

## **Part IV – Conditions of Contract**

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## Part IV – Conditions of Contract

### 1 Interpretation

1.1 In this Contract, unless the context otherwise requires, the following expressions have the following meanings:

“Acceptance Certificate” in relation to a Vessel, a certificate noting the acceptance of the Vessel on the terms set out therein issued by the Government pursuant to any applicable provision of these Conditions of Contract.

“Contract” means the contract between the Government and the Contractor comprising the following documents:

- (a) the “Articles of Agreement” (or “Part III”);
- (b) these “Conditions of Contract” (or “Part IV”) and the Annexes hereto;
- (c) the “Schedules” (or “Part V”) including those which were submitted by the Contractor as part of its tender for the Contract, and accepted by the Government, subject to such further changes as the Government may stipulate in exercise of its powers under the Conditions of Tender, and/or otherwise subject to such further changes as the Government and the Contractor may agree;
- (d) the “Technical Specifications” (or “Part VII”) and the Annexes thereto; and
- (e) all other schedules, plans, drawings and other documents which form part of the Contractor’s tender or are incorporated by reference herein or in any of the above documents.

(Copy of each of the above, except those which are incorporated by reference as mentioned in (e) above, is annexed to the executed copy of the Articles of Agreement for identification purposes, and each of the above documents shall be referred to in the Contract by the above alternative terms appearing in quotation marks.)

References to “the Contract” or “this Contract” refer to the one and the same Contract as defined above.

“Contract Date” means the date of the Contract appearing at the top of the Articles of Agreement.

“Contract Deposit” means the contract deposit referred to in Clause 22 of the Conditions of Tender and Clause 28 of the Conditions of Contract to be submitted by the Contractor as one of the conditions precedent to the award of the Contract.

“Contract Period” means the period commencing from the Contract Date and ending on the last day of the Warranty Period (or the last Warranty Period if there is more than one Warranty Period), unless earlier terminated or extended.

“Contract Speed”	means the minimum highest achievable speed of the Vessel prescribed in the Technical Specifications.
“Contractor”	means the person identified as such in the Articles of Agreement.
“Contractor Personnel”	means the persons nominated in Schedule 8 (as the same may from time to time be replaced) and all other employees, Sub-contractors (of whatever tier) and agents employed or appointed by the Contractor for the Contract from time to time and those employees and agents of such Sub-contractors (of whatever tier).
“Contractor Representative”	means any person duly authorised by the Contractor to act as its representative for and on its behalf.
“Deliverables”	means all tangible and intangible subject matters designed or produced or developed or provided by the Contractor pursuant to or for the purpose of the Contract separate from the Vessel including without limitation the Documentation, all Spare Parts, compilations of data and information, reports, plans, drawings, designs, models, photographs and all other materials which have to be finalised by the Contractor and approved by the Government in the design stage of the Vessel and those as required in the Technical Specifications which have to be delivered prior to, in preparation for, or upon, the Delivery Acceptance.
“Delivery Acceptance”	means the second part of the acceptance procedures for the Vessel and where applicable the Spare Parts and other Deliverables to be conducted in accordance with all applicable terms of the Contract including in particular the Technical Specifications.
“Delivery Date”	means in relation to a Vessel or Spare Parts or Deliverables as specified in Schedule 2, the deadline date as specified therein for delivery of such Vessel or Spare Parts or Deliverables to the Government Dockyard in Ready to Use condition.
“Delivery Location”	has the meaning given to it in Clause 13.2 of the Conditions of Contract.
“desirable specifications” (upper or lower case)	means those specifications in Part VII of the Tender Documents which are labelled [D];
“Director”	means the Director of Marine.
“Documentation”	means operating manuals, user instructions, technical literature, system specifications and all other related materials in respect of the Vessel and all the Equipment which are required to be produced, developed, provided or up-dated by the Contractor in accordance with the Contract or which the Contractor has committed to provide in the Schedules.
“Electronic Navigational Equipment” or “ENE”	means those Equipment as more particularly specified in Chapter 8 of the Technical Specifications.
“EMSD”	means the Electrical and Mechanical Services Department which will supervise the Contractor in its supply, installation and provision of Warranty Services in respect of the communication equipment and ENE.

“Equipment”	means all equipment, machinery, furniture and fittings required to be supplied under the terms of the Contract or which the Contractor has committed to provide in the Schedules including Schedule 6, including all outboard and onboard equipment, the engines, all ENE, all equipment for testing and maintenance to be procured by the Government, and all other items as listed in the Inventory List approved by the Government in preparation for the Delivery Acceptance.
“Glass Reinforced Plastic” (GRP)	means heterogeneous materials, consisting of a thermosetting resin as the matrix and an embedded reinforced materials.
“GNC”	means the Government New Construction Section, a unit within the MD.
“Government”	means the Hong Kong Government.
“Government Data”	means all data, documents, information, text, drawings, diagrams, images or sound stored, presented or embodied in any electronic or tangible medium, and which are supplied or in respect of which access is granted to the Contractor by the Government for the purposes of or in relation to the Contract.
“Government Dockyard”	means the dockyard located at Ngong Shung Road, Stonecutters Island, Sham Shui Po, Kowloon, Hong Kong.
“Government Recognised Servicing Shipyard (GRSS)”	means a servicing shipyard on the List of Government Dockyard Contractors – Item III - Hull, Deck & Tailshaft Group II as specified in Annex 7 to the Technical Specifications.
“Government Representative”	means the Director of Marine or any officer authorised to act on his behalf for the purposes of the Contract.
“Guarantee Slipping”	means all work as specified in Paragraph 2 of Annex 1 to the Technical Specifications.
“Hong Kong” or “HKSAR”	means the Hong Kong Special Administrative Region of the People’s Republic of China.
“Hong Kong Waters”	means all waters, whether navigable or not, included in the Hong Kong Special Administrative Region.
“Implementation Timetable” or “Implementation Plan”	means the time schedule and sequence of events for the performance of this Contract as specified in the Contract including the dates which are set out in Schedule 2 of Part V, and Annex 2 to the Technical Specifications and subject always to the foregoing, further elaborated and finalised by the Contractor and approved by the Government pursuant to the provisions of the Contract.
“Intellectual Property Rights”	means patents, trade marks, service marks, trade names, design rights, copyright, domain names, database rights, rights in know-how, new inventions, designs or processes and other intellectual property rights whether now known or created in future (of whatever nature and wherever arising) and in each case whether registered or unregistered and including applications for the grant of any such rights.

“Inventory List”	means the inventory list to be prepared by the Contractor and approved by the Government in preparation for the Delivery Acceptance which shall itemise all items of Equipment and Deliverables required to be delivered to the Government under the Contract upon the Delivery Date (including those to be installed on the Vessel).
“Length Overall” (“LOA”)	means the distance between the foreside of the foremost fixed permanent structure and the aft side of the aftermost fixed permanent structure of the Vessel.
“Licences”	has the meaning given to it in Clause 2.8 of the Conditions of Contract.
“Maximum Continuous Rating” or “MCR”	means the maximum power output the propulsion engine can produce while running continuously within safe limits and conditions as specified in the Technical Specifications.
“MD”	means the Marine Department.
“Official Sea Trial”	means the sea trial of the Vessel known as such to be conducted and passed as part of the Technical Acceptance including the tests and trials specified in Paragraph 1.7 of Chapter 1 of the Technical Specifications and Annex 5 of the Technical Specifications. The Official Sea Trial is to be carried out in Hong Kong.
“Product Warranties”	means all Warranties concerning the Vessel, the Equipment and the Deliverables including without limitation those specified in Clauses 19.1.10 to 19.1.19 of Conditions of Contract.
“Proprietary Made”	means in relation to a piece of Equipment, it is not manufactured by the manufacturer of the Vessel itself, but is one that is manufactured by a third party manufacturer whose business is manufacture of such Equipment.
“Punchlist Items”	means defects or outstanding Work not affecting the operation or diminish the safety standard, which MD, in its discretion, is willing to leave temporarily unrectified for the purpose of undergoing technical acceptance tests and trials commenced or, as the case may be, allowing a Delivery Acceptance of the Vessel.
“Ready for Use” or “Ready to Use”	means in case of the Vessel, or any Equipment or any Deliverable, that the same having been fully designed, properly constructed or installed or supplied in full accordance with all terms and conditions of the Contract including without limitation the Warranties, the Technical Specifications and the Schedules, and in the case of Equipment, having been fully installed on the Vessel, and in all cases, having successfully passed all tests and trials under the Technical Acceptance (including the Official Sea Trial) in accordance with all provisions of the Contract and with results accepted by the Government in writing.

“Recognised Organisations” or “RO”	<p>means any one of the following Classification Societies and as specified in Schedule 9 (or a different Classification Society from the one specified in Schedule 9 where it is expressly permitted that in relation to a particular requirement in Part VII that such different Classification Society as listed below may be designated):</p> <table><tr><td>American Bureau of Shipping</td><td>ABS</td></tr><tr><td>Bureau Veritas</td><td>BV</td></tr><tr><td>China Classification Society</td><td>CCS</td></tr><tr><td>Det Norske Veritas Germanischer Lloyd</td><td>DNVGL</td></tr><tr><td>Korean Register of Shipping</td><td>KR</td></tr><tr><td>Lloyd's Register of Shipping</td><td>LR</td></tr><tr><td>Nippon Kaiji Kyokai</td><td>NK</td></tr><tr><td>Registro Italiano Navale</td><td>RINA</td></tr><tr><td>Russian Maritime Register of Shipping</td><td>RS</td></tr></table>	American Bureau of Shipping	ABS	Bureau Veritas	BV	China Classification Society	CCS	Det Norske Veritas Germanischer Lloyd	DNVGL	Korean Register of Shipping	KR	Lloyd's Register of Shipping	LR	Nippon Kaiji Kyokai	NK	Registro Italiano Navale	RINA	Russian Maritime Register of Shipping	RS
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Korean Register of Shipping	KR																		
Lloyd's Register of Shipping	LR																		
Nippon Kaiji Kyokai	NK																		
Registro Italiano Navale	RINA																		
Russian Maritime Register of Shipping	RS																		
“Spare Parts”	<p>means the parts specified as such in Part 2 of Schedule 1 which the Government procures from the Contractor separate from the Vessel.</p>																		
“Stage” or “Milestone”	<p>means a milestone or a stage in the Implementation Plan.</p>																		
“Sub-contractor” or “sub-contractor”	<p>means a sub-contractor whose details are set out in Schedule 8 or such other sub-contractor from time to time appointed by the Contractor with the prior written approval of the Government pursuant to Clause 36 of the Conditions of Contract.</p>																		
“Tender Documents”	<p>means the documents issued by the Government in connection with this Invitation to Tender which comprises the following:</p> <p>Part I- Lodging of Tender; Part II- Conditions of Tender and Annexes A to C; Part III- Articles of Agreement; Part IV- Conditions of Contract and Annexes A to C; Part V- Schedules 1 to 9; Part VI- Offer to be Bound; and Part VII- Technical Specifications and Annexes 1 to 9</p> <p>together with all the respective annexes, attachments, appendices, schedules and annexures to any of the above specified documents (if any). Unless otherwise defined, each of the above documents constituting the Tender Documents or the Contract (as the case may be) shall be referred to by their names and/or the relevant Part number of the Tender Documents as specified above.</p>																		
“Technical Acceptance”	<p>means the first part of the acceptance procedures for the Vessel, and where applicable the Spare Parts, to be conducted in accordance with all applicable provisions of the Contract and to comprise all tests trials and experiment as stated in the Technical Specifications (unless otherwise stated expressly to be conducted at some other time).</p>																		
“Technical Specifications”	<p>means all requirements and specifications set out in the Part VII including all Annexes thereto regardless of whether they are labelled [E] or not and including desirable specifications which the Contractor has committed to comply with in Schedule 5. The expression “requirements of the Technical Specifications” or other similar expression shall have the same meaning.</p>																		

