

# **AGREEMENT AND CONDITIONS OF CONTRACT FOR BUILDING WORKS**

**PUBLISHED BY**

**THE JOINT BUILDING COUNCIL, KENYA**

**WITH THE SANCTION OF**

- THE ARCHITECTURAL ASSOCIATION OF KENYA
- THE KENYA ASSOCIATION OF BUILDING AND CIVIL ENGINEERING CONTRACTORS

**APRIL 1999 EDITION**

## **1.0 DEFINITIONS**

**1.1** Architects instructions - Means instructions issued by the Architect to the Contractor in accordance with these conditions and includes instructions issued by other agents of the Employer appointed under article 2.13 of the agreement.

**1.2** Bills of quantities or contract bills - Means the document drawn up by the Quantity Surveyor and priced by the Contractor to arrive at the contract price.

**1.3** Certificate of practical completion - Means a certificate issued by the Architect to the Contractor to signify a state of completion where, in the opinion of the Architect, the Works are substantially complete and can effectively and conveniently be used for the intended purposes.

**1.4** Final certificate - Means a certificate issued by the Architect to the Contractor signifying that the Works have been carried out and completed in accordance with the terms of this contract and that all adjustments to the contract price have been made in accordance therewith.

**1.5** Contract period - Means the period agreed for the construction of the Works and stated in the appendix to these conditions or extended in accordance therewith.

**1.6** Contract price - Means the price for the Works as stated in article 2.5 of the agreement or as adjusted in accordance with the contract.

**1.7** Contractor - Means the person or firm named in the articles of agreement with whom the Employer has entered into contract and includes the legal successors in title and permitted assigns.

**1.8** Contractor's equipment - Means all machinery, vehicles, tools, apparatus and other things required for the carrying out and completion of the Works and the remedying of any defects.

**1.9** Employer - Means the person or firm named in the articles of agreement with whom the Contractor has entered into contract and includes the legal successors in title and permitted assigns.

**1.10** Defect - Means any aspect of the Works which is not in accordance with the contract or to the reasonable satisfaction of the Architect.

**1.11** Force Majeure - means an event, occurrence or circumstance which;

**1.11.1** is beyond a party's control,

**1.11.2** such party could not reasonably have foreseen before entering into contract,

**1.11.3** having arisen, such party could not reasonably have avoided or overcome,

**1.11.4** and is not substantially attributable to either party.

**1.12** Patent defect - Means a defect which a reasonable inspection by the Architect would disclose.

**1.15** Latent defect - Means a defect which a reasonable inspection by the Architect would not disclose.

**1.14** Final account - Means the document prepared by the Quantity Surveyor containing all the adjustments to the contract price in accordance with the conditions of contract and which in his opinion is the total value of the Works at final completion.

**1.15** Materials and goods - Means things of all kinds and all supplies delivered by the Contractor, sub-contractors, suppliers or by others for incorporation in the Works whether stored on site or elsewhere but not yet incorporated in the Works.

**1.16** Prime cost sum - Means a sum included in the contract bills for works or services to be executed by a nominated sub-contractor, statutory or other authority or for materials or goods to be obtained from a nominated supplier.

**1.17** Provisional sum - Means a sum included in the contract bills for the execution of work which cannot be entirely foreseen, defined or detailed at the time the tender documents are issued.

**1.18** Site - Means the place or places where the permanent Works are to be carried out and to which materials and goods are to be delivered and includes workshops or other places where materials, goods or work are being prepared for incorporation in the Works either by the Contractor, sub-contractors or by others.

**1.19** Works - Means the permanent works designed for the Employer by the Architect or other agents for execution by the Contractor and as described in the contract documents. It shall include work of all sub-contractors and suppliers as well as materials and goods supplied for incorporation in the Works.

**1.20** All reference to days shall mean calendar days of 24 hours duration and shall include non working days unless otherwise stated.

**1.21** Unless inconsistent with the context, the masculine includes the feminine, the singular includes the plural and vice versa, and persons shall include bodies corporate.

**1.22** Titles and headings are for reference purposes only and do not form part of these conditions. They shall not be taken into consideration in the interpretation of these conditions or the contract.

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**2.0 ARTICLES OF AGREEMENT**

**2.1** This agreement is made on the.....day of.....

BETWEEN.....

of (or whose registered office is situated **at**) .....

(hereinafter called "the Employer") of the one part

AND.....

of (or whose registered office is situated **at**).....

(hereinafter called "the Contractor") of the other part.

**2.2** WHEREAS I Employer is desirous of.....

hereinafter called "the Works" **at**.....

on Land Reference No..... and has

caused drawings, bills of quantities and specifications showing and describing the work to be done to be prepared by or under the directions of an Architect.

2.3 AND WHEREAS the Contractor has supplied the Employer with a priced copy of the said bills of quantities (which copy is hereinafter referred to as "the contract bills") AND WHEREAS the said drawings numbered:

.....(hereinafter referred to as "the contract drawings") the contract bills and the specifications have been signed by or on behalf of the parties hereto.

**NOW IT IS HEREBY AGREED AS FOLLOWS:**

2.4 For the consideration hereinafter stated, the Contractor shall upon and subject to the conditions annexed hereto carry out and complete the Works shown upon the contract drawings and described by or referred to in the contract bills, the specifications and in the conditions of contract.

2.5 The Employer shall pay to the Contractor the sum of Kshs. (in words).....

(Kshs.....)

(hereinafter referred to as "the contract price") or such sum as shall become payable hereinafter at the times and in the manner specified in the said conditions.

2.6 The Employer shall appoint a representative whose name shall be communicated in writing to the Contractor, the Architect and the Quantity Surveyor. The powers and duties of the representative shall be deemed to be the same as those of the Employer unless otherwise stated in writing.

2.7 The term "the Architect" in these conditions shall mean of.....

and in the event of his ceasing to be the Architect for the purposes of this contract, the Employer shall appoint another person for that purpose. Such a person shall not be a person against whom the Contractor shall object for reasons considered to be sufficient by an Arbitrator appointed in accordance with clause 45.0 of these conditions.

2.8 No person subsequently appointed to be the Architect under this contract shall be entitled to disregard or overrule any certificate, opinion, decision, approval or instruction given or expressed by the previous Architect.

2.9 The Architect shall appoint a representative whose name shall be communicated in writing to the Contractor, the Employer and the Quantity Surveyor. The powers and duties of the representative shall be deemed to be the same as those of the Architect unless otherwise stated in writing.

2.10 The term "the Quantity Surveyor" in these conditions shall mean

of .....

and in the event of his ceasing to be the Quantity Surveyor for the purposes of this contract, such other person as the Employer shall appoint for that purpose. Such a person shall not be a person against whom the Contractor shall object for reasons considered to be sufficient by an Arbitrator appointed in accordance with clause 45.0 of these conditions.

**2.11** No person subsequently appointed to be the Quantity Surveyor under this contract shall be entitled to disregard or overrule any valuation, opinion, or assessment given or expressed by the previous Quantity Surveyor.

**2.12** The Quantity Surveyor shall appoint a representative whose name shall be communicated in writing to the Contractor, the Employer and the Architect. The powers and duties of the representative shall be deemed to be the same as those of the Quantity Surveyor unless otherwise stated in writing.

**2.13** The Employer may appoint Engineers, specialists and other consultants to render professional services under the contract. Where so appointed, such Engineers, specialists and other consultants shall be deemed, for the purposes of this contract, to be rendering such services under the delegated authority of the Architect.

**2.14** In the event of the need to appoint a replacement Architect, Quantity Surveyor, Engineer or other specialist (whether named in this agreement or not) the Employer shall make such appointment as soon as practicable after the need for such appointment arises.

**2.15** Where the contract does not incorporate bills of quantities, the terms "contract bills" and "bills of quantities" wherever appearing shall be deemed deleted and replaced with the term "schedule of rates" as applicable.

**2.16 AS WITNESS** the hands of the said parties;

Signed by the said:

.(Employer)

In the presence of:

Name: .....

Address: .....

Signed by the said:

.(Contractor)

In the presence of:

Name: .....

Address:.....

**2.17 CAUTION**

The words 'Architect,' 'Quantity Surveyor' and 'Engineer' are prescribed and protected by statute for the use of persons registered as such under the relevant laws. If this document is used by other than such a registered person, the references appropriate thereto must be deleted or amended.

## **2.18 NOTE**

The contract shall be under seal;

**2.18.1** When the articles of association of a limited company which is a party to the contract so require, or

**2.18.2** When either party is a non-trading corporation such as a hospital or school board.

**2.18.3** If the contract is to be executed under seal delete "as witness the hands of and insert "signed and sealed by".

## **CONDITIONS OF CONTRACT**

### **3.0 GENERAL OBLIGATIONS OF THE EMPLOYER**

The Employer shall upon the execution of the agreement;

**3.1** Clearly identify the site upon which the Works will be carried out and the access thereto.

**3.2** Confirm that the said site is in his legal possession and that it is free from all material encumbrances.

**3.3** Ascertain and confirm to the Contractor that the proposed Works comply with all statutory requirements, local authority planning and design bylaws or regulations as the case may be.

**3.4** Make adequate financial arrangements to ensure that all payments to the Contractor under these conditions are made within the periods and in the manner stipulated in the contract and shall provide such evidence to the Contractor on request.

### **4.0 GENERAL OBLIGATIONS OF THE CONTRACTOR**

The Contractor shall upon the execution of the agreement;

**4.1** Carry out, superintend upon and complete the Works and rectify any defects appearing therein in accordance with the contract and to the reasonable satisfaction of the Architect, unless it is legally or physically impossible to do so.

**4.2** Give a written notice to the Architect specifying any discrepancy, ambiguity or divergence in these conditions, the contract drawings, the contract bills or specifications immediately such discrepancy or divergence is detected. The Architect shall thereupon issue instructions in

regard thereto as soon as is practicable.

- 4.3** Notwithstanding any obligation of the Architect to the Employer and whether or not the Employer appoints a Clerk of Works, the Contractor shall remain wholly responsible for carrying out and completing the Works in all respects in accordance with the contract and whether or not the Architect or the Clerk of Works, if appointed, at any time goes on to the Works or to any workshop or other places where work is being prepared to inspect or approve the same or otherwise.

## **5.0 GENERAL OBLIGATIONS OF THE ARCHITECT**

The Architect shall upon the execution of the agreement;

- 5.1** Issue comprehensive drawings and all necessary details and other information required by the Contractor for the proper carrying out of the Works.
- 5.2** Expeditiously supply information, instructions and interpretations required or requested by the Contractor to ensure the timely carrying out of the Works.
- 5.3** Issue all necessary approvals and certificates and take other required action as soon as practicable.
- 5.4** Where the Architect is required under the contract to exercise his discretion by giving his decision, opinion, consent or approval or by taking any other action which may affect the rights and obligations of the Employer or the Contractor, he shall exercise such discretion impartially within the terms of the contract.

## **6.0 GENERAL OBLIGATIONS OF THE QUANTITY SURVEYOR**

The Quantity Surveyor shall, upon the execution of the agreement;

- 6.1** Expeditiously provide the necessary advice, opinion, assessment, measurements, computations, or valuations as the case may be of any matter required of him under these conditions. While giving advice, opinion, assessment, measurements, computations or valuations, he shall carry out the task impartially within the terms of the contract.

## **7.0 CONTRACT DOCUMENTS**

- 7.1** The contract documents for use in the carrying out of the Works shall be:-

**7.1.1** The agreement and these conditions.

**7.1.2** Contract drawings as listed in the articles of agreement;

**7.1.3** Contract bills of quantities or schedule of rates as applicable.

**7.1.4** Specifications as separately supplied or as contained in the contract bills.

- 7.2** All the original contract documents shall remain in the custody of the Architect or the Quantity Surveyor during the construction period. They shall be available at all reasonable times for the inspection of the Employer or the Contractor. Upon the issue of the final certificate, the original contract documents shall be handed over to the Employer.

