from time to time providing financing or refinancing to the Project.

First Synchronisation has the meaning given to it in Schedule 5, Part 1 of the Power Purchase Agreement.¹

Force Majeure is defined in Clause 19 [Force Majeure].

Fuel Supply Agreement means an agreement for the supply of fuel to the Facility entered into by the Employer with a fuel supplier from time to time in accordance with the terms of the Power Purchase Agreement.

Full Commercial Operation Date means the date notified by the Contractor in accordance with Sub-Clause 9.9.1 [Facility Commercial Operations Tests and Performance Guarantee Tests].

Functional Specification means the functional specifications for the Plant and each Unit as set out in Part A of Schedule 9.

GOK means the Government of the Country.

GOK Letter means the letter of comfort to be issued by GOK to the Employer on or before the Effective Date of the Power Purchase Agreement.

Goods means Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.

Governmental Authority means GOK, any ministry, authority (including any regional and local authorities of the Country and including any implementing executive organ or other branches of government) or division thereof, any agencies owned or controlled by GOK including the Energy Regulatory Commission, any legislative organ, any court, tribunal, any securities exchange, any other body in the Country having (i) statutory competence to promulgate rules and regulations governing or touching and concerning matters, transactions and issues contained or relating to this Contract or any of the other Project Agreements; or (ii) any other competence or powers to impose or vary regulations relating to permits or standards and/or to impose Taxes.

Heat Rate means [].

Independent Engineer means the person appointed pursuant to Sub-Clause 9.2.1 [Appointment of Independent Engineer].

¹ Issue 17 of the Issues List agreed 10 September 2015.

Insolvent means, in relation to any person, any of the following:

- (a) that person:
 - (i) suspends payment of its debts, is unable to pay its debts as they fall due within the meaning of section 123 of the Insolvency Act 1986 or admits its inability to pay its debts as they fall due;
 - (ii) begins negotiations with any creditor with a view to the readjustment or rescheduling of any of its indebtedness other than in the case of the Employer in relation to any refinancing in circumstances where the Employer remains capable of discharging its debts where they fall due;
 - (iii) has a voluntary arrangement proposed under section 1 of the Insolvency Act 1986;
 - (iv) convenes any meeting of creditors generally or proposes, enters into or makes a general assignment, composition or other arrangement for the benefit of its creditors generally or any class of creditors; or
 - (v) declares a moratorium on the payment of all or a substantial part of any of its Indebtedness;
- (b) any action is taken or any legal proceedings are started or any other steps are taken (including the presentation of any petition or the convening of any meeting to consider a resolution) for:
 - (i) that person to be adjudicated or found insolvent;
 - (ii) the winding-up, liquidation or dissolution of that person other than in connection with a solvent reconstruction, the terms of which have been previously approved in writing by the other party; or
 - (iii) the appointment of a trustee, receiver, administrative receiver, examiner, liquidator or similar officer in respect of that person or any of its assets;
- (c) any adjudication, order or appointment is made under or in relation to any of the actions, proceedings and steps referred to in paragraph (b) above;
- (d) any application is made to the court for an administration order under the Insolvency Act 1986 with respect to that person;
- (e) any lien or encumbrance over any of the assets of that person becomes enforceable;
- (f) any creditor or encumbrancer attaches or takes possession of, or a diligence, distress, execution, sequestration or other process is levied or enforced upon or sued out against, any of the assets of that person and such process is not discharged within thirty (30) days;
- (g) that person suspends, ceases or threatens to suspend or cease to carry on all or a substantial part of its business; or

- (h) any event or circumstance occurs with respect to that person in any jurisdiction to which it is subject which has an effect equivalent or similar to any of the events referred to in paragraphs (a) to (g) (inclusive) above.

KETRACO means Kenya Electricity Transmission Company Limited P.O. Box 34942-00100, Nairobi, a company incorporated in the Country and wholly owned by GOK on the Contract Date.

KETRACO Connection Facilities has the meaning ascribed to it in Schedule [x].

KETRACO Connection Facilities Operations Certificate means the certificate issued in accordance with Sub-Clause 9.5.2 [KETRACO Connection Facilities].

KETRACO Transmission Interconnector means the approximately 520 kilometre 400kV transmission line from Lamu to Nairobi.

Key Subcontractors means those Subcontractors whose appointments have been pre-approved by the Employer as identified in Schedule 15 (Acceptable Manufacturers and Subcontractors).

KPLC means the Kenya Power and Lighting Company Limited.

KPLC System means the high voltage transmission system operated by KPLC, together with all the distribution system(s) and ancillary electrical plant and equipment connected to such transmission and distribution systems including the KETRACO Transmission Interconnector.

KPLC System Interruption means any failure or inability of KPLC to receive delivery of electrical energy from the Facility howsoever arising other than as a result of: (i) an event which is caused by the Contractor or (ii) an event which is caused by the Employer; or (iii) Force Majeure affecting KPLC under the Power Purchase Agreement.

Lamu Port Facilities means either the temporary or permanent port facilities located at Lamu Port in the Country.

Laws means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority, and shall include constitutional law, national law, provincial law, county law, state law, local law, statute, by-law, ordinance, decree, directive, regulation, standard, circular, guideline, rule, code, delegated or subordinated legislation, judicial act or decision, judgment, order, proclamation, directive, executive order, other legislative measure or enactment.

Lease means the lease of the Site entered into or to be entered into by the Employer and KPLC on or about the signature date of the Power Purchase Agreement.

Lenders Technical Advisor means the technical advisor of the Financing Parties.

Long Stop Works Completion Date means the date falling six (6) months after the end of the Time for Completion as may be extended under the terms of this Contract.

Main Metering Equipment means equipment for metering and monitoring the operation and output of the Facility which equipment is owned, operated and maintained by the Employer in accordance with the Power Purchase Agreement.

Manda Bay Jetty means the Kenyan Navy's jetty at Manda Bay.

Materials means things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under the Contract.

Metering System means the Main Metering Equipment and the Back-Up Metering Equipment.

Milestone Payments means the payments to be made pursuant to the Milestone Payment Schedule.

Milestone Payment Schedule means the schedule set forth at Schedule 4 (Milestone Payment Schedule).

Minimum Performance Requirements means:

- (a) 95% of the Contracted Capacity; and
- (b) 105% of the contracted Heat Rate.

Notice to Proceed has the meaning given thereto in Sub-Clause 8.1 [Commencement of Works].

Off-Shore Portion means all that scope of work described under Part of Schedule [X].

Off-Shore Portion Contract Sum has the meaning set out in Sub-Clause 14.1.1 [The Contract Price].

On-Shore Portion means all that scope of work described under Part [X] of Schedule [X].

On-Shore Portion Contract Sum has the meaning set out in Sub-Clause 14.1.1 [The Contract Price].

Operation and Maintenance Agreement means the agreement to be entered into by the Employer and an operation and maintenance contractor in relation to the operation and maintenance of the Facility.

Party means the Employer or the Contractor, as the context requires.

Performance Certificate means the certificate issued under Sub-Clause 11.10 [Performance Certificate].

Performance Guarantees means the guaranteed performance values as appended to the Contract at Schedule 7 (Guaranteed Performance and Emissions and Basis of Guarantees).

Performance Guarantee Tests means [].

Performance Bond means the security under Sub-Clause 4.27 [Performance Bond].

Performance Test Completion Certificate means the certificate in the form set forth in Schedule [X] delivered to the Employer by the Contractor certifying that at least the Minimum Performance Requirements have been achieved and setting forth the results thereof in such detail to reflect the performance of the Facility as tested.

Permanent Works means the permanent works to be designed and executed by the Contractor under the Contract, including the KETRACO Connection Facilities and the Facility and any other permanent works that may be necessary.

Plant means the apparatus, machinery and vehicles intended to form or forming part of the Permanent Works.

Political Event means any event or circumstance whether arising from an action or inaction of GOK or any Governmental Authority or otherwise howsoever arising which adversely affects the Employer, the Contractor, any Subcontractor, any Financing Party, KPLC or the shareholders of the Employer including each of the following events and circumstances:

- (a) any blockade, embargo, riot, insurrection, civil commotion or any acts of sabotage, where such event has occurred in the Country;
- (b) war or act of foreign enemy;
- (c) an event of Force Majeure affecting KPLC;
- (d) any expropriation (including any series of events collectively constituting creeping expropriation), confiscation, or compulsory acquisition, of all or a portion of the properties or assets of the Contractor or of all or any part of its share capital where such event has occurred in the Country;
- (e) the imposition of any onerous or restrictive conditions in any of the Authorisations; and
- (f) any failure by a Governmental Authority to issue or renew any of the Authorisations required in connection with the GOK Letter, the Lease, the Project, any Project Agreements or any Financing Agreements on a timely basis, (including without limitation, where any Authorisation has been revoked, suspended or terminated as a result of any change in the direct or indirect ownership of shares in or control of the Employer whether pursuant to an enforcement of the security constituted by the Financing Parties' security package or otherwise or where new Authorisations are required by any transferee of the Employer to whom this Agreement and other Project Agreements are being transferred pursuant to the Direct Agreement), provided that in respect of any such failure it shall first be necessary for the affected Party to demonstrate that it is not prohibited by law (other than as a consequence of a change in the Laws) from obtaining such Authorisation and that it has first used reasonable endeavours to obtain such Authorisations (which endeavours shall include full and timely compliance with all the prescribed procedural requirements relating to the issue of such Authorisations, and with all the Laws of the Country which relate to the Employer's (or such other Party's as appropriate) activities within the Country), and solely as the result of lack of the Authorisation, the Contractor or the Employer cannot make its capacity available, generate electricity and/or perform its obligations under this Agreement or any other Project Agreement, any Financing Agreement and/or the Project, or in each case, cannot do so without a material increased cost or a material loss of revenue.

Power Purchase Agreement means the power purchase agreement dated on or about the date of this Contract between the Employer and KPLC for the sale and purchase of electric power from the Facility.

PPA Technical Standards means the technical standards set forth in paragraphs 1.6 and 1.7, Part A, Schedule 1 of the Power Purchase Agreement.

Programme means the initial programme for the completion of the Works as set out in Schedule 6 (Contract Schedule) as adjusted from time to time in accordance with Sub-Clause 8.3 [Programme].

Prohibited Act means:

- (a) offering, giving or agreeing to give to any government official any gift or consideration of any kind, for the purpose of, and to the extent that the person offering, giving or agreeing to give such gift or consideration knows or has reasonable grounds for believing that all or a portion of the gift or consideration is for the purpose of an inducement or reward for:
 - (i) influencing any act or decision of a government official in relation to the Contract or any other contract relating to the Contract; or
 - (ii) showing or not showing favour or disfavour to the Contractor in respect of the Contract or in respect of any other contract relating to the Contract; or
 - (iii) doing or not doing any act in relation to the obtaining or performance of the Contract or any other contract relating to the Contract;
- (b) entering into the Contract or any other contract in connection with the Works, in relation to which commission has been paid or has been agreed to be paid by the Contractor or on its behalf, or to its knowledge, unless before the relevant contract is entered into, particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Employer;
- (c) committing any offence:
 - (i) under any Anti-Corruption Laws and Regulations;
 - (ii) under any applicable Laws of the Country creating offences in respect of fraudulent acts; or
 - (iii) at common law (applicable in the Country) in respect of fraudulent acts in relation to the Contract or any other contract relating to the Contract;
- (d) defrauding or attempting to defraud or conspiring to defraud the Employer or the GoK; or
- (e) any other act or omission that would constitute a failure to satisfy the standards required under the UK Bribery Act 2010.

Prohibited Transaction means:

- (a) the receipt, transfer, transportation, retention, use, structuring, diverting, or hiding the proceeds of any criminal activity whatsoever, including drug trafficking, fraud, or the engaging in any transfer of funds or financial transaction to promote such an activity; or

- (b) engaging or becoming involved in, financing or supporting financially, sponsoring, facilitating, or giving aid to any Designated Party for the purposes of the matters referred to in sub-paragraph (a) of this definition.

Project has the meaning set forth in recital A of the Contract Agreement.

Project Agreements means this Contract, the Operation and Maintenance Agreement, the Power Purchase Agreement, the Fuel Supply Agreement, the Lease, the Direct Agreement, the GOK Letter.

Proposal Date means the date of the Contractor's proposal to the Employer in relation to the Works being 4 April 2014.

Prudent Operating Practice means in relation to either Party, standards of practice obtained by exercising that degree of skill, diligence, prudence and foresight which could reasonably be expected from a skilled and experienced contractor engaged on an international basis and at the standards set out in the PPA Technical Standards in the same or similar works as the Contractor under this Contract.

Punch List Bond has the meaning set forth in Sub-Clause 4.29 [Punch List Bond].

Punch List Items means those items of a minor nature as described in Sub-Clause 10.1.3(a) [Taking Over of the Works].

Reliability Run Test means the test carried out in accordance with the requirements of Part [**] of Schedule [**].

Retention Money means the accumulated retention moneys which the Employer retains under Sub-Clause 14.3 [Application for Interim Payments] and pays under Sub-Clause 14.9 [Payment of Retention Money].

Seller's Connection Facilities means the connection facilities specified in Part [X] of Schedule [X].

Seller's Connection Facilities Commissioning Date means the date specified in the Programme (including any extension thereof) as the target date for the start of Commissioning of the Seller's Connection Facilities, or such earlier date as the Contractor may specify by notice given to the Employer and KPLC not less than one hundred (100) days before such earlier date subject to the Employer's and KPLC's agreement to such earlier date which agreement shall not be unreasonably withheld or delayed.

Seller's Connection Facilities Operations Certificate means the certificate issued in accordance with Sub-Clause 9.6.2 [Seller's Connection Facilities].

Site means the places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, as described in Schedule 5 (Site).

Site Conditions means any physical conditions on, under, or over the surface, or in the vicinity, of, the Site including:

- (a) ground water, ground water hydrology and the effects of any de-watering;
- (b) physical and structural conditions above, upon and below the ground including any partially completed structures, in-ground works and neighbouring buildings;

- (c) topography, ground surface conditions and geology including rock, sub-surface conditions and other materials; and
- (d) any surface water run off and drainage, water seepage, wind blown dust and sand.

Statement means a statement submitted by the Contractor as part of an application for payment under Clause 14 [Contract Price and Payment].

Subcontractor means any person named in the Contract as a subcontractor, or any person appointed as a subcontractor, for a part of the Works; and the legal successors in title to each of these persons.

System Characteristics means the characteristics of the KPLC System specified in Part [**] of the Employer's Requirements.

Take-Over means the point when the Taking-Over Certificate has been issued by the Employer, and Taken-Over and Taking-Over shall be construed accordingly.

Taking-Over Certificate means a certificate for the Works issued under Clause 10 [Employer's Taking Over].

Taxes means all forms of taxation, duties, imposts, levies, fees, rates and withholding taxes of any nature whenever imposed and applicable.

Temporary Works means all temporary works of every kind (other than Contractor's Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects and any other temporary works that may be necessary.

Tests on Completion means the tests which are specified in the Contract including:

- (a) Metering System tests;
- (b) KETRACO Connection Facilities tests;
- (c) Seller's Connection Facilities tests;
- (d) Unit Commercial Operation Tests;
- (e) Facility Commercial Operation Tests; and
- (f) Performance Guarantee Tests,

or any other tests agreed by both Parties or instructed as a Variation, and which are carried out under Clause 9 [Tests on Completion] before the Works are Taken-Over by the Employer.

Time for Completion means the time for achieving the Full Commercial Operation Date for the Works under Sub-Clause 8.2 [Time for Completion] (with any extension under Sub-Clause 8.4 [Extension of Time for Completion]) calculated as forty two (42) months from the issuance of the Notice to Proceed.

Unit means a generating unit and related facilities as described in Part [**] of the Employer's Requirements.

Unit Commercial Operations Certificate shall have the meaning set forth in Sub-Clause 9.8.2 [Unit Commercial Operations Tests].

Unit Commercial Operations Date means for the:

- (a) first Unit, thirty six (36) months from the issuance of the Notice to Proceed;
- (b) second Unit, thirty nine (39) months from the issuance of the Notice to Proceed;
and
- (c) third Unit, forty two (42) months from the issuance of the Notice to Proceed.

Unit Commercial Operations Tests means the tests to be carried out in accordance with Part [**] of Schedule [**].

Unit Trip Test means the test carried out in accordance with the requirements of Part [X] of Schedule 8 (Tests for Completion - Performance, Reliability and Emissions Testing Requirements).

Variation means any change to the Employer's Requirements or the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments].

Warranty Bond has the meaning given thereto in Sub-Clause 4.28.1 [Warranty Bond].

Withholding Tax Cap has the meaning given to it in Sub-Clause 14.1.5(a) [Change in Tax].

Works means the Permanent Works and the Temporary Works, or either of them as appropriate.

1.2 Interpretation

1.2.1 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, and
- (d) **written** or **in writing** means hand-written, type-written, printed or electronically made, and resulting in a permanent record.

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

1.2.3 The Parties acknowledge that the Contract is based on the FIDIC Conditions of Contract for EPC/Turnkey Projects, also known as the "FIDIC Silver Book", First Edition 1999, under licence and with due permission by FIDIC. This Contract shall be construed on its own and the Parties agree that they may not refer to the standard FIDIC Silver Book as an aid to interpretation.

1.2.4 Reference to a business day is a reference to any day which is not a Saturday, Sunday or recognised public holiday in the Country and is a day on which commercial banks are open for business in the Country.

1.2.5 Reference to a day, month or year is a reference to a calendar day, month or year.

1.2.6 The term **including** shall be construed without limitation.

1.2.7 Where an obligation is required to be performed by a specified time and is not so performed, such obligation shall continue (until performed) notwithstanding that the time specified for its performance has elapsed.

1.3 Communications

1.3.1 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 and by e-mail transmission; and
- (b) delivered or sent and transmitted to the address for the recipient's communications as specified below.

(i) To the Employer:

Address: Amu Power Company Limited, P.O. Box 61872 Nairobi
00200 Geminia Insurance Plaza, 4th Floor, Kilimanjaro
Avenue, Upper Hill, Kenya

Email: fnjogu@gulfenergy.co.ke and joe.mutugu@amupower.co.ke

FAO: Managing Director

(ii) To the Contractor

Address: [**], Republic of China

Email: [**] and [**]

FAO: [**]

(c) deemed to have been served and received:

- (i) if delivered by hand, post or courier, upon receipt; or
- (ii) if sent by e-mail transmission, upon receipt by the sender of confirmation of correct transmission of the e-mail by way of a read-receipt from at least one of the two e-mail addresses specified above.

1.3.2 If the recipient:

- (a) gives notice of any change of address for receipt of communications, any communications shall hereafter be delivered accordingly; and

- (b) has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued.

1.3.3 Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed.

1.3.4 The Contractor agrees to give the Employer notice of its change of address as soon as it establishes an office in the Country, which in any event shall be no later than the Commencement Date.

1.4 Law and Language

1.4.1 The Contract (and any non-contractual obligations arising from or connected to the Contract) shall be governed by and construed in accordance with the laws of England and Wales.

1.4.2 If there are versions of any part of the Contract which are written in more than one language, the version which is in English language shall prevail.

1.4.3 The language for 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 Conditions of Contract;
- (c) the Employer's Requirements;
- (d) any other documents forming part of the Contract.

1.6 Contract Date and Conditions Precedent

1.6.1 The Contract shall come into full force and effect on the Contract Date.

1.6.2 Not used.

1.6.3 The Contractor shall proceed to carry out the Works and, for the avoidance of doubt the Contractor shall not be required to commence the Works, hereunder until the Commencement Date.