“Total Purchase Price”	means the amount specified as such in Schedule 1.
“Training Plan”	means the training plan to be submitted by the Contractor and approved by the Government setting out the training to be conducted by the Contractor in compliance with the requirements of the Contract.
“user department”	means the Government department which will use the Vessel for its operation.
“Vessel”	means the Vessel in the total quantity as specified in Schedule 1 to be designed and constructed by the Contractor in accordance with the Contract; where more than one Vessel is required as specified in Schedule 1, references to “the Vessel” shall mean each such Vessel; references to “a Vessel” shall mean any such Vessel; references to “Vessel” shall include all Equipment to be supplied and installed on such Vessel in accordance with the requirements of the Contract regardless of whether the expression “Equipment” is also mentioned separately.
“Vessel Unit Price”	means the unit price as specified in Part 1 of Schedule 1.
“Warranty Period”	means in respect of each Warranty Item, the period of 12 months commencing from the date of the Acceptance Certificate covering that Warranty Item, as the same may be extended in accordance with Annex 1 to the Technical Specifications.
“Warranty Items”	has the meaning given to the term in Annex 1 to the Technical Specifications.
“Warranty Services”	means the Warranty Services to be provided by the Contractor in respect of each Warranty Item as specified in the Contract including without limitation Annex 1 to the Technical Specifications.
“Warranty Spare Parts”	means spare parts (excluding the items listed in Part 2 of Schedule 1) to be supplied by the Contractor as part of the Warranty Services or otherwise under its obligations as specified in the Technical Specifications.
“Warranties”	has the meaning given to it in Clause 19.2 of the Conditions of Contract.
“Work” or “Services”	means all work to be performed by the Contractor including (a) all those work to ensure that the Vessel, the Equipment and the Deliverables to be delivered to the Government comply with the Technical Specifications, and pass the Technical Acceptance and Delivery Acceptance; (b) the Warranty Services; and (c) the Guarantee Slipping.
“working day”	means Monday to Friday other than a public holiday (as defined in the Interpretation and General Clauses Ordinance (Cap. 1 of the Laws of Hong Kong)) or a day on which Tropical Cyclone Warning Signal No. 8 or above is hoisted or a Black Rainstorm Warning Signal is in force for any time during 9:00 to 17:00 in Hong Kong.



- 1.2 In the Contract, unless the context otherwise requires, the following rules of interpretation shall apply:
- 1.2.1 references to any statute, enactment, order, regulation or other similar instrument shall be construed as references to such statute, enactment, order, regulation or instrument as it may from time to time amended, modified, extended, re-enacted or replaced (whether before or after the date of the Contract) and including all subsidiary legislation from time to time made under it;
  - 1.2.2 words importing the singular shall include the plural and vice versa; words importing a gender shall include every gender; references to any person shall include references to individual, firm, public body, body, corporate or unincorporate (wherever established or incorporated);
  - 1.2.3 section or clause headings are inserted for convenience of reference only and shall not in any way affect, vary, limit or extend the interpretation and construction of the Tender Documents and the Contract;
  - 1.2.4 a term defined in any one of the documents comprising the Contract shall have the same meaning throughout the Contract;
  - 1.2.5 references to time and dates shall be construed as Hong Kong time and dates;
  - 1.2.6 reference to a month or a monthly period refers to a calendar month;
  - 1.2.7 unless otherwise expressly specified, any word or expression to which a specific meaning has been attached in any part of any of the Tender Documents or the Contract shall bear such meaning whenever it may appear in the same or other parts of the Tender Documents or the Contract;
  - 1.2.8 unless other provided, all offers and payments shall be made in Hong Kong dollars,
  - 1.2.9 the expression “Cap.” means a Chapter of the Laws of Hong Kong;
  - 1.2.10 references to “associate” of a person shall mean:
    - (a) a relative or partner of that person; or
    - (b) a company one or more of whose directors is in common with one or more of the directors of that person;
  - 1.2.11 for the purposes of Clause 1.2.10 :
    - (a) “relative” shall mean the spouse, parent, child, brother or sister of the relevant person, and, in deducing such a relationship, an adopted child shall be deemed to be a child both of the natural parent and the adopting parent and a step child to be a child of both the natural parent and the step parent; and
    - (b) “director” shall mean any person occupying the position of a director by whatever name called and includes, without limitation, a de facto or shadow director.
  - 1.2.12 references to “associated person” of a person shall mean:
    - (a) any person who has control, directly or indirectly, over that person; or
    - (b) any person who is controlled, directly or indirectly, by that person; or
    - (c) any person who is controlled by, or has control over, the first-mentioned person in Clause 1.2.12 (a) or (b);
  - 1.2.13 for the purposes of Clause 1.2.12 , a person having “control” over another person shall mean the power of that person to secure:
    - (a) by means of the holding of shares or interests or the possession of voting power in or in relation to the second-mentioned person or any other person; or
    - (b) by virtue of powers conferred by any constitution, memorandum or articles of association, partnership, agreement or arrangement (whether legally enforceable or not) affecting that second-mentioned person or any other person; or
    - (c) by virtue of holding office as director in that second-mentioned person or any other person;that the affairs of that second-mentioned person are conducted in accordance with the wishes of the first-mentioned person; for the avoidance of doubt, without prejudice to the

- generality of the foregoing, the holding of 30% or more of shares or interests or voting power shall be deemed to be sufficient control to ensure such happening;
- 1.2.14 references to “Tenderer” or “Contractor” shall include its respective permitted assigns, successors-in-title or any persons deriving title under it; references to “Government” shall include its assigns, successors-in-title, and persons deriving title under it, regardless of whether or not any of these persons are mentioned separately in the relevant provisions;
- 1.2.15 references to Clauses, Sections, Paragraphs, Chapters, Appendices and Annexes in a document comprising the Contract shall, unless otherwise specified, mean the clauses, sections, paragraphs, chapters of, and appendices and annexes to, that document; references to Schedules or Contract Schedules shall regardless of where the term appears means the Schedules appearing in Part V;
- 1.2.16 references to “laws and regulations” or “law” shall include any constitutional provisions, treaties, conventions, ordinances, subsidiary legislation, orders, rules and regulations having the force of law and rules of civil and common law and equity;
- 1.2.17 unless otherwise expressly stated, there is no difference in the intended meaning of the terms “provided by” and “supplied by”; and references to “requirements” include “specifications” and vice versa and regardless of whether or not both terms are mentioned together;
- 1.2.18 references to “including” shall mean including on a without limitation basis regardless of whether it is expressly so provided;
- 1.2.19 any approval or consent or agreement of the Government or the Government Representative required under the Contract shall be evidenced in writing unless otherwise waived by the Government in writing; and no such approval or consent or agreement shall relieve the Contractor from its obligation to exercise all necessary skill, care and diligence in the performance of the Work; and
- 1.2.20 references to something done by the Contractor include something done by any of the Contractor Personnel or any other person for or on behalf of the Contractor.
- 1.3 All rights and powers of the Government under the Contract may be exercised by the Government Representative acting on behalf of the Government. The Government may change the Government Representative and/or his post title from time to time as it thinks fit without prior notice to the Contractor.

## **2 PRODUCTS AND WORK TO BE PROVIDED**

- 2.1 The Contractor hereby agrees to perform the Work including without limitation the following in full accordance with the requirements and specifications set out in the Contract, and in accordance with the Implementation Timetable:
- 2.1.1 design, construct, assemble and supply the Vessel (including the Equipment) in accordance with the Contract including in particular the Technical Specifications;
- 2.1.2 supply the Deliverables to the Government;
- 2.1.3 render the Vessel and the Deliverables Ready for Use in accordance with the Implementation Timetable;
- 2.1.4 deliver the Vessel and the Deliverables to the Government Dockyard in accordance with the Implementation Timetable;
- 2.1.5 provide training to the Government in accordance with the Training Plan;
- 2.1.6 provide the Warranty Services and Guarantee Slipping; and
- 2.1.7 provide other Work hereinafter described on the terms and conditions hereinafter contained.
- 2.2 The Contractor shall comply with all instructions, orders or directions that may from time to time be given by the Government Representative.
- 2.3 Without prejudice to the generality of Clause 2.1 above:
- 2.3.1 the Vessel shall be constructed of such materials as specified in the Technical Specifications or in the absence of any such specifications, as may be approved by the Director.

- 2.3.2 the Vessel shall be fitted with such Equipment as specified in the Technical Specifications.
- 2.3.3 the standard of workmanship employed in the construction of the Vessel shall be such as may be expected from a professional ship builder.
- 2.4 Notwithstanding the earlier submission as part of its tender, all plans, drawings and particulars relating to the construction of each part of the Vessel shall be submitted to the Director for examination and shall be approved by the Director or an authorised officer before the Contractor commences work on the construction of that part of the Vessel to which the plans, drawings or particulars are related.
- 2.5 The Vessel shall be constructed in accordance with such plans, drawings and particulars as shall be approved by the Director or an authorised officer under Clause 2.4.
- 2.6 The Contractor shall be responsible for any discrepancies, errors, or omissions in the plans, drawings and particulars supplied by him, whether they have been approved by the Director or any authorised officer or not.
- 2.7 Without prejudice to other rights and claims of the Government, the Contractor shall at its own cost and expense carry out any alterations or remedial work necessitated by reason of the discrepancies, errors, or omissions mentioned in Clause 2.6 and modify the plans, drawings and particulars accordingly, or if the same be done by or on behalf of the Government, the Contractor shall reimburse the Government all costs and expenses incurred by the Government.
- 2.8 Regardless of whether or not the Intellectual Property Rights in the Deliverables belong to the Contractor, the Contractor hereby grants, and procures at its own cost and expense that the relevant Intellectual Property Rights owner shall grant in favour of the Government, its successors-in-title, assigns and authorised users a world-wide, perpetual, royalty free, non-exclusive, sub-licensable, transferable and irrevocable licence to use, reproduce, modify, edit, merge, make derivative works, translate, enhance all and any of the Deliverables (“**Licence**”). All Intellectual Property Rights of whatever nature in such modification, editing, merging, derivative works, translation and enhancement shall belong to and shall be and remain vested in the Government, assigns or successors-in-title (as the case may be) absolutely as soon as they are created. For the avoidance of doubt, any such Licence granted shall not be terminated notwithstanding any early termination or expiry of the Contract. The Licence (regardless of the identity of the licensor) shall take effect from the date of delivery of the Deliverables to the Government.
- 2.9 The Contractor shall irrevocably waive, and undertake to procure at its own cost and expense all relevant authors to irrevocably waive all moral rights (whether past, present or future) in the Deliverables. The waiver shall operate in favour of the Government, its assigns, authorised users and successors-in-title and shall take effect from the Contract Date.
- 2.10 Throughout these Technical Specifications, the Schedules and other parts of the Tender Documents, there are specifications and instructions to the Tenderer on what it shall propose in its proposal. To the extent the Contractor has submitted a proposal in relation to any matter which complies fully with all applicable specifications and instructions, the Contractor shall carry out such proposal in the provision of the Work. If the Contractor, notwithstanding having been awarded the Contract, has not submitted a proposal in relation to any matter which fully complies with the relevant specifications and instructions, or has not submitted a proposal at all, or it is otherwise unclear to the Government whether or not the proposal is compliant with such specifications or instructions, the Contractor shall upon the request of the Government, and at no additional charge to the Government, submit to the Government for approval such replacement proposal during the Vessel design stage under the Implementation Plan, or otherwise at such other time as elsewhere required in the Contract if the non-compliant/missing/unclear proposal relates to the Vessel; or prior to the commencement of the Warranty Services before the Warranty Period, or at such other time as elsewhere required in the Contract, as the case may be, for any proposal relating to such Work, as the case may be. All submitted replacement proposals as approved by the Government shall form part of the Contract and replace the original non-compliant or unclear proposals and shall be carried out by the Contractor at no further charge to the Government. For the avoidance of doubt, this provision is without prejudice to the rights and powers of the Government to disqualify a Tenderer for failing to submit all or any of the proposals required in the Tender Documents issued by the Government inviting tenders for the Contract.

- 2.11 Notwithstanding the expiry or early termination of the Contract Period, the Contractor's obligations to provide Warranty Spare Parts to the Government upon demand of the Government in accordance with the applicable provisions of the Contract shall continue to subsist.