- 7.3** Upon the execution of the contract, the Employer shall register the agreement with the relevant statutory authority and pay all fees, charges, taxes, duties and all costs arising therefrom.
- 7.4** Immediately after the execution of the contract, the Architect or the Quantity Surveyor shall furnish the Employer with one certified set of all contract documents.
- 7.5** The Architect and the Quantity Surveyor shall, without charge to the Contractor, furnish him with:-
- 7.5.1** A registered counterpart of the agreement and these conditions.
  - 7.5.2** One certified copy of the contract bills, where applicable.
  - 7.5.3** Three certified copies of all contract drawings.
  - 7.5.4** Two certified copies of the unpriced bills of quantities where applicable.
  - 7.5.5** Two certified copies of the contract specifications, if not included in 7.5.4 above.
- 7.6** So soon as is practicable after the execution of this contract, the Architect shall, without charge to the Contractor, furnish him (unless he shall have been previously furnished) with three copies of the descriptive schedules or other like documents necessary for use in carrying out the Works. Provided that nothing contained in the said descriptive schedules or other documents shall impose any obligation beyond those imposed by the contract documents.
- 7.7** As and when necessary the Architect, without charge to the Contractor, shall furnish him with three copies of such further drawings or details as are reasonably necessary either to explain or amplify the contract drawings, or to enable the Contractor to carry out and complete the Works in accordance with these conditions.
- 7.8** The Contractor shall keep one copy of the contract drawings, a copy of the unpriced bills of quantities, one copy of the specifications descriptive schedules or other like documents referred to in sub-clause 7.5 of this condition, and one copy of the drawings, details and descriptive schedules referred to in sub-clauses 7.6 and 7.7 of this condition upon the Works so as to be available to the Architect or his representatives at all reasonable times.
- 7.9** Upon final payment under clause 34.0 of these conditions, the Contractor shall, if so requested by the Architect, forthwith return to the Architect all drawings, details, specifications, descriptive schedules and other documents of a like nature which bear the Architect's name.
- 7.10** The contract documents 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;
- 7.10.1** The letter of award of contract
  - 7.10.2** The agreement and these conditions
  - 7.10.3** The bills of quantities
  - 7.10.4** The specifications

**7.10.5** The drawings

**7.10.6** The schedules and other documents forming part of the contract.

- 7.11** None of the documents hereinbefore mentioned shall be used by the Contractor or the Employer for any purpose other than this contract and neither the Employer, the Architect nor the Quantity Surveyor shall divulge or use any of the prices in the contract bills except for the purposes of this contract.

**8.0 CONTRACT BILLS AND CONTRACT PRICE**

- 8.1** The Employer shall be deemed to have provided to the Contractor before the submission of the tender all available data concerning the site and its surroundings. The Contractor shall be responsible for interpreting such data.
- 8.2** Notwithstanding the above, the Contractor shall be deemed to have obtained all necessary information which may affect the tender or the Works and to have satisfied himself as to the correctness and sufficiency of his tender for the carrying out of the Works.
- 8.3** The quality and quantity of the work included in the contract price shall be deemed to be that which is set out in the contract bills. The bills, unless otherwise expressly stated therein, shall be deemed to have been prepared in accordance with the principles of the latest edition of the Standard Method of Measurement of Building Works for East Africa.
- 8.4** Any error in description or in quantity or any omission of items from the contract bills or specifications shall not vitiate this contract but shall be corrected and deemed to be a variation required by the Architect.
- 8.5** The contract price shall not be adjusted or altered in any way whatsoever otherwise than in accordance with the express provisions of these conditions.
- 8.6** Subject to sub-clause 8.4 of this condition, any error whether arithmetical or not in the computation of the contract price shall be deemed to have been accepted by the parties hereto.

**9.0 CONTRACTORS SITE AGENT AND OTHER STAFF**

- 9.1** The Contractor shall constantly keep upon the Works a competent site agent who is able to understand and interpret the contract documents and to superintend upon the Works. The site agent shall be literate in the English language. Any instructions given to him by the Architect shall be deemed to have been issued to the Contractor.
- 9.2** The Contractor shall make his own arrangements for the engagement of all labour and other workmen, both local or otherwise, required for the Works and shall comply with statutory, industrial or other rules and regulations governing the employment and working terms and conditions of labour.
- 9.3** The Contractor shall be responsible for the observance, by all sub-contractors (whether nominated or not) of all the foregoing provisions.
- 9.4** The Architect may (but not unreasonably or vexatiously) issue instructions requiring the dismissal from the Works of any person employed thereon.

**10.0 CLERK OF WORKS**

**10.1** The Employer shall be entitled to appoint a Clerk of Works whose primary duty shall be to act as inspector of the Works on behalf of the Employer under the direction of the Architect. The Contractor shall afford every reasonable facility for the performance of that duty.

**10.2** Where a Clerk of Works is appointed, the Employer may also appoint other persons to assist the Clerk of Works in the exercise of his functions. Directions given by the assistants shall be deemed to be those of the Clerk of Works unless otherwise stated in writing.

**10.3** The employment of a Clerk of Works shall not relieve the Contractor from any of his duties and obligations under the contract.

**10.4** Directions given by the Clerk of Works in writing to the Contractor or to his site agent shall be deemed to be Architect's instructions in respect of;

**10.4.1** The interpretation of Architect's instructions, drawings, specifications or bills of quantities.

**10.4.2** The removal from the site of any work, materials or goods which are not in accordance with the contract.

**10.4.3** Matters of urgency involving the safety or protection of persons or property, and

**10.4.4** Any other matters in respect of which the Architect is expressly empowered by these conditions to issue instructions and on which the Architect has authorized in writing the Clerk of Works so to act.

**10.5** Any other directions given by the Clerk of Works to the Contractor or the site agent shall be of no effect.

## **11.0 LIABILITY AGAINST INJURY TO PERSONS AND PROPERTY**

**11.1** The Contractor shall be liable for and shall indemnify the Employer against any expenses, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person arising out of or in the course of or caused by the carrying out of the Works, unless the injury or death is due to any act or neglect of the Employer or of any person for whom the Employer is responsible.

**11.2** Except for such loss or damage as is at the risk of Employer under clause 14.0 or clause 15.0 of these conditions (if applicable), the Contractor shall be liable for and shall indemnify the Employer against any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal insofar as such injury or damage arises out of or in the course of or by reason of the carrying out of the Works. Provided always that the injury or damage is due to any negligence, omission or default of the Contractor his servants or agents or of any sub-contractor his servants or agents.

## **12.0 INSURANCE AGAINST INJURY TO PERSONS AND PROPERTY**

**12.1** Without prejudice to his liability to indemnify the Employer under clause 11.0 of these conditions, the Contractor shall maintain and shall cause any sub-contractor to maintain;

**12.1.1** Such insurances as are necessary to cover the liability of the Contractor or as the case may be, of such sub-contractor, in respect of personal injuries or deaths arising out of or in the course of or caused by the carrying out of the Works, and

**12.1.2** Such insurances as are necessary to cover the liability of the Contractor or as the case

may be, of such sub-contractor, in respect of injury or damage to property real or personal arising out of or in the course of or by reason of the carrying out of the Works and caused by any negligence, omission or default of the Contractor, his servants or agents or, as the case may be, of such subcontractor, his servants or agents.

**12.2** As and when he is reasonably required to do so by the Architect, the Contractor shall produce and shall cause any sub-contractor to produce for inspection by the Employer, documentary evidence that the insurances required by sub-clause 12.1.1 and 12.1.2 are properly maintained but, on occasion, the Employer may require to have produced for his inspection, the policy or policies and the receipts in question.

**12.3** The Contractor shall maintain in the joint names of the Employer and the Contractor, insurances for such amounts of indemnity as may be specified by way of provisional sum items in the contract bills in respect of any expenses, liability, loss, claim, or proceedings which the Employer may incur or sustain by reason of damage to any property other than the Works caused by collapse, subsidence, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by the carrying out of the Works, excepting damage;

**12.3.1** Caused by the negligence, omission or default of the Contractor, his servants or agents or any sub-contractor, his servants or agents.

**12.3.2** Attributable to errors or omissions in the designing of the Works.

**12.3.3** Which can reasonably be foreseen to be inevitable having regard to the nature of the work to be executed or the manner of its execution.

**12.3.4** Which is at the risk of the Employer under clause 14.0 or clause 15.0 of these conditions (if applicable).

**12.3.5** Arising from a nuclear risk or war risk.

**12.4** The insurances shall be placed with insurers to be approved by the Employer. The Contractor shall deposit with the Quantity Surveyor the policy or policies and the receipts in respect of premiums paid.

**12.5** Should the Contractor or any sub-contractor make default in insuring or in continuing to insure as provided in sub-clauses 12.1.1, 12.1.2 and 12.3 of these conditions, the Employer may himself insure against any risk with respect to which the default shall have occurred and may deduct a sum equivalent to the amount paid by him in respect of premiums from any money due or to become due to the Contractor.

### **13.0 INSURANCE OF THE WORKS (CONTRACTOR'S LIABILITY)**

**13.1** In the erection of new buildings, if the Contractor is required by the contract to insure the Works, he shall before the commencement of the works, procure insurances in the Joint names of the Employer and the Contractor against loss and damage by fire, earthquake, fire following earthquake, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion for the full value thereof (plus the percentage, if any named in the

appendix to these conditions to cover professional fees). The insurances shall cover all work executed and all unfixed materials and goods delivered to, placed on or adjacent to the Works and intended therefore but excluding temporary buildings and equipment owned or hired by the Contractor or any sub-contractor. He shall keep such work, materials and goods so insured until practical completion of the Works.

**13.2** Such insurances shall be with insurers approved by the Employer. The Contractor shall deposit the policy or policies and the receipts in respect of premiums paid with the Quantity Surveyor. Should the Contractor make default in insuring or continuing to insure as aforesaid, the Employer may himself insure against any risk in respect of which the default shall have occurred and deduct a sum equivalent to the amount paid by him in respect of premiums from any money due or to become due to the Contractor.

**13.3** Provided always that if the Contractor shall independently of his obligations under this contract maintain a policy of insurance which covers (inter alia) the said work, materials and goods against the aforesaid contingencies to the full value thereof ( plus the aforesaid percentage, if any), then the maintenance by the Contractor of such policy shall, if the Employer's interest is endorsed thereon, be a discharge of the Contractor's obligation to insure in the joint names of the Employer and the Contractor.

**13.4** As long as the Contractor is able to produce for inspection documentary evidence that the said policy is properly endorsed and maintained as and when he is reasonably required to do so by the Architect, then the Contractor shall be discharged from his obligation to deposit a policy or policies and receipts with the Quantity Surveyor but on any occasion, the Employer may require to have produced for his inspection the policy and receipts in question.

**13.5** Upon settlement of any claim under the insurance aforesaid, the Contractor with due diligence shall restore work damaged, replace or repair any unfixed materials or goods which have been destroyed or injured, remove and dispose of any debris and proceed with the carrying out and completion of the Works. All money received from such insurances (less only the aforesaid percentage, if any), shall be paid to the Contractor by installments under certificates of the Architect issued at the periods of interim certificates stated in clause 34.0 of these conditions. The Contractor shall not be entitled to any payment in respect of the restoration of work damaged, the replacement and repair of any unfixed materials or goods, and the removal and disposal of debris other than the money received under the said insurances.

#### **14.0 INSURANCE OF THE WORKS (EMPLOYERS LIABILITY)**

**14.1** In the erection of new buildings, if the Employer is required by the contract to insure the Works, all work executed and all unfixed materials and goods, delivered to, placed on or adjacent to the Works and intended therefore but excluding temporary buildings and equipment owned or hired by the Contractor or any sub-contractor shall be at the sole risk of the Employer as regards loss or damage by fire, earthquake, fire following earthquake, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion. The Employer shall maintain a proper policy of insurance against such risks until practical completion of the Works.

The policy or policies and the receipts for the last premium paid for renewal shall, upon request, be produced for inspection by the Contractor.

**14.2** If the Employer shall at any time nil upon request to produce any receipt showing such a

policy as aforesaid to be effective, the Contractor may in the name and on behalf of the Employer, insure all work executed and all unfixed materials and goods as aforesaid against loss or damage occasioned by the said contingencies and shall, upon production of the receipt for any premium paid by him, be entitled to have its amount added to the contract price.

**14.3** If any loss or damage affecting the Works or any part thereof, or any such unfixed materials or goods is occasioned by any one or more of the said contingencies, then;

**14.3.1** The occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under or by virtue of the contract, and

**14.3.2** The Contractor with due diligence shall restore work damaged, replace or repair any unfixed materials or goods which have been destroyed or injured, remove and dispose of any debris and proceed with the carrying out and completion of the Works.

**14.3.3** The restoration of work damaged, the replacement and repair of unfixed materials and goods and the removal and disposal of debris shall be deemed to be a variation required by the Architect.

## **15.0 INSURANCE OF WORKS (WORKS OF ALTERATIONS etc)**

**15.1** In works of alterations, repairs or extensions, the Employer shall solely take the risk for the existing structures together with all the contents thereof owned by him or for which he is responsible and the Works and all unfixed materials and goods intended for, delivered to and placed on or adjacent to the Works and intended therefore but excluding temporary buildings and equipment owned or hired by the Contractor or any sub-contractor.