1.6.4 The Conditions Precedent to commencement of the Works are:

- (a) the delivery of an executed Advance Payment Bond, as required by Sub-Clause 4.26.1 [Advance Payment Bond]; and
- (b) the delivery of an executed Performance Bond required by Sub-Clause 4.27 [Performance Bond];

- (c) all of the Schedules as referred to in the Contract having been agreed between the Parties and each of them being initialed by an authorised signatory of each of the Parties;
- (d) the Project Agreements have been executed by all parties thereto and, save in respect of the Operation and Maintenance Agreement and the Fuel Supply Agreement, are in full force and effect, and the Effective Date has occurred under the Power Purchase Agreement;
- (e) the Financing Agreements have been duly executed and all conditions precedent to the initial availability of funds under the same (other than the occurrence of the Commencement Date) have been satisfied or waived;
- (f) those Authorisations listed in Schedule 11 (Authorisations and Taxes (Employer and Contractor)) as conditions precedent to the Commencement Date have been obtained by the Party responsible for procuring the same;
- (g) receipt of a Statement and payment of the Advance Payment pursuant to Sub-Clause 14.2 [Advance Payment];
- (h) confirmation from the Contractor that, as at the date of this Contract, no changed or new applicable standards have come into force in the Country that have not been taken into account in the Contract Price; and
- (i) the issue of a Notice to Proceed by the Employer.

1.6.5 The Employer shall not be entitled to waive the Conditions Precedents set out in subparagraphs (c), (d), (e), (f) or (g)² without the prior written consent of the Contractor, such consent not to be unreasonably withheld or delayed.

1.6.6 If the Conditions Precedent are not satisfied by 23 September 2016 (the **Interim Longstop Date**) then the Employer may on or before the Interim Longstop Date notify the Contractor of an extension to the Interim Longstop Date (the **Extended Longstop Date**) in which event payment of USD [X] will be made by the Employer for each month of extension pro rated on a daily basis provided that the Interim Longstop Date shall not be extended by more than six (6) months. All such payments shall be made in US Dollars to the Contractor's designated bank account within thirty (30) days of the Employer's receipt of a written statement (which shall include a reference to the Contractor's entitlement to payment under this Clause 1.6) provided by the Contractor.

1.6.7 Where either:

- (a) the Employer does not issue a notice of extension by the Interim Longstop Date; or
- (b) in the event of issue of a notice of extension by the Interim Longstop Date, the conditions precedent are not satisfied by the Extended Longstop Date,

then either party may terminate this Contract on notice to the respective other Party within seven (7) days.

² Issue 6 on the Issues List agreed 15 July 2015.

1.6.8 Each Party shall bear its own costs incurred in relation to this Contract (including tender costs). With the exception of any outstanding payment liabilities due under Sub-Clause 1.6.6, the Parties shall not owe any liabilities or obligations to each other following a termination under this Clause 1.6.

1.7 Assignment

1.7.1 Subject to Sub-Clause 1.7.2 [Assignment], neither Party shall assign the whole or any part of the Contract or any benefit or interest in or under the Contract. However, either Party:

- (a) may assign the whole or any part with the prior agreement of the other Party, at the sole discretion of such other Party; and
- (b) may, as security in favour of the Financing Parties or any agent or designee of Financing Parties, assign its rights under the Contract.

1.7.2 The Employer acknowledges that the Contractor may perform its obligations under this Contract by delegating by way of an assignment, the On-Shore Portion of the Works to an Affiliate in the Country substantially in accordance with the form set out in Schedule 34 (Deed of Assignment), but such delegation shall not in any way:

- (a) discharge the Contractor from its liabilities and/or obligations under this Contract except to the extent that such liabilities and/or obligations have been performed in full and on time as required under this Contract; or
- (b) increase the Contractor's liabilities and/or obligations under this Contract or prevent the Contractor from exercising any contractual rights hereunder on behalf of such Affiliate.

1.7.3 Any obligations so performed by any Affiliate in the Country shall discharge the Contractor pro-tanto. For the avoidance of doubt the Contractor shall at all times remain solely responsible for the performance of all obligations under this Contract.

1.7.4 The Contractor agrees that the Financing Parties, or their agents, successors and assigns, may accept an assignment or transfer of this Contract or the rights and obligations of the Employer under this Contract, pursuant to the valid exercise of remedies for default by the Employer of the Financing Agreements between the Employer and the Financing Parties.

1.8 Care and Supply of Documents

1.8.1 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 Employer one (1) soft copy and six (6) hard copies of each of the Contractor's Documents.

1.8.2 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.

1.8.3 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 Confidentiality

1.9.1 Each Party agrees that it shall, and shall ensure that its employees, officers and directors shall, hold in confidence this Contract and all information, documentation, data and know-how disclosed to it by the other Party and designated in writing as 'confidential' both before and after the Contract Date (**Confidential Information**), and shall not disclose to any third party or use Confidential Information other than in connection with the performance of this Contract or any part thereof without the other Party's prior written approval, provided that:

- (a) this Clause shall not apply to Confidential Information which is in the public domain other than by reason of a breach of this Sub-Clause 1.9 [Confidentiality], or was already in the rightful possession of the recipient Party, or was obtained by the recipient Party in good faith from a third party entitled to disclose it;
- (b) a Party may disclose Confidential Information in accordance with any legal requirement to do so, or to consultants and contractors (subject to obtaining undertakings of confidentiality except where professional duties already impose an obligation of confidentiality) whose duties reasonably require such disclosure save that the Employer shall be entitled to disclose, such Confidential Information as it reasonably considers necessary, to its customers in connection with inquiries raised by customers in relation to the Employer's tariffs or in circumstances where the Employer is obliged to disclose Confidential Information in connection with the determination of tariff values or establishment of the Employer's tariffs applicable to its customers; and
- (c) a Party may disclose Confidential Information, subject to obtaining an undertaking to keep the same confidential, to:
 - (i) any prospective assignee of the Party and its advisers;
 - (ii) to any bank or financial institution or investor from whom the Party is seeking finance, provided that such entity shall not be required to give such undertaking but shall nevertheless be expected to keep such information confidential; and
 - (iii) to any Expert or arbitrator under this Contract.

1.9.2 The provisions of this Sub-Clause 1.9 [Confidentiality] shall survive the termination or expiry of this Contract.

1.10 Employer's Use of Contractor's Documents

1.10.1 As between the Parties, the Contractor shall retain the copyright and other intellectual property rights in the Contractor's Documents and other design documents made by (or on behalf of) the Contractor.

1.10.2 The Contractor shall be deemed (by signing the Contract) to give to the Employer a non-terminable transferable non-exclusive royalty-free licence to copy, use and communicate the Contractor's Documents, including making and using modifications of them. This licence shall:

- (a) apply throughout the actual or intended working life (whichever is longer) of the relevant parts of the Works;

- (b) entitle any person in proper possession of the relevant part of the Works to copy, use and communicate the Contractor's Documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing and demolishing the Works; and
- (c) in the case of Contractor's Documents which are in the form of computer programs and other software, permit their use on any computer on the Site and other places as envisaged by the Contract, including replacements of any computers supplied by the Contractor.

1.10.3 The Contractor's Documents and other design documents made by (or on behalf of) the Contractor shall not, without the Contractor's consent, be used, copied or communicated to a third party by (or on behalf of) the Employer for purposes other than those permitted under this Sub-Clause.

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, the Drawings 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 Other Information

The Contractor shall disclose any other information which the Employer may reasonably require in order to verify the Contractor's compliance with the Contract.

1.13 Compliance with Laws and Authorisations

1.13.1 The Contractor shall in performing the Contract:

- (a) comply with applicable Laws;
- (b) give all notices, pay all Contractor Taxes and obtain all Contractor Authorisations 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; and
- (c) provide for the handling of materials, equipment and construction equipment, including, as necessary, inspection, expediting, shipment to Site, unloading, receiving, and customs' clearance on behalf of the Employer in the name of the Employer as importer, and shall give the Employer no less than thirty (30) days prior written notice of delivery of each shipment pursuant to Sub-Clause 2.4 [Access Issues] to the Manda Bay Jetty or Lamu Port Facilities (as applicable).

1.13.2 The Employer shall:

- (a) pay all Employer Taxes and obtain all Employer Authorisations;
- (b) provide reasonable assistance to the Contractor in arranging for customs clearance in the Country (in the name of the Employer as importer) which shall not in any

event include payment of customs agents' fees for all equipment, material or supplies for the performance of the Work, which shall include obtaining an exemption from import duties following submission of accurate and complete relevant documentation by the Contractor, registering the master list of imported items with the customs authorities of the Country and submitting such other documentation to Kenyan customs authorities as may be required and, where necessary, in the Employer's name³; and

- (c) have obtained (or shall obtain) the planning, zoning or similar permission for the Permanent Works, and any other permissions described in the Employer's Requirements as having been (or being) obtained by the Employer.

1.13.3 If the Contractor suffers delay and/or incurs storage and/or demurrage costs as a result of a failure by the Employer to provide reasonable assistance to the Contractor for customs clearance in the Country pursuant to Sub-Clause 1.13.2(b):

- (a) the Contractor shall give notice to the Employer and, provided that it has complied with its obligation to give the Employer no less than thirty (30) days prior written notice of delivery of each shipment to the Manda Bay Jetty pursuant to Sub-Clause 1.13.1(c), shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:
 - (i) 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
 - (ii) payment of any such storage and/or demurrage costs, which shall be added to the Contract Price;
- (b) after receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters; and
- (c) 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 processing the relevant customs clearance documentation, the Contractor shall not be entitled to such extension of time or Cost.

1.14 Joint Several Liability

Each of SEDC and PCCC shall:

- (a) be jointly and severally liable to the Employer for the performance of the Contract;
- (b) not alter its composition or legal status without the prior consent of the Employer.

Each of SEDC and PCCC confirm that the leader of the consortium is SEDC who has authority to bind the Contractor and each of SEDC and PCCC.

1.15 Financing Parties

1.15.1 The Contractor agrees to provide such information as the Employer may reasonably request in support of the financing of the construction of the Facility. During the performance of the Works, the Contractor agrees to provide information to the Financing Parties on the progress

³ Issue 8 on the Issues List agreed 14 July 2015.

of the Works, including shipment, delivery, construction, testing and commissioning of the Facility, as the Employer or the Financing Parties may reasonably request.

1.15.2 The Contractor agrees to provide such notices and consents as may be reasonably requested by the Employer or the Financing Parties in support of the financing of the construction of the Facility or the transfer or assignment of this Agreement to the Financing Parties, or their agents or nominees.

1.15.3 The Contractor shall enter into a Direct Agreement upon request as a condition precedent to the funding of the Project by the Financing Parties.

2 The Employer

2.1 Right of Access to the Site

2.1.1 Subject to Sub-Clause 2.1.3 [Right of Access to the Site], the Employer shall give the Contractor a right of access to, and possession of, all parts of the Site for the purpose of carrying out the Works, from the Commencement Date.

2.1.2 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 Bond has been received.

2.1.3 Subject to Sub-Clause 2.4 [Access Issues], the Employer shall provide a right of access to the Site via the Access Road.

2.1.4 If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to provide a right of access to and subject to Sub-Clause 2.1.2 possession of the Site via the Access Road:

- (a) the Contractor shall give notice to the Employer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:
 - (i) 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
 - (ii) payment of any such Cost, which shall be added to the Contract Price;
- (b) after receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters; and
- (c) if and to the extent that the Employer's failure was caused by any error or delay by the Contractor, the Contractor shall not be entitled to such extension of time or Cost.

2.2 Permits, Licences or Approvals

2.2.1 At the request of the Contractor the Employer shall (where in a position to do so) provide reasonable assistance to the Contractor for the Contractor's applications for any Contractor Authorisations:

- (a) which the Contractor is required to obtain under Sub-Clause 1.13 [Compliance with Laws and Authorisations];
- (b) for the delivery of Goods, including clearance through customs; and
- (c) for the export of Contractor's Equipment when it is removed from the Site.

2.2.2 The Employer shall at the request of the Contractor:

- (a) exercise its rights under clause 7 of the GOK Letter; and
- (b) at the Contractor's cost, provide reasonable assistance in relation to the Contractor's applications for any work permits for the Contractor's Personnel and visas required for the Contractor's Personnel to enter into the Country.

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 Co-ordination]; 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] and under Sub-Clause 4.18 [Protection of the Environment].

2.4 Access Issues

2.4.1 Prior to the first required use of any section of the Access Road for the delivery of Plant or Materials to the Site, the Employer shall procure that the Access Road is upgraded to enable transportation along the Access Road using vehicles within the national axle loading requirements set out in Schedule [X].

2.4.2 The upgrade of the Access Road shall be limited to the gravelling, surfacing, grading and compacting of the Access Road.

2.4.3 The Employer shall procure at its discretion the use of either the Manda Bay Jetty or the Lamu Port Facilities for the Contractor's use in connection with the importation of major items of Plant.

2.4.4 Such use shall be for the delivery of up to six (6) major items of Plant in one or more shipments, provided that:

- (a) the size of any single item shall not exceed 9m x 4m x 4m;
- (b) the weight of any single item shall not exceed two hundred and twenty four (224) metric tonnes;

2.4.5 The following provisions shall apply to the Contractor's use of both the Manda Bay Jetty and the Lamu Port Facilities in relation to the six (6) items referred to at Clause 2.4.4:

- (a) the Contractor will bear any costs incurred by the Employer from procuring the use of the Manda Bay Jetty or Lamu Port Facilities (as applicable) up to a maximum of one million United States Dollars (\$1,000,000); and
- (b) the Contractor will bear all costs incurred from unloading all items and transporting such items to the Site; and
- (c) the Contractor provides the Employer with at least three (3) months advance notice of the delivery of each item to the Manda Bay Jetty or Lamu Port Facilities (as applicable), such notice to include the size and weight of each item.

2.4.6 If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to procure the use of either the Manda Bay Jetty or the Lamu Port Facilities:

- (a) the Contractor shall give notice to the Employer and, provided that it has complied with its obligations in Sub-Clause 2.4.5, shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:
 - (i) 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
 - (ii) payment of any such Cost, which shall be added to the Contract Price;
- (b) after receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters; and
- (c) if and to the extent that the Employer's failure was caused by any error or delay by the Contractor, the Contractor shall not be entitled to such extension of time or Cost.

2.5 Employer's Claims

2.5.1 If the Employer considers itself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas] or for other services requested by the Contractor.

2.5.2 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 Defects Notification Period shall be given before the expiry of such period.

2.5.3 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 itself to be entitled in connection with the Contract. The Employer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].

2.5.4 The Employer may deduct this amount from any moneys due, or to become due, to the Contractor. The Employer shall only be entitled to set off against or make any deduction from an amount due to the Contractor, or to otherwise claim against the Contractor, in accordance

with this Sub-Clause or with sub-paragraph (a) and/or (b) of Sub-Clause 14.6 [Interim Payments].

3 The Employer's Administration

3.1 The Employer's Representative

- 3.1.1 The Employer may appoint an Employer's Representative to act on its behalf under the Contract. In this event, the Employer shall give notice to the Contractor of the name, address, duties and authority of the Employer's Representative.
- 3.1.2 The Employer's Representative shall carry out the duties assigned to the Employer, and shall exercise the authority delegated to it, by the Employer. Unless and until the Employer notifies the Contractor otherwise, the Employer's Representative shall be deemed to have the full authority of the Employer under the Contract, except in respect of Clause 15 [Termination by Employer].
- 3.1.3 If the Employer wishes to replace any person appointed as Employer's Representative, the Employer shall give the Contractor not less than fourteen (14) days' notice of the replacement's name, address, duties and authority, and of the date of appointment.

3.2 Other Employer's Personnel

- 3.2.1 The Employer or the Employer's Representative 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 not take effect until a copy of it has been received by the Contractor.
- 3.2.2 Assistants shall be suitably qualified persons, who are competent to carry out these duties and exercise this authority, and who are fluent in the English language.

3.3 Delegated Persons

All these persons, including the Employer's Representative and assistants, 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 a delegated person, in accordance with the delegation, shall have the same effect as though the act had been an act of the Employer. However:

- (a) unless otherwise stated in the delegated person's communication relating to such act, it shall not relieve the Contractor from any responsibility that it has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances;
- (b) any failure to disapprove any work, Plant or Materials shall not constitute approval, and shall therefore not prejudice the right of the Employer to reject the work, Plant or Materials; and
- (c) if the Contractor questions any determination or instruction of a delegated person, the Contractor may refer the matter to the Employer, who shall promptly confirm, reverse or vary the determination or instruction.

3.4 Instructions

- 3.4.1 The Employer may issue to the Contractor instructions which may be necessary for the Contractor to perform its obligations under the Contract. Each instruction shall be given in writing and shall state the obligations to which it relates and the Sub-Clause (or other term of the Contract) in which the obligations are specified. If any such instruction constitutes a Variation, Clause 13 [Variations and Adjustments] shall apply.
- 3.4.2 The Contractor shall take instructions from the Employer, or from the Employer's Representative or an assistant to whom the appropriate authority has been delegated under this Clause.

3.5 Determinations

- 3.5.1 Whenever these Conditions provide that the Employer shall proceed in accordance with this Sub-Clause 3.5 [Determinations] to agree or determine any matter, the Employer shall consult with the Contractor in an endeavour to reach agreement. If agreement is not achieved, the Employer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.
- 3.5.2 The Employer shall give notice to the Contractor of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination, unless the Contractor gives notice, to the Employer, of its dissatisfaction with a determination within fourteen (14) days of receiving it. Either Party may then refer the dispute for determination in accordance with Clause 20 [Claims, Disputes and Arbitration].

4 The Contractor

4.1 Contractor's General Obligations

- 4.1.1 The Contractor shall design, execute and complete the Works in accordance with the Contract and Prudent Operating Practice, and shall remedy any defects in the Works. When completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Contract.
- 4.1.2 The Contractor warrants that it has the requisite degree of skill, experience, capability and resources to carry out the Works.
- 4.1.3 The Contractor shall ensure that, when completed, the Works are consistent and compatible with the System Characteristics.
- 4.1.4 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 this design, execution, completion and remedying of defects.
- 4.1.5 The Works shall include any work which is necessary to satisfy the Employer's Requirements, 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.
- 4.1.6 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.

- 4.1.7 The Contractor shall, whenever required by the Employer, submit details of the arrangements and methods which the Contractor proposes to adopt for the execution of the Works. No significant alteration to these arrangements and methods shall be made without this having previously been notified to the Employer.
- 4.1.8 The Contractor shall ensure that the performance of the Work will not cause the Employer to be in breach of its obligations under the Lease.

4.2 Metering

- 4.2.1 The Contractor shall, in accordance with Prudent Operating Practice, supply and install, the Metering System and then test and commission the Metering System in accordance with Sub-Clause 9.4 [Metering System].
- 4.2.2 The Contractor shall ensure that the Metering System shall comply with the specifications set out in Schedule [X].
- 4.2.3 Following certification of completion of the Metering System under Clause 9 [Tests on Completion], the Contractor undertakes not to tamper or otherwise interfere with any part of the Metering System in any way and shall ensure that the Metering System is not tampered with by any other person under its control.
- 4.2.4 Any dispute arising under this Clause 4.2 [Metering] shall be referred to an Expert for determination in accordance with Clause 20.3 [Expert Determination]. During the period that such a dispute exists, the procedures that existed immediately prior to such dispute coming into existence shall prevail.

4.3 Contractor's Representative

- 4.3.1 The Contractor shall appoint the Contractor's Representative and shall give the Contractor's Representative all authority necessary to act on the Contractor's behalf under the Contract.
- 4.3.2 The Contractor's Representative shall be based in the Country and, following the issue of the Notice to Proceed, shall be based on Site.
- 4.3.3 Unless the Contractor's Representative is named in the Contract, the Contractor shall, prior to the Commencement Date, submit to the Employer 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.
- 4.3.4 The Contractor shall not, without the prior consent of the Employer, revoke the appointment of the Contractor's Representative or appoint a replacement.
- 4.3.5 The Contractor's Representative shall, on behalf of the Contractor, receive instructions under Sub-Clause 3.4 [Instructions].
- 4.3.6 The Contractor's Representative may delegate any powers, functions and authority to any competent person, and may at any time revoke the delegation. Any delegation or revocation shall not take effect until the Employer has:
- (a) received prior notice signed by the Contractor's Representative, naming the person and specifying the powers, functions and authority being delegated or revoked; and

- (b) given its prior written consent to the delegation, such consent not to be unreasonably withheld or delayed.