### **3 CONTRACTOR'S ACKNOWLEDGEMENT**

- 3.1 The Contractor acknowledges and agrees that it has been supplied with sufficient information to enable it to perform the Work in accordance with, and to ensure that the Vessel, all Equipment and all Deliverables comply fully with all requirements and specifications of the Technical Specifications and other provisions of this Contract. The Contractor shall not be entitled to any additional payment nor be relieved from performing any obligation or excused from any liability under this Contract as a consequence of any misinterpretation by the Contractor of any matter or fact relating to the Technical Specifications or any other provisions of this Contract.
- 3.2 Notwithstanding anything in the Contract to the contrary, and regardless of whether the Contractor appoints any sub-contractor for performing any of the Work, it is hereby agreed that the Contractor is the primary obligor responsible for performing the Work including the design and construction of the Vessel and that the Government relies on the professional skill, care and judgment of the Contractor in respect of the same. Without prejudice to the generality of the foregoing, the Government relies on the professional judgment and expertise of the Contractor to ensure that the Vessel is fit for the purposes for which it is intended as specified in the Technical Specifications.

### **4 CONDUCT OF THE WORK**

- 4.1 The Contractor shall in accordance with the time schedule stipulated in the Contract carry out the Work in a timely and professional manner with all due and reasonable diligence and dispatch and shall conform to the standards generally observed in the industry for similar services.
- 4.2 The Contractor shall, through the Government Representative, keep the Government informed of all matters related to the Work within the actual or constructive knowledge of the Contractor and shall answer all enquiries received from the Government Representative. Without prejudice to the generality of the foregoing, the Contractor is obliged to update the Government on the latest development and information to the best of its knowledge relevant to the implementation and performance of the Vessel.
- 4.3 The Contractor shall attend all meetings convened by the Government Representative to which it may be summoned and shall advise and assist the Government on all matters relating to the Work.
- 4.4 The Director or any authorised officer may at any time during the construction of the Vessel:
- 4.4.1 examine and check the Vessel or any part thereof;
  - 4.4.2 examine and check any materials used, or intended to be used, in the construction of the Vessel; and
  - 4.4.3 examine and check any Equipment fitted, or intended to be fitted, in the Vessel.
- regardless of where the Vessel or any part thereof or any such materials or equipment may be situated, stored or placed at any time.
- 4.5 All Government Data, equipment and all other materials (tangible or intangible) supplied to the Contractor by the Government for the purpose of this Contract shall remain the property of the Government and shall be returned in good and functional conditions upon the Delivery Acceptance or such later time as the Government may agree. Should any such property be lost or damaged from any cause whatsoever while in the possession or control of the Contractor or his employees, sub-contractors or agents, the Contractor shall compensate the Government an amount equal to replacement cost of property (in the case of loss or damage beyond repair) or repair cost of the property (in the case repair is considered appropriate by the Government) plus an amount to cover all administrative and legal costs and expenses incurred by the Government for arranging the replacement or repair. A count of the articles or material in the possession of the Contractor may be made at any time by the Government Representative and the Contractor shall render such assistance as is necessary for this purpose.

## **5 REJECTION OF MATERIALS AND EQUIPMENT**

- 5.1 In addition to Clause 12, the Director may at any time during the construction of a Vessel, reject that Vessel or any part thereof or any material used, or intended to be used, in the construction of that Vessel or any Equipment fitted, or intended to be fitted, in that Vessel if he has reasonable grounds for believing:
- 5.1.1 that Vessel or any part thereof has not been constructed in accordance with plans, drawings or particulars approved by the Director or an authorised officer under Clause 2.4; or
  - 5.1.2 that any material used, or intended to be used, in the construction of that Vessel is not in accordance with the Technical Specifications or otherwise not having been approved by the Director or are defective; or
  - 5.1.3 that any Equipment fitted, or intended to be fitted, in that Vessel is not in accordance with the Technical Specifications or otherwise not having been approved by the Director or is defective; or
  - 5.1.4 that the standard of workmanship employed in the construction of that Vessel does not meet the Director's requirements.
- 5.2 The Director shall, by notice in writing served on the Contractor, state:
- 5.2.1 the reasons for his rejection under Clause 5.1 above of that Vessel or any part thereof or any of its materials or Equipment; and
  - 5.2.2 the action which he shall require the Contractor to take in order to remedy the specified defect or fault in the construction of that Vessel.
- 5.3 On receipt of a notice under Clause 5.2 above, the Contractor shall take such action as may be required by the Director in the notice.
- 5.4 The Government shall not be responsible or liable for any expense incurred by the Contractor in taking such action as may be required in any such notice.

## **6 TITLE AND RISKS**

- 6.1 Upon the issue of Acceptance Certificate under Clause 12 in respect of a Vessel, all title, beneficial ownership, interest, to, in and of the following shall become the exclusive property of and shall vest in the Government absolutely free and clear of all and any liens, claims, mortgages, charges, and all and any other form of encumbrance, contractual rights, and third party rights and interests of whatsoever nature:
- 6.1.1 the relevant Vessel;
  - 6.1.2 all materials used, or intended to be used, in the construction of the relevant Vessel;
  - 6.1.3 all Equipment of the relevant Vessel; and
  - 6.1.4 all Deliverables to be delivered together with the relevant Vessel.
- 6.2 Without prejudice to the generality of Clause 6.1 above, until the Acceptance Certificate is issued under the terms of this Contract in respect of a Vessel:
- 6.2.1 the relevant Vessel (including all parts thereof while it is under construction);
  - 6.2.2 all materials used, or intended to be used, in the construction of the relevant Vessel;
  - 6.2.3 all Equipment fitted, or intended to be fitted, in the relevant Vessel; and
  - 6.2.4 all Deliverables relating to the relevant Vessel
- shall be deemed to be at the Contractor's risk. All risks to the relevant Vessel, the aforesaid materials and Equipment shall remain with the Contractor, and shall not pass to the Government until issue by the Government of the Acceptance Certificate in respect of the relevant Vessel and its Equipment and Deliverables. The Contractor shall be responsible for the due care, custody and safe keeping of the relevant Vessel, the aforesaid materials and Equipment.

## **7 INSURANCE**

- 7.1 If the Contractor carries on its business in Hong Kong, it shall effect and maintain all such policies of insurance as required under the laws of Hong Kong including employees' compensation insurance policy under the requirements of the Employees' Compensation Ordinance (Cap. 282 of the Laws of Hong Kong).

- 7.2 In respect of each Vessel, the Contractor shall effect and keep in force whilst it is being delivered from the place of manufacture to the Delivery Location; and throughout the period whilst it is in Hong Kong after such delivery until the Acceptance Certificate in respect of the relevant Vessel is issued under the terms of the Contract a public liability insurance policy exclusively for that Vessel in the joint names of (i) the Contractor, and (ii) the Government (with appropriate cross-indemnity clause as if a separate policy has been issued to each of them) subject to a maximum indemnity amount in the sum of not less than HK\$100 million for each claim or a series of claims arising from one event, but otherwise unlimited in the aggregate indemnity amount for all claims arising during the entire period of insurance with a reputable insurance company acceptable to the Government against liability to pay damages and compensation for injury or death or any person and loss or damage to any property whatsoever where such injury, death, loss or damage as the case may be, is caused or arises out of any act, omission or default of the Contractor or its employees, agents or sub-contractors in the performance of the Work or otherwise in connection with the Work whether occurring within or outside Hong Kong.
- 7.3 The Contractor shall deposit with the Government Representative for record in accordance with Clause 25.2 of the Conditions of Tender, and immediately upon renewal, copies of policies of insurance required under Clause 7.1, or if not available, copies of the insurance certificates, together with the receipt of payment of the current premium, certified as true and correct by the Contractor.
- 7.4 The Contractor shall deposit with the Government Representative for record a copy of the public liability insurance policy specified in Clause 7.2 above for each Vessel, seven days before the Vessel is being delivered from the place of manufacture, or if not available, copy of the insurance certificate, together with the receipt of payment of the relevant premium, certified as true and correct by the Contractor.
- 7.5 If the Contractor fails to effect and keep in force any of the insurance policies required under Clauses 7.1 and 7.2 above or fails to pay the premium thereunder or otherwise required for the reinstatement of the indemnity limit, the Government may effect and keep in force any such insurance policy and pay such premium or premiums as may be necessary for those purposes and from time to time deduct the amount so paid by the Government as aforesaid from any monies due or which may become due to the Contractor or recover the same as a debt due from the Contractor.
- 7.6 In the event of any of the Contractor's employees, agents or sub-contractors suffering any injury or death in the course of performing the Contract and whether there be a claim for compensation or not, the Contractor shall notify the Government Representative as soon as practicable, followed by a notice in writing of such injury or death to the Government Representative within seven working days.

## **8 DAMAGE TO THE VESSEL WHILE UNDER CONSTRUCTION**

- 8.1 Subject to Clause 8.2, in the event of any damage being sustained to:
- 8.1.1 a Vessel or any part thereof while it is under construction; or
  - 8.1.2 any materials used, or intended to be used, in the construction of a Vessel; or
  - 8.1.3 any Equipment fitted, or intended to be fitted in a Vessel,
- the Contractor shall immediately make good the damage sustained to that Vessel or its materials or Equipment.
- 8.2 If the damage sustained to a Vessel or its materials or Equipment is so extensive as to make it impracticable in the circumstances for the Contractor to make good the damage ("Damaged Vessel"), the Director may at his option:
- 8.2.1 reject the Damaged Vessel and at the election of the Government all other Vessel which have not been accepted, and terminate this Contract pursuant to Clause 29.1 (complete termination) or 29.3 (partial termination) depending on the scope of the rejection; or
  - 8.2.2 negotiate and agree with the Contractor to vary the terms of this Contract in light of the damage subject to such abatement of the Total Purchase Price as is considered reasonable in light of the variation. If no agreement can be reached within one month after the Government's request for negotiation or such longer period as the Government may allow, the Government may terminate this Contract pursuant to Clause 8.2.1.

8.3 If the terms of this Contract are varied by agreement under Clause 8.2.2, the terms of the variation agreement shall be deemed incorporated into, and prevail over the relevant parts of the Contract in the event of inconsistency.

## **9 VARIATION OF OR ADDITION TO THE SPECIFICATIONS OF THE VESSEL**

9.1 The Director may, by notice in writing served on the Contractor at any time during the construction of a Vessel, vary or add to any of the specifications of that Vessel set out in the Technical Specifications.

9.2 Within seven working days of receipt of such notice, the Contractor shall give the Government a written estimate of any increase or decrease in the Vessel Unit Price and of any effect on the Implementation Plan including the Delivery Date as a result of the requested change.

9.3 The Government will use its reasonable endeavours to inform the Contractor in writing within 45 working days of receipt of the written estimate provided in Clause 9.2 whether or not the Government wishes the requested changes to be made, and, even if the changes are required, the Contractor shall not make the requested changes until a written change agreement specifying in particular changes to the Implementation Timetable and Vessel Unit Price and consequently the Total Purchase Price is approved by the Government in writing. The change agreement shall be deemed incorporated into, and prevail over the relevant parts of the Contract in the event of inconsistency.

9.4 Notwithstanding Clauses 9.1 to 9.3, the Government shall have the right to demand a change to the specifications in the Technical Specifications to overcome an actual or likely failure of the Contractor to meet any of such specifications or any stage in the Implementation Plan, but without prejudice to the rights and claims of the Government (including without limitation the right to demand a decrease in the Vessel Unit Price and consequentially the Total Purchase Price, or bringing forward of any of completion dates for any of the Stages). Unless otherwise agreed by the Government in writing, if any change is effected pursuant to this Clause 9.4, Clauses 9.1 to 9.3 shall not apply and the Contractor shall not be entitled to any increase in the Total Purchase Price or any extension of time for any other Stage.

9.5 In the event of a change agreement having been reached pursuant to Clause 9.3 or the Government's demand for a change pursuant to Clause 9.4, the Contractor shall make or incorporate in the construction of such Vessel to which the change agreement relates such change as set out in the change agreement or written demand from the Government (as the case may be).