The Employer shall maintain a proper policy of insurance against the risks of loss or damage by fire, earthquake, fire following earthquake, lightning, explosion, storm, tempest, flood, bursting or overflowing of water tanks, apparatus or pipes, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion until practical completion of the Works. The policy and the receipts for the last premium paid for the renewal of the insurance cover shall, upon request, be produced for inspection by the Contractor.

**15.2** If the Employer shall at any time fail, upon request, to produce any receipt showing such a policy as aforesaid to be effective, the Contractor may in the name and on behalf of the Employer insure the existing structures together with all the contents thereof, the Works and all unfixed materials and goods as aforesaid against loss or damage occasioned by the said contingencies. He shall have such right of entry and inspection as may be required to make a survey and inventory of the existing structures and contents therein. Upon production of receipts for any premium paid by him, the Contractor shall be entitled to have its amount added to the contract price.

**15.3** If any loss or damage affecting the Works or any part thereof or any such unfixed materials or goods is occasioned by any one or more of the said contingencies, then;

**15.3.1** The occurrence of such loss or damage shall be disregarded in computing any amounts payable to the Contractor under or by virtue of this contract.

**15.3.2** If the contract is not terminated in accordance with sub- clause 40.3, the Contractor with due diligence shall reinstate or make good all loss or damage and proceed with the

carrying out and completion of the Works.

**15.3.3** The Architect may issue instructions requiring the Contractor to remove and dispose of any debris, and

**15.3.4** The reinstatement and making good of such loss or damage and (when required) the removal and disposal of debris shall be deemed to be a variation required by the Architect.

## **16.0 PERFORMANCE BOND**

**16.1** Before commencing the Works, the Contractor shall provide one surety who must be an established bank or insurance company to the approval of the Employer and who will be bound to the Employer in the sum equivalent to ten per cent (10%) of the contract price for the due performance of the contract until the certified date of practical completion. No payments shall be made to the Contractor before the said bond is provided.

**16.2** Where stated in the contract, the Employer shall provide one surety who must be an established bank or insurance company to the approval of the Contractor who will be bound to the Contractor in the sum equal to one half of the limit of retention fund for the due performance of the Employer's payment obligations until the final certificate is issued and honoured.

## **17.0 COMPLIANCE WITH REGULATIONS, NOTICES, etc.**

**17.1** The Contractor shall comply with and give all notices required by any enactment or regulation of any statutory or other authority or of any public service company which has any jurisdiction with regard to the Works or with whose system the same are or will be connected. The Contractor, before making any variation from the contract drawings, specifications or the contract bills necessitated by such compliance, shall give to the Architect a written notice specifying and giving the reason for such variation and the Architect may issue instructions in regard thereto. If within fourteen days of having given the said notice the Contractor does not receive any instructions in regard to the matters therein specified, he shall proceed with the work complying with the enactment or regulation in question and any variation thereby necessitated shall be deemed to be a variation required by the Architect.

**17.2** The Employer shall be responsible for obtaining all planning and similar permits and approvals and shall serve all statutory and other notices and shall pay and indemnify the Contractor against liability in respect of any fees or charges (including any rates or taxes) legally demandable under any enactment or regulation of any statutory or other authority or any public service company in respect of the Works and the site upon which the Works are to be constructed.

**17.3** The Employer's responsibility and liability under sub-clause 17.2 herein shall subsist irrespective of whether or not such fees, charges, rates, taxes etc. are covered by way of prime cost or provisional sums or arise as a result of an Architect's instruction issued under clause 22.0 of these conditions.

**17.4** In the event of the Employer failing to comply with the provisions of sub-clause 17.2 herein, the Contractor may pay such fees, charges, rates, taxes, etc. Any costs or expenses incurred by the Contractor in making such payments shall be assessed by the Quantity Surveyor and added to the contract price and if an interim certificate is issued after the date of assessment,

the said amount shall be added to the amount which would otherwise be stated as due in such a certificate.

## **18.0 PROGRAMME OF WORKS**

- 18.1** The Contractor shall, within the period stated in the appendix to these conditions, submit for the approval of the Architect a programme of Works in such form and detail as the Architect shall reasonably prescribe.
- 18.2** Should actual progress not match the programme, the Contractor shall amend the programme accordingly and submit the revisions to the Architect. In the event that a Contractor fails to submit or amend a programme within a reasonable time after being so instructed by the Architect, the Employer may withhold half of the amount due to the Contractor in subsequent payment certificates until the default is rectified.
- 18.3** Neither the submission of the programme by the Contractor nor its approval by the Architect shall in any way relieve the Contractor from any of his duties and obligations under the contract.

## **19.0 ACCESS TO THE WORKS**

- 19.1** The Employer, the Architect, Quantity Surveyor, Engineers and other agents of the Employer shall, at all reasonable times, have access to the Works and to the workshops or other places where work is being prepared for the contract.
- 19.2** Where work is to be prepared in workshops or other places of a subcontractor (whether nominated or not) the Contractor shall as far as possible secure a similar right of access to those places for the persons mentioned above.

## **20.0 POSSESSION OF SITE AND COMMENCEMENT OF WORKS**

- 20.1** Within the period stated in the appendix to these conditions, the Employer, or the Architect on his behalf, shall give possession of site to the Contractor and such access as may be necessary to enable the Contractor to commence and proceed with the Works in accordance with the contract.
- 20.2** On or before the date for commencement stated in the appendix to these conditions, the Contractor shall commence the execution of the Works and shall regularly and diligently proceed with the same and complete on or before the date stated in the appendix to these conditions as the date for practical completion.

## **21.0 LEVELLING AND SETTING OUT**

- 21.1** The Employer shall be responsible for the proper identification of the site and the establishment of boundary pegs and beacons and the correctness of the datum levels *Jon* which the Architect's drawings are based. Such pegs, beacons and datum levels shall be identified to the Contractor by the Employer or by the Architect on his behalf.
- 21.2** The Contractor shall take all necessary precautions to preserve such pegs, beacons and datum levels and should they become disturbed he shall replace or reinstate them at his cost.
- 21.3** The Architect shall determine any levels which may be required for the execution of the Works

and shall furnish to the Contractor, by way of accurately dimensioned drawings, such information as shall enable the Contractor to set out the Works.

**21.4** The Contractor shall provide all necessary equipment and assistance to enable the accuracy of the setting out to be checked by the Architect. Checking of the setting out shall not relieve the Contractor of his responsibility for the correctness thereof. Unless the Architect shall otherwise instruct, the Contractor shall be responsible for and entirely at his own cost correct any errors arising from his own inaccurate setting out. If the Architect otherwise instructs, an appropriate deduction shall be made from the contract price to reflect the cost of such errors.

## **22.0 ARCHITECT'S INSTRUCTIONS**

**22.1** The Contractor shall (subject to sub-clauses 22.3 and 22.4 of this condition) forthwith comply with all instructions issued to him by the Architect in regard to any matter in respect of which the Architect is expressly empowered by these conditions to issue instructions.

**22.2** If within fourteen days after receipt of a written notice from the Architect requiring compliance with an instruction the Contractor does not comply therewith, then the Employer may employ and pay other persons to execute any work whatsoever which may be necessary to give effect to such instructions. All costs incurred in connection with such employment shall be recoverable from the Contractor by the Employer as a debt or may be deducted by him from any money due or to become due to the Contractor under this contract.

**22.3** Upon receipt of what purports to be an instruction issued to him by the Architect, the Contractor may request the Architect to specify in writing the provisions of these conditions which empower the issue of the said instruction. The Architect shall comply with any such request, and if the Contractor shall thereafter comply with the said instructions, then the issue of the same shall be deemed for all the purposes of this contract to have been empowered by these conditions.

**22.4** All instructions issued by the Architect shall be in writing. Any instruction issued orally shall be of no immediate effect, but shall be confirmed in writing by the Contractor to the Architect within seven days. If not dissented from in writing by the Architect within seven days from receipt of the Contractor's confirmation, the oral instruction shall take effect as from the expiration of the latter said seven days. Provided always that;

**22.4.1** If the Architect shall within seven days of giving such an oral instruction himself confirm the same in writing, then the Contractor shall not be obliged to confirm as aforesaid and the said instruction shall take effect as from the date of the Architect's confirmation.

**22.4.2** If neither the Contractor nor the Architect shall confirm such an oral nevertheless comply with the same, then the Architect may confirm the same **in** writing at any time prior to the issue of the final certificate and the said instruction shall thereupon be deemed to have taken effect on the date on **which it** was issued.-

**22.5** Any instructions given directly by the Employer to the Contractor shall be of no immediate effect but shall be confirmed by the Architect within seven days, failing which the Contractor shall confirm the same in writing in the same manner as is provided for in sub-clause 22.4. If confirmed by the Contractor, such instructions shall be deemed to be Architect's instructions.

## **23.0 SPECIFICATION OF GOODS, MATERIALS AND WORKMANSHIP**

- 23.1** All materials, goods and workmanship shall so far as procurable be of the respective kinds and standards described in the contract bills, the drawings and the specifications.
- 23.2** The Contractor shall, upon request by the Architect, furnish him with trade catalogues or manufacturer's brochures to prove that the materials and goods comply with sub-clause 23.1 of this condition.
- 23.3** If the Contractor shall fail to obtain materials or goods of the respective kinds and standards shown in the contract drawings and described or referred to in the contract bills and specifications, he shall forthwith give to the Architect a written notice specifying the non-availability. The Architect shall within fourteen days of receipt of such notice issue instructions in regard thereto.
- 23.4** Where not so described, the materials, goods and workmanship shall be to a standard appropriate to the Works and to the reasonable satisfaction of the Architect.
- 23.5** Notwithstanding the generality of his powers, if any work, materials or goods are not in accordance with the contract, the Architect may in his discretion allow any or all such work, materials or goods to remain in the Works. If so allowed, an appropriate deduction shall be assessed by the Quantity Surveyor and the contract price adjusted accordingly.
- 23.6** The Architect may issue instructions requiring the Contractor to open up for inspection any work covered up or to arrange for or carry out tests of any materials or goods (whether or not already incorporated in the Works) or of any executed work. The cost of such opening up or testing, together with the cost of making good in consequence thereof, shall be added to the contract price unless provided for in the contract bills or unless the inspection or test shows that the work, materials or goods are not in accordance with the contract.
- 23.7** Where materials or goods are specified by a trade or brand name, the Contractor shall not be liable for any latent defects therein, if any. The Contractor shall be deemed to have assigned to the Employer any right of action that may exist against the supplier **or** the manufacturer in case of failure arising from such defects.
- 23.8** The Architect may issue instructions in regard to the removal from the site of any work, materials or goods which are not in accordance with the contract.

## **24.0 SAMPLES AND TESTS**

- 24.1** The Contractor shall arrange for and furnish to the Architect, samples of any materials, goods or workmanship and perform any tests that may be called for by the Architect for his approval. Any samples and tests approved by the Architect shall be deemed to represent the minimum standard for the part of the Works to which they apply.
- 24.2** Where the Contractor fails to comply with the provisions of sub-clause 24.1, the Architect may arrange with other parties to provide the requisite samples or carry out the necessary tests. The Contractor shall be obliged to conform to the standards set by such samples or tests. All costs and expenses incurred in the procurement of such samples and tests shall be borne by the Contractor.

## **25.0 ROYALTIES AND PATENT RIGHTS**

- 25.1** All royalties or other sums payable in respect of the supply and use of any patented articles, processes or inventions in carrying out the Works as described by or referred to in the contract bills and the specifications, shall be deemed to have been included in the contract price.
- 25.2** The Contractor shall indemnify the Employer from and against all claims, proceedings, damages, costs and expenses which may be brought or made against the Employer or to which he may be put by reason of the Contractor infringing or being held to have infringed any patent rights in relation to any such articles, processes or inventions.
- 25.3** Where the Contractor shall supply and use in carrying out the Works any patented articles, processes or inventions in compliance with Architect's instructions, the Contractor shall not be liable in respect of any infringement or alleged infringement of any patent rights in relation to any such articles, processes and inventions. All royalties, damages or other money which the Contractor may be liable to pay to the persons entitled to such patent rights shall be added to the contract price.

## **26.0 ASSIGNMENT**

- 26.1** Neither the Employer nor the Contractor shall, without the written consent of the other, assign this contract. Provided that the approval of assignment shall not relieve either party of his obligations for the part of the contract already performed or the part not assigned.
- 26.2** It shall be a condition of any assignment that the employment of any assigns shall terminate immediately upon the termination (for whatever reason) of the Contractor's employment under the contract.

## **27.0 SUBLETTING**

- 27.1** The Contractor shall not sublet the whole of the Works without the written consent of the Employer and the Architect. He may sub-let part of the Works upon giving notice to the Architect.
- 27.2** The Contractor shall remain liable under the contract for all work sublet under this clause as if he had himself carried out such work.
- 27.3** It shall be a condition in any sub-letting that the employment of the sub-contractor shall terminate forthwith upon the termination (for whatever reason) of the Contractor's employment under the contract.