4.3.7 The Contractor's Representative and all these persons shall be fluent in the English language.

4.4 Subcontractors

4.4.1 Subject to Sub-Clause 4.4.2 [Subcontractors] below, the Contractor shall only be entitled to subcontract portions of the Works to Subcontractors with the prior written consent of the Employer.

4.4.2 The Contractor may subcontract the relevant portions of the Works without the Employer's consent:

- (a) to Key Subcontractors; and
- (b) where the contract value of the subcontract to be entered into between the Contractor and a Subcontractor in relation to the Works does not exceed one million and seven hundred thousand US dollars (US\$1,700,000).⁴

4.4.3 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.

4.4.4 In respect of any Key Subcontractors that are replaced and any Subcontractors falling under Sub-Clause 4.4.2(b) above, the Contractor shall give the Employer not less than twenty eight (28) days' notice of:

- (a) the intended appointment of the Subcontractor, with detailed particulars which shall include its relevant experience; and
- (b) the intended commencement of the Subcontractor's work on the Site.

4.4.5 Within fourteen (14) days of the Employer's request, the Contractor shall procure collateral warranties in favour of the Employer in the form set out in Schedule 46 [Form of Subcontractor Collateral Warranty] from those Subcontractors whose subcontract works comprise:

- (a) turbines;
- (b) boiler;
- (c) boiler feed pump;
- (d) coal mills;
- (e) induced draft fans;
- (f) forced draft fans;
- (g) ESP;

⁴ Issue 13 on the Issues List agreed 15 July 2015.

- (h) generator; and
- (i) main transformer.

4.5 Local Contracts

The Contractor shall, where possible give a fair and reasonable opportunity to Subcontractors with existing operations in the Country and suppliers of materials and services with existing operations in the Country to be appointed as Subcontractors provided that the quality, delivery times, warranties, guarantees, price and other terms are comparable to those offered by international manufacturers, contractors and/or suppliers working to international standards.

4.6 Co-operation and Co-ordination

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

- (a) the Employer's Personnel;
- (b) any other contractors employed by the Employer; and
- (c) the personnel of any legally constituted public authorities,

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

4.6.2 Any such instruction shall constitute a Variation if and to the extent that it causes the Contractor to incur Cost in an amount which was not reasonably foreseeable by an experienced contractor using Prudent Operating Practice.

4.6.3 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.

4.6.4 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 Employer in the time and manner stated in the Employer's Requirements.

4.6.5 The Contractor shall provide the Employer with all assistance that it requires to keep KPLC informed of activities at the Site and to co-ordinate such activities with KPLC to ensure that any activities at the Site or at any adjacent site being undertaken by or on behalf of KPLC are not interfered with or disrupted and to ensure the safety of personnel.

4.7 Setting Out

The Contractor shall set out the Works in relation to original points, lines and levels of reference specified in the Contract. The Contractor shall be responsible for the correct positioning of all parts of the Works, and shall rectify any error in the positions, levels, dimensions or alignment of the Works at its own cost and expense and without any entitlement to any extension of time.

4.8 Safety Procedures and Security

4.8.1 The Contractor shall:

- (a) comply with all applicable safety regulations;
- (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) subject to Sub-Clause 4.8.2, provide:
 - (i) lighting and guarding of the Site as required by the Employer's Requirements;
 - (ii) masonry wall for the colony and the [Facility] as shown in [red] on the Site plan in Schedule 5 (Site) as required by the Employer's Requirements;
 - (iii) 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.

4.8.2 The Employer shall provide:

- (a) armed security of the Site perimeter (and for the avoidance of doubt shall not provide security beyond the Site perimeter including in relation to the Access Road) in accordance with the security specification set out in Schedule 12 (EHSS Plan and Manual Scope: Environmental, Health, Safety and Security)⁵; and
- (b) fencing for the Site perimeter as shown in [green] on the Site plan in Schedule 5 (Site).

4.9 Quality Assurance

- 4.9.1 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 Employer shall be entitled to audit any aspect of the system.
- 4.9.2 Details of all procedures and compliance documents shall be submitted to the Employer for information before each design and execution stage is commenced. When any document of a technical nature is issued to the Employer, evidence of the prior approval by the Contractor itself shall be apparent on the document itself.
- 4.9.3 Compliance with the quality assurance system shall not relieve the Contractor of any of its duties, obligations or responsibilities under the Contract.

⁵ Issue 15 on the Issues List agreed 10 September 2015. Agreed as 10 watchtowers and Amu will provide 15 armed guards per shift.

4.10 Site Data

- 4.10.1 The Employer shall have made available to the Contractor for its information, prior to the Commencement Date, all relevant data in the Employer's possession on subsurface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer's possession after the Commencement Date.
- 4.10.2 The Contractor shall be responsible for verifying and interpreting all such data. The Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data, except as stated in Sub-Clause 5.1 [General Design Obligations].

4.11 Sufficiency of the Contract Price

- 4.11.1 The Contractor shall be deemed to have satisfied itself as to the correctness and sufficiency of the Contract Price.
- 4.11.2 Unless otherwise stated in the Contract, the Contract Price covers all the Contractor's obligations under the Contract and all things necessary for the proper design, execution and completion of the Works and the remedying of any defects.

4.12 Unforeseeable Difficulties and Site Conditions

- 4.12.1 The Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works, and by signing the Contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works. The Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs.
- 4.12.2 The Contractor is responsible for, and assumes the risk of, all increased costs and any damage, losses, expenses and liability it suffers or incurs arising out of, or in any way in connection with Site Conditions, and is not entitled to make any claim arising out of, or in any way in connection with Site Conditions whether the same were foreseeable or not.

4.13 Rights of Way and Facilities

The Contractor shall bear all costs and charges for special and/or temporary rights-of-way which the Contractor may require, including those for access to the Site. Subject to Sub-Clause 2.4 [Access Issues], the Contractor shall also obtain, at its risk and cost, any additional facilities outside the Site which it may require for the purposes of the Works other than the Coal Receiving and Handling Facilities.

4.14 Avoidance of Interference

- 4.14.1 The Contractor shall not interfere unnecessarily or improperly with:
- (a) the convenience of the public; or
 - (b) the access to and use and occupation of all roads and footpaths, irrespective of whether they are public or in the possession of the Employer or of others.
- 4.14.2 The Contractor shall indemnify and hold the Employer harmless against and from all damages, losses and expenses (including legal fees and expenses) resulting from any such unnecessary or improper interference.

4.15 Access Route

4.15.1 The Contractor shall be deemed to have been satisfied as to the suitability and availability of access routes to and within the Site. The Contractor shall use reasonable efforts to prevent any road or bridge from being damaged by the Contractor's traffic or by the Contractor's Personnel. These efforts shall include the proper use of appropriate vehicles and routes.

4.15.2 Subject to the Employer's obligation to upgrade the Access Road in accordance with Sub-Clauses 2.4.1 and 2.4.2 and except as otherwise stated in these Conditions:

- (a) the Contractor shall (as between the Parties) be responsible for any construction or maintenance which may be required for its use of access routes within the Site and shall procure such rights of passage as it may require for its access to the Site;
- (b) the Contractor shall provide all necessary signs or directions along access routes, and shall obtain any permission which may be required from the relevant authorities for its use of routes, signs and directions;
- (c) the Employer shall not be responsible for any claims which may arise from the use or otherwise of any access route;
- (d) the Employer does not guarantee the suitability or availability of particular access routes; and
- (e) Costs due to non-suitability or non-availability, for the use required by the Contractor, of access routes shall be borne by the Contractor.

4.16 Transport of Goods

The Contractor shall:

- (a) give the Employer not less than twenty-one (21) days' notice of the date on which any Plant or a major item of other Goods will be delivered to the Site;
- (b) be responsible for packing, loading, transporting, receiving, unloading, storing and protecting all Goods and other things required for the Works; and
- (c) 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 shall negotiate and pay all claims arising from their transport.

4.17 Contractor's Equipment

The Contractor shall be responsible for all Contractor's Equipment. When brought on to the Site, Contractor's Equipment shall be deemed to be exclusively intended for the execution of the Works.

4.18 Protection of the Environment

4.18.1 The Contractor shall take all reasonable steps to protect the environment (both on and off the Site) and to limit damage and nuisance to people and property resulting from pollution, noise and other results of its operations.

4.18.2 The Contractor shall ensure that emissions, surface discharges and effluent from the Contractor's activities shall not exceed the values indicated in the Employer's Requirements, and shall not exceed the values prescribed by applicable Laws.

4.19 Electricity, Water and Gas

4.19.1 The Contractor shall, except as stated below, be responsible for the provision of all power, water and other services that it may require.

4.19.2 Subject to Sub-Clause 4.19.3, the Contractor shall be entitled to use for the purposes of the Works such supplies of electricity, water, gas and other services as may be available on the Site and of which details and prices are given in the Employer's Requirements. The Contractor shall, at its risk and cost provide any apparatus necessary for its use of these services and for measuring the quantities consumed.

4.19.3 Subject to Sub-Clause 4.19.6, the Employer shall be responsible for the provision of back-feed power to enable the Contractor to carry out the Tests on Completion and the Employer shall procure that it exercises its rights under clause 6.2 of the Power Purchase Agreement to require back-feed power six (6) months prior to the Commissioning Date of the first Unit.

4.19.4 On or before the Contract Date, the Contractor shall apply to KPLC for a 66kV electricity connection to the Site and the Employer shall at its own cost provide such assistance as may be required in relation to such application provided that any deposit or costs in relation to the application shall be borne by and promptly paid by the Contractor. The Contractor shall promptly respond to any questions or clarifications or requests for evidence that KPLC may raise in relation to the Contractor's application and the Contractor shall provide any additional evidence or information that may be required by KPLC.

4.19.5 If the Contractor suffers delay and/or incurs Cost as a result of a failure by KPLC to provide requisite power to the Site by the date of issue of the Notice to Proceed then, provided that it has made its application to KPLC and has responded to any questions or queries from KPLC in such reasonable time as may be required to enable KPLC to carry out the Works:

- (a) the Contractor shall give notice to the Employer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:
 - (i) 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
 - (ii) payment of any such Cost, which shall be added to the Contract Price;
- (b) after receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters; and
- (c) if and to the extent that KPLC's failure was caused by any error or delay by the Contractor, the Contractor shall not be entitled to such extension of time or Cost.⁶

4.19.6 If required by the Contractor, the Employer shall provide to the Contractor coal complying with Schedule 10 (Design Fuel and Fuel Range (Fuel and Sorbent Specifications)), fuel and consumables required by the Facility, in the quantities required by the Contractor and as soon as reasonably practicable but in any event no sooner than within [] days. The Contractor

⁶ Issue 16 on the Issues List agreed 10 September 2015.

shall be responsible for the documented costs of such coal, fuel and consumables as are required prior to First Synchronisation of the Facility, and the Employer shall be responsible for the costs of such coal, fuel and consumables as are required after First Synchronisation of the Facility.⁷

- 4.19.7 The quantities consumed and the amounts due (at these prices) for such services shall be agreed or determined 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.

4.20 Coal Receiving and Handling Facilities

4.20.1 The Employer shall at its sole cost and expense procure that the Coal Receiving and Handling Facilities are designed and constructed in accordance with the Programme, the technical specifications and requirements for the same contained in Schedule [X]. The Contractor shall procure that the Works are capable of interfacing with the Coal Receiving and Handling Facilities so as to allow the same to comply with the requirements of this Contract and the Power Purchase Agreement.

4.20.2 If the Contractor suffers delay and/or incurs Cost as a result of any act or omission of the Coal Receiving and Handling Facilities Contractor, the Contractor shall give notice to the Employer and, provided that:

- (a) the Contractor has complied with its obligations in Sub-Clause 4.6 [Co-operation and Co-ordination] to cooperate with the Coal Receiving and Handling Facilities Contractor;
- (b) the Contractor has used reasonable endeavours to mitigate the losses and/or delay incurred as a result of the delay caused by the Coal Receiving and Handling Facilities Contractor;
- (c) the Coal Receiving and Handling Facilities Contractor is not an Affiliate of [the Contractor]; and
- (d) the Contractor has complied with the requirements of the Access Protocol to enable the Coal Receiving and Handling Facilities Contractor requisite access across the Site to the Coal Receiving and Handling Facilities Site.

the Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

- (e) 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
- (f) payment of any such Cost, which shall be added to the Contract Price.

4.20.3 After receiving the Contractor's notice under Sub-Clause 4.20.2, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

⁷ Issue 17 on the Issues List agreed 10 September 2015.

4.20.4 If and to the extent that the Coal Receiving and Handling Facilities Contractor's failure was caused by any error or delay by the Contractor, the Contractor shall not be entitled to such extension of time or Cost.⁸

4.21 Progress Reports

4.21.1 Monthly progress reports shall be prepared by the Contractor and submitted to the Employer, KPLC and the Lenders Technical Advisor in soft copy and six (6) hard copies in total. 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 seven (7) days after the last day of the period to which it relates.

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

4.21.3 Each report shall comply with the requirements of Schedule 19 (Monthly Progress Reports and Meetings).

4.21.4 The Contractor covenants and agrees that any information provided to the Employer under this Sub-Clause 4.21 [Progress Reports] shall, to the Contractor's reasonable knowledge, be complete and accurate in all material respects.

4.22 Security of the Site

4.22.1 Subject to the Employer's obligations under Sub-Clause 4.8.2 [Safety Procedures and Security], the Contractor shall be responsible for keeping unauthorised persons off the Site.

4.22.2 Authorised persons shall be limited to the Contractor's Personnel and the Employer's Personnel; and to any other personnel notified to the Contractor, by (or on behalf of) the Employer, as authorised personnel of the Employer's other contractors on the Site.

4.22.3 The Contractor shall comply with the requirements of Schedule 12 [EHSS Plan and Manual Scope: Environmental, Health, Safety and Security].

4.23 Contractor's Operations on Site

4.23.1 The Contractor shall confine its operations to the Site, and to any additional areas which may be obtained by the Contractor and agreed by the Employer as working areas. The Contractor shall take all necessary precautions to keep Contractor's Equipment and Contractor's Personnel within the Site and these additional areas, and to keep them off adjacent land.

4.23.2 During the execution of the Works, the Contractor shall keep the Site free from all unnecessary obstruction, and shall store or dispose of any Contractor's Equipment or surplus materials. The Contractor shall clear away and remove from the Site any wreckage, rubbish and Temporary Works which are no longer required.

4.23.3 Upon the issue of the Taking-Over Certificate for the Works, the Contractor shall clear away and remove all Contractor's Equipment, surplus material, wreckage, rubbish and Temporary Works. The Contractor shall leave the Site and the Works in a clean and safe condition.

⁸ Issue 14 on the Issues List agreed 11 September, save that the Contractor does not to agree to bear responsibility for an Affiliate of PCCC.

However, the Contractor may retain on Site, during the Defects Notification Period, such Goods as are required for the Contractor to fulfil obligations under the Contract.

4.24 Fossils

4.24.1 All fossils, coins, articles of value or antiquity, and structures and other remains or items of geological or archaeological interest found on the Site shall be placed under the care and authority of the Employer. The Contractor shall take reasonable precautions to prevent Contractor's Personnel or other persons from removing or damaging any of these findings.

4.24.2 The Contractor shall, upon discovery of any such finding, promptly give notice to the Employer, who shall issue instructions for dealing with it.

4.25 Corrupt Gifts and Fraud

4.25.1 The Contractor shall, in accordance with Prudent Operating Practice establish and operate, and shall procure that any Subcontractors establish and operate the following in accordance with Prudent Operating Practice in relation to each of their activities relating to the Contract:

- (a) a compliance program to prevent and detect violations of Anti-Corruption Laws and Regulations;
- (b) an education and training program for its employees and agents in relation to the requirements and prohibitions of the Anti-Corruption Laws and Regulations; and
- (c) due diligence arrangements to seek to minimise the risk of the Contractor:
 - (i) entering into agreements or arrangements with a Designated Party;
 - (ii) employing a Designated Party; and
 - (iii) entering into a Prohibited Transaction.

4.25.2 The Contractor shall, on reasonable written notice, provide details and demonstrate to the Employer its compliance with the obligations set out in Sub-Clause 4.25.1 [Corrupt Gifts and Fraud].

4.25.3 If the Employer reasonably believes that a Prohibited Act has been committed either directly or indirectly, by the Contractor or by any Contractor's Personnel:

- (a) it shall provide to the Contractor such information as it has in its possession in relation to the alleged Prohibited Act including:
 - (i) the nature of the Prohibited Act;
 - (ii) the identity of the party whom it believes has committed the Prohibited Act; and
 - (iii) the activity in connection with the Contract that the Prohibited Act related to; and
- (b) upon provision of such information, the Contractor shall cooperate in good faith with the Employer and its representatives in determining whether a Prohibited Act has been committed.

4.25.4 If the Contractor or any of the Contractor's Personnel are convicted of a Prohibited Act, then the Employer shall be entitled to act in accordance with the following provisions:

- (a) if a Prohibited Act is committed by the Contractor, then the Employer shall be entitled, but shall not be obliged, to give notice to the Contractor requesting that the Contractor take or procure such reasonable action as is notified by the Employer to remedy the effects of the Prohibited Act (excluding payment of compensation for any loss suffered by the Contractor) and to seek to avoid any re-occurrence including compliance with specific procedures within thirty (30) days of receipt of such notice;
- (b) if the Prohibited Act is committed by an employee of the Contractor acting independently, then the Employer may give notice to the Contractor requiring it to immediately remove the relevant person from any further involvement with the Works or the Contract and (if necessary) procure the performance of such part of the Works performed by the employee by another person; and
- (c) if the Employer has given notice in accordance with any of Sub-Clauses 4.25.4(a) to (b) [Corrupt Gifts and Fraud] that the Contractor is required to take or procure certain actions and the Contractor has failed to take or procure such actions as are notified by the Employer within the time period specified, then the Contractor shall compensate the Employer for any and all loss suffered by the Employer arising from such failure.

4.25.5 Any notice given by the Employer under Sub-Clause 4.25.4 [Corrupt Gifts and Fraud] shall specify:

- (a) the nature of the Prohibited Act;
- (b) the identity of the party whom the Employer believes has committed the Prohibited Act; and
- (c) the activity in connection with the Contract that the Prohibited Act related to.

4.25.6 In exercising its rights in this Sub-Clause 4.25 [Corrupt Gifts and Fraud] the Employer shall act in a reasonable and proportionate manner having regard to such matters as the gravity of the Prohibited Act and the identity of the person committing the Prohibited Act.