## **10 TECHNOLOGY SUBSTITUTION AND ADVANCE NOTICE OF DISCONTINUATION**

10.1 The Contractor undertakes to offer to the Government and the Government may, at any time before delivery of unit(s) of the Equipment and at its sole option, elect to obtain from the Contractor any unit(s) of Equipment in substitution for unit(s) of the equipment where the substitute unit(s) contain new technology or have functional or performance or security or reliability characteristics similar to or better than the relevant Equipment. Such substitute units shall be offered to the Government at the Contractor's or the manufacturer's prevailing prices whichever is the lower from time to time published by the Contractor or the manufacturer, as the case may be, subject further to the discount offered to the Government in respect of the original Equipment under this Contract. In the event that the Government elects to obtain the substitute unit(s) of Equipment from the Contractor, the provisions of this Contract shall apply to such substitute unit(s) as they shall form part of the Equipment.

10.2 Without prejudice to the Contractor's obligation to provide the Warranty Services, as soon as the Contractor or the manufacturer decides to discontinue or becomes aware of the prospective discontinuance of the production of any of the Equipment or Warranty Spare Parts, or no later than 12 months before the discontinuance, whichever is the earlier, the Contractor shall in writing notify the Government Representative stating clearly the model, part number, exact date of discontinuation of production, substitution proposal, if any, and all other relevant information.

- 11 IMPLEMENTATION TIMETABLE & TIMETABLE FOR DRAWINGS SUBMISSION AND MAIN ITEMS INSPECTION**
- 11.1 Upon commencement of the Contract Period, the Contractor shall submit an Implementation Timetable (Part VII - Annex 2) setting out major Milestones with the completion dates to the Government for approval. However, the date for the Vessel to become Ready for Use (viz., before the Delivery Date) and the Delivery Date shall remain as stipulated in Schedule 2 and shall not be subject to any change unless the Government expressly agrees or stipulates in accordance with the applicable provisions of the Contract.
- 11.2 Upon commencement of the Contract Period, the Contractor shall submit a Drawings Submission Timetable (Part VII – Annex 3) and Main Items Inspection Timetable (Part VII - Annex 4) to the Government in respect of the Vessel and propose for the Government’s written approval the dates for completion of the respective activities as required therein. Such timetables shall include the scheduled dates of submission of those drawings which are required to be approved by GNC or for GNC’s reference and for those items as listed in that needed to be inspected prior to or as part of the Technical Acceptance.
- 11.3 Subject to Clause 11.5, the Contractor shall perform the Work and deliver the Vessel, the Equipment and the Deliverables in accordance with the Implementation Timetable and the Drawings Submission Timetable and Main Items Inspection Timetable (collectively, “**Timetables**”). The Contractor shall complete each activity by the date specified in these Timetables. All time stipulations in the Timetables shall be of the essence of this Contract. In the event of any inconsistency amongst the Timetables, unless the Government otherwise stipulates, the Implementation Timetable shall prevail.
- 11.4 The Government shall be entitled to re-arrange the sequence of any activities within a Milestone or the sequence of different Milestones or accelerate or postpone any of the dates in any of the Timetables for any further period provided the Government shall give the Contractor not less than seven days’ written notice prior to the sequence to be re-arranged or date or dates to be accelerated or postponed. The remaining activities, Milestones and dates in the Timetables not so re-arranged or accelerated or postponed by the Government shall remain in full force and effect unless the Government shall otherwise determine or unless the re-arrangement or acceleration or postponement is material and the Contractor provides justifications to the satisfaction of the Government that there shall be a corresponding postponement of the remaining dates.
- 11.5 Without prejudice and in addition to Clause 31 (Force Majeure), should it become reasonably apparent to the Contractor that the Work is or will be unduly delayed or disrupted as a result of any of the following events, the Contractor shall, as soon as possible, but in any event no later than seven days after the occurrence of the relevant event, issue a written notice to the Government Representative stating in full details the alleged event triggering the delay or disruption:
- 11.5.1 instructions having been issued by the Government Representative requiring compliance with specifications or requirements not already specified in the Contract or otherwise not pursuant to the Contract; or
- 11.5.2 the Contractor not having received any necessary information from the Government Representative in accordance with the time specified in the Contract or otherwise within a reasonable time.
- 11.6 Upon receipt of any notice from the Contractor under Clause 11.5, the Government Representative will review the alleged event. If the Government Representative in its reasonable opinion considers that (a) there has indeed been such event as mentioned in Clause 11.5.1 or Clause 11.5.2, and that (b) such event will cause undue delay or disruption to the Work, the Government Representative will grant to the Contractor the appropriate postponement of any of the dates specified in the Implementation Plan. All decisions of the Government shall be binding on the Contractor (save in the case of manifest error). The Contractor shall not be entitled to raise any subsequent objection or protest in light of any alleged event falling within Clause 11.5.1 or 11.5.2 if it has not issued any notice concerning such alleged event in accordance with Clause 11.5.
- 11.7 Any re-arrangement of sequence of activities within the same Milestone or different Milestones or acceleration or postponement pursuant to this Clause 11 or other applicable provisions of this Contract by the Government shall not:



- 11.7.1 oblige the Government to pay any additional remuneration or compensation to the Contractor; or
- 11.7.2 release the Contractor from any of its obligations or liabilities or give rise to any waiver or estoppel in relation to any of its obligations or liabilities; or
- 11.7.3 give rise to any other obligation or liability on the part of the Government.

## **12 ACCEPTANCE TESTS AND TRIALS**

- 12.1 As part of the Technical Acceptance, the Vessel including all Equipment and all Deliverables shall be required to undergo acceptance tests, trials and inspections to the satisfaction of the Director in accordance with all the applicable provisions of the Technical Specifications and other provisions of the Contract.
- 12.2 The Contractor shall submit the Vessel including all Equipment and all Deliverables to all tests and trials as specified in the Technical Specifications including all tests, trials and inspections comprised in the Technical Acceptance and Delivery Acceptance at such time in accordance with the Implementation Timetable and other Timetables (where applicable) and at such place as specified in the Technical Specifications or in the absence of which as stipulated by the Government.
- 12.3 Both the Director or an authorised officer and the Contractor or his authorised representative shall be present and on board the Vessel when it undergoes each acceptance test and trial unless the Director agrees otherwise in writing.
- 12.4 Without prejudice to Clause 12.1, if the Director is not satisfied with the results of any test, trial or inspection as referred to in Clause 12.1, he may, by notice in writing served on the Contractor, require the Vessel including all Equipment and all Deliverables to undergo such further test, trials and inspection as may be specified in the notice.
- 12.5 If, after a Vessel (“relevant Vessel”) and all Equipment which are required to be installed on the relevant Vessel and all Deliverables which are required to be delivered together with the relevant Vessel have undergone and passed the Technical Acceptance and the Delivery Acceptance, the Director is satisfied that (a) the relevant Vessel, all such Equipment to be installed on such relevant Vessel and all such Deliverables to be delivered together with that relevant Vessel have been properly designed, constructed, supplied and where applicable installed in accordance with all terms and conditions of this Contract (including without limitation the Technical Specifications, the Schedules and the Warranties) and are Ready for Use, and (b) subject further to the successful completion of the Delivery Acceptance (including the due delivery of the relevant Vessel with all Equipment duly installed on the relevant Vessel and fully functional to the Delivery Location by the Delivery Date, and all Deliverables and other items in the Inventory List duly delivered also by the Delivery Date for such relevant Vessel), and (c) subject further to the Contractor’s compliance and observance of all terms and conditions set out in the Contract (including those which are required to be complied with and observed up to and including the time of the Delivery Date of that Vessel), he will issue an Acceptance Certificate in respect of that the relevant Vessel to the Contractor to come into effect on the actual date of delivery of the relevant Vessel.
- 12.6 If, (a) a Vessel or any part thereof or any Equipment or any of the Deliverables fails to pass any part the Technical Acceptance before the Delivery Date, or any part of the Delivery Acceptance on or before the Delivery Date, or fails to become Ready for Use before the Delivery Date, or (b) otherwise that the Director is not satisfied that that Vessel or any part thereof or any Equipment or any of the Deliverables complies with or observes any terms and conditions of the Contract (including without limitation the Technical Specifications, the Schedules and the Warranties) or (c) the Contractor fails to comply and observe with any terms and conditions of the Contract applicable to that Vessel or any part thereof or any Equipment or any of the Deliverables, (“**Defective Item**”), he may, in his absolute discretion, elect to exercise **one or more** of the following options:
  - 12.6.1 refraining from issuing any Acceptance Certificate for the Vessel and require the Contractor to remedy the Defective Item in accordance with Clause 12.7;
  - 12.6.2 even if the Defective Item is not the Vessel per se but any of the Equipment to be installed on the Vessel or any of the Deliverables, refrain from issuing any Acceptance Certificate for the Vessel and require the Contractor to remedy the Defective Item in accordance with Clause 12.7;

- 12.6.3 issue an Acceptance Certificate with qualifications noting the non-compliance or defects or deficiencies which need to be rectified by the Contractor in accordance with Clause 12.7 by the time specified in the qualified Acceptance Certificate; or
  - 12.6.4 accept the Defective Item on and subject to the terms and conditions set out in Clause 12.10;
  - 12.6.5 reject the Defective Item;
  - 12.6.6 in addition and/or in lieu of the rejection mentioned in Clause 12.6.5, reject all other Vessel(s), all Equipment and Deliverables, provided that no Acceptance Certificate has been issued in respect of the items to be rejected; and for the avoidance of doubt, this right of rejection may be exercised together with all or any of the options mentioned in Clause 12.6.1 to 12.6.7 and Clause 12.10; and
  - 12.6.7 upon rejection pursuant to Clause 12.6.5, and/or where applicable also Clause 12.6.6, the Government may terminate the Contract pursuant to Clause 29.1 (complete termination) or Clause 29.3 (partial termination), depending on the extent of the rejection.
- 12.7 Where the option mentioned in Clause 12.6.1 or 12.6.2 or 12.6.3 is exercised, the Director shall (a) notify the Contractor in writing the defects or deficiencies or non-compliance of the Defective Item; (b) require the Contractor to take all necessary remedial actions (including those as specified in the notification (if any)) within such time as specified in the notification; (c) save in the case a qualified Acceptance Certificate is already issued under Clause 12.6.3 (where applicable), no Acceptance Certificate will be issued unless the Contractor has remedied all non-compliance, defects and deficiencies by the time stipulated by the Government in the notice to be issued under this Clause 12.7 to the satisfaction of the Government; (d) where the option mentioned in Clause 12.6.1 or Clause 12.6.2 is exercised, the Contractor shall still be liable to pay the liquidated damages under Clauses 13.3 and 13.4 even if eventually an Acceptance Certificate without qualifications is issued; and (e) the Government may also exercise the rights and options as mentioned in Clauses 12.10.6 and 12.10.7 even if eventually an Acceptance Certificate without qualifications is issued.
- 12.8 In the event of the Director issues a notification pursuant to Clause 12.7, the Contractor shall, at its cost and expense, take such actions as shall be necessary (including those as specified in the aforesaid notification), in the opinion of the Director, to remedy all non-compliance, defects and deficiencies of the Defective Item including all those non-compliance, defects and deficiencies as specified in the aforesaid notification issued by the Director within such time period as specified in the aforesaid notification (or such longer period as the Director may but is not obliged to allow). Without prejudice to the generality of the foregoing requirement concerning costs and expenses, all berthing or docking charges for berthing or docking the Vessel to undergo such further remedial work shall be borne by the Contractor.
- 12.9 In the event of the Contractor failing to comply with Clause 12.8 or otherwise any requirement specified in the notification issued by the Director under Clause 12.7, the Director may exercise all and any of the options specified in Clause 12.6 and/or Clause 12.10.
- 12.10 Where the Director in its absolute discretion elects to accept the Defective Item whether before or after exercise of any options specified in Clause 12.6, it shall issue a notice to this effect to the Contractor:
- 12.10.1 the Contractor shall deliver the Defective Item to the Government by such time and date as stipulated by the Government in the notice;
  - 12.10.2 upon delivery of such Defective Item, if not already done so, the Government will issue an Acceptance Certificate to the Contractor; and the acceptance of the Defective Item (or continued acceptance) upon such delivery shall be subject to the reservation of all rights and claims of the Government arising from the Contractor's non-compliance with the requirements of the Contract including without limitation those rights and claims specified in Clauses 12.10.3 to 12.10.7 below;
  - 12.10.3 the Government may take such action as may be necessary to remedy the defects and deficiencies of the Defective Item and procure the outstanding Work, Equipment and Deliverables, Warranty Services, and/or Guarantee Slipping whether through the appointment of a third party contractor or through its own in-house resources;
  - 12.10.4 the Contractor shall indemnify and compensate the Government for (a) all losses, liabilities, costs and expenses incurred by taking the actions pursuant to Clause 12.10.3