## **28.0 SUSPENSION OF THE WORKS BY THE ARCHITECT**

- 28.1** The Architect may issue instructions to postpone the carrying out of any work included in this contract.
- 28.2** The Architect may issue instructions to suspend the carrying out of any work included in this contract, if;
- 28.2.1** The Contractor fails to comply with an Architect's instruction requiring the dismissal from the Works of any person employed thereon, or
- 28.2.2** There arises any matters of urgency involving the safety or protection of persons or property, or

- 28.2.3** The Contractor fails to comply with the contract provisions to insure the Works, or
  - 28.2.4** The Contractor fails to comply with an Architect's instruction in regard to the removal from the site of any work, materials or goods which are not in accordance with the contract, or
  - 28.2.5** The Contractor assigns the contract or sub-lets the whole of the Works without the written consent of the Employer.
- 28.3** Except for suspension under sub-clause 28.2.2, all other instructions to suspend shall be accompanied by a seven days notice.
- 28.4** Instructions for postponement or suspension shall be copied to the Employer
- 28.5** The suspension shall not take effect if the matter occasioning the notice is rectified within the period of the notice. Such suspension shall cease immediately the matter occasioning the notice is rectified.
- 28.6** Should the Works be suspended under this clause, the Contractor shall be liable for all expenses arising therefrom.

## **29.0 SUSPENSION OF THE WORKS BY THE CONTRACTOR**

- 29.1** The Contractor may suspend the carrying out of the Works, if;
- 29.1.1** He has not received a payment certificate which he applied for in accordance with Clause 34.0 of these conditions and the default continues for thirty days after expiry of the stated period, or
  - 29.1.2** He has not received payment within the period for honouring certificates provided in clause 34.0 of these conditions and the default continues for thirty days after expiry of the stated period, or
  - 29.1.3** The Contractor notifies the Architect that it has become impossible to impracticable to procure goods and materials for the Works for reason beyond the Contractor's control and the Architect has not given appropriate instructions in accordance with sub-clause 23.3, or
  - 29.1.4** Delay occurs in the nomination or renomination of a sub-contractor or supplier which delay materially affects the progress of the Works, **or**
  - 29.1.5** Delay occurs in the appointment of a replacement Architect, Quantity Surveyor or Engineer which delay materially affects the progress of the Works.
- 29.2** Where the Contractor intends to suspend the carrying out of the Works, he shall give the Employer a seven days notice in writing to that effect, with a copy to the Architect.
- 29.3** The Contractor shall not suspend the carrying out of the Works if the matter occasioning the notice is rectified within the period of the notice. Such suspensions shall cease immediately the matter occasioning the notice is rectified.
- 29.4** During the period of suspension either under clause 28.0 or herein the Contractor shall properly protect and secure the Works to the reasonable satisfaction of the Architect.

## **30.0 VARIATIONS**

- 30.1** The term 'variation' as used in these conditions shall mean the alteration or modification of the design, quality or quantity of the Works as shown upon the contract drawings and described by or referred to in the contract bills and specifications and includes:
- 30.1.1** The addition, omission or substitution of any item of work.
  - 30.1.2** The alteration of the kind or standard of any of the materials or goods to be used in the Works.
  - 30.1.3** The removal from the site of any work, materials, or goods brought upon the Works by the Contractor for the purposes of the Works other than work, materials, or goods which are not in accordance with the contract.
  - 30.1.4** The issue of instructions by the Architect in regard to the expenditure of prime cost and provisional sums included in the contract bills and of prime cost sums which arise as a result of instructions issued in regard to the expenditure of provisional sums.
- 30.2** The Architect may issue instructions requiring a variation and he may sanction in writing any variation made by the Contractor otherwise than pursuant to an instruction of the Architect. No variation required by the Architect or subsequently sanctioned by him shall vitiate this contract, provided that no such instructions shall substantially change the scope or object of the contract without the consent of the Employer and the Contractor.
- 30.3** If the net value of all variations should equal 15% of the builders work, the Architect shall not issue any further instructions requiring a variation for additional work without the consent of the Employer and the Contractor.
- 30.4** All instructions for variations shall be copied to the Employer.
- 30.5** All variations required by the Architect or subsequently sanctioned by him in writing and all work executed by the Contractor for which provisional sums are included in the contract bills (other than work for which a tender made under sub-clause 31.11 of these conditions has been accepted) shall be assessed by the Quantity Surveyor who shall give to the Contractor an opportunity of being present at the time of such assessment and of taking such notes and measurements as the Contractor may require.
- 30.6** The valuation of variations and of work executed by the Contractor for which a provisional sum is included in the contract bills (other than work for which a tender has been accepted as aforesaid) unless otherwise agreed, shall be made in accordance with the following rules:
- 30.6.1** The prices in the contract bills shall determine the valuation of work of similar character executed under similar conditions as work priced therein.
  - 30.6.2** The said prices, where work is not of a similar character or executed under similar conditions as aforesaid, shall be the basis of prices for the same so far *as may be* reasonable, failing which a fair valuation thereof shall be made.
  - 30.6.3** Where work cannot properly be measured and valued, the Contractor shall be allowed day-

work rates on the prices prevailing when such work is carried out (unless otherwise provided in the contract bills). The day-work rates will be;

**30.6.3.1** Rates, if any, inserted by the Contractor in the contract bills or in a schedule of rates, or

**30.6.3.2** When no such rates have been inserted, at rates to be agreed between the Quantity Surveyor and the Contractor.

**30.6.3.3** Vouchers specifying the time daily spent upon the work (and if required by the Architect, the workmen's names) the equipment and the materials used shall be delivered for verification to the Quantity Surveyor not later than the end of the week following that in which the work was executed.

**30.6.4** The prices in the contract bills shall determine the valuation of items omitted. Provided that if omissions substantially vary the conditions under which any remaining items of work are carried out, the prices for such remaining items shall be valued as set out in sub-clause 30.6.2.

**30.7** Effect shall be given to the measurement and valuation of variations under sub-clause 30.6 of this condition in interim certificates and by adjustment of the contract price. Effect shall also be given to the measurement and valuation of work for which a provisional sum is included in the contract bills under the said sub-clause in interim certificates and by adjustment of the contract price in accordance with sub-clause 34.19.

**30.8** If upon written application being made by the Contractor, the Quantity Surveyor is of the opinion that a variation or the execution by the Contractor of work for which a provisional sum is included in the contract bills (other than work for which a tender made under clause 31.0 of these conditions has been accepted) has involved the Contractor in direct loss and or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in sub-clause 30.6 of this condition and if the said application is made with supporting details within thirty days of the loss or expense having been incurred, the Quantity Surveyor shall assess the amount of such loss or expense. Any amount so assessed from time to time shall be added to the contract price, and if an interim certificate is issued after the date of assessment the said amount shall be added to the amount which would otherwise be stated as due in such certificate.

**30.9** Should any part of the Works be omitted from the contract and that part is carried out by others, the Contractor shall be entitled to reimbursement of the profit he would have made had he carried out the omitted part. Such loss of profit shall be assessed by the Quantity Surveyor and if an interim certificate is issued after the date of assessment the said amount shall be added to the amount which would otherwise be stated as due in such a certificate.

**30.10** No instructions for variations shall be issued after the practical completion certificate is issued without the consent of the Contractor.

**30.11** Where a variation is necessitated by the default or breach of the contract by the Contractor, any additional cost attributable to such a variation shall be borne by the Contractor.

**30.12** Except as expressly stated in the contract, the Architect shall have no authority to alter or amend the terms and conditions of the contract or to relieve the Contractor of any of his obligations under the contract.

**30.13** Where the Architect, with the consent of the Employer and the Contractor, issues instructions requiring a variation beyond the limit provided in sub-clause 30.3, the Employer may require an additional performance bond over and above that provided under sub-clause 16.1. The Contractor shall be reimbursed for the provision of the additional bond pro-rata to the amount priced for the bond in the contract.

**30.14** The Architect shall not issue an instruction requiring a variation for additional work exceeding 0.01% of the contract price without the prior approval of the Employer unless otherwise communicated by the Employer to the Architect and to the Contractor.

### **31.0 NOMINATED SUB-CONTRACTORS**

**31.1** The following provisions shall apply where prime cost sums are included in the contract bills or arise as a result of Architect's instructions given in regard to the expenditure of provisional sums in respect of persons to be nominated by the Architect to supply and fix or install materials or goods or to carry out work.

**31.2** Such sums shall be expended in favour of such persons as the Architect shall instruct, with the consent of the Employer, and all specialists or others who are nominated by the Architect are hereby declared to be sub-contractors employed by the Contractor, and are referred to in these conditions as 'nominated sub-contractors'.

**31.3** The Architect shall not nominate any person as a sub-contractor against whom the Contractor shall make reasonable objection.

**31.4** The nominated sub-contractor shall carry out and complete the sub-contract works in every respect to the reasonable satisfaction of the Contractor and of the Architect and in conformity with all the reasonable directions and requirements of the Contractor.

**31.5** The Contractor and the nominated sub-contractor shall enter into a sub-contract agreement which provides (inter alia):

**31.5.1** That the nominated sub-contractor shall observe, perform and comply with all the provisions of this contract on the part of the Contractor to be observed, performed and complied with (other than clause 13.0 of these conditions, if applicable) so far as they relate and apply to the sub-contract works or to any , portion of the same.

**31.5.2** That the nominated sub-contractor shall indemnify the Contractor against the same liabilities in respect of the sub-contract works as those for which the Contractor is liable to indemnify the Employer under this contract.

**31.5.3** That the nominated sub-contractor shall indemnify the Contractor against claims in respect of any negligence, omission or default of such subcontractor, his servants or agents or any misuse by him or them of any scaffolding or other equipment, and shall insure himself against any such claims and produce the policy or policies and receipts in respect of premiums paid as and when required by either the Architect or the Contractor.

**31.5.4** That the sub-contract works shall be completed within the period or (where they are to be completed in sections) periods therein specified.

**31.5.5** That the Contractor shall not without the written consent of the Architect, grant any extension of time for the completion of the sub-contract works or any section thereof, and that the Contractor shall inform the Architect of any representation made by the nominated sub-contractor as to the cause of any delay in the progress or completion of the

sub-contract works or any section thereof.

- 31.5.6** That if the nominated sub-contractor shall fail to complete the sub-contract works or (where the sub-contract works are to be completed in sections) any section thereof, within the period therein specified or within any extended time granted by the Contractor with the written consent of the Architect and the Architect certifies in writing to the Contractor that the same ought reasonably so to have been completed, the nominated sub-contractor shall or allow to the Contractor either a sum calculated at the rate therein agreed as liquidated damages for the period during which the said works or any section thereof, as the case may be, shall so remain or have remained incomplete or where no such rate is therein agreed), a sum equivalent to any loss or damage suffered or incurred by the Contractor and caused by the failure of the nominated sub-contractor as aforesaid.
- 31.5.7** That payment in respect of any work, materials or goods comprised in the sub-contract shall be made within fourteen days after receipt by the Contractor of the sum to which the Contractor shall be entitled by virtue of the Architect's certificates issued under clause 34.0 of these conditions which states as due an amount calculated by including the total value of such work, materials or goods, and shall when due be subject to retention by the Contractor of the sums stated in sub-clause 31.5.8 of this condition.
- 31.5.8** That the Contractor shall retain from the sum directed by the Architect as having been included in the calculation of the amount stated as due in any certificate issued under clause 34.0 of these conditions in respect of the total value of work, materials or goods executed or supplied by the nominated subcontractor the percentage of such value named in the appendix to these conditions as percentage of certified value retained up to a total amount not exceeding a sum which bears the same ratio to the sub-contract price as the unreduced sum named in the appendix to these conditions as the limit of retention fund bears to the contract price.
- 31.5.9** That the Contractor's interest in any sums so retained (by whomsoever held)-shall be fiduciary as trustee for the nominated sub-contractor (but without obligation to invest), and that the nominated sub-contractor's beneficial interest in such sums shall be subject only to the right of the Contractor to have recourse thereto from time to time for payment of any amount which he is entitled under the sub-contract to deduct from any sum due or to become due to the nominated sub-contractor; and that if and when such sums or any part thereof are released to the nominated sub-contractor, they shall be paid in full.
- 31.5.10** That the Employer, the Architect, Quantity Surveyor, Engineers and other agents of the Employer, shall have a right of access to the workshops and other places of the nominated sub-contractor where work is being prepared as provided for in clause 19.0 of these conditions.
- 31.6** The Architect shall direct the Contractor as to the total value of the work, materials or goods executed or supplied by a nominated sub-contractor included in the calculation of the amount stated as due in any certificate issued under clause 34.0 of these conditions and shall forthwith inform the nominated sub-contractor in writing of the amount of the said total value. The sum representing such total value shall be paid by the Contractor within fourteen days after receipt by the Contractor of the sum to which the Contractor shall be entitled by virtue of the certificate less only;

**31.6.1** Any retention money which the Contractor may be entitled to deduct under the terms of the sub-contract, and

**31.6.2** Any sum to which the Contractor may be entitled in respect of delay in the completion of the sub-contract works or any section thereof, and

**31.6.3** Amounts already paid under previous certificates.

**31.7** Before issuing any certificate under clause 34.0 of these conditions, the Architect may request the Contractor to furnish to him reasonable proof that all amounts included in the calculation of the amounts stated as due in previous certificates in respect of the total value of the work, materials or goods executed or supplied by any nominated subcontractor have been duly paid and if the Contractor fails to comply with any such request the Architect shall issue a certificate to that effect and thereupon the Employer may himself pay such amounts to any nominated sub-contractor concerned and deduct the same from any money due or to become due to the Contractor.