4.26 Advance Payment Bond

4.26.1 As a condition precedent to the payment of the Advance Payment, the Contractor shall deliver to the Employer an Advance Payment Bond for an amount equal to the Advance Payment, which shall be issued directly by a financially sound and reputable first class international bank being rated at least A by Standard & Poor's. The Advance Payment Bond shall become valid upon receipt by the Contractor of, and in an amount equivalent to, the amounts paid by the Employer in respect of the Advance Payment. The Advance Payment Bond shall be reduced pro rata upon the achievement of Milestone Payments by the Contractor. This shall be calculated as a percentage in accordance with the following formula:

$$\frac{\text{Milestone Payments paid to the Contractor}}{\text{Total Contract Price at the Commencement Date less the Advance Payment and the retention payment Milestone Payment}} \times 100$$

- 4.26.2 The Advance Payment Bond amount shall be reduced in accordance with the formula above on the submission of confirmation of receipt of payments of amounts set out in Statements to the issuing bank.
- 4.26.3 If an Advance Payment Bond in place from time to time expires or ceases to be in effect before it has been fully reduced in accordance with Sub-Clause 4.26.1 above, the Contractor shall either extend such bond or procure a replacement bond (as the case may be) and such Advance Payment Bond shall be valid until it has been fully reduced. If any replacement bond is provided, such bond shall be issued by a financially sound and reputable first class international bank being rated at least A by Standard & Poor's and delivered to the Employer not later than the fifteenth (15th) day prior to the date of expiry or cessation of the original Advance Payment Bond.
- 4.26.4 If any such extension of any Advance Payment Bond, or any replacement thereof, shall not have been delivered to the Employer on or before the fifteenth (15th) day prior to the expiry of the original Advance Payment Bond or any replacement thereof, the Employer shall be entitled to draw the full amount of the Advance Payment Bond then available for drawing and retain the same by way of security until such time as the Employer shall receive such replacement bond whereupon, subject to the terms of this Contract, the Employer shall refund to the Contractor the full amount of such drawing less any sums then properly due to the Employer in accordance with the terms of this Contract.

4.27 Performance Bond

- 4.27.1 As a condition precedent to this Contract, the Contractor shall deliver to the Employer a performance bond in the form set out in Schedule 29 (the **Performance Bond**) for an aggregate amount equal to 12.5% of the Contract Price, which shall be issued directly by a financially sound and reputable first class international bank being rated at least A by Standard & Poor's. The Performance Bond shall be valid until Take-Over.
- 4.27.2 If any Performance Bond in place from time to time will expire or cease to be in effect before Take-Over, the Contractor shall extend such bond or procure a replacement Performance Bond (as the case may be) and such Performance Bond shall be valid until Take-Over. If any such replacement bond is provided, such bond shall be issued by a financially sound and reputable financial institution being rated at least A by Standard & Poor's and delivered to the Employer not later than the fifteenth (15th) day prior to the date of expiry or cessation of the original Performance Bond.
- 4.27.3 If any such extension of any Performance Bond, or any replacement thereof, shall not have been delivered to the Employer on or before the fifteenth (15th) day prior to the expiry of the original Performance Bond or any replacement thereof, the Employer shall be entitled to draw the full amount of the Performance Bond then available for drawing and retain the same by way of security until such time as the Employer shall receive such replacement bond whereupon, subject to the terms of this Contract, the Employer shall refund to the Contractor the full amount of such drawing less any sums then properly due to the Employer in accordance with the terms of this Contract.
- 4.27.4 The Employer is only entitled to claim under the Performance Bond in respect of events or circumstances occurring on or before the expiry of Take-Over.

4.28 Warranty Bond

- 4.28.1 As a condition precedent to Taking Over, the Contractor shall deliver to the Employer a warranty bond in the form set out in Schedule 30 (the **Warranty Bond**) for an amount equal to ten per cent (10%) of the Contract Price reducing on the date falling twelve (12) months after Take-Over to an amount equal to [] per cent ([]%) of the Contract Price, which shall be issued directly by a financially sound and reputable first class international bank being rated at least A by Standard & Poor's. The Contractor's obligation to maintain the Warranty Bond shall cease on the date of the Performance Certificate.
- 4.28.2 If the Warranty Bond expires or ceases to be in effect the Employer has issued the Performance Certificate, the Contractor shall either extend such bond or procure a replacement bond (as the case may be) and such Warranty Bond shall be valid until the Performance Certificate has been issued. If any replacement bond is provided, such bond shall be issued by a financially sound and reputable first class international bank being rated at least A by Standard & Poor's and delivered to the Employer not later than the fifteenth (15th) day prior to the date of expiry or cessation of the original Warranty Bond.
- 4.28.3 If any such extension of any Warranty Bond, or any replacement thereof, shall not have been delivered to the Employer on or before the fifteenth (15th) day prior to the expiry of the original Warranty Bond or any replacement thereof, the Employer shall be entitled to draw the full amount of the Warranty Bond then available for drawing and retain the same by way of security until such time as the Employer shall receive such replacement bond whereupon, subject to the terms of this Contract, the Employer shall refund to the Contractor the full amount of such drawing less any sums then properly due to the Employer in accordance with the terms of this Contract.

4.29 Punch List Bond

- 4.29.1 Simultaneously with the creation of the Punch List in accordance with Sub-Clause 10.1.4 [Taking Over of the Works], the Contractor shall deliver to the Employer a bond payable on demand in the form set out in Schedule 36 (Form of Punch List Bond) (the **Punch List Bond**). The stated amount of the Punch List Bond shall be an amount equal to two hundred percent (200%) of the total projected cost of completing the Punch List items. The Contractor shall maintain the Punch List Bond in effect until the date that all of the Punch List Items have been certified by the Employer as completed.
- 4.29.2 If the Punch List Bond expires or ceases to be in effect before the Employer has certified that the Punch List Items have been completed, the Contractor shall either extend such bond or procure a replacement bond (as the case may be) and such Punch List Bond shall be valid until the Punch List Items have been certified as completed. If any replacement bond is provided, such bond shall be issued by a financially sound and reputable first class international bank being rated at least A by Standard & Poor's and delivered to the Employer not later than the fifteenth (15th) day prior to the date of expiry or cessation of the original Punch List Bond.
- 4.29.3 If any such extension of any Punch List Bond, or any replacement thereof, shall not have been delivered to the Employer on or before the fifteenth (15th) day prior to the expiry of the original Punch List Bond or any replacement thereof, the Employer shall be entitled to draw the full amount of the Punch List Bond then available for drawing and retain the same by way of security until such time as the Employer shall receive such replacement bond whereupon, subject to the terms of this Contract, the Employer shall refund to the Contractor the full

amount of such drawing less any sums then properly due to the Employer in accordance with the terms of this Contract.

5 Design

5.1 General Design Obligations

- 5.1.1 The Contractor shall be deemed to have scrutinised, prior to the Commencement Date, the Employer's Requirements (including design criteria and calculations, if any). The Contractor shall be responsible for the design of the Works and for the accuracy of such Employer's Requirements (including design criteria and calculations), except as stated below.
- 5.1.2 The Employer shall not be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements as originally included in the Contract and shall not be deemed to have given any representation of accuracy or completeness of any data or information, except as stated below. Any data or information received by the Contractor, from the Employer or otherwise, shall not relieve the Contractor from its responsibility for the design and execution of the Works.
- 5.1.3 However, the Employer shall be responsible for the correctness of the following portions of the Employer's Requirements and of the following data and information provided by (or on behalf of) the Employer:
- (a) portions, data and information which are stated in the Contract as being immutable or the responsibility of the Employer;
 - (b) definitions of intended purposes of the Works or any parts thereof;
 - (c) criteria for the testing and performance of the completed Works;
 - (d) Schedule 10 (Design Fuel and Fuel Range (Fuel and Sorbent Specifications) in relation to the coal specification; and
 - (e) Schedule 1 Part B of the Power Purchase Agreement in relation to the KETRACO Connection Facilities.

5.2 Contractor's Documents

- 5.2.1 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 English language.
- 5.2.2 The Contractor shall prepare all Contractor's Documents, and shall also prepare any other documents necessary to instruct the Contractor's Personnel.
- 5.2.3 If the Employer's Requirements describe the Contractor's Documents which are to be submitted to the Employer for review, 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 Employer for review, and (ii) **Contractor's Documents** exclude any documents which are not specified as being required to be submitted for review.

- 5.2.4 Unless otherwise stated in the Employer's Requirements, each review period shall not exceed twenty-one (21) days, calculated from the date on which the Employer 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 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.
- 5.2.5 The Employer 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 in accordance with this Sub-Clause, at the Contractor's cost.
- 5.2.6 For each part of the Works, and except to the extent that the Parties otherwise agree:
- (a) 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;
 - (b) execution of such part of the Works shall be in accordance with these Contractor's Documents, as submitted for review; and
 - (c) if the Contractor wishes to modify any design or document which has previously been submitted for review, the Contractor shall immediately give notice to the Employer. Thereafter, the Contractor shall submit revised documents to the Employer in accordance with the above procedure.
- 5.2.7 Any such agreement (under the preceding paragraph) or any review (under this Sub-Clause or otherwise) shall not relieve the Contractor from any obligation or responsibility.

5.3 Contractor's Undertaking

The Contractor undertakes that the design, the Contractor's Documents, the execution and the completed Works will be in accordance with:

- (a) the Laws in the Country;
- (b) the documents forming the Contract, as altered or modified by Variations;
- (c) Prudent Operating Practice; and
- (d) relevant international standards including:
 - (i) World Bank and International Finance Corporation Environmental, Health and Safety Guidelines for Thermal Power Plants 2008;
 - (ii) International Finance Corporation Environmental and Social Performance Standards;
 - (iii) the African Development Bank standards as set out in Schedule 14 [African Development Bank and Gendering Requirements], including the African Development Bank Standards relating to Integrated Safeguards System and Gender Considerations in the Energy Sector; and

- (iv) the international standards set out in the Employer's Requirements⁹.

5.4 Technical Standards and Regulations

5.4.1 The design, the Contractor's Documents, the execution and the completed Works shall comply with each of:

- (a) the Country's technical standards, building and construction standards as may be required by Laws and any environmental Laws¹⁰;
- (b) Laws applicable to the product being produced from the Works to the extent required by the other provisions of this Contract;
- (c) the PPA Technical Standards; and
- (d) other standards specified in the Employer's Requirements.

5.4.2 All these Laws shall, in respect of the Works, be those prevailing when the Works 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 Proposal Date¹¹, unless stated otherwise.

5.4.3 If changed or new applicable standards come into force in the Country after the Proposal Date, the Contractor shall give notice to the Employer and (if appropriate) submit proposals for compliance. In the event that:

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

then the Employer shall initiate a Variation in accordance with Clause 13 [Variations and Adjustments].

5.5 Training

The Contractor shall carry out the training of Employer's Personnel in the operation and maintenance of the Works to the extent specified in the Employer's Requirements. If the Contract specifies training which is to be carried out before taking-over, 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] until this training has been completed.

5.6 As-Built Documents

5.6.1 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. These records shall be kept on the Site and shall be used exclusively for the purposes of this Sub-Clause. One soft copy, one set of reproducible copies and five sets of white print copies (or equivalent) of all as-built plans and designs relating to the operation or

⁹ Issue 3 on the Issues List agreed 15 July 2015.

¹⁰ Issue 3 on the Issues List agreed 15 July 2015.

¹¹ Issue 21 on the Issues List agreed 13 July 2015.

maintenance of the Facility shall be supplied to the Employer within one (1) month of the Full Commercial Operation Date.

- 5.6.2 In addition, the Contractor shall supply to the Employer as-built drawings of the Works, showing all Works as executed, and submit them to the Employer for review under Sub-Clause 5.2 [Contractor's Documents]. The Contractor shall obtain the consent of the Employer as to their size, the referencing system, and other relevant details.
- 5.6.3 Prior to the issue of any Taking-Over Certificate, the Contractor shall supply to the Employer 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] until the Employer has received these documents.

5.7 Operation and Maintenance Manuals

- 5.7.1 Prior to commencement of the Tests on Completion, the Contractor shall supply to the Employer provisional operation and maintenance manuals in English and in sufficient detail for the Employer to operate, maintain, dismantle, reassemble, adjust and repair the Plant.
- 5.7.2 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] until the Employer has received one soft copy and two white print copies of the final operation and maintenance manuals in such detail, and any other manuals specified in the Employer's Requirements for these purposes.

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 5.

5.9 Disclaimer

- 5.9.1 The Contractor:
- (a) accepts that any information provided by the Contractor under Sub-Clause 4.21 [Progress Reports], or any engineering review or inspection conducted by the Employer or KPLC solely for their own information and accordingly, the Employer's or KPLC's review or failure to review or carry out any inspection under this Clause 5.9 [Disclaimer] shall not be construed as constituting any approval or acceptance of the Works and the Employer makes no representation as to the engineering soundness of the Works nor shall it be treated as having accepted the Works as fit to meet the terms of this Contract;
 - (b) shall in no way represent to any third party that, as a result of any review or inspection by the Employer or KPLC, the Employer is responsible for the engineering soundness of the Works; and
 - (c) shall, subject to the other provisions of this Contract, be solely responsible for the technical feasibility, operational capacity and reliability of the Facility.

6 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.

6.2 Rates of Wages and Conditions of Labour

The Contractor shall pay rates of wages, and observe conditions of labour, which are not lower than those established for the trade or industry where the work is carried out. If no established rates or conditions are applicable, the Contractor shall pay rates of wages and observe conditions which are not lower than the general level of wages and conditions observed locally by employers whose trade or industry is similar to that of the Contractor, provided always that, in complying with this Clause, the Contractor shall at all times ensure provision with the African Development Bank's standards set out in Schedule 14 (African Development Bank and Gendering Requirements), including the African Development Bank Standards relating to Integrated Safeguards System and Gender Considerations in the Energy Sector.

6.3 Persons in the Service of Others

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

6.4 Labour Laws

6.4.1 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.

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

6.5 Working Hours

No work shall be carried out on the Site on locally recognised days of rest, or outside normal working hours, unless:

- (a) otherwise stated in the Contract;
- (b) the Employer gives consent; or
- (c) the work is unavoidable, or necessary for the protection of life or property or for the safety of the Works, in which case the Contractor shall immediately advise the Employer.

6.6 Facilities for Staff and Labour

6.6.1 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. The Contractor shall also provide facilities for the Employer's Personnel as stated in the Employer's Requirements.

6.6.2 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 Permanent Works.

6.7 Health and Safety

6.7.1 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 are available at all times 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.

6.7.2 The Contractor shall appoint an occupational health and safety 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.

6.7.3 The Contractor shall send, to the Employer, 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 Employer may reasonably require.

6.8 Contractor's Superintendence

6.8.1 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.

6.8.2 Superintendence shall be given by a sufficient number of persons having adequate knowledge of the English 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.

6.9 Contractor's Personnel

6.9.1 The Contractor's Personnel shall be appropriately qualified, skilled and experienced in their respective trades or occupations. The Employer 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.

6.9.2 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 Employer, 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 Employer, until the Contractor has completed all work which is known to be outstanding at the completion date stated in the 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.

7 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 Prudent Operating Practice;
- (c) with properly equipped facilities and non-hazardous Materials, except as otherwise specified in the Contract; and
- (d) in accordance with its obligations at Sub-Clause 1.13 [Compliance with Laws and Authorisations]

7.2 Samples

The Contractor shall submit samples to the Employer, for review in accordance with the procedures for Contractor's Documents described in Sub-Clause 5.2 [Contractor's Documents], as specified in the Contract and at the Contractor's cost. Each sample shall be labelled as to origin and intended use in the Works.

7.3 Inspection

7.3.1 The Employer's Personnel, the Lender's Technical Advisor and the Employer's technical advisor shall at all reasonable times, upon reasonable notice to the Contractor and at the Employer's cost:

- (a) have full access to all parts of the Site and to all places from which natural materials are being obtained; and
- (b) during production, manufacture and construction (at the Site and, to the extent specified in the Contract, elsewhere), be entitled to examine, inspect, measure and test the materials and workmanship, and to check the progress of manufacture of Plant and production and manufacture of Materials, to the extent that such activities do not interfere with the progress of manufacture of Plant and production and manufacturer of Materials.

- 7.3.2 The Contractor shall give the Employer's Personnel full opportunity to carry out these activities, including providing access, facilities, permissions and safety equipment. No such activity shall relieve the Contractor from any obligation or responsibility under this Contract.
- 7.3.3 In respect of the work which Employer's Personnel are entitled to examine, inspect, measure and/or test, the Contractor shall give notice to the Employer whenever any such work is ready and before it is covered up, put out of sight, or packaged for storage or transport. The Employer shall then either carry out the examination, inspection, measurement or testing without unreasonable delay, or promptly give notice to the Contractor that the Employer does not require to do so. If the Contractor fails to give the notice, the Contractor shall, if and when required by the Employer, uncover the work and thereafter reinstate and make good, all at the Contractor's cost.

7.4 Testing

- 7.4.1 This Sub-Clause shall apply to all tests specified in the Contract.
- 7.4.2 Subject to Sub-Clause 4.19 [Electricity, Water and Gas], the Contractor shall provide all apparatus, assistance, documents and other information, electricity, equipment, consumables, instruments, labour, materials, and suitably qualified and experienced staff, as are necessary to carry out the specified tests efficiently. The Contractor shall agree, with the Employer, the time and place for the specified testing of any Plant, Materials and other parts of the Works.
- 7.4.3 The Employer 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.
- 7.4.4 The Employer shall give the Contractor not less than twenty four (24) hours' notice of the Employer's intention to attend the tests.
- 7.4.5 The Contractor shall promptly forward to the Employer duly certified reports of the tests. When the specified tests have been passed, the Employer shall endorse the Contractor's test certificate, or issue a certificate to the Contractor, to that effect.

7.5 Rejection

- 7.5.1 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 Employer 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.
- 7.5.2 If the Employer 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

- 7.6.1 Notwithstanding any previous test or certification, the Employer may instruct the Contractor to:

- (a) remove from the Site 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.

7.6.2 If the Contractor fails to commence such remedial work within five (5) days then, provided that the Employer's instruction complies with Sub-Clause 3.4 [Instructions], 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

Each item of Plant and Materials shall, to the extent consistent with the Laws of the Country, become the property of the Employer at whichever is the earlier of the following times, free from liens and other encumbrances:

- (a) when it is delivered to the Site; or
- (b) when the Contractor has received payment in full for the relevant item of Plant and Materials.

7.8 Royalties

Unless otherwise stated in the Employer's Requirements, the Contractor shall pay all royalties, rents and other payments for:

- (a) natural materials obtained from outside the Site; and
- (b) the disposal of material from demolitions and excavations and of other surplus material (whether natural or man-made), except to the extent that disposal areas within the Site are specified in the Contract.

8 Commencement, Delays and Suspension

8.1 Commencement of Works

- 8.1.1 The Employer shall give the Contractor not less than seven (7) days' notice (Notice to Proceed) of the Commencement Date in the form set out in Schedule 25 (Form of NTP).
- 8.1.2 The Contractor shall commence the design and execution of the Works immediately following the Commencement Date, and shall then proceed with the Works with due expedition and without delay.

8.2 Time for Completion

- 8.2.1 The Contractor shall achieve the Unit Commercial Operations Certificate for each Unit by the relevant Unit Commercial Operations Date. The Employer's sole remedy in respect of any failure by the Contractor to comply with this Sub-Clause 8.2.1 shall be to collect delay liquidated damages from the Contractor under Sub-Clause 8.7 [Delay Liquidated Damages]

to the extent any such failure result in a failure to complete the whole of the Works within the Time for Completion.

8.2.2 The Contractor shall complete the whole of the Works within the Time for Completion for the Works, 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 to be considered to be completed for the purposes of Taking-Over under Sub-Clause 10.1 [Taking Over of the Works].

8.3 Programme

8.3.1 The Contractor shall carry out the Works in accordance with the Programme. The Contractor shall submit a revised Programme to the Employer within twenty eight (28) days after the Commencement Date, and thereafter on a monthly basis. The Contractor shall also submit a revised Programme whenever the previous Programme is inconsistent with actual progress or with the Contractor's obligations. Unless otherwise stated in the Contract, each Programme shall include:

- (a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each major stage of the Works;
- (b) the periods for reviews under Sub-Clause 5.2 [Contractor's Documents];
- (c) the sequence and timing of inspections and tests specified in the Contract, and
- (d) a supporting report which includes:
 - (i) a general description of the methods which the Contractor intends to adopt for the execution of each major stage of the Works; and
 - (ii) the approximate number of each class of Contractor's Personnel and of each type of Contractor's Equipment for each major stage.