- and (b) those amounts mentioned in Clause 30.1.3 (to the extent applicable); and the compensation shall be payable by the Contractor forthwith upon the first written demand of the Government and/or the same may be deducted from the outstanding balance of the Total Purchase Price (“**Compensation for the Defective Item**”);
- 12.10.5 the Contractor shall still be liable to pay the liquidated damages under Clauses 13.3 and 13.4 (“**LD for Delay**”);
- 12.10.6 notwithstanding anything in the Contract to the contrary, save to the extent agreed by the Government, any unpaid and outstanding balance of the Vessel Unit Price for the Vessel which is the Defective Item or otherwise on which Vessel the Defective Item is to be installed (“**Relevant Vessel**”) or any other Vessel(s) will not be payable until and unless the Government has determined the actual amount of the Compensation for the Defective Item, the LD for Delay, and that all these amounts have been set off against the Vessel Unit Price in respect of the Relevant Vessel and/or any other Vessel(s) and/or any other amount due by the Government to the Contractor and/or otherwise that these amounts have been settled in full by the Contractor; and
- 12.10.7 the Government may still exercise all and any of the other options under Clause 12.6 (to the extent not precluded by the acceptance of the Defective Item).
- 12.11 If the Contractor has pursuant to Clause 12.8 purported to remedy the defects and deficiencies of the Defective Item (including all those failures to comply with the Technical Specifications as specified in the notification issued by the Director under Clause 12.7), unless and to the extent waived by the Government, the Defective Item shall undergo a fresh round of acceptance tests and trials as part of the Technical Acceptance and Delivery Acceptance (including those tests and trials which the Defective Item has failed to pass on the first occasion). Where the Defective Item is not the Vessel but some other Equipment to be installed on the Vessel, the Government may still request the Technical Acceptance and Delivery Acceptance to be conducted for the entire Vessel covering the Defective Item. If any acceptance test or trial cannot be passed, or the Government is not satisfied that any of the aforesaid defects or deficiencies has been fixed, the Government may exercise any of its options under Clause 12.6 or 12.10.

### **13 COMPLETION, DELIVERY AND DELAY**

- 13.1 The Contractor shall ensure that each Vessel with all Equipment installed thereon and where applicable all Deliverables, will become Ready for Use by passing all acceptance tests and trials as part of the Technical Acceptance in accordance with the applicable provisions of the Contract before the applicable Delivery Date.
- 13.2 Upon a Vessel with all Equipment installed thereon, and where applicable all Deliverables relating to such Vessel becoming Ready for Use, the Contractor shall deliver the completed Vessel with all Equipment installed and fully functional, and all such Deliverables to the Government on or before the applicable Delivery Date to the location (“**Delivery Location**”) specified for such purposes in this Contract (which shall be the Government Dockyard unless otherwise expressly specified) for undergoing the Delivery Acceptance.
- 13.3 If the Contractor fails to deliver to the Delivery Location a Vessel with all Equipment installed thereon and/or Deliverables, by the Delivery Date in Ready for Use condition (viz., whether because of any failure of any part of the tests and trials in the Technical Acceptance or failure to comply with other requirement to be fulfilled in order for a Vessel to become Ready for Use or otherwise due to delay in the construction of the Vessel), or even if such delivery has been made, but fail to procure and ensure that the Vessel with all Equipment installed thereon and/or the Deliverables pass the Delivery Acceptance to the satisfaction of the Government by the same Delivery Date (“**Delay**”, and the Vessel and/or Equipment and/or Deliverables affected by the Delay is “**Delayed Item**”, without prejudice to all other rights, options and claims of the Government (including those under Clauses 12.6 and 12.10), the Contractor shall pay to the Government as and by way of liquidated damages and not as a penalty for the losses and damage sustained by the Government resulting from the Delay during the period from the Delivery Date to the date of the Acceptance Certificate for such Delayed Item at the rate specified for this purpose in Schedule 4. In the case the Delayed Item is any Equipment to be installed on the Vessel, the applicable rate shall be the rate applicable the Vessel as the Vessel will not be treated as Ready for Use in the absence of any such Equipment.

- 13.4 Subject to Clause 13.5, the payment of the liquidated damages under Clause 13.3 shall be in full satisfaction of the Contractor's liability for such Delay only. Notwithstanding the foregoing, for each Delayed Item, the aggregate amount payable by the Contractor under Clause 13.3 shall be capped in the manner specified in Schedule 4. In the case the Delayed Item is any Equipment to be installed on the Vessel, the applicable cap shall be the cap applicable to the Vessel as the Vessel will not be treated as Ready for Use in the absence of any such Equipment. The payment of liquidated damages shall not relieve the Contractor from its obligation to provide the Delayed Item Ready for Use and to deliver the Delayed Item to the Delivery Location or from any other liability or obligation under this Contract. Whether or not the Delayed Item has successfully become Ready for Use and delivered to the Delivery Location shall be subject to certification by the Government in the form of the Acceptance Certificate without qualifications. For the avoidance of doubt, if there is more than one Delayed Item, the delay of each such Delayed Item shall accrue liquidated damages in the manner specified in this Clause 13. The liquidated damages is not the applicable compensation where the Contractor has failed to make available and deliver the Delayed Item in Ready for Use condition and the Government elects to reject the Delayed Item (as the case may be) and where applicable any other Vessels Equipment and Deliverables.
- 13.5 As time of essence of the Contract, if there is a Delay in relation to one or more Delayed Item, and regardless of the length of the Delay, and notwithstanding anything else contained in this Contract, the Government Representative shall be entitled to exercise all or any of the options specified in Clauses 12.6.1 to 12.6.7 (where the Delayed Item is also a Defective Item), or all or any of the options specified in Clauses 12.6.5 to 12.6.7 (where the Delayed Item is not at the same time a Defective Item and under this case, reference to "Defective Item" shall mean the "Delayed Item").

#### 14 REJECTION AFTER ACCEPTANCE

- 14.1 Notwithstanding the issuance of any Acceptance Certificate or any payment of the Total Purchase Price, the Government shall be entitled to, reject a Vessel or any Equipment thereon and Deliverables in respect thereof, or any of the other Deliverables any time during the Warranty Period in respect of the items to be rejected ("**Defective Accepted Item**") by giving a notice to this effect to the Contractor if:
- 14.1.1 the Defective Accepted Item is in breach of any of the Product Warranties; and
  - 14.1.2 such breach is not reasonably discoverable in the Technical Acceptance and the Delivery Acceptance; or even the breach was discovered, the Contractor has given assurance or representation to the Government prior to the Government's acceptance of the Defective Accepted Item that the defect or non-conformity causing the breach of the relevant Product Warranties has been cured; and
  - 14.1.3 there is no substantial change in the condition of the Defective Accepted Item which is not caused by the defect or non-conformity constituting the breach of any of the Product Warranties (except fair wear and tear arising from normal use prior to the issue of the notice under Clause 14.1).
- 14.2 Upon the issuance of a rejection notice pursuant to Clause 14.1 above, without prejudice to its other rights and claims, the Government may exercise any of the following rights as indicated by it in the same rejection notice:
- 14.2.1 to require the Contractor to replace the Defective Accepted Item with brand new replacement which will not cause any breach of any of the Product Warranties ("**Replacement Goods**"). The Contractor shall procure the conduct of such parts of the testing and inspection in the Technical Acceptance and Delivery Acceptance as required by the Government in respect of the Replacement Goods. The timetable for all of these testing and inspection shall be proposed by the Contractor within seven days after the rejection notice and acceptable to the Government ("**Replacement Timetable**"). If no Acceptance Certificate in respect of the Replacement Goods can be issued by the stipulated date in the Replacement Timetable, or if the Replacement Timetable as proposed by the Contractor is not acceptable to the Government, or the Replacement Goods does not comply with any of the Product Warranties, the Government will exercise the option mentioned in Clause 14.2.2; or

- 14.2.2 to require the Contractor to refund all amounts paid by the Government in respect of the Defective Accepted Item plus interest to accrue in the manner as specified in Clause 30.1.4 and to terminate the Contract pursuant to Clause 14.4. In the case of any failure to refund the principal plus interest, the Government may recover the amount from the Contractor as a debt.
- 14.3 In addition to or as an alternative to the rejection pursuant to Clause 14.1 above, the Government may reject the other Vessel, the Equipment and Deliverables in respect thereof, and/or any other Deliverables originally scheduled to be delivered which have not been accepted through the issuance of an unqualified Acceptance Certificate.
- 14.4 If the option in Clause 14.2.2 is exercised and/or the Government proceeds with the rejection mentioned in Clause 14.3, the Government may terminate the Contract pursuant to Clause 29.1 (complete termination) or Clause 29.3 (partial termination), depending on the extent of the rejection.
- 14.5 In lieu of rejection under Clauses 14.1 and/or 14.3, the Government may continue to accept the Defective Accepted Item and/or other Vessel provided that an abatement of the unit price for each of such Defective Accepted Item (and also the Vessel Unit Price for the other Vessel) shall be agreed between the Government and the Contractor within 14 days from the date of the Government's notice to the Contractor that it is exercising its right under this Clause 14.5 or within such longer period as the parties may agree. If the parties fail to reach any agreement on the amount of the abatement or the Contractor fails to refund to the Government the amount which the Contractor agrees to make as part of such agreement, the Government may still exercise its right of rejection under Clause 14.1 and/or 14.3.

## **15 MISCELLANEOUS PROVISIONS CONCERNING REJECTION**

- 15.1 Upon rejection by the Government of a Vessel, or Spare Parts or Deliverables pursuant to any applicable provision of the Conditions of Contract, unless the Government wishes to continue to retain these items as evidence in any future proceedings or arbitration with the Contractor to resolve any dispute, the Contractor shall collect the rejected items from the Government premises if the same are in the possession of the Government within one month after the issue by the Government of the rejection notice. If the Contractor fails to do so, the Government shall be free to deal with or dispose of the rejected items as it sees fit without any compensation arising therefrom to the Contractor and the Contractor shall reimburse the Government for all costs incurred in doing so.
- 15.2 For the avoidance of doubt, the right to reject items under any applicable provision of the Contract shall be without prejudice to other rights and claims of the Government under the Contract or at law (including without limitation to right to rescind the Contract on ground of misrepresentation). Without prejudice to the generality of the foregoing and other rights and claims of the Government, the Government may in lieu of rejecting all or any of the Defective Item or Delayed Item or Defective Accepted Item, and regardless of whether it would have been entitled to proceed with rejection under the applicable provisions, claim indemnity from the Contractor on the terms set out in Clause 21.2 and/or 21.5 of the Conditions of Contract.
- 15.3 Nothing in the Contract including without limitation Clause 14 shall prejudice the Government's right to demand a replacement of all or any part of the Vessel (including any Equipment thereon) or any of the Spare Parts as part of the Warranty Services.

## **16 TRAINING**

- 16.1 The Contractor shall submit a draft training plan and draft training materials for all trainings specified in Part VII to the Government for approval at least one month prior to the commencement of the relevant training in compliance with the Contract or otherwise within such time as stipulated by the Government. The draft training plan shall cover all training specified in the Technical Specifications. The training plan as approved by the Government shall be referred to as the Training Plan.
- 16.2 The Contractor undertakes to provide the training to the Government personnel in accordance with the Training Plan as approved by the Government at no additional cost to the Government.

## **17 GUARANTEE SLIPPING**

- 17.1 The Contractor shall perform Guarantee Slipping for each Vessel by arranging it to be slipped and all its materials and fittings, and all Equipment thereon fully inspected and checked at a date and place to be appointed by the Director which shall be on or about the expiry of 12 months after the date of the Acceptance Certificate in respect of that Vessel. The scope of the services to be carried as part of Guarantee Slipping is more fully set out in Annex 1 to the Technical Specifications.
- 17.2 Both the Director or an authorised officer and the Contractor or his authorised representative shall be present when the Vessel is inspected and checked in accordance with Clause 17.1.
- 17.3 The cost of the Guarantee Slipping shall be borne by the Contractor.
- 17.4 The Guarantee Slipping shall be carried out in a shipyard in Hong Kong.