**31.8** The Contractor shall not grant to any nominated sub-contractor any extension of the period within which the sub-contract works, or (where the sub-contract works are to be completed in sections) any section thereof is to be completed without the written consent of the Architect. Provided always that the Contractor shall inform the Architect of any representations made by the nominated sub-contractor as to the cause of any delay in the progress or completion of the sub-contract works or of any section thereof. The consent of the Architect shall not be unreasonably withheld. Any extension of time granted under this clause shall be copied to the Employer.

**31.9** If any nominated sub-contractor fails to complete the sub-contract works or (where the sub-contract works are to be completed in sections) any section thereof within the period specified in the sub-contract or within any extended time granted by the Contractor with the written consent of the Architect, then if the same ought reasonably so to have been completed, the Architect shall certify in writing accordingly. Immediately upon issue, the Architect shall send a copy of any such certificate to the nominated sub-contractor and to the Employer.

**31.10** If the Architect desires to secure final payment to any nominated sub-contractor before final payment is due to the Contractor, and if such sub-contractor has satisfactorily indemnified the Contractor against any latent defects, then the Architect may in an interim certificate include an amount to cover the said final payment, and the Contractor shall pay to such nominated sub-contractor the amount so certified within fourteen days of receipt of the payment. Upon such final payment, the amount named in the appendix to these conditions as limit of retention fund shall be reduced by the sum which bears the same ratio to the said amount as does such sub-contractor's subcontract price to the contract price, and save for latent defects, the Contractor shall be discharged from all liability for the work, materials or goods executed or supplied by such sub-contractor under the sub-contract to which the payment relates.

**31.11** Where the Contractor in the ordinary course of his business directly carries out works for which prime cost sums are included in the contract bills and where he has so informed the Architect, the Contractor shall be permitted to tender for the same or any of them but without prejudice to the Employer's right to reject the lowest or any tender.

**31.12** Where a prime cost sum arises under Architect's instructions issued under sub-clause 30.1.4, of these conditions, it shall be deemed for the purposes of this sub-clause to have been included in the contract bills.

**31.13** It shall be a condition of any tender accepted under sub-clause 31.11 that clause 30.0 of these conditions shall apply in respect of the items of work included in the tender as if the reference therein to the contract drawings, specifications and the contract bills were references to the equivalent documents included in or referred to in the tender.

**31.14** Where the terms of a contract between the Contractor and a nominated sub-contractor so require or the Architect shall so authorize in writing, the Contractor shall make advance payment to the sub-contractor before delivery of the materials or goods, and the Contractor shall be allowed simple interest for the period of such advance payment calculated at the commercial bank lending rate in force at the time of the advance until the value of the said materials or goods is included in a certificate in accordance with clause 34.0.

**31.15** If a nominated sub-contractor terminates the sub-contract or the Contractor terminate the sub-contract on the advice of the Architect, the Architect shall make a further nomination of a sub-contractor as may be necessary to carry out and complete the work left incomplete by the sub-contractor whose employment has been terminated Any additional costs arising therefrom shall be borne by the Employer.

Notwithstanding the above, the Architect may instruct, with the consent of the Contractor, that the incomplete work shall be executed by the Contractor and sue] instruction shall be deemed to be a variation to the contract.

**31.16** Provided that where a nominated sub-contractor terminates the sub-contract as a result of a default by the Contractor, or the Contractor terminates the sub-contract without the written advice of the Architect, the Contractor shall be liable to the Employer to any additional costs arising therefrom.

**31.17** Where a nominated sub-contract provides a defects liability period which extend beyond the Contractor's defects liability period, the Contractor's obligations and liabilities in connection with the defects of the nominated sub-contract shall nevertheless terminate at the end of the Contractor's defects liability period. The remaining portion of the nominated sub-contractor's defects liability period shall be subject to a direct agreement between the Employer and the nominated sub-contractor and shall not form part of this agreement

**31.18** Where a sub-contractor is required to give a guarantee or warranty relating to the subcontract works such guarantee or warranty shall be assigned by the sub-contractor to the Employer prior to the issue of the final certificate.

**31.19** The employment of a nominated sub-contractor under these conditions shall terminate forthwith upon the termination (for any reason) of the Contractor's employment under the contract.

**31.20** Neither the existence nor the exercise of the foregoing powers nor anything else contained in these conditions shall render the Employer in any way liable to any nominated sub-contractor.

## **32.0 NOMINATED SUPPLIERS**

**32.1** The following provisions shall apply where prime cost sums are included in the contract bills, or arise as a result of Architect's instructions given in regard to the expenditure of provisional sums in respect of any materials or goods to be supplied by others and fixed or installed by the Contractor.

**32.2** Such sums and the term prime cost, when included or arising as aforesaid, shall be understood to mean the net cost to be defrayed as a prime cost after deducting any trade or other discount and shall include customs duty or other taxes, and the cost of packing, carriage and delivery.

Provided that, where in the opinion of the Architect the Contractor has incurred expense for special packing or special carriage, such special expenses shall be allowed as part of the sums actually paid by the Contractor.

**32.3** Such sums shall be expended in favour of such persons as the Architect shall instruct. All specialists, merchants; tradesmen or others who are so nominated by the Architect to supply materials or goods are hereby declared to be suppliers to the Contractor and are referred to in these conditions as 'nominated suppliers'.

**32.4** The Architect shall not nominate as a supplier, a person who will not enter into a contract of sale which provides (inter alia):

**32.4.1** That the materials or goods to be supplied shall be to the reasonable satisfaction of the Architect.

**32.4.2** That the nominated supplier shall make good by replacement or otherwise any defects in the materials or goods supplied which appear within such period as is therein stated and shall bear any expenses reasonably incurred by the Contractor as a direct consequence of such defects provided that:-

**32.4.2.1** Where the materials or goods have been used or fixed such defects are not such that examination by the Contractor ought to have revealed them before using or fixing, and

**32.4.2.2** Such defects are due solely to defective workmanship or defects in the materials or goods supplied and shall not have been caused by improper storage by the Contractor or by misuse or by any act or neglect of either the Contractor, the Architect or the Employer or by any person or persons for whom they may be responsible.

**32.4.3** That delivery of the materials or goods supplied shall be commenced and completed at such times as the Contractor may reasonably direct.

**32.4.4** All payments by the Contractor for materials or goods supplied by a nominated supplier shall be in full and shall be paid within thirty days of the end of the month during which delivery is made. Failure by the Contractor to pay the nominated supplier as stipulated shall entitle the Employer to pay the relevant sums direct and deduct the same from any money due or to become due to the Contractor.

**32.4.5** Where the terms of a contract between the Contractor and a nominated supplier so require, or the Architect shall so authorize in writing, the Contractor shall make advance payments to the supplier before delivery of the materials or goods. The Contractor shall be allowed simple interest for the period of such advance payment calculated at the commercial bank lending rate in force at the time of the advance until the value of the said materials or goods is included in a certificate in accordance with clause 34.0.

### **33 WORKS BY OTHER PERSONS ENGAGED BY THE EMPLOYER**

**33.1** The Contractor shall permit the carrying-out of work not forming part of this contract, but described in the contract bills, by the Employer or by other persons employed or otherwise engaged by him.

**33.2** Where the work is not described in the contract bills, the Employer may arrange the carrying out of such work only with the consent of the Contractor, which consent shall not be unreasonably withheld.

**33.3** Every person employed or otherwise engaged by the Employer under this clause shall be deemed to be a person for whom the Employer is responsible and not a subcontractor.

#### **34.0 PAYMENTS**

**34.1** At intervals stated in the appendix to these conditions, the Contractor shall submit to the Quantity Surveyor an application for payment giving sufficient details of the works done and the materials on site and the amounts which the Contractor considers himself to be entitled to. The application for payment shall be copied to the Architect and the Employer.

**34.2** Upon receipt of the application and after verifying the amounts, the Quantity Surveyor shall prepare within seven days an interim valuation of work done and materials on site during the relevant period and forward the same to the Architect. The valuation shall be copied to the Employer.

**34.3** The Architect shall issue an interim payment certificate within seven days from the date of receipt of the Quantity Surveyor's valuation. The payment certificate shall be copied to the Employer.

**34.4** Neither the Quantity Surveyor nor the Architect shall be bound to issue a valuation for a payment certificate, as the case may be, whose value is less than the amount stated in the appendix to these conditions as the minimum amount of a payment certificate before the issue of the certificate of practical completion of the whole of the Works or any section thereof.

**34.5** The Contractor shall, on presenting any interim payment certificate to the Employer be entitled to payment thereof within fourteen days from presentation.

**34.6** If a certificate remains unpaid beyond the period for honoring certificates stated herein, the Employer shall pay or allow to the Contractor simple interest on the unpaid amount for the period it remains unpaid at the commercial bank lending rate in force during the period of default. The Quantity Surveyor shall assess the amounts to be included in an interim certificate as the interest due for the delay and if an interim certificate is issued after the date of any such assessment, the amount shall be added to the amount which would otherwise be stated as due in such a certificate.

**34.7** The payment of interest for late payment of certified sums shall not relieve the Employer from his obligation to honour payment certificates when due.

**34.8** The Architect may, by a subsequent or supplementary certificate, make any correction, amendment or modification to any previously issued certificate and shall have the authority, if work is not carried out to his satisfaction, to omit or reduce the value of such work in any certificate.

**34.9** The amount stated as due in an interim certificate shall, subject to any agreement between the parties as to stage payments, be the total value of work properly executed and the value of materials and goods required for use in the Works which have been delivered to the Works.

**34.10** The Architect may, with the consent of the Employer, include in an interim certificate the value of materials and goods which have been stored elsewhere in safe custody by the Contractor.

**34.11** Provided that such interim certificate shall only include the value of such materials and goods

as and from such time as they are reasonably, properly and not prematurely brought to the Works or stored as aforesaid and are adequately stored and protected against weather and other casualties and are covered by proper insurance and have passed to the legal ownership of the Contractor. There shall be deducted from the amount of the certificate such sums as may be retained by the Employer as hereinafter provided and less any amounts previously certified under this clause.

**34.12** The Employer may retain the percentage of the total value of the work, materials and goods referred to in sub-clause 34.9 of this condition, which is named in the appendix to these conditions as percentage of certified value retained. Provided always that when the sum of the amounts so retained equals the amount named in the said appendix as limit of retention fund, or that amount as reduced pursuant to sub-clause, 31.10, 42.7, and 42.8 of these conditions, as the case may be, no further amount shall be retained by virtue of this clause.

**34.13** Where any certificate of which the Contractor has received payment in accordance with sub-clause 34.5 of these conditions, includes the value of any unfixed materials and goods required for use in the Works, such materials and goods shall become the property of the Employer and shall not be removed without the authority of the Architect except for use upon the Works. The Contractor shall remain responsible for any loss of or damage to such materials and goods whether the same are stored on site or elsewhere.

**34.14** The following amounts, when included in interim certificates, shall not be subject to retention:-

**34.14.1** Payment for taxes, levies and charges in respect of which the Contractor pays or indemnifies the Employer under the provisions of sub-clause 17.4 of these conditions.

**34.14.2** Payment made for inspections and tests carried out by the Contractor or by third parties under clauses 23.0 and 24.0.

**34.14.3** Payment to the Contractor for the provision of a performance bond under clause 16.1 of these conditions.

**34.14.4** Payment to the Contractor for the provision of insurances under clauses 12.0, 13.0,14.0 and 15.0 of these conditions, as applicable.