8.3.2 Unless the Employer, within twenty-one (21) days after receiving a Programme, gives notice to the Contractor stating the extent to which it does not comply with the Contract, the Contractor shall proceed in accordance with the Programme, subject to its other obligations under the Contract. The Employer's Personnel shall be entitled to rely upon the Programme when planning their activities.

8.3.3 The Contractor shall promptly give notice to the Employer of specific probable future events or circumstances which may adversely affect or delay the execution of the Works. In this event, or if the Employer gives notice to the Contractor that a Programme fails (to the extent stated) to comply with the Contract or to be consistent with actual progress and the Contractor's stated intentions, the Contractor shall submit a revised Programme to the Employer in accordance with this Sub-Clause.

8.4 Extension of Time for Completion

8.4.1 The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] 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] is or will be delayed by any of the following causes:

- (a) a Variation (unless an adjustment to the Time for Completion has been agreed under Sub-Clause 13.3 [Variation Procedure]);
- (b) any delay, impediment or prevention directly caused by the Employer or the Employer's Personnel, subject to compliance by the Contractor with its obligations under Sub-Clause 4.20 (Coal Receiving and Handling Facilities);
- (c) any delay as a result of a failure by the Employer to provide reasonable assistance to the Contractor for customs clearance in the Country in accordance with Sub-Clause 1.13 [Compliance with Laws and Authorisation];
- (d) any failure by the Employer to provide a right of access to and possession of the Site via the Access Road in accordance with Clause 2.1.4 [Right of access to the Site];
- (e) any failure by the Employer to procure the use of either the Manda Bay Jetty or the Lamu Port Facilities in accordance with Clause 2.4 [Access Issues];
- (f) Suspension in accordance with Sub-Clauses 8.9 [Consequences of Suspension] or 16.1 [Contractor's Entitlement to Suspend Work];
- (g) any change in the Laws of the Country in accordance with Sub-Clause 13.7.4 [Change in Law];
- (h) any Employer's risks under Sub-Clause 17.3 [Employer's Risks];
- (i) Force Majeure;
- (j) a period equivalent to an extension granted to the programme under the Power Purchase Agreement;
- (k) any delay as a result of a failure by the Employer to respond to the Contractor's application for a Taking-Over Certificate pursuant to Sub-Clause 10.1.6 [Employer's Taking Over];
- (l) if the Contractor is entitled to an extension of time under Sub-Clause 10.3.2 [Interference with Tests on Completion];
- (m) if the Contractor is entitled to an extension of time under Sub-Clause 4.19.5 [Electricity, Water and Gas] with regard to the provision of power to the Site by KPLC; or
- (n) if the Contractor is entitled to an extension of time under Sub-Clause 4.20 [Coal Receiving and Handling Facilities].

8.4.2 Notwithstanding any other provision of the Contract, the Contractor shall not be entitled to any extension of the Time for Completion under this Sub-Clause if and to the extent that any delay:

- (a) is attributable to any default, omission, neglect or failure on the part of the Contractor, any Subcontractor or any Contractor's Personnel; or

- (b) would have nevertheless been experienced had such event or circumstance referred to in the first paragraph to this Sub-Clause not occurred.

8.4.3 If the Contractor considers itself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Employer in accordance with Sub-Clause 20.1 [Contractor's Claims]. When determining each extension of time under Sub-Clause 20.1 [Contractor's Claims], the Employer shall review previous determinations and may increase, but shall not decrease, the total extension of time.

8.4.4 Subject to Sub-Clause 8.4.5, any extension of time granted by the Employer under this Sub-Clause 8.4 [Extension of Time for Completion] shall not, for that reason alone, entitle the Contractor to any addition to the Contract Price.

8.4.5 If the Contractor incurs Cost as a result of any delay, impediment or prevention directly caused by the Employer or the Employer's Personnel, the Contractor shall give notice to the Employer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to payment of any such Cost, which shall be added to the Contract Price. After receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

8.5 Delays Caused by Authorities

8.5.1 If the following conditions apply, namely:

- (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country;
- (b) authorities delay or disrupt the Contractor's work, including but not limited to delays in issuing or renewing Authorizations, permits, licences or approvals required for the Works, and attaching conditions to any such Authorizations, permits, licences and approvals which cause delay to the Contractor's work; and
- (c) the delay or disruption was not reasonably foreseeable by an experienced contractor by the date for submission of its tender,

[then this delay or disruption will be considered as a cause of delay under sub-paragraph [(d)] of Sub-Clause 8.4 [Extension of Time for Completion].]

8.6 Rate of Progress

8.6.1 If, at any time:

- (a) actual progress is too slow to complete within the Time for Completion; and/or
- (b) progress has fallen (or will fall) behind the current Programme under Sub-Clause 8.3 [Programme],

other than as a result of a cause listed in Sub-Clause 8.4 [Extension of Time for Completion], then the Employer may instruct the Contractor to submit, under Sub-Clause 8.3 [Programme], a revised Programme and supporting report describing the revised methods which the Contractor proposes to adopt in order to expedite progress and complete within the Time for Completion.

8.6.2 Unless the Employer notifies otherwise, the Contractor shall adopt these revised methods, which may require increases in the working hours and/or in the numbers of Contractor's Personnel and/or Goods, at the risk and cost of the Contractor. If these revised methods 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, in addition to delay damages (if any) under Sub-Clause 8.7 [Delay Liquidated Damages] below.

8.7 Delay Liquidated Damages

8.7.1 If the Contractor fails to comply with the Time for Completion for the whole of the Works, the Contractor shall subject to Sub-Clause 2.5 [Employer's Claims] pay delay liquidated damages to the Employer for this default. These delay liquidated damages shall be at the weekly rate of 0.4% of the Contract Price (or pro rata thereof), which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay liquidated damages set out in Sub-Clauses 17.6.4 [Limitation of Liability] and 17.6.5 [Limitation of Liability].

8.7.2 These delay damages 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 for Contractor Default] 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.

8.7.3 The Parties acknowledge and agree that any liquidated damages for delay payable under this Sub-Clause constitute a genuine pre-estimate of the loss that would be incurred and are not a penalty, and are fair and reasonable and shall be the sole remedy of the Employer in the case of delay which shall include any delay in a Unit achieving its Unit Commercial Operations Date. In the event that the delay liquidated damages payable under this Sub-Clause 8.7 [Delay Liquidated Damages] are found to be void or unenforceable for any reason, the Contractor shall be liable to the Employer (against proof) for any loss and expense suffered or incurred by the Employer as a result of the Contractor's failure to achieve Time for Completion. Without prejudice to the Employer's rights to terminate the Contract under Clause 15 [Termination by Employer], these delay damages shall be the only damages due from the Contractor for such default, or any other delay.

8.8 Suspension of Work

8.8.1 The Employer 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 of the Works against any deterioration, loss or damage.

8.8.2 The Employer 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, the following 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

8.9.1 If the Contractor suffers delay and/or incurs Cost from complying with the Employer's instructions under Sub-Clause 8.8 [Suspension of Work] and/or from resuming the work, the Contractor shall give notice to the Employer 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.

8.9.2 After receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

8.9.3 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 twenty eight (28) days; and
- (b) the Contractor has marked the Plant and/or Materials as the Employer's property in accordance with the Employer's instructions.

8.11 Prolonged Suspension

If the suspension under Sub-Clause 8.8 [Suspension of Work] has continued for more than one hundred and thirty five (135) days, the Contractor may request the Employer's permission to proceed. If the Employer does not give permission within thirty (30) days after being requested to do so, the Contractor may, by giving notice to the Employer, treat the suspension as an omission under Clause 13 [Variations 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 for Employer Default].

8.12 Resumption of Work

After the permission or instruction to proceed is given, the Parties shall jointly examine the Works and the Plant and Materials affected by the suspension. The Contractor shall make good any deterioration or defect in or loss of the Works or Plant or Materials, which has occurred during the suspension.

9 Tests on Completion

9.1 Contractor's Obligations

9.1.1 The Contractor shall carry out the Tests on Completion in accordance with Prudent Operating Practice and this Clause 9 [Tests on Completion] 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].

9.1.2 The Contractor shall give to the Employer and KPLC not less than thirty (30) days' notice of the date after which the Contractor will be ready to carry out each of the Tests on Completion.

9.1.3 The Employer, KPLC and the Lenders Technical Advisor shall have the right to be present at the Site on each occasion, on which a test is being conducted, and to inspect and witness the test, and to receive, within fifteen (15) days after the test, a written copy of the test reports.

9.1.4 The Tests on Completion shall be carried out in the following sequence:

- (a) pre-commissioning tests, which shall include the appropriate inspections and (**dry** or **cold**) functional tests including the tests prior to synchronisation of each Unit at paragraph 1 of Schedule 8 (Tests for Completion - Performance, Reliability and Emissions Testing Requirements) to demonstrate that each item of Plant can safely under-take the next stage, (b);
- (b) commissioning tests, which shall include the specified operational tests to demonstrate that the Works can be operated safely and as specified, under all available operating conditions including:
 - (i) Metering System tests;
 - (ii) KETRACO Connection Facilities tests;
 - (iii) Seller's Connection Facilities tests;
 - (iv) Unit Commercial Operations Tests;
 - (v) Facility Commercial Operations Tests; and
 - (vi) Performance Guarantee Tests;
- (c) during the Facility Commercial Operations Tests, when the Works are operating under stable conditions, the Contractor shall give notice to the Employer 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 Performance Guarantees. Trial operation shall not constitute a taking-over under Clause 10 [Employer's Taking Over]. Any product produced by the Works during trial operation shall be the property of the Employer.

9.1.5 In considering the results of the Tests on Completion, appropriate allowances shall be made 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 have passed each of the Tests on Completion described in sub-paragraph (a), (b) or (c), the Contractor shall submit a certified report of the results of these Tests to the Employer.

9.2 Appointment of Independent Engineer

9.2.1 The Employer shall pursuant to clause 6.8 of the Power Purchase Agreement not less than three (3) months prior to the commencement of the Tests on Completion appoint an independent suitably qualified professional engineer approved by the Contractor (such approval not to be unreasonably withheld or delayed) provided that the Independent Engineer is an internationally recognised entity experienced in commissioning facilities of this size and nature who shall among other things witness the Commissioning and testing of the Facility pursuant to this Clause 9 (**Independent Engineer**).

9.2.2 The Contractor acknowledges that the Independent Engineer shall be appointed under the Power Purchase Agreement in consultation with the Financing Parties such that only one

Independent Engineer is required for the development and financing of the Facility. If the Contractor fails to approve such appointment, the Employer shall have the right to request the International Chamber of Commerce (ICC) International Centre for Expertise to make such appointment on the basis that only one Independent Engineer is required for the development and financing of the Facility and such appointment shall be binding on the Employer and the Contractor. The Parties acknowledge that under clause 6.8 of the Power Purchase Agreement the fees and costs payable in respect of the Independent Engineer are to be shared equally between KPLC and the Employer.

9.3 Detailed Procedures and Technical Information

9.3.1 The parties agree to meet as soon as practicable following the Commencement Date to agree the draft detailed procedures for the Commissioning and testing of the Units and the Facility, which shall be procedures consistent with Prudent Operating Practice and with Part A of Schedule 8 (Tests for Completion - Performance, Reliability and Emissions Testing Requirements). The Employer shall use reasonable endeavours to procure that KPLC is engaged in the process as soon as practicable.

9.3.2 The Contractor shall not later than one hundred (100) days prior to the Commissioning Date of the first Unit provide to the Employer draft detailed procedures for the Commissioning and testing of the Units and the Facility. The Parties acknowledge that pursuant to clause 6.5 of the Power Purchase Agreement, KPLC and the Employer are required to meet in good faith to discuss and reach agreement on the said procedures no later than sixty (60) days prior to the Commissioning Date of the first Unit. The Contractor shall provide all reasonable assistance to the Employer in relation to such discussions and the Employer shall consult with the Contractor before reaching agreement with KPLC. If KPLC and the Employer fail to so meet or agree on the procedures within fifty (50) days prior to the Commissioning Date of the first Unit, then the matter shall be referred to an Expert for determination in accordance with clause 6.5 of the Power Purchase Agreement. The Employer shall not agree to the appointment of an Expert under the Power Purchase Agreement for the purpose referred to in this Clause 9.3.2 without obtaining the prior agreement of the Contractor to such appointment, such agreement not to be unreasonably withheld or delayed.

9.3.3 At the Contractor's request, the Employer shall:

- (a) exercise its rights under clause 6.7 of the Power Purchase Agreement to require KPLC to cooperate in order to enable the Commissioning of each Unit and to authorise connection to the KPLC System and despatch each Unit to the extent reasonably required for such purpose;
- (b) request that KPLC provides all technical information necessary to connect the KPLC System in accordance with clause 6.7 of the Power Purchase Agreement. Upon receipt of the technical information from KPLC, the Employer shall provide such information to the Contractor as soon as reasonably practicable and in any event no later than three (3) business days from receipt.

9.4 Metering System

9.4.1 Upon the satisfactory completion of the commissioning and testing of the Metering System, the Employer shall procure in accordance with the Power Purchase Agreement the issue of a certificate of the Independent Engineer addressed to the Employer, KPLC and the Contractor, certifying, without any qualification, that the Metering System has been supplied, installed, tested and commissioned in accordance with Schedule [X]. The Employer, KPLC and the

Lenders Technical Advisor shall be entitled to attend and witness the testing and commissioning of the Main Metering Equipment after having been given forty-eight (48) hours' notice by the Contractor thereof.

9.5 KETRACO Connection Facilities

- 9.5.1 The Contractor shall complete the installation of the KETRACO Connection Facilities not later than six (6) months before the Commissioning Date of the first Unit so as to enable the Contractor to complete the testing and Commissioning of the KETRACO Connection Facilities before the Commissioning Date of the first Unit.
- 9.5.2 On the satisfactory completion of the Commissioning of the KETRACO Connection Facilities, the Employer shall procure the issue of a certificate (**KETRACO Connection Facilities Operations Certificate**) of the Independent Engineer addressed to the Employer and the Contractor, certifying that Commissioning of the KETRACO Connection Facilities has been so completed.

9.6 Seller's Connection Facilities

- 9.6.1 Subject to the Contractor's obligations to notify the Employer of an earlier Seller's Connection Facilities Commissioning Date, the Contractor shall give the Employer not less than thirty (30) days' notice of the date of commencement of the Seller's Connection Facilities Commissioning Date, provided that the Contractor may postpone any such date by giving the Employer notice of the postponed date in accordance with such detailed procedures agreed or determined in accordance with Sub-Clause 9.3 [Detailed Procedures].
- 9.6.2 On the satisfactory completion of the Commissioning of the Seller's Connection Facilities, the Employer shall procure the issue of a certificate (**Seller's Connection Facilities Operations Certificate**) of the Independent Engineer addressed to the Employer and the Contractor, certifying that Commissioning of the Seller's Connection Facilities has been so completed.

9.7 Not used

9.8 Unit Commercial Operations Tests

- 9.8.1 Subject to the Contractor's obligations to notify the Employer of an earlier Commissioning Date, the Contractor shall give the Employer not less than thirty (30) days' notice of the date of commencement of Commissioning of the second and third Units, provided that the Contractor may postpone any such date by giving the Employer notice of the postponed date in accordance with such detailed procedures agreed or determined in accordance with Sub-Clause 9.3 [Detailed Procedures].
- 9.8.2 On the satisfactory completion of the Commissioning of a Unit, the Employer shall procure the issue of a certificate (**Unit Commercial Operations Certificate**) of the Independent Engineer addressed to the Employer and the Contractor, certifying that the Unit's Commissioning has been so completed, that the Unit Commercial Operations Tests for such Unit have been successfully completed, and that the Unit is substantially complete and available for despatch and shall, upon issue of the certificate, notify the Employer and KPLC of the Commercial Operation Date for that Unit being a date not later than twenty-one (21) days after the date of the notice.

9.9 Facility Commercial Operations Tests and Performance Guarantee Tests

- 9.9.1 Following satisfactory completion of the Metering System tests, KETRACO Connection Facilities tests, Seller's Connection Facilities tests and the Unit Commercial Operations Tests for each Unit, the Contractor shall conduct the Facility Commercial Operations Tests. Upon satisfactory completion of the Facility Commercial Operations Tests, the Employer shall procure the issue of a certificate of the Independent Engineer addressed to the Employer and the Contractor, certifying, without any material qualification, that:
- (a) all plant and equipment specified in the Functional Specification has been installed;
 - (b) the Facility's Commissioning has been completed;
 - (c) the Facility is available for full commercial operation;
 - (d) the Contracted Capacity achieved by the Facility during the Contracted Capacity Test forming part of the Facility Commercial Operations Tests is not less than ninety-five percent (95%) of the Contracted Capacity at the Contract Date; and
 - (e) the Employer has accepted the Performance Test Completion Certificate under Sub-Clause 9.9.7 [Facility Commercial Operations Tests and Performance Guarantee Tests].
- 9.9.2 The Contractor shall, upon issue of the certificate, give notice to the Employer of a date (the **Full Commercial Operation Date**) being a date not later than twenty-one (21) days after the date of the notice.
- 9.9.3 At the same time as carrying out the Facility Commercial Operations Tests, the Contractor shall carry out the Performance Guarantee Tests.
- 9.9.4 If the Facility does not achieve the Minimum Performance Requirements during the Facility's Performance Guarantee Tests, the Contractor shall take appropriate corrective measures and shall re-conduct the Facility's Performance Guarantee Tests in accordance with this Clause.
- 9.9.5 If the Facility achieves the Minimum Performance Requirements but not the Performance Guarantees the Contractor shall, as may be necessary, re-conduct the Performance Guarantee Tests until, the earlier of:
- (a) achievement of the Performance Guarantees; and
 - (b) the date on which the cap on delay liquidated damages at Sub-Clause 17.6.4(b) [Limitation of Liability] is reached.
- 9.9.6 Together with the Performance Test Completion Certificate the Contractor shall deliver to the Employer the calculation of any applicable performance liquidated damages in accordance with Sub-Clause 9.9.7 [Facility Commercial Operations Tests and Performance Guarantee Tests].
- 9.9.7 The Employer shall accept the Performance Test Completion Certificate if the Minimum Performance Requirements as stated in Schedule 7 (Guaranteed Performance and Emissions and Basis of Guarantees) have been achieved[and the performance liquidated damages, if any are due, have been paid to the Employer]. If the Facility has failed to achieve the Minimum Performance Requirements by the Long Stop Works Completion Date, the Contractor's liability for performance liquidated damages shall be:

- (a) [USD [] for each kW reduction in the net plant capacity]
- (b) [USD [] for each [kJ/BTU]/kWh increase in the Facility Heat Rate from the Guaranteed Heat Rate;]

9.9.8 The Parties acknowledge and agree that any liquidated damages for performance payable under this Sub-Clause constitute a genuine pre-estimate of the loss that would be incurred and are not a penalty, and are fair and reasonable and shall be the sole remedy of the Employer in the case of non-performance. In the event that the performance liquidated damages payable under this Sub-Clause 9.9 (Facility Commercial Operations Tests and Performance Guarantee Tests) are found to be void or unenforceable for any reason, the Contractor shall be liable to the Employer (against proof) for any loss and expense suffered or incurred by the Employer as a result of the Contractor's failure to achieve the Minimum Performance Requirements by the Long Stop Works Completion Date. Without prejudice to the Employer's rights to terminate the Contract under Clause 15 [Termination by Employer], these performance damages shall be the only damages due from the Contractor for such default, or any other non-performance.

9.10 Delayed Tests

9.10.1 If any of the Tests on Completion are being unduly delayed by the Employer Sub-Clause 10.3 [Interference with Tests on Completion] shall be applicable.

9.10.2 If any of the Tests on Completion are being unduly delayed by the Contractor, the Employer may by notice require the Contractor to carry out the Tests on Completion within twenty-one (21) days after receiving the notice. The Contractor shall carry out the Tests on Completion on such day or days within that period as the Contractor may fix and of which it shall give notice to the Employer.