## **18 WARRANTY SERVICES**

- 18.1 The Contractor shall provide the Warranty Services throughout the Warranty Period.
- 18.2 The Warranty Services shall comprise all of the Work specified as forming part of the Warranty Services in the Contract including this Clause 18 and those specified in the Technical Specifications including Annex 1.
- 18.3 The Warranty Services shall be provided free of charge to the Government throughout the Warranty Period.

## **19 CONTRACTOR'S WARRANTIES AND UNDERTAKINGS**

- 19.1 The Contractor hereby warrants and represents to the Government that:
- 19.1.1 it has the full capacity and authority and all necessary licences, permits and consents to enter into the Contract and to perform the Work in accordance with the terms and conditions of the Contract and any other transactions to be entered into, or effected by it under the Contract;
- 19.1.2 each of the documents contained in the tender submitted by the Contractor, and the Articles of Agreement, have been duly executed by the Contractor in accordance with the laws of the place of its incorporation;
- 19.1.3 the Contract constitutes valid, binding and enforceable obligations of the Contractor enforceable in accordance with their terms;
- 19.1.4 the entry into the Contract and the performance by the Contractor of its obligations under it will not conflict or result in breach of:
- (a) any provision of the memorandum and articles of association, or other equivalent constitutional documents governing the Contractor; or
  - (b) any contract or arrangement to which the Contractor is a party or by which the Contractor is bound; or
  - (c) any order, judgment or decree of any court or government agency to which the Contractor is a party or by which the Contractor is bound; or
  - (d) any applicable laws or regulations;
- 19.1.5 all representations, information and documents in the Contractor's tender for the Contract, and from time to time provided by the Contractor to the Government (via the Government Representative or other person or means) throughout the continuance of the Contract are genuine, true, complete and accurate;
- 19.1.6 the Contractor and each of the Contractor Personnel shall have all the necessary skills, qualifications and experience to perform the Work on the terms and conditions of the Contract;
- 19.1.7 the Work shall be performed and completed in an impartial, timely and diligent manner, and the Contractor, and each of the Contractor Personnel, shall use all proper, professional and reasonable skill, experience, care and diligence in the performance of the Work and discharge of all its duties and obligations under the Contract as may be expected from a person who is an expert in providing, or assisting in providing, services of a kind similar to the Work;
- 19.1.8 the Work shall be performed in compliance with all applicable laws and regulations;

- 19.1.9 when performing the Work, it shall comply with such instructions or directions as the Government Representative may give from time to time;
- 19.1.10 the Government obtains good and marketable title to the Vessel, the Equipment and the Deliverables with absolute legal and beneficial entitlement on the terms set out in Clause 6.1;
- 19.1.11 upon the issue of the Acceptance Certificate in respect of the Vessel, there is no option, right to acquire, mortgage, charge, pledge, lien, hire purchase, or other form of security or encumbrance on, over or affecting the Vessel, the Equipment and the Deliverables; and there is no agreement or commitment to give or create any of the foregoing and no claim has been made by any person to be entitled to any of the foregoing;
- 19.1.12 (a) the performance of the Work by the Contractor;  
(b) the use, operation or possession by the Government, its authorised users, assigns and successors-in-title of the Vessel, the Equipment and the Deliverables; and  
(c) the exercise by the Government, its authorised users, assigns and successors-in-title of all or any of the Licences  
does not and will not infringe any Intellectual Property Rights of the Contractor or any other person;
- 19.1.13 the Contractor either owns, or has obtained valid and subsisting licences to exercise all necessary Intellectual Property Rights to perform the Contract including the design, construction, assembly and supply of the Vessel, the Equipment and the Deliverables on the terms set out in the Contract;
- 19.1.14 throughout the applicable Warranty Period, the Vessel, the Equipment and the Deliverables are free from defects in design, material, workmanship and installation; all such items have been procured directly from the manufacturer/distributors;
- 19.1.15 the Vessel, the Equipment and the Deliverables are of merchantable quality and they shall be fit for the purposes for which they are intended as specified in the Contract;
- 19.1.16 the Vessel, the Equipment and the Deliverables conform in all respects of the Technical Specifications, and where applicable, but unless otherwise required or agreed by the Government, a Vessel to be delivered on a later Delivery Date conform in all respects with a Vessel delivered on an earlier Delivery Date which has been accepted by the Government;
- 19.1.17 all necessary consents, licences, and approvals required under all applicable laws and regulations and those required under the Contract (including the approvals and certifications of Recognised Organisation(s) as specified in Schedule 9) have been duly obtained for the design, construction, manufacture, sale and delivery of the Vessel, Equipment and Deliverables to the Government;
- 19.1.18 the Vessel and all Equipment and Deliverables comply with all applicable laws and regulations prevailing as at the Delivery Date for the Vessel; and all rules and regulations and class notation of the Recognised Organisation(s) as specified in Schedule 9 prevailing as at the Delivery Date for the Vessel; and
- 19.1.19 no claim is being made and no litigation, arbitration or administrative proceeding is presently in progress, or pending or threatened against it or any of its assets, or otherwise in relation to any claim or allegation of infringement of Intellectual Property Rights in the design, construction, manufacture or sale of the Vessel or any of the Equipment or any of the Deliverables.
- 19.2 The warranties, representations and undertakings contained in this Clause 19 and those contained in other parts of the Contract (collectively “**Warranties**”) shall be true without limitation in time, save that in the case of any Warranty expressed to be effective during the Warranty Period or other specified period, it shall be true on each day of the Warranty Period or the specified period as if it is repeated on each such day. References to “**Warranties**” include the Product Warranties.
- 19.3 Each of the Warranties shall be separate and independent and without prejudice to any other Warranty and, except where expressly stated otherwise, shall not be limited by reference to or inference from any other Warranty or any other provision of the Contract.

- 19.4 The Contractor accepts and acknowledges that the Government is entering into the Contract strictly in reliance upon each of the Warranties notwithstanding any knowledge (actual or constructive) of the Government or investigations which the Government or its agent or advisor may have made. The Government relies on the professional judgment and expertise of the Contractor to ensure that the Vessel, the Equipment and the Deliverables are in compliance with the Warranties.
- 19.5 Unless otherwise expressly excluded from or provided to the contrary in the Contract, the rights, duties and liabilities imposed on a seller and the rights conferred on a buyer under the Sale of Goods Ordinance (Cap. 26 of the Laws of Hong Kong) apply to the Contractor as a seller and the Government as a buyer respectively.
- 19.6 If the Contractor receives written notice from the Government of any breach of any of the Warranties, the Contractor shall, without prejudice to any other rights and claims the Government may have, at its own expense and as soon as possible after receiving such notice, take all such remedial action to the satisfaction of the Government within such time period as stipulated by the Government in the written notice to ensure that the breaches of the Warranties are remedied to the satisfaction of the Government.

## **20. Intellectual Property Rights**

### *Warranties and Representations*

- 20.1 The Contractor hereby warrants and represents that:
- 20.1.1 the Vessel, Equipment and the Deliverables to be supplied under the Contract, the process of their manufacture or preparation, and any operation, possession, distribution, export or sale by the Contractor of such Vessel, Equipment and Deliverables under the Contract, do not infringe the Intellectual Property Rights of any person.
- 20.1.2 If and to the extent licence is required for the Contractor to sell the Vessel, Equipment and Deliverables, the Contractor has a valid and subsisting licence granted from the manufacturer (or its authorised agent) in its favour which entitles the Contractor to sell and supply these items on the terms and conditions set out in the Contract.
- 20.1.3 The possession, import, purchase, usage in the manner and for the purposes contemplated by the Contract of the Vessel, Equipment and Deliverables by the Government, its authorised users, assigns, and successors-in-title will not infringe the Intellectual Property Rights of any person.
- 20.1.4 The Contractor is not aware of and has no reason to believe that in relation to the Vessel, Equipment and Deliverables (a) there is any judgment or order or ruling or decision from any court of competent jurisdiction or from any arbitration body that such items infringe the Intellectual Property Rights of any person; or (b) any claims, actions or proceedings or arbitration have been initiated or threatened against it or any manufacturer of the Vessel, Equipment and Deliverables or a sub-contractor of the Contractor for infringement of any Intellectual Property Rights of any person; or (c) any agreement having been entered into to settle any such claims, actions, proceedings or arbitration. Each of the events mentioned in (a) to (c) above shall be referred to as "Infringement Event".

### *Notification*

- 20.2 Within seven days of the first written request from the Government, the Contractor shall provide all such documentary evidence to the satisfaction of the Government to prove compliance with the Warranties specified in Clause 20.1 above.
- 20.3 In the event that there is any Infringement Event (as defined in Clause 20.1.4 above) which has not already been notified to the Government during the tendering stage, without prejudice to the rights and claims of the Government, the Contractor shall immediately notify the Government concerning such Infringement Event, and continue to update the Government concerning the progress and status thereof. In addition, the Contractor shall provide all such information and documents to the Government concerning such Infringement Event as the Government may request.



*Vesting of Intellectual Property Rights in the Original Works to the Government*

- 20.4 Without prejudice to the Contractor's obligations under the Contract including this Clause 20 and Clauses 21.5 to 21.10, the Government does not claim ownership of any Intellectual Property Rights which may subsist in the Vessel or Equipment or any of the Deliverables (if any) except for all and any Deliverables which are original work designed or created or developed or produced by or on behalf of or for the Contractor for this Contract or for any other Government contract ("Original Works"). The Deliverables excluding the Original Works are known as "Licensed Deliverables".
- 20.5 To the extent all and any Intellectual Property Rights subsist in the Original Works, such Intellectual Property Rights shall vest in the Government forthwith upon the date of their creation.
- 20.6 The vesting under Clause 20.5 shall relate to all Intellectual Property Rights whether existing as at the Contract Date or arising or subsisting any time or from time to time in the future.
- 20.7 Save with the prior written approval of the Government, the Contractor shall not, and shall ensure that its associates and associated persons, and the Contractor Personnel and their respective associates and associated persons will not, use the Original Works otherwise than for the purpose of performing the Works. Without prejudice to the generality of the foregoing, all acts restricted by the copyright specified in section 22(1) of the Copyright Ordinance (Cap. 528 of the Laws of Hong Kong) in relation to such Original Works or any part thereof shall be prohibited.
- 20.8 All Intellectual Property Rights in any correction, improvement, enhancement, modification of all the Original Works made pursuant to this Contract by the Contractor or by the Government or by any other person for the Government ("Subsequent Work") shall belong to and shall be and remain vested in the Government immediately upon creation.
- 20.9 Upon request by the Government, the Contractor shall at its sole cost and expense within one week or such later date as may be granted by the Government deliver to the Government all the Original Works and all the copies thereof then in the Contractor's custody control or possession, whether in their completed forms or not. All Intellectual Property Rights in the items so delivered up shall, if those rights have not already been vested in the Government in accordance with Clause 20.5, forthwith be assigned and transferred to the Government. The Contractor shall take all necessary steps to so assign and transfer such Intellectual Property Rights to the Government or procure at its sole cost and expense such Intellectual Property Rights to be assigned and transferred to the Government.
- 20.10 In the event if for any reason whatsoever the Intellectual Property Rights referred to in Clause 20.5 do not vest in the Government, the Contractor shall at its sole cost and expense forthwith, or shall ensure that the owner(s) of the Intellectual Property Rights will forthwith, upon the first written demand of the Government execute a deed of assignment and all other necessary documents under which the Government shall be assigned such Intellectual Property Rights on the terms set out in Clause 20.3 to 20.9 of this Part.