**34.14.5** Payment for goods and materials supplied by nominated suppliers under clause 32.0.

**34.14.6** Any amounts to which the Contractor is entitled in accordance with sub-clause 34.28.

**34.15** The Employer and the Contractor may agree to open a joint interest earning bank account where all retention money shall be deposited. Such account, if opened, shall be operated jointly by the Employer and the Contractor. All interest accruing to the deposited retention fund shall be periodically released to the Contractor at the times agreed between the parties and inserted in the appendix to these conditions.

**34.16** The amounts retained by virtue of sub-clause 34.12 of this condition shall be subject to the following rules;

**34.16.1** The Employer's interest in any amount so retained shall be fiduciary a trustee for the Contractor (but without obligation to invest) and the Contractor's beneficial interest therein shall be subject only to the right of the Employer to have recourse thereto from time to time for payment of an amount which he is entitled under the provisions of this contract to deduct from any sum due or to

become due to the Contractor.

**34.16.2** On the issue of the certificate of practical completion, the Architect shall issue a certificate for one half of the total amount then so retained and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment of the said amount within fourteen days from presentation.

**34.16.3** On the expiration of the defects liability period named in the appendix these conditions, or on the issue of the certificate of completion of rectification of defects, whichever is the later, the Architect shall issue a certificate for the balance of the amount then so retained and the Contractor shall be entitled to payment of the said balance within fourteen days from presentation.

**34.17** The measurement and valuation of the Works shall be completed within the period of final measurement and valuation stated in the appendix to these conditions calculated from the date of practical completion, and the Contractor shall be supplied with a copy of the final account not later than the end of the said period and before the issue of the final certificate under sub-clause 34.21 of this condition.

**34.18** Either before or within a reasonable time after practical completion of the Works, the Contractor shall send to the Quantity Surveyor all documents and calculation necessary for the purposes of the computations required by these conditions including all documents relating to the accounts of nominated sub-contractors and nominated suppliers. The Quantity Surveyor may request the Contractor to submit further documents as he may deem necessary for the computation of the final account.

**34.19** In the settlement of accounts, the amounts paid or payable under the appropriate contracts by the Contractor to nominated sub-contractors or nominated suppliers, the amount paid or payable by virtue of clause 17.0 of these conditions in respect of fee or charges for which a provisional sum is included in the contract bills, the amount paid or payable in respect of any insurances maintained in compliance with sub-clause 12.3 of these conditions, the tender price (or such other sum as may be appropriate or accordance with the terms of the tender) for any work for which a tender made under sub-clause 31.11 of these conditions is accepted and the value of any work executed by the Contractor for which a provisional sum is included in the contract bills, shall be set against the relevant prime cost sum or provisional sum included in the contract bills or arising under Architect's instructions issued under clause 30.1.4 of these conditions as the case may be. The balance, after allowing in all cases pro rata for the Contractor's profit at the rates shown in the contract bills, shall be added to or deducted from the contract price. Provided that no deduction shall be made in respect of any damages paid or allowed to the Contractor by any sub-contractor or supplier.

**34.20** The final account shall be agreed between the Quantity Surveyor, the Contractor and the Architect. If the Contractor does not sign the final account within thirty days after being so requested to do, the Architect may issue the final certificate based on the final account prepared by the Quantity Surveyor. The final account shall be copied to the Employer.

**34.21** So soon as the Quantity Surveyor has prepared the final account but before the expiration of sixty days from the end of the defects liability period stated in the appendix to these conditions, or from completion of rectification of defects under clause 41.6 of these conditions, or from receipt by the Quantity Surveyor of the documents referred to in paragraph

34.18 of this condition, whichever is the latest, the Architect shall issue the final certificate.

The final certificate shall state;

**34.21.1** The sum of the amounts certified to the Contractor under interim certificates and the amount named in the said appendix as limit of retention fund, and

**34.21.2** The contract price adjusted as necessary in accordance with the terms of these conditions, and as reflected in the final account.

**34.21.3** The difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor, as the case may be. Subject to any deductions authorized by these conditions, the said balance as from the fourteenth day after presentation of the final certificate by the Contractor to the Employer shall be a debt payable by the Employer to the Contractor or by the Contractor to the Employer, as the case may be.

**34.22** Unless a written request to concur in the appointment of an Arbitrator shall have been given under clause 45.0 of these conditions by either party before the final certificate has been issued, or within thirty days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this contract (whether by arbitration under clause 45.0 of these conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this contract and that any necessary effect has been given to all the terms of this contract which require an adjustment to be made to the contract price, except and insofar as any sum mentioned in the said certificate is erroneous by reason of;

**34.22.1** Fraud, dishonesty or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate, or

**34.22.2** Any defect including any omission in the Works or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the Works or before the issue of the said certificate would not have disclosed, or

**34.22.3** Any accidental inclusion or exclusion of any work, materials, goods or figure in any computation or any arithmetical error in any computation.

**34.23** Save as aforesaid, no certificate of the Architect shall of itself be conclusive evidence that any Works, materials or goods to which it relates are in accordance with this contract.

**34.24** If the Architect shall delete or reduce any sum in the final certificate which was previously certified in respect of work done or goods and materials supplied or services rendered by a nominated sub-contractor or supplier, which sum has already been paid by the Contractor to the nominated sub-contractor or supplier, the Employer shall reimburse the Contractor the amount of any sum so overpaid to the extent that the Contractor is unable to recover the said overpayment.

**34.25** The Employer shall be entitled to deduct from or set off against any money due from him to the Contractor in interim certificates any sum or sums which the Contractor is liable to pay to the Employer arising under or in connection with the contract.

**34.26** Where in these conditions it is provided that an amount is to be added to or deducted from the

contract price, then as soon as such an amount is assessed in whole or in part, it shall be reflected in the next payment certificate following such assessment.

**34.27** All certificates to be issued by the Architect under these conditions shall be issued to the Contractor except that the Architect may issue a special payment certificate to others for payment by the Employer where the Employer;

**34.27.1** Engages others to execute work in accordance with sub-clause 22.2.

**34.27.2** Elects to pay nominated sub-contractors or nominated suppliers direct in accordance with clauses 31.7 and 32.4.4.

**34.27.3** Elects to pay direct statutory and similar services providers in accordance with clause 17.2.

**34.28** Any penalties or fines imposed on the Contractor by the relevant authority for delay in the payment of Value Added Tax and other taxes levied in the building industry arising from a delay in the honouring of a payment certificate shall be reimbursed by the Employer to the Contractor.

## **35.0 FLUCTUATIONS**

**35.1** The contract price shall be deemed to have been calculated to include all duties on materials and goods to be incorporated into the finished Works unless otherwise stated in the contract. If at any time during the period of the contract the duties shall be varied and this shall affect the cost to the Contractor of such materials, then the Quantity Surveyor shall assess the net difference in cost of such materials. Any amount from time to time so assessed shall be added to or deducted from the contract price, as the case may be. For purposes of this clause, 'duties' shall include all customs and excise charges, tariffs, V.A.T and other taxes and duties imposed by statutory or other authority in the country where the Works are being carried out.

**35.2** The contract price shall be deemed to be based on exchange rates current at the date of tender in calculating the cost to the Contractor of materials to be specifically imported (by express provisions in the contract bills or specifications) for permanent incorporation in the Works. Unless otherwise stated in the contract, if at any time during the period of the contract the exchange rates shall be varied and this shall affect the cost to the Contractor of such materials, then the Quantity Surveyor shall assess the net difference in the cost of such materials. Any amount from time to time so assessed shall be added to or deducted from the contract price, as the case may be.

**35.3** Unless otherwise stated in the contract, the contract price shall be deemed to have been calculated in the manner set out below and in sub-clauses 35.4 and 35.5 and shall be subject to adjustment in the events specified there under.

**35.3.1** The prices contained in the contract bills shall be deemed to be based upon the rates of wages and other emoluments and expenses as determined by the Joint Building Council of Kenya (J.B.C) and set out in the schedule of basic rates annexed to the contract bills.

**35.3.2** Upon J.B.C determining that any of the said rates of wages or other emoluments and expenses are increased or decreased, then the contract price shall be increased or decreased by the amount assessed by the Quantity

Surveyor based upon the difference, expressed as a percentage, between the rate set out in the annexed schedule of basic rates and the rate published by the J.B.C and applied to the quantum of labour incorporated within the amount of work remaining to be executed at the date of publication of such increase or decrease.

**35.3.3** No adjustment shall be made in respect of changes in the rates of wages and other emoluments and expenses which occur after the date of practical completion except during such other period as may be granted as an extension of time under clause 36.0 of these conditions.

**35.4** The prices contained in the contract bills shall be deemed to be based upon the basic prices of materials to be permanently incorporated in the Works as determined by the J.B.C and set out in the schedule of basic rates annexed to the contract bills.

**35.5** Upon the J.B.C determining that any of the said basic prices are increased or decreased then the contract price shall be increased or decreased by the amount to be assessed by the Quantity Surveyor based upon the difference between the price set out in the schedule of basic rates and the rate published by the J.B.C and applied to the quantum of the relevant materials which have not been taken into account in arriving at the amount of any interim certificate under clause 34.0 of these conditions issued before the date of publication of such increase or decrease.

**35.6** No adjustment shall be made in respect of changes in basic prices which occur after the date for practical completion except during such other period as may be granted as an extension of time under clause 36.0 of these conditions.

**35.7** The provisions of sub-clauses 35.1 and 35.2 herein shall not apply in respect of any materials included in the annexed schedule of basic rates.

**35.8** The provision of sub-clause 35.3 to 35.5 shall not apply to nominated sub-contractors and nominated suppliers except in so far as shall be specifically provided in any subcontract agreement.

## **36.0 EXTENSION OF TIME**

**36.1** Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect with supporting details showing the extent of delay caused or likely to be caused. Thereafter the Architect shall evaluate the information supplied by the Contractor and if in his opinion the completion of the Works is likely to be or has been delayed

**36.1.14** By reason of delay caused by nominated subcontractors or nominated suppliers which delay the Contractor has taken all reasonable measures to avoid or reduce the effects of, or

**36.1.15** By reason of the Contractor's inability, for reasons beyond his control, to secure such skilled labour and other workmen essential to the proper carrying out of the Works, or

**36.1.16** By delay arising from the nomination or renomination of a sub-contractor or supplier, or

**36.1.17** By delay in receiving possession of or access to the site.

- 36.2** Then the Architect shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid, but in any case not later than thirty days after receiving an application for extension of time in the manner prescribed, make in writing a fair and reasonable extension of time for the completion of the Works.
- 36.3** Provided always that should a cause of delay be of continuing effect, the Architect shall make an interim decision within the said thirty days and a final decision made within thirty days of the end of the cause of delay.
- 36.4** The Contractor shall use constantly his best endeavors to prevent delay and shall do all that may reasonably be required of him to the satisfaction of the Architect to proceed with the Works.
- 36.5** If the Architect's decision on extension of time is not communicated to the Contractor within the said thirty days, and no justifiable grounds are given for the failure to act, the time applied for by the Contractor shall be deemed to have been accepted by the Architect as being a fair extension of time for the completion of the Works. Such a decision shall take effect not earlier than fourteen days after the expiry of the thirty day period.
- 36.6** If by the Architect's instructions the scope of the Works is reduced and in the opinion of the Architect the time for completion of the Works has been or is likely to be reduced, the Architect shall as soon as he is able to estimate the reduction in time, make in writing a fair and reasonable reduction to the time for completion of the Works. Provided always that such a reduction in the time for completion of the Works shall be notified to the Contractor within thirty days from the date of issue of such Architect's instructions.
- 36.7** The Architect shall not be bound to evaluate a request for extension of time which is submitted more than thirty days after the events listed in sub-clause 36.1 have occurred.
- 36.8** All applications for extension of time and all decision on the same shall be copied to the Employer at the time of application or decision, as the case may be.