9.10.3 If the Contractor fails to carry out any of the Tests on Completion within the period of twenty-one (21) days, the Employer's Personnel may proceed with the Tests on Completion at the risk and cost of the Contractor. These Tests on Completion shall then be deemed to have been carried out in the presence of the Contractor and the results of the Tests on Completion shall be accepted as accurate.

9.11 Retesting

If the Works fail to pass the Tests on Completion, Sub-Clause 7.5 [Rejection] shall apply, and the Employer or the Contractor may require an applicable further test of the relevant Tests on Completion on any related work, by giving not less than seven (7) days' notice to the other Party and to KPLC.

9.12 Failure to Achieve Full Commercial Operation Date

9.12.1 If the Full Commercial Operation Date has not occurred by the Long Stop Works Completion Date the Employer may at its discretion:

- (a) where KPLC has rejected the Works under the Power Purchase Agreement:
 - (i) reject the Works in accordance with Sub-Clause 9.13 [Rejection of Works]; or
 - (ii) issue the Taking-Over Certificate, provided that the Parties agree an amendment to the Contract Price to reflect the value of the delivered Facility; and/or

- (b) demand payment in full under the Performance Bond; and/or
- (c) serve notice of termination of this Contract in accordance with Sub-Clause 15.2.1(j) [Termination by Employer for Contractor Default].

9.13 Rejection of the Works

9.13.1 Where the Employer is entitled to reject the Works pursuant to Sub-Clause 9.12.1(a) [Failure to Achieve Full Commercial Operation Date] then the Contractor shall refund to the Employer:

- (a) the part of the Contract Price already paid to the Contractor, plus interest;
- (b) the reasonable documented cost of legal, technical and other advisers properly incurred by the Employer in relation to the employment of a new contractor(s) to rectify and complete the Works; and
- (c) equity and financing costs pursuant to Sub-Clause 15.4 [Payment after Termination].

9.13.2 The rejection will be effective from the date of receipt by the Contractor of the notice of rejection sent by the Employer.

9.13.3 The Contractor shall remove all equipment and Work from the Site and dispose of the same in accordance with all applicable Laws and clear and restore the Site in accordance with the requirements of the Lease (as if there had been a termination of the Lease) at the Contractor's cost and shall indemnify the Employer for all costs charges and expenses incurred by it following any failure of such removal and clearance. Title and ownership in the equipment and the Work shall pass to the Contractor following their removal from the Site by the Contractor.

9.13.4 Any amount payable by the Contractor pursuant to the provisions of Sub-Clauses 9.12 and 9.13 shall be paid within the period agreed by the Parties, which shall be no more than forty (40) days from the date of notice of rejection and invoice.

10 Employer's Taking Over

10.1 Taking Over of the Works

10.1.1 The Works shall be Taken-Over by the Employer when:

- (a) certificates have been issued confirming completion of all Tests on Completion comprising:
 - (i) Metering System tests;
 - (ii) KETRACO Connection Facilities tests;
 - (iii) Seller's Connection Facilities;
 - (iv) Unit Commercial Operation Tests;
 - (v) Facility Commercial Operation Tests; and
 - (vi) Performance Guarantee Tests.

- (b) the Works have been completed in accordance with this Contract, including the matters described in Sub-Clause 8.2 [Time for Completion] and except as allowed in Sub-Clause 10.1.3(a) [Taking Over of the Works] below;
- (c) a Taking-Over Certificate for the Works has been issued in accordance with Sub-Clause 10.1.3(a) [Taking Over of the Works];
- (d) the Contractor has paid (or the Employer has recovered) all delay liquidated damages and all performance liquidated damages due and payable under Clauses 8.7 [Delay Liquidated Damages] and 9.9.7 [Facility Commercial Operations Tests and Performance Guarantee Tests]; and
- (e) the Contractor has delivered to the Employer the Warranty Bond pursuant to Clause 4.28 [Warranty Bond].

10.1.2 The Contractor may apply by notice to the Employer for a Taking-Over Certificate not earlier than fourteen (14) days before the Works will, in the Contractor's opinion, be complete and ready for Taking-Over.

10.1.3 The Employer shall, within forty (40) days after receiving the Contractor's application:

- (a) issue the Taking-Over Certificate to the Contractor, stating the date on which the Works 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 for their intended purpose (either until or whilst this work is completed and these defects are remedied) (the **Punch List Items**); 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.

10.1.4 If the Employer fails either to issue the Taking-Over Certificate or to reject the Contractor's application within such forty (40) day period, then the Contractor shall be entitled to issue a second notice informing the Employer that it has failed to respond and requiring the Employer to issue the Taking-Over Certificate or to reject the Contractor's application by the date falling twenty (20) days after the date of such second notice.

10.1.5 If the Employer fails either to issue the Taking-Over Certificate or to reject the Contractor's application within the additional twenty (20) day period pursuant to Sub-Clause 10.1.4 then, provided that the Works are substantially in accordance with the Contract, the Taking-Over Certificate shall be deemed to have been issued on the last day of the twenty (20) day period referred to in Sub-Clause 10.1.4.

10.1.6 If the Contractor suffers delay and/or incurs Cost where the Employer fails to respond to the Contractor's application for a Taking-Over Certificate by the date falling twenty eight (28) days after the issue of such application, the Contractor shall be entitled to an extension of time pursuant to Sub-Clause 8.4 and to payment of Costs reasonably incurred from the date commencing on the expiry of such twenty eight (28) day period until the first to occur of:

- (a) the issue by the Employer of either:
 - (i) the Taking-Over Certificate; or

- (ii) the notice of rejection of the Contractor's application for Taking-Over; and
 - (b) the deemed issue of the Taking-Over Certificate pursuant to Sub-Clause 10.1.5.
- 10.1.7 Any Punch List Item noted by the Employer as requiring rectification on Taking-Over shall be so rectified or completed by the Contractor within the time stated in the Punch List and in any event within one month of Take-Over.

10.2 Taking Over of Parts of the Works

Parts of the Works shall not be Taken-Over or used by the Employer, except as may be stated in the Contract or as may be agreed by both Parties.

10.3 Interference with Tests on Completion

10.3.1 If the Contractor is prevented from carrying out the Tests on Completion by;

- (a) any delay, impediment or prevention for which the Employer is responsible, other than for any such event that would be covered by sub-paragraph (b) below; or
- (b) an event under clauses 6.7, 6.12(a) or 14.4 of the Power Purchase Agreement for which KPLC is responsible, including a KPLC System Interruption, a breach by KPLC of the Power Purchase Agreement or the Lease or any other event for which KPLC is responsible and/or which entitles the Required Full Commercial Operation Date as defined under the Power Purchase Agreement to be extended,

the Contractor shall carry out the Tests on Completion as soon as practicable.

10.3.2 If the Contractor suffers delay and/or incurs Cost as a result of this delay in carrying out the Tests on Completion, the Contractor shall give notice to the Employer 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] provided that, where such delay arises as a result of a risk for which KPLC is responsible under clauses 6.7 or 14.4 of the Power Purchase Agreement, any extension shall be no longer than the equivalent extension granted under the Power Purchase Agreement; and
- (b) payment of any such Cost, which shall be added to the Contract Price, provided that where such Cost is incurred as a result of a risk for which KPLC is responsible under clauses 6.7 or 14.4 of the Power Purchase Agreement, the Contractor shall be entitled to payment of no more than the equivalent sum recovered under the Power Purchase Agreement.

10.3.3 After receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

11 Defects Liability

11.1 Completion of Outstanding Work and Remedying Defects

11.1.1 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 date of the relevant Defects Notification 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 Employer; and
- (b) execute all work required to remedy defects or damage, as may be notified by the Employer on or before the expiry date of the Defects Notification Period for the Works.

11.1.2 If a defect appears or damage occurs, the Employer shall notify the Contractor accordingly.

11.2 Cost of Remedying Defects

11.2.1 All work referred to in sub-paragraph (b) of Sub-Clause 11.1 [Completion of Outstanding 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;
- (b) 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 [Training] to 5.7 [Operation and Maintenance Manuals] or otherwise); or
- (d) failure by the Contractor to comply with any other obligation.

11.2.2 If and to the extent that such work is attributable to any other cause, the Employer shall give notice to the Contractor accordingly, and Sub-Clause 13.3 [Variation Procedure] shall apply.

11.3 Extension of Defects Notification Period

11.3.1 The Employer shall be entitled subject to Sub-Clause 2.5 [Employer's Claims] to an extension of the Defects Notification Period for the Works if and to the extent that the Works or a major item of Plant (as the case may be, and after Taking Over) cannot be used for the purposes for which they are intended by reason of a defect or damage. However, a Defects Notification Period shall not be extended by more than two years from Taking Over.

11.3.2 If delivery and/or erection of Plant and/or Materials was suspended under Sub-Clause 8.8 [Suspension of Work] or Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work], the Contractor's obligations under this Clause shall not apply to any defects or damage occurring more than two years after the Defects Notification Period for the Plant and/or Materials would otherwise have expired.

11.4 Failure to Remedy Defects

11.4.1 If the Contractor fails to remedy any defect or damage within a reasonable time, a date may be fixed by (or on behalf of) the Employer, on or by which the defect or damage is to be remedied. The Contractor shall be given reasonable notice of this date.

11.4.2 If the Contractor fails to remedy the defect or damage by this notified date and this 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 its option):

- (a) carry out the work itself 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) 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 as a whole, or in respect of such major part which cannot be put to the intended use.

11.4.3 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 or for such part (as the case may be), 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 Bond or Warranty Bond (as appropriate) by the full replacement cost of these items, or to provide other appropriate security.

11.6 Further Tests

11.6.1 If the work of remedying of any defect or damage may affect the performance of the Works, the Employer may to the extent reasonable given the nature of the defect or damage require the repetition of any of the tests described in the Contract, including Tests on Completion. The requirement shall be made by notice within twenty eight (28) days after the defect or damage is remedied.

11.6.2 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 Not Used¹²

11.8 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 restrictions.

11.9 Contractor to Search

The Contractor shall, if required by the Employer, search for the cause of any defect, under the direction of the Employer. 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 shall be agreed or determined in accordance with Sub-Clause 3.5 [Determinations] and shall be added to the Contract Price.

¹² Issue 26 on Issues List agreed 16 July 2015.

11.10 Performance Certificate

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

11.10.2 The Contractor may apply by notice to the Employer for a Performance Certificate the last of the matters listed in Sub-Clause 11.10.3(b) have, in the Contractor's opinion, been completed.

11.10.3 The Employer shall issue the Performance Certificate within forty (40) days after the later of:

- (a) receipt of the Contractor's notice pursuant to Sub-Clause 11.10.2; and
- (b) completion of the latest of:
 - (i) the expiry date of the eighteen (18) month Defects Notification Period;
 - (ii) the Contractor has supplied all the Contractor's Documents;
 - (iii) completion of all Tests on Completion, including remedying any defects;
 - (iv) payment of any liquidated damages.

11.10.4 If the Employer fails to issue the Performance Certificate within such forty (40) day period, then the Contractor shall be entitled to issue a second notice informing the Employer that it has failed to respond and requiring the Employer to issue the Performance Certificate by the date falling twenty (20) days after the date of such second notice.

11.10.5 If the Employer fails to issue the Performance Certificate within the additional twenty (20) day period pursuant to Sub-Clause 11.10.4 then the Performance Certificate shall be deemed to have been issued on the last day of the twenty (20) day period referred to in Sub-Clause 11.10.4.

11.10.6 If the Contractor incurs Cost where the Employer fails to issue the Performance Certificate by the date falling twenty eight (28) days after the issue of such application, the Contractor shall be entitled to payment of Costs reasonably incurred from the date commencing on the expiry of such twenty eight (28) day period until:

- (a) the issue by the Employer of the Performance Certificate; and
- (b) the deemed issue of the Taking-Over Certificate pursuant to Sub-Clause 11.10.5.

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

11.11 Unfulfilled Obligations

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

11.12 Clearance of Site

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

11.12.2 If all these items have not been removed within ninety (90) days after the Employer issues 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.

11.12.3 Any balance of the moneys from the sale shall be paid to the Contractor. If these moneys are less than the Employer's costs, the Contractor shall pay the outstanding balance to the Employer.

12 Not used

13 Variations and Adjustments

13.1 Right to Vary

13.1.1 Variations may be initiated by the Employer at any time prior to issuing the 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.

13.1.2 The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Employer stating (with supporting particulars) that:

- (a) it will reduce the safety or suitability of the Works;
- (b) it will have an adverse impact on the achievement of the Performance Guarantees; or
- (c) the Employer has failed to provide to the Contractor reasonable evidence of available funds to make payment of the sums that would be payable to the Contractor in respect of a proposed Variation,

and upon receiving such notice the Employer shall cancel, confirm or vary the instruction.

13.1.3 The Employer shall not be entitled to initiate a Variation pursuant to Sub-Clause 13.1.1 [Right to Vary]:

- (a) where the aggregate value of all instructed Variations would result in a reduction of the Contract Price in excess of four per cent (4%) of the Contract Price; or
- (b) in order to instruct the construction of the Coal Receiving and Handling Facilities by the Contractor.

13.2 Value Engineering

13.2.1 The Contractor may, at any time, submit to the Employer 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.

13.2.2 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

13.3.1 If the Employer requests a proposal, prior to instructing a Variation, the Contractor shall respond in writing as soon as reasonably practicable and in any event within ten (10) business days, either by giving reasons based on the grounds set out in Sub-Clause 13.1.2 [Right to Vary] why the Contractor 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 Programme according to Sub-Clause 8.3 [Programme] and to the Time for Completion; and
- (c) the Contractor's proposal for a reasonable adjustment to the Contract Price.

13.3.2 The Employer 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.

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

13.3.4 Upon instructing or approving a Variation, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine adjustments to the Contract Price and the Milestone Payment Schedule. These adjustments shall take account of the Contractor's submissions under Sub-Clause 13.2 [Value Engineering] if applicable.

13.4 Not used

13.5 Not used

13.6 Change in Tax

13.6.1 In Schedule 11 (Authorisations and Taxes (Employer and Contractor)) the Contractor has identified all the Contractor Taxes applicable at the Contract Date in respect of the Contractor's activities under this Contract.

13.6.2 Subject to Sub-Clause 13.6.3, the liability of the Employer for any Change in Tax shall not exceed USD[**] (**Change in Tax Cap**).

13.6.3 The Contractor shall be liable for any Change in Tax above the Change in Tax Cap save that, to the extent the Employer benefits from and has received amounts in excess of the Change in Tax Cap from KPLC in respect of an equivalent Change of Tax pursuant to clause 9.10 of

the Power Purchase Agreement, the Employer shall pay such amounts to the Contractor in accordance with the terms of this Contract.¹³

13.7 Change in Law

13.7.1 [The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws or in the judicial or official governmental interpretation of such Laws, made after the Commencement Date, which affect the Contractor in the performance of obligations under the Contract.

13.7.2 If the Contractor suffers delay and/or incurs additional Cost as a result of these changes in the Laws or in such interpretations, made after the Commencement Date, the Contractor shall give notice to the Employer 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.

13.7.3 After receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

13.7.4 In the event of a dispute between the Parties as to the required period of extension of time, the matter shall be referred to an Expert pursuant to Sub-Clause 20.3 [Expert Determination].]

14 Contract Price and Payment

14.1 The Contract Price

14.1.1 Payment for the Works shall be made on the basis of the lump sum Contract Price of [nine hundred and ninety two million four hundred and seventy six thousand, seven hundred and sixty nine US dollars and seventy nine cents] (US\$[992,476,769.79])¹⁴, subject to adjustments in accordance with the Contract. The Contract Price is divided into the amounts set out in the table below.

Portion of Works	Total for each portion (USD)
Off-Shore Portion	[**] (the Off-Shore Portion Contract Sum)
On-Shore Portion	[**] (the On-Shore Portion Contract Sum)

¹³ Issue 29 on the Issues List agreed in principle on 10 September 2015 (cap to be proposed and agreed).

¹⁴ Reduced Contract Price to reflect the agreed position that Amu is taking on the cost of financing the VAT (Issue 31 on Issues List agreed 15 July 2015). Amu to confirm amended Contract Sum.

- 14.1.2 Payment shall be made to the Contractor and to any delegated contractor pursuant to Sub-Clause 1.7.2 [Assignment] in accordance with the Contract Price splits for the Off-Shore Portion and the On-Shore Portion set out in Schedule 4 (Milestone Payment Schedule).
- 14.1.3 The Contractor shall pay all Contractor Taxes required to be paid by it under the Contract, and the Contract Price shall not be adjusted for any of these costs.
- 14.1.4 The Employer shall apply to the Kenya Revenue Authority (**KRA**) for a withholding tax certificate in relation to the Works when requested to do so by the Contractor and, upon receipt of the withholding tax certificate from KRA, shall forward the same to the Contractor within thirty (30) days of receipt.
- 14.1.5 In the event that the Employer receives an exemption from the relevant Governmental Authority confirming that withholding taxes are no longer applicable to the Offshore Portion then:
- (a) any payment received by the Employer from the relevant Governmental Authority up to and including one million and five hundred thousand US dollars (US\$1,500,000) (the **Withholding Tax Cap**) shall be for the Employer's benefit only; and
 - (b) the Employer shall pay to the Contractor an amount equal to sixty-five per cent (65%) of any payment that it receives from the relevant Governmental Authority in excess of the Withholding Tax Cap.¹⁵ Such payment shall be made to the Contractor within thirty (30) days of receipt of a valid invoice from the Contractor.
- 14.1.6 The Employer shall pay value added tax or equivalent sales tax upon submission by the Contractor of a valid value added tax or sales tax invoice in relation to the On-Shore Portion Contract Sum, save that the Employer's total liability for the payment of value added tax or equivalent sales tax shall not exceed USD[].¹⁶

14.2 Advance Payment

- 14.2.1 The Employer shall pay the Advance Payment to the Contractor after receiving from the Contractor:
- (a) a Statement (under Sub-Clause 14.3 [Application for Interim Payments]);
 - (b) the Performance Bond in accordance with Sub-Clause 4.27 [Performance Bond]; and
 - (c) the Advance Payment Bond in accordance with Sub-Clause 4.26.1 [Advance Payment Bond]. Unless and until the Employer receives the Advance Payment Bond, this Sub-Clause shall not apply.
- 14.2.2 If the Advance Payment has not been repaid prior to the issue of the Taking-Over Certificate for the Works or prior to termination under Clause 15 [Termination by Employer], Clause 16 [Suspension and Termination by Contractor] or Clause 19 [Force Majeure] (as the case may

¹⁵ Issue 31 on the Issues List agreed 10 September, save that Amu's maximum liability for payment of VAT is to be agreed.

¹⁶ Issue 31 on the Issues List agreed 15 July 2015.

be), the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Employer.

- 14.2.3 If on termination of this Contract there is any element of the Advance Payment which has not been applied in relation to the Works, then any such unutilised amounts shall be deducted from any amount due from the Employer to the Contractor or will be added to any amount due from the Contractor to the Employer (as the case may be) under the payment following termination provisions at Clauses 15 [Termination by Employer], 16 [Suspension and Termination by the Contractor] and/or 19 [Force Majeure].

14.3 Application for Interim Payments

- 14.3.1 The Contractor shall submit a Statement in six copies to the Employer at the periods stated in Schedule 4 (Milestone Payment Schedule), in a form approved by the Employer, showing in detail the amounts to which the Contractor considers itself to be entitled, together with supporting documents which shall include the relevant report on progress in accordance with Sub-Clause 4.21 [Progress Reports].