*Licence to the Government*

- 20.11 The Contractor hereby grants, or in case it is not empowered to do so, shall at its own cost and expense procure that there will be granted to the Government and each of its authorised users, assigns and successors-in-title (collectively "licensees" and each a "licensee") the licences which are non-exclusive (except that ownership and rights as an owner including right to possession shall be on an exclusive basis), royalty-free sub-licensable, irrevocable, transferable, effective throughout the world and throughout the Licence Term for all purposes as stated in the Contract and as and how the licensee sees fit:
- 20.11.1 to use, make copies and modify the Licensed Deliverables; and
- 20.11.2 to the extent any Intellectual Property Rights subsist in the Vessel, Equipment or in the design of the Vessel or Equipment (and that such Intellectual Property Rights is not covered in the Original Works), to use, possess, distribute, repair, replace and if required as part of the work to be performed by the Contractor under the Contract, modify or customise, the Vessel, the Equipment and any part thereof.
- (all of the rights mentioned above in Clauses 20.11.1 and 20.11.2 above) shall be collectively referred to as "Licensed Rights"; and the licences as provided for in this Clause 20.11 shall be collectively referred to as "Licences").

- 20.12 The Contractor hereby undertakes to procure, obtain and produce for inspection by the Government within seven working days upon request, at its own cost and expense, all proper licences clearances and releases in writing and completion of all other formalities and requirements necessary to ensure that the Licences have been validly and legally granted to each licensee in accordance with Clause 20.11 above.
- 20.13 Reference to the Licence Term in Clause 20.11 above shall mean
- 20.13.1 in the case of the Licence referred to in Clause 20.11.1 above, the full remaining period (as from time to time extended, renewed or revived) during which all or any of the respective Intellectual Property Rights in the Licensed Deliverables continue to subsist under all and any applicable laws (including the laws of Hong Kong), counting from the date the relevant Licensed Deliverable is created; and
- 20.13.2 in the case of the Licence referred to in Clause 20.11.2 above, the full remaining period (as from time to time extended, renewed or revived) during which all or any of the respective Intellectual Property Rights continue to subsist in the Vessel and/or the Equipment under all and any applicable laws including the laws of Hong Kong, counting from the date the Vessel is delivered to the Government.
- 20.14 Apart from the Total Purchase Price, under no circumstances whatsoever shall the Government or any other licensee be liable or responsible to pay to the Contractor or any other person any money (whether on a recurrent or non-recurrent basis) for all or any of the Licences or for the Licensed Rights.

#### *Waiver of Moral Rights*

- 20.15 The Contractor hereby irrevocably waives and undertakes to procure, at its own costs and expense, all relevant authors of the Deliverables to waive all the moral rights therein (whether past, present or future). The waiver shall operate in favour of the Government, its assigns, authorised users and successors-in-title and shall take effect upon creation or delivery to the Government of the relevant Deliverables or the grant of the relevant Licence (as the case may be).
- 20.16 In the event that for any reason whatsoever a Licence referred to in Clause 20.11 above has not been granted in favour of a licensee, the Contractor shall forthwith, or shall ensure that the licensor(s) who is capable of granting the Licence will respectively forthwith, upon the first written demand of the Government execute such deed and all other necessary documents under which the Government, its authorised users, successors-in-title and assigns shall be granted such Licence on the terms set out in Clause 20.11 above.
- 20.17 References to “authorised users” in this Clause 20 and Clause 21 and other parts of the Contract shall include, without limitation, customers of the Government Representative or other authorised users of the Vessel, Equipment and/or Deliverables.

## **21 INDEMNITIES**

- 21.1 Neither the Government nor any of its employees or agents shall be under any liability whatsoever for or in respect of:
- 21.1.1 any loss of or damage to any of the Contractor's property or that of its employees or agents however caused (whether by any Negligence of the Government or any of its employees or agents or otherwise) (including the Vessel or any of the Equipment or any of the Deliverables whilst the risks thereto are still with the Contractor as stated in Clause 6.2); or
- 21.1.2 any injury to or death of the Contractor (in the case where the Contractor is a natural person) or any of its employees or agents, save and except any such injury or death caused by the Negligence of the Government or any of its employees (in the course of employment).
- 21.2 In addition to and without prejudice to Clause 21.3, the Contractor shall indemnify and keep indemnified the Government, its authorised users, assigns and successors-in-title (each an “Indemnified Party”) from and against:
- 21.2.1 all and any liabilities and indebtedness (including liabilities to pay damages or compensation), losses, damage, costs, charges and expenses incurred or suffered by an Indemnified Party of whatsoever nature (including all legal and expert costs, charges and expenses on a full indemnity basis); and

21.2.2 all and any demands, claims, actions, arbitrations, proceedings, threatened, brought or instituted by any person against an Indemnified Party or by an Indemnified Party against any person (regardless of whether or not they have been settled or compromised) (collectively, "Claims" and each a "Claim") and everything stated in Clause 21.2.1 above incurred or suffered by an Indemnified Party in all and such Claims,

which arise directly or indirectly as a result of or in connection with, or which relate in any way to, all or any of the following:

- (a) a breach of any provision of the Contract by the Contractor;
- (b) any Warranty which is incorrect, inaccurate, incomplete or misleading or has not been complied with;
- (c) the negligence, recklessness, or wilful misconduct of the Contractor or of any Contractor Personnel in the conduct of the Work;
- (d) (whether or not involving any element of fault or negligence on the part of the Contractor) any act or omission of the Contractor, or of any Contractor Personnel, in the discharge of the Work;
- (e) any loss, damage, injury or death referred to in Clause 21.1 above save and except injury or death caused by the Negligence of the Government or any of its employees (in the course of employment); or
- (f) any injury or death of any third party, or any loss or damage to property sustained by any third party, in consequence of any act, omission, default, or negligence of the Contractor or any of its employees, agents and sub-contractors.

Each of the above is separate and shall be construed independently and shall not prejudice or be limited by reference to or inference from the other of them or other provisions of this Contract.

21.3 In the event of any person suffering any injury or death in the course of or arising out of the Contract and whether there be a claim for compensation or not, the Contractor shall verbally inform the Government Representative as early as practicable and deliver to the Government a written report within seven working days after the occurrence of the injury or death, or on an earlier date specified by the Government Representative.

21.4 For the purposes of this Clause, "Negligence" (appearing in upper case) shall have the same meaning as that assigned to it in section 2(1) of the Control of Exemption Clauses Ordinance (Cap. 71 of the Laws of Hong Kong).

21.5 In addition to, and without prejudice to Clause 21.2 and Clauses 21.6 to 21.10, the Contractor shall indemnify and keep indemnified the Government, its authorised users, assigns and successors-in-title (each an "Indemnified Party") from and against

21.5.1 all and any liabilities and indebtedness (including liabilities to pay damages or compensation), losses, damage, costs, charges and expenses incurred or suffered by an Indemnified Party (including all legal and expert costs, charges and expenses on a full indemnity basis); and

21.5.2 all and any demands, claims, actions, arbitrations, proceedings, threatened, brought or instituted by any person against an Indemnified Party or by an Indemnified Party against any person (regardless of whether or not they have been settled or compromised) (collectively, "Claims" and each a "Claim") and everything stated in Clause 21.5.1 above incurred or suffered by an Indemnified Party in all and such Claims,

which arise directly or indirectly as a result of or in connection with, or which relate in any way to, the infringement or alleged infringement of any Intellectual Property Rights of any person due to all or any of the following:

- (a) the exercise of the Licences;
- (b) the performance by the Contractor of all or any of the Work or the design, construction, assembly or supply of all or any of the Vessel, Equipment or Deliverables in the manner provided for or contemplated under the Contract;
- (c) the enjoyment or exercise by any of the Indemnified Parties of any of its right or powers under the Contract;
- (d) (whether or not involving any element of fault or negligence on the part of the Contractor) any act, omission or default by the Contractor in the performance of the Contract; or

- (e) the breach of any Warranties concerning Intellectual Property Rights.  
(Each of the above is an “infringing act” and is separate and shall be construed independently and shall not prejudice, or be limited by reference to or inference from, the other of them or other provisions of this Contract.)
- 21.6 In the event that there is an infringing act or an alleged infringing act, the Contractor shall as soon as it becomes aware of the same, but in any event within seven days of the first written request of the Government or such longer period as the Government may allow, at its own costs and expenses, without prejudice to any other rights and claims of an Indemnified Party (including in particular those under Clauses 21.2 and 21.5):
- 21.6.1 procure the consent and licence of all relevant parties on such terms to the satisfaction of the Government to permit the infringing act or alleged infringing act, failing which the Government shall procure the same, and any costs incurred by the Government shall be recovered from the Contractor on a full indemnity basis; or
- 21.6.2 modify the Vessel by replacing any part (including Equipment and the Deliverables) which causes the infringing act or alleged infringing act, provided that (a) any proposed modification must be approved by the Government in writing in advance; and (b) all Vessel, Equipment and Deliverables after any proposed modification must comply with the Product Warranties.
- 21.7 Without prejudice to any other rights and claims that the Government may have under the Contract or at law (including without limitation to claim indemnity from the Contractor in light of any third party claims against the Government pursuant to Clause 21.2 or 21.5), if any of the options under Clause 21.6 above cannot be accomplished the Government may reject the Vessel which causes the infringing act or alleged infringing act (including Equipment and the Deliverables in respect of such Vessel and regardless of whether they have been delivered or accepted through the issuance of the Acceptance Certificate) (“**Infringing Vessel**”) and demand a refund of all amounts paid by the Government in respect of the Infringing Vessel plus interest to accrue in the manner as specified in Clause 30.1.4. Upon rejection as aforesaid, the Government may terminate the Contract pursuant to Clause 29.1 (complete termination) or Clause 29.3 (partial termination), depending on the extent of the rejection.
- 21.8 For the avoidance of doubt, in light of any infringing act or alleged infringing act affecting a Vessel or any of the Deliverables, without prejudice to its other rights and claims (including under Clauses 21.2 and 21.5), the Government may elect to exercise its right under Clause 14, 21.6 or 21.7.
- 21.9 Regardless of whether a Vessel has been delivered and accepted by the Government, the Contractor shall forthwith notify the Government in writing if any claim or demand is made or action brought against the Contractor or any of the Indemnified Parties for infringement or alleged infringement of any Intellectual Property Rights.
- 21.10 As and when the Government may require, and regardless of whether a Vessel has been delivered and accepted by the Government, the Contractor shall, at its cost, forthwith upon receiving written directions and instructions from time to time of the Government, take all such actions (including initiating or defending a legal action in its name or in such other manner as the Government deems fit), or provide to the Government all such documents or information in the possession or under the control of the Contractor, to cause all and any claims, demands, or actions instituted against any of the Indemnified Parties and/or the Contractor referred to in Clause 21.9 to be withdrawn, resisted, disputed, counter-claimed, settled or compromised in such manner as the Government may direct.

## **22 PAYMENT**

- 22.1 In consideration of and subject to the performance by the Contractor of the Work and all of its other obligations in full accordance with the Contract, and subject always to all and any set-off, deductions, retention and withholding, the Government shall pay the Contractor the Total Purchase Price by instalments in accordance with the payment schedule specified in Schedule 3 or such other payment schedule from time to time be agreed between the Government and the Contractor.
- 22.2 No instalment of the Total Purchase Price shall be paid until the Director confirms in writing based on the evidence available (including any inspection that may have been conducted) that the payment event, the occurrence and completion of which is necessary before the relevant instalment under the terms of the payment schedule is payable, has occurred and completed.