### **37.0 LOSS AND EXPENSE CAUSED BY DISTURBANCE OF REGULAR PROGRESS OF THE WORKS**

**37.1** If upon written application being made to him by the Contractor the Architect is of the opinion that the Contractor has been involved in direct loss and or expense for which he would not be reimbursed by a payment made under any other provision in this contract by reason of the regular progress of the Works or of any part thereof having been materially affected by;

- 37.1.1** The Contractor not having received in due time necessary instructions, drawings, details or levels from the Architect for which he specifically applied in writing, on a date which having regard to the date for practical completion stated in the appendix to these conditions or to any extension of time then fixed under clause 36.0 of these conditions was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same, or
- 37.1.2** The opening up for inspection of any work covered up or the testing of any work, materials or goods in accordance with clause 23.0 of these conditions (including making good in consequence of such opening up or testing), unless the inspection or test showed that the work, materials, or goods were not in accordance with this contract, or
- 37.1.3** Delay in appointing a replacement Architect, Quantity Surveyor or Engineer, **or**

**37.1.4** Any discrepancy in or divergence in these conditions, **the contract drawings**, specifications and or the contract bills, or

**37.1.5** Delay on the part of artists, tradesmen or others engaged by the Employer **in** executing work not forming part of this contract; or

**37.1.6** Delay by statutory or other services providers or similar bodies engaged directly by the Employer, or

**37.1.7** Architect's instruction issued in regard to the postponement of any work **to be** carried out under the provisions of this contract, or

**37.1.8** Delay arising from the nomination or renomination of a sub-contractor or supplier, or

**37.1.9** The Contractor suspending the carrying out of the Works in accordance with clause 29.0 of these conditions, except under sub-clause 29.1.3., or

**37.1.10** Delay caused by the late supply of goods or materials or in executing work for which the Employer or his agents are contractually obliged to supply or to execute as the case may be, or

**37.1.11** Delay in receiving possession of or access to the site.

**37.2** And if the written application is accompanied by detailed particulars of the claim and it is made within the period stated in sub-clause 37.4 herein upon it becoming apparent that the progress of the Works or of any part thereof has been affected as aforesaid, then the Quantity Surveyor shall as soon as practicable assess the amount of such loss and or expense. Any amount from time to time so assessed shall be added to the contract price, and if an interim certificate is issued after the date of assessment, any such amount shall be added to the amount which would otherwise be stated as due in such a certificate.

**37.3** Upon the happening of any of the events listed at sub-clause 37.1.1 to 37.1.11, the Contractor shall maintain such records as may be necessary to support any claim he may wish to make. The Quantity Surveyor may request any further information as he may deem necessary for a fair and just assessment of the claim.

**37.4** The Contractor shall give written notice to the Architect of his intention to make a claim within thirty days after the event giving rise to the claim has first arisen. The claim shall be submitted within thirty days thereafter.

**37.5** Provided always that should the event giving rise to the claim be of continuing effect, the Contractor shall submit an interim claim within the said thirty days and a final claim within thirty days of the end of the event giving rise to the claim.

**37.6** If the Contractor fails to comply with any of the provisions of this clause in respect of any claim he seeks to make, his entitlement to payment in respect thereof shall not exceed such amount as the Quantity Surveyor or any Arbitrator appointed under clause 45.0 shall consider to be verified by contemporary records submitted at the time the event occurred.

**37.7** All applications for the reimbursement of loss and or expense made by the Contractor, and all assessments of loss and expense made by the Quantity Surveyor, shall be copied to the Employer.

## **TERMINATION OF THE CONTRACT BY THE EMPLOYER**

**38.1** Without prejudice to any other rights and remedies which the Employer may possess, if the Contractor shall make default in any one or more of the following respects, that is to say,

- 38.1.1** If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, for a period exceeding fourteen days, or
- 38.1.2** If he fails to proceed regularly and diligently with the Works, or
- 38.1.3** If he fails to commence the Works within thirty days of the date for commencement, or
- 38.1.4** If he refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods, and by such refusal or neglect the Works are materially affected, or
- 38.1.5** If he fails to comply with the provisions of clause 26.0 and 27.0 of these conditions, or
- 38.1.6** If despite previous notices from the Architect in writing he persistently or flagrantly neglects to comply with any of his obligations under the contract,
- 38.2** Then the Architect may give to the Contractor a notice by registered post or recorded delivery specifying the default, and if the Contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default then the Employer may within fourteen days after such continuance or repetition by notice by registered post or recorded delivery, forthwith terminate the contract, provided that such notice shall not be given unreasonably or vexatiously.
- 38.3** In the event of the Contractor becoming bankrupt or making a composition or arrangement with his creditors or having a winding up order made or (except for purposes of reconstruction) a resolution for voluntary winding up passed or a receiver or manager of his business or undertaking duly appointed or possession taken by or on behalf of the holders of any debentures secured by a floating charge of any property comprised in or subject to the floating charge, then the contract shall automatically terminate but it may be reinstated and continued if the Employer and the Contractor, his trustee in bankruptcy, receiver or manager, as the case may be, shall so agree.
- 38.4** In the event of the contract being terminated as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the Employer and the Contractor;
- 38.4.1** The carrying out of the Works by the Contractor shall cease forthwith and the Contractor shall vacate the site thereby relinquishing possession thereof and the responsibility and care of the site and the Works shall henceforth pass to the Employer.
- 38.4.2** So soon as it is practicable, the Architect shall arrange a joint inspection with the Contractor and the Quantity Surveyor for the purpose of taking a record of the work done, materials and goods delivered on site, the contractor's equipment, and temporary buildings.
- 38.4.3** The Quantity Surveyor shall, within a reasonable time after the inspection, prepare a final account for that part of the Works carried out by the Contractor by the date of termination of the contract.
- 38.5** The Employer may employ and pay other persons to carry out and complete the Works and to rectify any defects and he or they may enter upon the Works and use all temporary buildings,

equipment, goods and materials intended for, delivered to and placed on or adjacent to the Works, and may purchase all materials and goods necessary for the carrying out and completion of the Works.

- 38.6** The Contractor shall, if so required by the Employer, within fourteen days of the date of termination, assign to the Employer without payment the benefit of any agreement for the supply of materials or goods and or for the execution of any work for the purposes of this contract, but on the terms that a supplier or sub-contractor shall be entitled to make any reasonable objection to any further assignment thereof by the Employer. In any case, the Employer may pay any supplier or sub-contractor for any materials or goods delivered or works executed for the purpose of this contract (whether before or after the date of termination) insofar as the cost thereof has not already been paid by the Contractor. The Employer's rights under this sub-clause are in addition to his rights to pay nominated sub-contractors as provided in sub-clause 31.7 of these conditions and payments made under this sub-clause may be deducted from any money due or to become due to the Contractor.
- 38.7** The Contractor shall as and when required in writing by the Architect so to do (but not before) remove from the Works any temporary buildings, equipment, goods and materials belonging to or hired by him. If within thirty days after any such requirement has been made the Contractor has not complied therewith, then the Employer may (but without being responsible for any loss or damage) remove and sell any such property of the Contractor holding the proceeds less all costs incurred to the credit of the Contractor.
- 38.8** The Contractor shall allow or pay to the Employer in the manner hereinafter appearing, the amount of any direct loss and or damage caused to the Employer by the termination. Until after completion of the Works under sub-clause 38.5, the Employer shall not be bound by any provision of this contract to make any further payments to the Contractor, but upon such completion and the verification within a reasonable time of the accounts therefore, the Quantity Surveyor shall assess the amount of expenses properly incurred by the Employer and the amount of any direct loss and or damage caused to the Employer by the termination and, if such amounts when added to the money paid to the Contractor before the date of termination exceed the total amount which would have been payable on due completion in accordance with this contract, the difference shall be a debt payable to the Employer by the Contractor. If the said amounts when added to the money paid to the Contractor be less than the said total amount, the difference shall be a debt payable by the Employer to the Contractor.
- 38.9** The Contractor shall not be relieved of any of his obligations and liabilities in regard to that part of the Works carried out by him.

## **39.0 TERMINATION OF THE CONTRACT BY THE CONTRACTOR**

- 39.1** Without prejudice to any other rights and remedies which the Contractor may possess, if:

**39.1.1** The Contractor does not receive a payment certificate which he applied for in accordance with clause 34.1 of these conditions within fourteen-days of the application and the default continues for sixty days after expiry of the stated period, or

**39.1.2** The Employer does not pay to the Contractor the amount due on any certificate within the period for honouring certificates named in clause 34.5 of these conditions and continues such default for sixty days after expiry of that period, or

**39.1.3** The Employer interferes with or obstructs the issue of any certificate due under this contract, and continues such act for sixty days after a notice of default has been issued by the Contractor, or

**39.1.4** The carrying out of the whole or substantially the whole of the uncompleted Works (other than the execution of work required under sub-clause 41.6 of these conditions) is suspended for a continuous period of sixty days by reason of;

**39.1.4.1** Delay in receiving possession of or access to the site, or

**39.1.4.2** Architect's instructions issued under clauses 22.0, 28.1, or 30.0 of these conditions, or

**39.1.4.3** The Contractor not having received in due time necessary instructions, drawings, details or levels from the Architect for which he specifically applied in writing on a date which having regard to the date for practical completion stated in the appendix to these conditions, or to any extension of time granted under clause 36.0 of these conditions, was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same, or

**39.1.4.4** Delay in appointing a replacement architect, Quantity Surveyor, Engineer, or

**39.1.4.5** Delay on the part of artists, tradesmen or others engaged by the employer in executing works not forming part of this contract, or

**39.1.4.6**

**39.5** After taking into account amounts previously paid under this contract, the Contractor shall be paid by the Employer;

**39.5.1** The total value of work completed at the date of termination.

**39.5.2** The total value of work begun and executed but not completed at the date of termination, the value being assessed in accordance with clause 30.6 of these conditions as if such work were a variation required by the Architect.

**39.5.3** Any sum assessed in respect of direct loss and or expense under clause 37.0 of these conditions (whether assessed before or after the date of termination).

**39.5.4** The cost of materials or goods properly ordered for the Works for which the Contractor shall have paid or for which the Contractor shall be legally bound to pay, and which have been recorded in accordance with sub-clause 39.4.2, and on such payment by the Employer, any materials or goods so paid for shall become the property of the Employer and shall not be removed from the site without the authority of the Employer.

**39.5.5** The reasonable cost of removal under sub-clause 39.4.3

**39.5.6** Any direct loss and or damage caused to the Contractor by the termination.

## **40.0 TERMINATION OF THE CONTRACT BY EITHER PARTY**

- 40.1** If during the progress of the Works the Government and people of the country in which the site is located shall become engaged in war, warlike operations or hostilities or kindred activities which either directly or indirectly involve or would involve either party in loss or expense beyond that provided for in or reasonably contemplated by this contract, then the contract may be terminated by either party giving to the other fourteen days notice by registered post or recorded delivery. Upon termination the Contractor shall be paid by the Employer in respect of the work carried out before such termination in accordance with the provisions of sub-clauses 39.5.1 to 39.5.5 of these conditions.
- 40.2** In the event of the Works or any part thereof or any goods or materials brought on the site for use in the Works being destroyed or damaged by war, warlike operations or hostilities or kindred activities as the case may be, the Contractor shall be under no liability whatsoever to repair, reinstate or make good the destruction or damage so caused and shall be entitled;
- 40.2.1** To be paid the full value of all work carried out before such event and for all materials on the site for use in the works (including the work or materials so damaged or destroyed), and
- 40.2.2** To be paid for any work done and materials or goods supplied in the reinstatement or making good of any destruction or damage so caused upon such terms as may be agreed between the parties, and in default of agreement, upon the basis of prime cost plus a reasonable profit to be assessed by the Quantity Surveyor.
- 40.3** In the case of works of alterations, repairs or extensions, if the Works are damaged by any of the contingencies referred to in clause 15.0 and if it is just and equitable to do so, the contract may within sixty days of the occurrence of such loss or damage be terminated at the option of either party upon giving a fourteen days notice by registered post or recorded delivery. Within fourteen days of receiving such a notice either party may give to the other a written request to concur in the appointment of an Arbitrator under clause 45.0 of these conditions in order that it may be determined whether such termination will be just and equitable. Upon the giving or receiving by the Employer of such a notice of termination or, where a reference to arbitration is made as aforesaid, upon the Arbitrator upholding the notice of termination, the provisions of sub-clause 39.5.1 to 39.5.5 of these conditions shall apply.
- 40.4** If the carrying out of the whole or substantially the whole of the uncompleted Works (other than the execution of work required under sub-clause 41.6 of these conditions) is suspended for a continuous period of sixty days by reason of;
- 40.4.1** Force majeure, or
- 40.4.2** Loss or damage occasioned by any one or more of the contingencies referred to in clauses 13.0 and 14.0 of these conditions (if applicable), or
- 40.4.3** Loss or damage arising from nuclear activity,
- 40.5** Then either party may, upon giving a fourteen days notice by registered post or recorded delivery, terminate the contract, provided that such notice shall not be given unreasonably or vexatiously. Upon such termination, the Contractor shall be paid by the Employer in respect of the work executed before such termination in accordance with the provisions of clause 39.5.1 to 39.5.5.