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

- (a) the achievement of the milestones set out in Schedule 4 (Milestone Payment Schedule) in the amounts specified therein;
- (b) any amount to be deducted for retention, calculated by applying the percentage of five per cent (5%) to the total of the above amounts, until the amount so retained by the Employer reaches this limit;
- (c) any amounts to be added and deducted for the Advance Payment and repayments in accordance with Sub-Clause 14.2 [Advance Payment];
- (d) any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration];
- (e) the deduction of amounts included in previous Statements; and
- (f) other than in relation to the first and the final milestones for the On-Shore Portion, where the Statement includes a portion of the On-Shore Portion, a valid value added tax or sales invoice.¹⁷

- 14.3.3 Any dispute under this Sub-Clause 14.3 [Application for Interim Payments] shall be referred to an Expert for determination in accordance with Sub-Clause 20.3 [Expert Determination].

14.4 Milestone Payment Schedule

- 14.4.1 The Contract includes the Payment Milestone Schedule at Schedule 4 specifying the milestone payment instalments in which the Contract Price shall be paid.
- 14.4.2 The payment against each milestone event in respect of the Works shall only become due when the relevant milestone event has been achieved in full.

14.5 Plant and Materials intended for the Works

¹⁷ Issue 31 on the Issues List agreed 15 July 2015.

14.5.1 If the Contractor is entitled, under the Contract, to an interim payment for Plant and Materials which are not yet on the Site, the Contractor shall nevertheless not be entitled to such payment unless:

- (a) such payment falls within the payments to be made for Goods to which Milestone Payment [X] and [X] relates and a copy of the bill of lading or bill of entry (as applicable) in respect of the loading of final assembled Plant and Materials onto a vessel bound for the Country is provided as part of the relevant application for interim payment; or
- (b) the relevant Plant and Materials are in the Country and have been marked as the Employer's property in accordance with the Employer's instructions; or
- (c) the Contractor has delivered, to the Employer, evidence of insurance and a bank guarantee in a form and issued by an entity approved by the Employer in amounts and currencies equal to such payment. This guarantee may be in a similar form to the form referred to in Sub-Clause 4.26 [Advance Payment Bond] and shall be valid until the Plant and Materials are properly stored on Site and protected against loss, damage or deterioration.

14.6 Interim Payments

14.6.1 No amount of the Contract Price will be paid until the Employer has received and approved the Performance Bond. Thereafter, the Employer shall within twenty eight (28) days after receiving a Statement and supporting documents, give to the Contractor notice of any items in the Statement with which the Employer disagrees, with supporting particulars. Payments due shall not be withheld, except that:

- (a) if any thing 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 Employer, the value of this work or obligation may be withheld until the work or obligation has been performed.

14.6.2 The Employer may, by any payment, make any correction or modification that should properly be made to any amount previously considered due. Payment shall not be deemed to indicate the Employer's acceptance, approval, consent or satisfaction.

14.7 Timing and manner of Payments

14.7.1 Except as otherwise stated in Sub-Clause 1.6 [Contract Date and Conditions Precedent], Sub-Clause 2.5 [Employer's Claims] and subject to Sub-Clause 14.6 [Disputed Payment], the Employer shall pay to the Contractor:

- (a) the amount which is due in respect of each Statement, other than the Final Statement, within thirty (30) days after receiving the Statement and supporting documents; and
- (b) the final amount due, within forty two (42) days after receiving the Final Statement and written discharge in accordance with Sub-Clause 14.11 [Application for Final Payment] and Sub-Clause 14.12 [Discharge].

14.7.2 Payment of the amount due shall be made by telegraphic transfer into the bank account, nominated by the Contractor, in the payment country (for this currency) specified in the Contract.

14.8 Delayed Payment

14.8.1 If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Timing and manner of Payments], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay.

14.8.2 These financing charges shall be calculated at the annual rate of three percentage points (3%) above the discount rate of the United States Federal Reserve System, and shall be paid in US Dollars.

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

14.9 Payment of Retention Money

14.9.1 When the Taking-Over Certificate has been issued for the Works, and the Works have passed all specified tests and the Contractor has rectified all Punch List items to the satisfaction of the Employer, the Retention Money shall be paid to the Contractor in full, provided that the Contractor has delivered to the Employer a Punch List Bond in accordance with Sub-Clause 4.29 (Punch List Bond).

14.10 Statement at Completion

14.10.1 Within eighty four (84) days after receiving the Taking-Over Certificate for the Works, the Contractor shall submit to the Employer six (6) copies of a Statement at completion with supporting documents, in accordance with Sub-Clause 14.3 [Application for Interim Payments], showing:

- (a) the value of all work done in accordance with the Contract up to the date stated in the 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 it under the Contract. Estimated amounts shall be shown separately in this Statement at completion.

14.10.2 The Employer shall then give notice to the Contractor in accordance with Sub-Clause 14.6 [Interim Payments] and make payment in accordance with Sub-Clause 14.7 [Timing and manner of Payments].

14.11 Application for Final Payment

14.11.1 Within fifty six (56) days after receiving the Performance Certificate, the Contractor shall submit, to the Employer, six (6) copies of a draft final statement with supporting documents showing in detail in a form approved by the Employer:

- (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 it under the Contract or otherwise.

14.11.2 If the Employer disagrees with or cannot verify any part of the draft final statement, the Contractor shall submit such further information as the Employer 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 Employer the final statement as agreed. This agreed statement is referred to in these Conditions as the **Final Statement**.

14.11.3 However if, following discussions between the Parties and any changes to the draft final statement which are agreed, it becomes evident that a dispute exists, the Employer shall pay the agreed parts of the draft final statement in accordance with Sub-Clause 14.6 [Interim Payments] and Sub-Clause 14.7 [Timing and manner of Payments]. Thereafter, if the dispute is finally resolved in accordance with Clause 20 [Claims, Disputes and Arbitration], the Contractor shall then prepare and submit to the Employer 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 Bond and the outstanding balance of this total, in which event the discharge shall be effective on such date.

14.13 Final Payment

In accordance with sub-paragraph (b) of Sub-Clause 14.7.1 [Timing and manner of Payments], the Employer shall pay to the Contractor the amount which is finally due, less all amounts previously paid by the Employer and any deductions in accordance with Sub-Clause 2.5 [Employer's Claims].

14.14 Cessation of Employer's Liability

14.14.1 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
- (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].

14.14.2 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 US dollars.

14.16 Disputed Payment

If any sum or part of any sum shown on a Statement rendered by the Contractor is disputed in good faith by the Employer then payment of any undisputed sums or parts shall not be withheld and shall be paid to the Contractor when due. The Employer shall be entitled to withhold payment of any disputed sums and interest at the rate specified in Sub-Clause 14.8 [Delayed Payment] shall be payable on any disputed sum subsequently agreed or determined by an Expert to be due in accordance with Sub-Clause 20.3 [Expert Determination], from and including the date when the sum in question was due until, but excluding, the date when it is received by the Contractor.

15 Termination by Employer

15.1 Notice to Correct

If the Contractor fails to carry out any obligation under the Contract, the Employer 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 for Contractor Default

15.2.1 The Employer shall be entitled to terminate the Contract if the Contractor:

- (a) fails to comply with Sub-Clause 4.27 [Performance Bond];
- (b) fails to:
 - (i) comply with a notice under Sub-Clause 15.1 [Notice to Correct] within forty five (45) days of receipt of such notice in accordance with Sub-Clause 1.3.1(c)(i); and
 - (ii) upon receipt of a second notice by the Employer in accordance with Sub-Clause 1.3.1(c)(i), fails to comply with such notice within a further twenty five (25) day period;
- (c) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of its obligations under the Contract for more than twenty five (25) consecutive days;
- (d) without reasonable excuse fails to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension] and fails to expedite progress of the Works in accordance with Sub-Clause 8.6 [Rate of Progress] and it is highly likely that the Contractor will be unable to achieve completion by the Long Stop Works Completion Date;
- (e) subcontracts the whole of the Works or assigns the Contract without the required agreement;
- (f) becomes Insolvent; or
- (g) 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 (g). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination;

- (h) is in material breach of its obligations under the Contract;
- (i) termination of the Power Purchase Agreement where the reason for the termination is caused wholly or substantially by a failure of the Contractor to comply with its obligations under this Contract;
- (j) reaches the cap on delay liquidated damages under Sub-Clause 17.6.4(a) [Limitation of Liability];
- (k) reaches the cap on performance liquidated damages under Sub-Clause 17.6.4(b) [Limitation of Liability];
- (l) reaches the maximum cap on liquidated damages under Sub-Clause 17.6.5 [Limitation of Liability]; or
- (m) fails to complete the Works before the Long Stop Works Completion Date.

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

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

15.2.4 The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for the Contractor, to the Employer. 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.

15.2.5 After termination, the Employer may 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.

15.2.6 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 the date falling four (4) months after the Employer's notice 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

15.3.1 As soon as practicable after a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Employer 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

15.4.1 After a notice of termination under Sub-Clause 15.2 [Termination by Employer for Contractor Default] 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:
 - (i) any Costs, losses and damages incurred or suffered by the Employer under the terminated Power Purchase Agreement and/or the Financing Agreements including, without limitation, breakage costs; and/or
 - (ii) 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]; and/or
 - (iii) *[component for repayment of equity costs to be due.]*

15.4.2 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

15.5.1 The Employer shall be entitled to terminate the Contract, at any time for the Employer's convenience, by giving notice of such termination to the Contractor. The termination shall take effect twenty eight (28) days after the later of the dates on which the Contractor receives this notice or the Employer returns the Performance Bond. The Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works itself or to arrange for the Works to be executed by another contractor.

15.5.2 Without prejudice to the Employer's right to terminate the Contract pursuant to Sub-Clause 15.2.1(i) [Termination by Employer for Contractor Default] the Employer shall be entitled to terminate the Contract immediately in the event of termination of the Power Purchase Agreement where the reason for termination is not caused wholly or partially by an act or omission of the Contractor in accordance with Clause 15.2.1(i) [Termination by Employer for Contractor Default].

15.5.3 After this termination, the Contractor shall proceed in accordance with Sub-Clause 16.3 [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].

16 Suspension and Termination by Contractor

16.1 Contractor's Entitlement to Suspend Work

- 16.1.1 If the Employer fails to comply with Sub-Clause 14.7 [Timing and manner of Payments], the Contractor may, after giving not less than twenty-one (21) days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the reasonable evidence or payment, as the case may be and as described in the notice.
- 16.1.2 If the Employer fails to comply with its obligations to provide security in accordance with Sub-Clause 4.8.2 [Safety Procedures and Security] then provided that:
- (a) the Contractor notifies the Employer of such failure;
 - (b) the Employer has not remedied such failure within [twenty-one (21)] days; and
 - (c) it would not be reasonable or practicable for the Contractor to remedy the failure (at the Employer's Cost),
- then the Contractor shall be entitled to suspend work (or to reduce the rate of work) unless and until the Employer has remedied the failure as described in the Contractor's notice under Sub-Clause 16.1.2(a).¹⁸
- 16.1.3 The Contractor's action shall not prejudice its entitlements to financing charges under Sub-Clause 14.8 [Delayed Payment] and to termination under Sub-Clause 16.2 [Termination by Contractor for Employer Default].
- 16.1.4 If the Contractor subsequently receives such evidence or payment (as described in the relevant Sub-Clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.
- 16.1.5 If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-Clause, the Contractor shall give notice to the Employer 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.
- 16.1.6 After receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

16.2 Termination by Contractor for Employer Default

- 16.2.1 The Contractor shall be entitled to terminate the Contract if:
- (a) the Employer fails to make any payment due and payable under this Contract unless the Employer has cured such breach within thirty (30) days) of the Employer's receipt of written notice from the Contractor in accordance with Sub-Clause 1.3.1(c)(i);

¹⁸ Issue 32 of the Issues List agreed 10 September 2015.

- (b) the Employer fails to comply with Sub-Clause 1.7 [Assignment];
- (c) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.11 [Prolonged Suspension] following suspension by the Employer pursuant to Sub-Clause 8.8 [Suspension of Work]; or
- (d) the Employer becomes Insolvent.

16.2.2 In any of these events or circumstances, the Contractor may, upon giving fourteen (14) days' notice to the Employer, terminate the Contract. However, in the case of sub-paragraph (d), the Contractor may by notice terminate the Contract immediately.

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

16.3 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 16.2 [Termination by Contractor for Employer Default] or Sub-Clause 19.6 [Optional Termination, Payment and Release] has taken effect, the Contractor shall promptly:

- (a) cease all further work, except for such work as may have been instructed by the Employer 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.

16.4 Payment on Termination

After a notice of termination under Sub-Clause 16.2 [Termination by Contractor for Employer Default] has taken effect, the Employer shall promptly:

- (a) return the Performance Bond to the Contractor;
- (b) pay the Contractor in accordance with Sub-Clause 19.6 [Optional Termination, Payment and Release];
- (c) pay to the Contractor an amount equal to three and a half percent (3.5%)¹⁹ of the value of the unperformed Works by the Contractor as at the date of termination representing the Contractor's loss of profit arising from the termination; and
- (d) bear the costs of any replanting obligations that may arise following any such termination.

¹⁹ Issue 34 on Issues List agreed 10 September 2015.

17 Risk and Responsibility

17.1 Indemnities

- 17.1.1 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; and
 - (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 and completion of the Works and the remedying of any defects; and
 - (ii) is not attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, their respective agents, or anyone directly or indirectly employed by any of them.
- 17.1.2 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, and (2) the matters for which liability may be excluded from insurance cover, as described in sub-paragraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [Insurance Against Injury to Persons and Damage to Property].

17.2 Contractor's Care of the Works

- 17.2.1 The Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued for the Works, when responsibility for the care of the Works shall pass to the Employer.
- 17.2.2 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.
- 17.2.3 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, Goods and Contractor's Documents conform with the Contract.
- 17.2.4 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 [Consequences of Employer's Risks] below are:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies involving the Country;
- (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; and
- (e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds.

17.4 Consequences of Employer's Risks

17.4.1 If and to the extent that any of the risks listed in Sub-Clause 17.3 [Employer's Risks] above results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Employer and shall rectify this loss or damage to the extent required by the Employer.

17.4.2 If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Employer 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.

17.4.3 After receiving this further notice, the Employer shall proceed in accordance with Sub Clause 3.5 [Determinations] to agree or determine these matters.

17.5 Intellectual and Industrial Property Rights

17.5.1 In this Sub-Clause 17.5, **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.

17.5.2 Whenever a Party does not give notice to the other Party of any claim within twenty eight (28) days of receiving the claim, the first Party shall be deemed to have waived any right to indemnity under this Sub-Clause.

17.5.3 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,
- (b) or 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 Commencement Date or is stated in the Contract.

17.5.4 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.

17.5.5 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

17.6.1 Save in respect of Clause 15.4.1(c) [Payment after Termination] 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 16.4 [Payment on Termination] and Sub-Clause 17.1 [Indemnities].

17.6.2 The total liability of the Contractor to the Employer, under or in connection with the Contract other than under Sub-Clause 4.19 [Electricity, Water and Gas], Sub-Clause 17.1 [Indemnities] and Sub-Clause 17.5 [Intellectual and Industrial Property Rights], shall not exceed one hundred per cent (100%) of the Contract Price.

17.6.3 This Sub-Clause shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.

17.6.4 Subject to Sub-Clause 17.6.5 [Limitation of Liability], the Contractor's maximum liability for liquidated damages for:

- (a) delay in achieving the Time for Completion under Sub-Clause 8.7 [Delay Liquidated Damages] shall not exceed ten per cent (10%) of the Contract Price;
- (b) Performance Guarantees under Sub-Clause 9.14 [Performance Guarantees] shall not exceed twelve and a half per cent (12.5%) of the Contract Price.

17.6.5 The Contractor's maximum aggregated liability for liquidated damages under Sub-Clause 17.6.4 [Limitation of Liability] shall not exceed fifteen per cent (15%) of the Contract Price.

18 [Insurance²⁰

18.1 General Requirements for Insurances

- 18.1.1 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.
- 18.1.2 Wherever the Contractor is the insuring Party, each insurance shall be effected with insurers and in terms approved by the Employer. These terms shall be consistent with any terms agreed by both Parties before they signed the Contract Agreement. This agreement of terms shall take precedence over the provisions of this Clause.
- 18.1.3 Wherever the Employer is the insuring Party, each insurance shall be effected with insurers and in terms consistent with the details annexed to this Contract at Schedule 32 (Insurances).
- 18.1.4 If a policy is required to indemnify joint insured, the cover shall apply separately to each insured as though a separate policy had been issued for each of the joint insured. If a policy indemnifies additional joint insured, namely in addition to the insured specified in this Clause, (i) the Contractor shall act under the policy on behalf of these additional joint insured except that the Employer shall act for Employer's Personnel, (ii) additional joint insured shall not be entitled to receive payments directly from the insurer or to have any other direct dealings with the insurer, and (iii) the insuring Party shall require all additional joint insured to comply with the conditions stipulated in the policy.
- 18.1.5 Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify the loss or damage. Payments received from insurers shall be used for the rectification of the loss or damage.
- 18.1.6 The relevant insuring Party shall, within the respective periods stated in Schedule 32 (Insurances) (calculated from the Commencement Date), submit to the other Party:
- (a) evidence that the insurances described in this Clause have been effected, and
 - (b) copies of the policies for the insurances described in Sub-Clause 18.2 [Insurance of Works and Contractor's Equipment] and Sub-Clause 18.3 [Insurance against Injury to Persons and Damage to Property].
- 18.1.7 When each premium is paid, the insuring Party shall submit evidence of payment to the other Party.
- 18.1.8 Each Party shall comply with the conditions stipulated in each of the insurance policies. The insuring Party shall keep the insurers informed of any relevant changes to the execution of the Works and ensure that insurance is maintained in accordance with this Clause.
- 18.1.9 Neither Party shall make any material alteration to the terms of any insurance without the prior approval of the other Party. If an insurer makes (or attempts to make) any alteration, the Party first notified by the insurer shall promptly give notice to the other Party.
- 18.1.10 If the insuring Party fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this Sub-Clause, the other Party may (at its option and without

²⁰ Revised insurance clauses to replace Clause 18 (Issue 35 on Issue List).

prejudice to any other right or remedy) effect insurance for the relevant coverage 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.

18.1.11 Nothing in this Clause limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Contractor and/or the Employer in accordance with these obligations, liabilities or responsibilities. However, if the insuring Party fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the Contract, and the other Party neither approves the omission nor effects insurance for the coverage relevant to this default, any moneys which should have been recoverable under this insurance shall be paid by the insuring Party.

18.1.12 Payments by one Party to the other Party shall be subject to Sub-Clause 2.5 [Employer's Claims] or Sub-Clause 20.1 [Contractor's Claims], as applicable.

18.2 Insurance for Works and Contractor's Equipment

18.2.1 The insuring Party shall insure the Works, Plant, Materials and Contractor's Documents for not less than the full reinstatement cost including marine cargo, the costs of demolition, removal of debris and professional fees and profit. This insurance shall be effective from the date by which the evidence is to be submitted under sub-paragraph (a) of Sub-Clause 18.1 [General Requirements for Insurances], until the date of issue of the Taking-Over Certificate for the Works.

18.2.2 The insuring Party shall maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Contractor or Subcontractors in the course of any other operations (including those under Clause 11 [Defects Liability]).

18.2.3 The insuring Party shall insure the Contractor's Equipment for not less than the full replacement value, including delivery to Site. For each item of Contractor's Equipment, the insurance shall be effective while it is being transported to the Site and until it is no longer required as Contractor's Equipment.

18.2.4 Insurances under this Sub-Clause:

- (a) shall be effected and maintained by the Contractor as insuring Party;
- (b) shall be in the joint names of the Parties, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated between the Parties for the sole purpose of rectifying the loss or damage;
- (c) shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 [Employer's Risks];
- (d) shall also cover loss or damage from the risks listed in sub-paragraph (c) of Sub-Clause 17.3 [Employer's Risks], with deductibles per occurrence of not more than the amount stated in Schedule 32 (Insurances) (if an amount is not so stated, this sub-paragraph shall not apply); and
- (e) may however exclude loss of, damage to, and reinstatement of:

- (i) a part of the Works which is in a defective condition due to a defect in its design, materials or workmanship (but cover shall include any other parts which are lost or damaged as a direct result of this defective condition and not as described in sub-paragraph (ii) below);
- (ii) a part of the Works which is lost or damaged in order to reinstate any other part of the Works if this other part is in a defective condition due to a defect in its design, materials or workmanship;
- (iii) a part of the Works which has been Taken Over by the Employer, except to the extent that the Contractor is liable for the loss or damage; and
- (iv) Goods while they are not in the Country, subject to Sub-Clause 14.5 [Plant and Materials intended for the Works].

18.2.5 If, more than one year after the Commencement Date, the cover described in sub-paragraph (d) above ceases to be available at commercially reasonable terms, the Contractor shall (as insuring Party) give notice to the Employer, with supporting particulars. The Employer shall then (i) be entitled subject to Sub-Clause 2.5 [Employer's Claims] to payment of an amount equivalent to such commercially reasonable terms as the Contractor should have expected to have paid for such cover, and (ii) be deemed, unless the Employer obtains the cover at commercially reasonable terms, to have approved the omission under Sub-Clause 18.1 [General Requirements for Insurances].

18.3 Insurance against Injury to Persons and Damage to Property

18.3.1 The insuring Party shall insure against each Party's liability for any loss, damage, death or bodily injury which may occur to any physical property (except things insured under Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment]) or to any person (except persons insured under Sub-Clause 18.4 [Insurance for Contractor's Personnel]), which may arise out of the Contractor's performance of the Contract and occurring before the issue of the Performance Certificate.

18.3.2 This insurance shall be for a limit per occurrence of not less than the amount stated Schedule 32 (Insurances), with no limit on the number of occurrences. If an amount is not stated in the Contract, this Sub-Clause shall not apply.

18.3.3 The insurances specified in this Sub-Clause:

- (a) shall be effected and maintained by the Contractor as insuring Party;
- (b) shall be in the joint names of the Parties;
- (c) shall be extended to cover liability for all loss and damage to the Employer's property (except things insured under Sub-Clause 18.2 [Insurance for Works and Contractor's Equipment]) arising out of the Contractor's performance of the Contract; and
- (d) may however exclude liability to the extent that it arises from:
 - (i) the Employer's right to have the Permanent Works executed on, over, under, in or through any land, and to occupy this land for the Permanent Works;

- (ii) damage which is an unavoidable result of the Contractor's obligations to execute the Works and remedy any defects; and
- (iii) a cause listed in Sub-Clause 17.3 [Employer's Risks], except to the extent that cover is available at commercially reasonable terms.

18.4 Insurance for Contractor's Personnel

- 18.4.1 The Contractor shall effect and maintain insurance against 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 or any other of the Contractor's Personnel.
- 18.4.2 The Employer shall also be indemnified under the policy of insurance, except that this insurance may exclude losses and claims to the extent that they arise from any act or neglect of the Employer or of the Employer's Personnel.
- 18.4.3 The insurance shall be maintained in full force and effect during the whole time that these personnel are assisting in the execution of the Works. For a Subcontractor's employees, the insurance may be effected by the Subcontractor, but the Contractor shall be responsible for compliance with this Clause.

18.5 Automobile Liability Insurance

The Contractor shall take out and maintain automobile liability insurance for a sum of [] per occurrence from the Commencement Date until []. The Contractor shall provide to the Employer within five (5) days of the Commencement Date confirmation from the insurance carrier providing the automobile liability insurance that such insurance is in force and within ninety (90) days of the Commencement Date a copy of the policy in force for such insurance together with evidence that the current premium has been paid and thereafter, upon request by the Employer, shall provide a certificate of insurance for the automobile liability insurance policy together with evidence that the premiums therefore have been paid. If such insurance, on renewal, ceases to be available to the Contractor in the London insurance market at reasonable commercial rates or for any other reason, the Contractor shall immediately notify the Employer so that the Parties can discuss the best means available for protecting each Party's respective position in the absence of such insurance.

18.6 Professional Indemnity Insurance

The Contractor shall take out and maintain professional indemnity insurance in respect of the performance of the Works for a sum of [] per occurrence from the Contract Date until the issue of the Performance Certificate. The Contractor shall provide to the Employer within five (5) days of the Contract Date confirmation from the insurance carrier providing the professional indemnity insurance that such insurance is in force and within ninety (90) days of the Contract Date a copy of the policy in force for such insurance together with evidence that the current premium has been paid and thereafter, upon request by the Employer, shall provide a certificate of insurance for the professional indemnity insurance policy together with evidence that the premiums therefore have been paid. If such insurance, on renewal, ceases to be available to the Contractor in the London insurance market at reasonable commercial rates or for any other reason, the Contractor shall immediately notify the Employer so that the Parties can discuss the best means available for protecting each Party's respective position in the absence of such insurance.]

19 Force Majeure

19.1 Definition of Force Majeure

19.1.1 Subject to Sub-Clause 19.1A, in this Clause 19, **Force Majeure** means an exceptional event or circumstance:

- (a) not within the reasonable control (directly or indirectly) of the Party affected, and such event or circumstance or its effects cannot be prevented, avoided or removed by such Party acting in accordance with Prudent Operating Practice;
- (b) which is not attributable in any way to the fault or negligence or a breach of the Contract by the affected Party or its agents or subcontractors.

19.1.2 Force Majeure shall include each of the following events and circumstances:

- (a) an act of God including but not limited to lightning, fire, earthquakes, volcanic activity, floods, storms, cyclones, typhoons, or tornadoes;
- (b) epidemics or plagues;
- (c) explosions or chemical contamination (other than resulting from an act of war);
- (d) labour disputes including strikes, works to rule or go-slows or lockouts that extend beyond the Facility or are widespread or nationwide;
- (e) any Political Event; and
- (f) terrorism.

19.1A Exclusions from Force Majeure

19.1A.1 The following events or circumstances shall not constitute Force Majeure:

- (a) late delivery to the Contractor of machinery, equipment, materials, spare parts or consumables save where such late delivery is due to the action or inaction of any Governmental Authority after the Contractor has acted prudently and allowed a reasonable time for all required processes or where the later delivery itself is due to Force Majeure;
- (b) a delay in the performance of any Subcontractor except where the delay itself is due to Force Majeure;
- (c) normal wear and tear of, or random flaws in, Materials and equipment or breakdowns of equipment; and
- (d) unavailability of funds.

19.2 Notice of Force Majeure

19.2.1 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 fourteen (14) days after the Party

became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

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

19.2.3 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

19.3.1 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.

19.3.2 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

19.4.1 If the Contractor is prevented from performing any of its obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor 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) to the extent the Employer benefits from and has received amounts from any contract of insurance in respect of the Project or from the provisions of the GOK Letter in respect of any event of Force Majeure, an equitable adjustment to the Contract Price.

19.4.2 After receiving this notice, the Employer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

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, such additional or broader force majeure events or circumstances shall not excuse the Contractor's non-performance or entitle the Contractor to relief under this Clause.

19.6 Optional Termination, Payment and Release

19.6.1 If the execution of substantially all the Works in progress is prevented for a period of one hundred and eighty (180) days by reason of Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], then the Parties shall meet in good faith with a view to determining mutually acceptable terms for continuing this Contract notwithstanding the effects of the event of Force Majeure. If at the end of ninety (90) days, no solution is found, either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect seven (7) days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment].

19.6.2 Upon such termination, the Employer shall pay to the Contractor

- (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.

19.7 Release from Performance under the Law

19.7.1 Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

- (a) the Parties shall be discharged from further performance, without prejudice to the rights of either Party in respect of any previous breach of the Contract; and
- (b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.6 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.6 [Optional Termination, Payment and Release].

20 Claims, Disputes and Arbitration

20.1 Contractor's Claims

20.1.1 If the Contractor considers itself 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 Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than forty (40) days after the Contractor became aware, or should have become aware, of the event or circumstance.

20.1.2 If the Contractor fails to give notice of a claim within such period of forty (40) 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.

- 20.1.3 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.
- 20.1.4 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 Employer. Without admitting liability, the Employer 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 Employer to inspect all these records, and shall (if instructed) submit copies to the Employer.
- 20.1.5 Within fifty four (54) 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 Employer, the Contractor shall send to the Employer 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 Employer may reasonably require; and
 - (c) the Contractor shall send a final claim within twenty eight (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 Employer.
- 20.1.6 Within forty two (42) days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Employer and approved by the Contractor, the Employer shall respond with approval, or with disapproval and detailed comments. The Employer may also request any necessary further particulars, but shall nevertheless give its response on the principles of the claim within such time.
- 20.1.7 Each interim payment 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 it has been able to substantiate.
- 20.1.8 The Employer 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.
- 20.1.9 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 Amicable Settlement

- 20.2.1 In the event of any claim, dispute or disagreement arising out of, in connection with or relating to this Contract that the Parties hereto have been unable to settle or agree upon within a

period of thirty (30) days after the dispute or disagreement arises, each Party shall nominate a senior officer of its management to meet at a mutually agreed time and place not later than forty-five (45) days after the dispute or disagreement has arisen to attempt to resolve such dispute or disagreement.

20.2.2 Should a resolution of such claim, dispute or disagreement not be obtained within seventy five (75) days of the dispute or disagreement arising, either Party may then by notice to the other submit the dispute to arbitration in accordance with the provisions of Clause 20.4 [Arbitration].

20.3 Expert Determination

20.3.1 Where the Contract provides that any dispute or other matter shall be referred to an Expert or the Parties otherwise so agree the following provisions shall apply:

- (a) the Dispute shall be administered in accordance with the rules of procedure of the International Chamber of Commerce (provided that in the event of any inconsistency or contradiction between such rules and the terms of this Contract, the latter shall prevail);
- (b) each Party shall act in a transparent manner and provide to the Expert all information in its possession requested by the Expert for the purposes of making its determination;
- (c) the Expert shall be an independent person with relevant experience and willing to act, agreed between the Parties, or if not agreed within fourteen (14) days of a request in writing by either Party, appointed by the International Chamber of Commerce;
- (d) for a period of forty-two (42) days after the appointment of the Expert or such other period as the Parties may agree, each Party may make such written submissions as it wishes to the Expert and shall simultaneously provide a copy to the other Party, and at the end of such forty-two (42) day period each Party shall have a period of twenty-one (21) days to make counter-submissions to the Expert (with a copy to the other Party) in reply to the other Party's written submissions made during the aforementioned forty-two (42) day period provided that neither Party shall during such twenty-one (21) day period make any written counter-submission which purports to reply to, raise or refer to, any new matters not raised or referred to in any submission made during the aforementioned forty-two (42) day period;
- (e) at the end of the twenty-one (21) day period referred to in paragraph (d) above, and no later than twenty-one (21) days thereafter, either Party may, with the consent of the Expert and at a time and place decided by the Expert, make an oral presentation to the Expert in the presence of the other Party commenting on or explaining matters previously submitted to the Expert in writing;
- (f) the Expert shall render his determination in writing within fourteen (14) days of the completion of the oral presentation given in accordance with Clause 20.3.1(c) [Expert Determination] and give reasonable details of the reasons for his determination;
- (g) subject to Clause 20.3.1(k), the decision of the Expert shall be final and binding on the Parties save in the event of fraud or manifest error;

- (h) the Expert shall act as an expert and not as an arbitrator;
- (i) the costs of the Expert shall be borne as determined by the Expert or, in default of such determination, equally by the Parties;
- (j) in the case of invoices disputed by the Employer in accordance with Sub-Clause 14.16 [Disputed Payment], the periods in Clauses 20.3.1(d) and (e) [Expert Determination] shall be reduced respectively to ten (10) business days instead of forty two (42) days and five (5) business days instead of twenty-one (21) days. In the case of disputes referred to an Expert in accordance with Sub-Clause [9.3] [Detailed Procedures], the periods in Sub-Clauses 20.3.1(d) and (e) [Expert Determination] shall be reduced to such extent as shall enable the Expert to render its determination in accordance with the provisions of Sub-Clause [9.3] [Detailed Procedures]; and
- (k) any Party that wishes to challenge a decision of the Expert must initiate arbitration in accordance with Clause 20.4 [Arbitration] of this Contract in respect of:
 - (i) Clause 4.2.4 [Metering] and Clause 9.3.2 [Detailed Procedures and Technical Information]; within three (3) months) of its receipt of the decision; and
 - (ii) Clause 13.7.4 (Change in Law), Clause 14.3.3 [Application for Interim Payments] and Clause 14.16 [Disputed Payment]; within six (6) months of its receipt of the decision,²¹

and set forth one or more of the limited grounds set forth in Clause 20.3.1(g) [Expert Determination] as the basis of its challenge in its request for Arbitration, failing which the decision shall be final and binding.

20.4 Arbitration

20.4.1 Subject to Clause 20.3 [Expert Determination], all disputes arising out of or in connection with this Contract including but not limited to its validity and any purported breach or termination shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce which Rules are deemed to be incorporated by reference into this Clause 20.4 [Arbitration]. It is hereby agreed that:

- (a) the seat of the arbitration shall be London, England;
- (b) there shall be three (3) arbitrators;
- (c) the language of the arbitration shall be English;
- (d) the award rendered shall apportion the costs of the arbitration;
- (e) the award shall be in writing and shall set forth in reasonable detail the facts of the dispute and the reasons for the tribunal's decision;
- (f) the award in such arbitration shall be final and binding upon the Parties and judgment thereon may be entered in any Court having jurisdiction for its

²¹ Issue 38 on Issues List agreed 15 July 2015.

enforcement; and the Parties renounce any right of appeal from the decision of the tribunal insofar as such renunciation can validly be made; and

- (g) if any dispute arising out of or in connection with this Contract raises issues which are substantially the same as or in connection with the other Project Agreements (a **Related Project Dispute**) then:
 - (i) if arbitrators have not already been appointed in relation to the dispute under the other Project Agreements the Employer shall consult with the Contractor and shall give due consideration to, but shall not be bound by, the Contractor's proposals in relation to the appointment of arbitrators in relation to the Related Project Dispute);
 - (ii) if arbitrators have been appointed in relation to the dispute under the other Project Agreements, either Party may, by written notice to the other Party and the arbitrators who have already been agreed or appointed hereunder, require the dispute to be referred to and finally settled by the arbitral tribunal appointed under the other Project Agreements provided that the arbitration in respect of the Related Project Dispute is an arbitration under the Rules of Arbitration of the International Chamber of Commerce (or any other rules reasonably satisfactory to the Employer) and Clauses 20.4(a) [Arbitration] through 20.4(g) [Arbitration] (both inclusive) apply and the arbitral tribunal appointed under the other Project Agreements, has the necessary expertise and is otherwise qualified to arbitrate the dispute arising out of or in connection with this Contract.

20.4.2 Subject to Sub-Clause 20.4.1(g) [Arbitration], each Party will appoint an arbitrator within thirty (30) days of the date of the request to initiate arbitration who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, which third arbitrator shall not be a citizen of the Country, or the country of the Contractor and no arbitrator shall have any existing or prior relationship with either Party, to act as Chairman of the tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the ICC Court of Arbitration (as defined in the ICC Rules).

20.4.3 If there is a conflict between this Contract and the said Rules, this Contract shall prevail.

20.5 Jurisdiction

The parties irrevocably agree that the English courts have non-exclusive jurisdiction to settle any dispute arising out of or in connection with this Contract.

21 General

21.1 No Inducement

Each Party acknowledges that it has not entered into this Contract in reliance upon any warranty, statement or representation inducing it to enter into this Contract and agrees to waive any right which it might otherwise have to bring any action in respect of such representation and the Parties confirms that there are no other collateral contracts or warranties of which the Party is beneficiary which might impose upon the other Party obligations which are in addition to or vary or relate to the obligations under this Contract. Nothing in this Clause shall exonerate the Parties from its obligations and performance under this Contract or reduce its liability to the other Party thereunder.

21.2 Remedies and Waiver

- 21.2.1 No delay or omission on the part of either Party in exercising any right provided by law or under the Contract shall impair such right or operate as a waiver thereof.
- 21.2.2 The single or partial exercise of any right provided by law or under the Contract shall not preclude any other or further exercise thereof or the exercise of any other right.

21.3 Severability

If at any time any provision of the Contract is or becomes illegal, invalid or unenforceable in any respect under the Laws of any jurisdiction, that shall not affect or impair:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of the Contract; or
- (b) the legality, validity or enforceability under the Laws of any other jurisdiction of that or any other provision of the Contract.

21.4 Notice of Actions

The Contractor shall promptly notify the Employer on becoming aware of any claim, notice of violation, demand, action, abatement or order, conditional or otherwise, which has been made against it or any director, company secretary, manager or similar officer of the Contractor in relation to the Works.

21.5 Entire Agreement and Amendments

- 21.5.1 The Contract constitutes the entire agreement between the Parties in relation to its subject matter and supersedes all prior agreements and understandings whether oral or written with respect to such subject matter.
- 21.5.2 No amendment of the Contract or waiver of any obligations herein shall be effective unless reduced to writing and signed by or on behalf of a duly authorised representative of each of the Parties.

21.6 Rights of Audit and Contemporary Records

Complete and accurate records shall be maintained by the Contractor in connection with this Contract and all such records shall be maintained for at least twenty-four (24) months after the term of this Contract.

21.7 No Third Party Beneficiaries

The terms and provisions of this Contract are intended solely for the benefit of each Party to this Contract and their respective successors or assigns, and it is not the intention of the Parties to confer any rights on any third parties.

Schedule 1 - Employer's Requirements

Schedule 2 - Not Used

Schedule 3 - Workshop and Chemical Laboratory Equipment

Schedule 4 - Tests for Completion

Schedule 5 - Site

Schedule 6 - Contract Schedule

Schedule 7 - Guaranteed Performance and Emissions and Basis of Guarantees

Schedule 8 - Performance, Reliability and Emissions Testing Requirements

Schedule 9 - PPA Obligations Pertaining to Contractor

Schedule 10 - Design Fuel and Fuel Range (Fuel and Sorbent Specifications)

Schedule 11 - Authorisations and Taxes (Employer and Contractor)

Schedule 12 - EHSS Plan and Manual Scope: Environmental, Health, Safety and Security

Schedule 13 - Quality Assurance/Quality Control Plan

Schedule 14 - African Development Bank and Gendering Requirements

Schedule 15 - Acceptable Manufacturers and Subcontractors

Schedule 16 - Contractor's Key Personnel

Schedule 17 - O&M Manual Guidelines

Schedule 18 - Training Requirements

Schedule 19 - Monthly Progress Reports and Meetings

Schedule 20 - Temporary Facilities

Schedule 21 - List of Spares

Schedule 22 - Schedule of Documents for Approval or Information

Schedule 23 - Power, Water, Fuel and Sorbent Used During Commissioning and Testing

Schedule 24 - Not Used

Schedule 25 - Form of Notice to Proceed

Schedule 26 - Form of Application for Milestone Payment

Schedule 27 - Not Used

Schedule 28 - Advance Payment Bond

Schedule 29 - Performance Bond

Schedule 30 - Warranty Bond

Schedule 31 - Not Used

Schedule 32 - Insurances

Schedule 33 – Not Used

Schedule 34 - Deed of Assignment

Schedule 35 - Not Used

Schedule 36 - Form of Punch List Bond

Schedule 37 – Form of KETRACO Connection Facilities Operations Certificate

Schedule 38 - Power Purchase Agreement and/or the Financing Agreements

Schedule 39 - Seller's Connection Facilities Operations Certificate

Schedule 40 - Unit Commercial Operations Certificate

Schedule 41 - Full Commercial Operations Certificate

Schedule 42 - Performance Test Completion Certificate

Schedule 43 - Taking-Over Certificate

Schedule 44 - Performance Certificate

Schedule 45 - Form of Direct Agreement

Schedule 46 - Form of Subcontractor Collateral Warranty