## **41.0 PRACTICAL COMPLETION AND DEFECTS LIABILITY**

- 41.1** When in the opinion of the Contractor the whole of the Works are practically complete, he shall give a notice in writing to the Architect to that effect. The notice shall be accompanied by an undertaking to complete any outstanding work within a reasonable time or within such time as the Architect may direct.
- 41.2** Within fourteen days of the issue of such notice, the Architect shall inspect the Works and if in his opinion the Works are practically complete, he shall issue the certificate of practical completion, and the defects liability period shall be deemed to commence on the date of issue of the said certificate. If the Works are not practically complete, he shall specify in writing to the Contractor the work which in his opinion requires to be completed before the certificate can be issued.
- 41.3** The Contractor shall retain possession of the site of the Works up to and including the date of issue of the certificate of practical completion and subject to clause 42.0 hereof, the Employer shall not be entitled to take possession of any part or parts of the Works until that date.
- 41.4** Upon the Employer taking possession of the whole or any part of the Works, (hereinafter referred to as the relevant part), the relevant part of the Works taken over shall be at the sole risk of the Employer in every respect as from the date of such taking over.
- 40.3** In the case of works of alterations, repairs or extensions, if the Works are damaged by any of the contingencies referred to in clause 15.0 and if it is just and equitable to do so, the contract may within sixty days of the occurrence of such loss or damage be terminated at the option of either party upon giving a fourteen days notice by registered post or recorded delivery. Within fourteen days of receiving such a notice either party may give to the other a written request to concur in the appointment of an Arbitrator under clause 45.0 of these conditions in order that it may be determined whether such termination will be just and equitable. Upon the giving or receiving by the Employer of such a notice of termination or, where a reference to arbitration is made as aforesaid, upon the Arbitrator upholding the notice of termination, the provisions of sub-clause 39.5.1 to 39.5.5 of these conditions shall apply.
- 40.4** If the carrying out of the whole or substantially the whole of the uncompleted Works (other than the execution of work required under sub-clause 41.6 of these conditions) is suspended for a continuous period of sixty days by reason of;
- 40.4.1** Force majeure, or
- 40.4.2** Loss or damage occasioned by any one or more of the contingencies referred to in clauses 13.0 and 14.0 of these conditions (if applicable), or
- 40.4.3** Loss or damage arising from nuclear activity,
- 40.5** Then either party may, upon giving a fourteen days notice by registered post or recorded delivery, terminate the contract, provided that such notice shall not be given unreasonably or vexatiously. Upon such termination, the Contractor shall be paid by the Employer in respect of the work executed before such termination in accordance with the provisions of clause 39.5.1 to 39.5.5.

## **41.0 PRACTICAL COMPLETION AND DEFECTS LIABILITY**

- 41.1** When in the opinion of the Contractor the whole of the Works are practically complete, he shall give a notice in writing to the Architect to that effect. The notice shall be accompanied by an undertaking to complete any outstanding work within a reasonable time or within such time as the Architect may direct.
- 41.2** Within fourteen days of the issue of such notice, the Architect shall inspect the Works and if in his opinion the Works are practically complete, he shall issue the certificate of practical completion, and the defects liability period shall be deemed to commence on the date of issue of the said certificate. If the Works are not practically complete, he shall specify in writing to the Contractor the work which in his opinion requires to be completed before the certificate can be issued.
- 41.3** The Contractor shall retain possession of the site of the Works up to and including the date of issue of the certificate of practical completion and subject to clause 42.0 hereof, the Employer shall not be entitled to take possession of any part or parts of the Works until that date.
- 41.4** Upon the Employer taking possession of the whole or any part of the Works, (hereinafter referred to as the relevant part), the relevant part of the Works taken over shall be at the sole risk of the Employer in every respect as from the date of such taking over.
- 41.5** Should the employer take over the whole or any part of the Works before the issue of a certificate of practical completion, practical completion shall be deemed to have taken place on the date of taking over of the whole or any part of the Works.
- 41.6** Any defects, shrinkages or other faults which shall appear within the defects liability period stated in the appendix to these conditions and which are due to materials or workmanship not being in accordance with the contract shall be specified by the architect in a schedule of defects which he shall deliver to the Contractor not later than thirty days after the expiry of the said defects liability period. Within a reasonable time after receipt of such schedule, the defects, shrinkages and other faults therein specified shall be rectified by the contractor and (unless the Architect shall otherwise instruct,) entirely at his own cost.
- 42.3** For the purposes of sub clauses 41.2, 41.6 and 41.7 of these conditions, practical completion of the relevant part shall be deemed to have occurred and the defects liability period in respect of the relevant part shall be deemed to have commenced on the date on which the Employer shall have taken possession thereof.
- 42.4** When in the opinion of the Architect any defects, shrinkages or other faults in the relevant part which he may have required to be rectified under sub-clause 41.6 and 41.7 of these conditions shall have been rectified he shall issue a certificate to that effect.
- 42.5** The Contractor shall reduce the value insured under sub-clause 13.1 of these conditions (if applicable) by the full value of the relevant part, and the said relevant part shall as from the date on which the Employer shall have taken possession thereof, be at the sole risk of the Employer as regards any of the contingencies referred to in the said sub-clause.
- 42.6** In lieu of any sum to be paid or allowed by the Contractor under clause 43.0 of these conditions in respect of any period during which the Works may remain incomplete occurring after the date on which the Employer shall have taken possession of the relevant part, there shall be paid or allowed such sum as bears the same ratio to the sum which would be paid or allowed apart from the provisions of this condition, as does the contract price less the total value of the said relevant part to the contract price.

42.7 Within thirty days of the date on which the Employer shall have taken possession of the relevant part, there shall be paid to the Contractor from the sums then retained under clause 34.0 of these conditions (if any), one half of such amount as bears the same ratio of the unreduced amount named in the appendix to these conditions as limit of retention fund as does the total value of the said relevant part to the contract price, and the amount named in the appendix to these conditions as limit of retention fund shall be reduced by the amount so paid to the Contractor.

42.8 On the expiration of the defects liability period named in the appendix to these conditions in respect of the relevant part, or on the issue of the certificate of completion of rectification of defects in respect of the relevant part, whichever is the later, there shall be paid to the Contractor from the sums then retained under sub-clause 34.12 of these conditions (if any), the balance of the amount referred to in sub-clause 42.7 and the amount named in the appendix to these conditions as limit of retention fund shall be reduced by the amount of such payment.

### **43.0 DAMAGES FOR DELAY IN COMPLETION**

43.1 If the Contractor fails to complete the Works by the date for practical completion stated in the appendix to these conditions, or within any extended time fixed under clause 36.0 of these conditions, and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the said appendix as liquidated damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any money due or to become due to the Contractor under the contract or recover the same from the Contractor as a debt.

43.2 The payment or deduction of such damages shall not relieve the Contractor from his obligations to complete the Works or any part thereof or from any other obligations and liabilities under the contract.

### **44.0 ANTIQUITIES AND OTHER OBJECTS OF VALUE**

44.1 All fossils, antiquities and other objects of interest or value which may be found on the site or in excavating the same during the progress of the work, shall become the property of the Employer. The Contractor shall carefully take out and preserve all such objects and shall immediately or as soon as convenient after the discovery of such articles, deliver the same into the possession of the Architect or of the Clerk of Works uncleaned and as excavated.

44.2 If in the opinion of the Architect, compliance with the provisions of the preceding sub-clause has involved the Contractor in direct loss and or expense for which he would not be reimbursed by a payment made under any other provision in this contract, then the Quantity Surveyor shall assess the amount of such loss and or expense. Any amount from time to time so assessed shall be added to the contract price, and if an interim certificate is issued after the date of assessment, any such amount shall be added to the amount which would otherwise be stated as due in such a certificate.

### **45.0 SETTLEMENT OF DISPUTES**

45.1 In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the

Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of The Architectural Association of Kenya or by the Chairman or Vice Chairman of The Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party.

- 45.2** The arbitration may be on the construction of this contract or on any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this contract to the discretion of the Architect, or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation referred to in clause 34.0 of these conditions, or the rights and liabilities of the parties subsequent to the termination of contract.
- 45.3** Provided that no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute.
- 45.4** Notwithstanding the issue of a notice as stated above, the arbitration of such a dispute or difference shall not commence unless an attempt has in the first instance been made by the parties to settle such dispute or difference amicably with or without the assistance of third parties.
- 45.5** In any event, no arbitration shall commence earlier than ninety days after the service of the notice of a dispute or difference.
- 45.6** Notwithstanding anything stated herein the following matters may be referred to arbitration before the practical completion of the Works or abandonment of the Works or termination of the contract by either party:
- 45.6.1** The appointment of a replacement Architect, Quantity Surveyor or Engineer upon the said persons ceasing to act.
- 45.6.2** Whether or not the issue of an instruction by the Architect is empowered by these conditions.
- 45.6.3** Whether or not a certificate has been improperly withheld or is not in accordance with these conditions.
- 45.6.4** Any dispute or difference arising in respect of war risks or war damage.
- 45.7** All other matters in dispute shall only be referred to arbitration after the practical completion or alleged practical completion of the Works, or abandonment of the Works, or termination or alleged termination of the contract, unless the Employer and the Contractor agree otherwise in writing.
- 45.8** The Arbitrator shall, without prejudice to the generality of his powers, have powers to direct such measurements, computations, tests or valuations as may in his opinion be desirable in order to determine the rights of the parties and assess and award any sums which ought to have been the subject of or included in any certificate.
- 45.9** The Arbitrator shall, without prejudice to the generality of his powers, have powers to open up,

review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.

**45.10** The award of such Arbitrator shall be final and binding upon the parties.

## **APPENDIX**

## **Clause**

Percentage to cover professional fees for insurance purposes only

Name of Contractor's surety

Amount of surety

Name of Employer's surety

Amount of surety

Period for submission of programme

Period for possession of site

Contract period

**Date** for commencement of Works

Date for practical completion

Name of the bank for purposes of interest calculation.

Interval for application of payment certificates

Minimum amount of payment certificate

**Percentage** of certified value retained

Limit of retention fund

Periods for release of interest on retention money to Contractor

Period of final measurement and valuation

Defects liability period

Damages for delay in completion  
Signed by the said:

43.1 at the rate of Kshs.

EMPLOYER

CONTRACTOR

**CONTRACTOR'S PERFORMANCE BOND**

BY THIS AGREEMENT, we.....(SURETY)  
of.....  
.....

are bound to .....(EMPLOYER)

in the sum of Kenya Shillings .....

.....(Ksh.....)

to be paid by us to the said.....(EMPLOYER)

WHEREAS by an agreement in writing dated .....

.....(CONTRACTOR)

entered into contract with.....(EMPLOYER)

to carry out and complete the works therein stated in the manner and by the time therein specified all  
in accordance with the provisions of the said contract, namely; (description of Works)

NOW the condition of the above written bond is such that if the said Contractor his executors,  
administrators, successors or assigns shall duly perform his obligations under the contract, or  
if on default by the Contractor the Surety shall satisfy and discharge the damages sustained by  
the Employer thereby up to the amount of the above written bond, then this bond shall be  
void, otherwise it shall remain in full force and effect. Upon default, and without prejudice to  
his other rights under the contract, the Employer shall be entitled to demand forfeiture of the  
bond and we undertake to honour the demand in the amount stated above.

PROVIDED always and it is hereby agreed and declared that no alteration in the terms of the said  
contract or in the extent or nature of the works to be carried out and no extension of time by  
the Architect under the contract shall in any way release the Surety from any liability under  
the above written bond.

IN WITNESS whereof we have set our hands this .....day of

Surety Witness

Authorised-by Power of Attorney No...

**EMPLOYER'S PAYMENT BOND**

BY THIS AGREEMENT, we..... (SURETY)  
of.....  
.....  
are bound to..... (CONTRACTOR)  
in the sum of Kenya Shillings.....  
..... (Ksh.....)  
to be paid by us to be said..... (CONTRACTOR)  
WHEREAS by an agreement in writing dated.....  
..... (CONTRACTOR)  
entered into contract with..... (EMPLOYER)

to carry out and complete the works therein stated in the manner and by the time therein specified all in accordance with the provisions of the said contract, namely; (description of Works).

NOW the condition of the above written bond is such that if the said Employer his executors, administrators, successors or assigns shall duly perform his payment obligations under the contract then this bond shall be void, otherwise it shall remain in full force and effect. That is to say, should the Contractor terminate the contract under clause 39.1.1., 39.1.2 or 39.1.3 of the contract or should the final certificate remain unpaid beyond the period stated in clause 34.21.3, then without prejudice to his other rights under the contract, the Contractor shall be entitled to demand forfeiture of the bond and we undertake to honour the demand in the amount stated above.

PROVIDED always and it is hereby agreed and declared that no alteration in the terms of the said contract or in the extent or nature of the works to be carried out and no extension of time by the Architect under the contract shall in any way release the Surety from any liability under the above written bond.

IN WITNESS whereof we have set our hands this .....day of

Surety Witness

Authorized by Power of Attorney No...