- 22.3 The Contractor shall notify the Director in writing when the construction of the Vessel has reached the relevant stage of development for the purposes of an inspection of the Vessel by the Director or an authorised officer.
- 22.4 The written confirmation issued by the Government under Clause 22.2 shall not constitute a waiver of, or prejudice, any right and power of the Government under the Contract or at law.
- 22.5 Each instalment of the Total Purchase Price shall, in addition to any other applicable deduction, withholding and retention under other terms of the Contract, be subject to a retention of such percentage as specified in Schedule 3 (Payment Schedule and Retention Money). The Retention Money in respect of all instalments of the Total Purchase Price shall only be payable in accordance with the provisions specified in Schedule 3.
- 22.6 For the avoidance of doubt, the Total Purchase Price constitutes the sole remuneration and expenses payable to the Contractor by the Government under the Contract whether in respect of the Work, the Vessel, the Equipment, the Deliverables, and any other service or thing to be performed or supplied by the Contractor. No other money or compensation whatsoever shall be payable by the Government to the Contractor in respect thereof (whether by way of upfront payment or reimbursement). Subject to the foregoing, the Contractor shall perform the Contract at its own cost. All costs and expenses incurred by the Contractor whether or not purportedly in discharge of its obligations under the Contract shall be deemed as costs and expenses incurred for performing the Work, and be compensated for in the form of the Total Purchase Price.
- 22.7 Notwithstanding anything in the Contract to the contrary, each instalment of the Total Purchase Price payable by the Government under this Contract will only be paid within 30 days after the Government Representative's written acceptance of the Contractor's invoice for such instalment which shall have included all proper deductions, withholding and retentions as required under the Contract and issued in accordance with Clause 22.8.
- 22.8 Invoice for an instalment of the Total Purchase Price payable may only be issued after the written confirmation relating to such instalment as referred to in Clause 22.2 has been issued by the Government. The invoice shall be addressed to:  
Address: Government New Construction Section  
Government Dockyard  
Ngong Shung Road  
Stonecutters Island  
Shamshuipo  
Hong Kong  
Attention: Senior Surveyor/Government New Construction (SS/GNC)
- 22.9 The Government shall not be held responsible or liable for any delay in payment and no interest or other surcharge or any other payment howsoever described shall be charged to the Government due to (a) invoices not having been issued in accordance with this Clause 22, or (b) the invoices containing charges not having been duly calculated in accordance with the provisions of the Contract (including without limitation not having taken into account all applicable deductions), or (c) the Contractor disputing any set-off, deductions or withholding or retention made by the Government pursuant to the Contract, or (d) any invoice or correspondence being improperly addressed. Each invoice shall include all deductions which may be made pursuant to the terms of the Contract and shall show the net amount payable. If the Contractor does not render an invoice charging a correctly stated net amount due to its failure to take into account all appropriate deductions or otherwise, the Government may, but is not obliged to, pay the net amount which duly takes into account all appropriate deductions.
- 22.10 The Contractor shall not be entitled to any increase in the Total Purchase Price by reason of foreign exchange fluctuations.
- 22.11 In addition to the interest as mentioned in Clause 30.1.4, in the event that the Contractor fails to pay any sum of money on the date it falls due or upon demand by the Government under the Contract, it shall pay interest on such sum to accrue from the due date or date of demand up to the date of actual payment in full (after as well as before judgment) at the rate of 5% above the rate per annum which shall be a simple average of the rates per annum announced by all note-issuing banks of Hong Kong from time to time to be their prime lending rates for Hong Kong dollars. Such interest shall accrue on a daily basis in year of 365 days.

**23 CONTRACTOR'S OBLIGATION NOT TO DISCLOSE CONFIDENTIAL INFORMATION AND GOVERNMENT DATA**

- 23.1 The Contractor shall not disclose the Deliverables or the Government Data, or any other information, report, document, plan, record, data, database, code or particulars (i) furnished by or on behalf of the Government or by any other person to the Contractor or any of the Contractor Personnel, or any part respectively thereof; or (ii) otherwise is accessible by or available to the Contractor or any of the Contractor Personnel in the course of performing the Work (collectively “**confidential information**”), provided that the restrictions on disclosure contained in this Clause 23.1 shall not apply to the disclosure of any confidential information:
- 23.1.1 to any person employed, used or engaged by the Contractor in the conduct of the Work in circumstances where such disclosure is necessary in the reasonable opinion of the Contractor for the performance of the Contractor's duties and obligations under the Contract, provided that the Contractor has imposed on the said person employed, used or engaged an absolute and legally binding obligation to the Contractor to refrain from disclosing the confidential information to a third party;
  - 23.1.2 already known to the recipient other than as a result of disclosure by the Contractor or any of the Contractor Personnel or their respective associates or associated persons;
  - 23.1.3 which is or becomes public knowledge other than as a result of disclosure by the Contractor or any of the Contractor Personnel or their respective associates or associated persons;
  - 23.1.4 in circumstances where such disclosure is required pursuant to any laws of Hong Kong or an order of a court of Hong Kong; or
  - 23.1.5 with the prior consent in writing of the Government.
- 23.2 Any disclosure permitted under Clause 23.1 (excluding Clause 23.1.4 above) shall be in strict confidence and shall extend only so far as may be necessary for the purposes specified in Clause 23.1 and the Contractor shall ensure the confidentiality of any such disclosure by taking appropriate action to restrain or restrict any further disclosure.
- 23.3 The Contractor shall not, and shall procure and ensure each one of the Contractor Personnel, and their respective associates and associated persons, shall not disclose, retain, make use of or reproduce any confidential information other than in the performance of the Contractor's obligations under the Contract or with the prior written consent of the Government.
- 23.4 The Contractor shall ensure that all of the Contractor Personnel and any other persons engaged in any work in connection with the Contract are aware of and comply with the provisions of this Clause 23 and the Official Secrets Ordinance (Cap. 521 of the Laws of Hong Kong) and the Contractor shall indemnify and keep the Government, its authorised users, assigns and successors-in-title fully and effectively indemnified on the terms set out in Clause 21 as a result of any breach of confidence (whether actionable based on this Contract or at law) by any such persons.
- 23.5 If and when requested by the Government, the Contractor shall forthwith require each member of the Contractor Personnel, and such other persons to whom disclosure is made pursuant to this Clause 23, to execute a written undertaking in favor of the Contractor and the Government in a form to be determined by the Government agreeing to the restrictions attached to the confidential information set out in this Clause 23; and shall provide certified true copies of any such undertakings to the Government within seven working days from the date of execution of any such undertakings. The Contractor shall, if so required by the Government, take such actions and steps as are lawful and necessary and at its own cost and expense to enforce such undertaking in the event of any breach thereof by anyone who has executed such undertaking.
- 23.6 The Contractor shall promptly notify the Government of, and give the Government all reasonable assistance in connection with, any proceedings which the Government may institute against any person pursuant to any of the provisions in this Clause 23.

**24 CONTRACTOR'S OBLIGATION TO INFORM GOVERNMENT OF RELEVANT FACTS**

- 24.1 The Contractor shall keep itself informed and immediately inform the Government of any or all circumstances, facts and matters which will or may lead to default of or non-compliance with any of the Contractor's obligations under the Contract.
- 24.2 The Contractor shall provide the Government and all persons from time to time authorised by the

Government with access to all records and data in the possession or under the control of the Contractor concerning the Vessel, the Equipment and the Deliverables. The Government may make and retain copies of any of the same.

## **25 PROTECTION OF PERSONAL DATA**

- 25.1 The Contractor shall (and shall ensure that its Contractor Personnel) comply with:
- 25.1.1 any applicable privacy or data protection laws (including the Personal Data (Privacy) Ordinance, Cap. 486 of the Laws of Hong Kong) and all guidelines issued by the Office of the Privacy Commissioner for Personal Data, Hong Kong; and
  - 25.1.2 any privacy procedures or policies stipulated by the Government from time to time.
- 25.2 In this Clause 25, “**Personal Information**” shall mean personal data as defined in Section 2(1) of the Personal Data (Privacy) Ordinance (Cap. 486 of the Laws of Hong Kong).
- 25.3 If the Contractor collects, stores, controls, processes or discloses any Personal Information in connection with the provision of the Services, the Contractor:
- 25.3.1 shall take all reasonable steps to ensure that the Personal Information is protected against misuse and loss, and from unauthorised access, modification or disclosure;
  - 25.3.2 shall not, directly or indirectly use the Personal Information except to the extent necessary to provide the Services;
  - 25.3.3 shall not disclose the Personal Information whether directly or indirectly to any person without the prior written consent of the Government;
  - 25.3.4 shall disclose the Personal Information to Contractor Personnel only to the extent that they have a need to know for the purpose of providing the Services;
  - 25.3.5 shall provide appropriate training to Contractor Personnel with respect to the correct handling of the Personal Information so as to minimise the risk of accidental security breaches;
  - 25.3.6 shall ensure that its internal operating systems permit only properly authorised personnel to access the Personal Information; and
  - 25.3.7 shall notify the Government as soon as possible after it becomes aware that use or disclosure of the Personal Information is required by an order of the court.
- 25.4 On termination or expiry of the Contract, the Contractor shall promptly return to the Government or, if requested by the Government, destroy all copies of the Personal Information, in which case any right to use, copy or disclose that Personal Information ceases.
- 25.5 In relation to the Contractor Personnel’s access to Personal Information, the Contractor shall implement and maintain a system for logging and identifying all of the Contractor Personnel that access any Personal Information. If requested by the Government, the Contractor shall provide to the Government a copy of that access log.
- 25.6 If the Contractor becomes aware that any Contractor Personnel is using, or has used, Personal Information in contravention of this Clause 25, the Contractor must promptly notify the Government in writing with full details of the contravention. The Government’s knowledge of, or response to, such notification, will not affect any other rights of the Government under the Contract.
- 25.7 The Personal Information of any individual provided by the Contractor to the Government will be used by the Government for the purposes of, arising from or incidental to this Contract, including for the purposes of exercising or enforcing any of its rights and powers under this Contract or at law, and for resolution of any dispute arising from this Contract. The Government may disclose the data to any public officer within the Government, its adviser, contractors and consultants or any public body (as defined in the Interpretation and General Clauses Ordinance, Cap. 1 of the Laws of Hong Kong) or any entity having the jurisdiction to adjudicate over any dispute arising from this Contract for all or any of the aforementioned purposes.
- 25.8 The Contractor shall ensure that each individual whose Personal Information has been passed by the Contractor to the Government has been made aware of (prior to the passing of such Personal Information to the Government), acknowledged and consented that his Personal Information may be disclosed to the Government, and in turn disclosed by the Government to those persons for such purposes as mentioned in Clause 25.7 above.

25.9 The Contractor shall indemnify the Government on the terms set out in Clause 21 of this Part in the event of any non-compliance with any provisions of this Clause 25 or any claim instituted by any person in relation to his Personal Information or by the Privacy Commissioner for Personal Data, which claim would not have arisen but for any act, omission, breach of this Contract or negligence on the part of the Contractor or any of the Contractor Personnel.

## 26 CONFLICT OF INTEREST

26.1 During the Contract Period and for twelve months thereafter:

26.1.1 the Contractor shall not, and shall ensure that each of the Contractor Personnel, and the Contractor's and each of the Contractor Personnel's respective associates and associated persons (collectively "**Restricted Group**") will not undertake any service, task or job or do anything whatsoever on its own account or for or on behalf of a third party (other than in the proper performance of the Contract) which relates to, concerns or affects the Vessel or services provided by the Government (including MD or the user department) or the operation of the Government (including MD or the user department) or which may reasonably be seen to relate to, concern or affect the Vessel or such services or operation without the prior written approval of the Government; and

26.1.2 the Contractor shall forthwith notify in writing the Government of all or any facts which may reasonably be considered to give rise to a situation where the interests of any member of the Restricted Group conflict or compete, or may conflict or compete, with the Contractor's duties or obligations under the Contract. The Contractor shall immediately take all reasonable actions to avoid or remove the cause of any such actual or potential conflict of interest to the satisfaction of the Government Representative.

26.2 The Contractor shall ensure that each member of the Restricted Group informs the Contractor and keeps it informed regularly of all facts which may be reasonably considered to give rise to a situation in which the interests of such person conflict or compete, or may conflict or compete with the Contractor's duties to the Government under the Contract.

## 27 PUBLICITY

27.1 The Contractor shall not, without the prior written consent of the Government, publish or use any advertising or other publicity materials relating to the Contract or the Work or the Vessel or any Equipment supplied or any other work done in connection with the Contract wherein the Government's or the Vessel's name is mentioned or language used from which a connection with the Government can reasonably be inferred or implied.

27.2 The Government shall have the absolute discretion to request the Contractor to remove any advertisement or publicity material relating to the Contract or the Work or the Vessel or any other work done in connection with the Contract wherein the Government or the Vessel or the Work is/are mentioned or language used from which a connection with the Government or the Vessel or the Work can reasonably be inferred or implied and the Contractor must comply with such request.

## 28 CONTRACT DEPOSIT AND ADVANCE PAYMENT BOND

28.1 The Contractor shall provide the following:

28.1.1 An amount equivalent to 2% of the Total Purchase Price as security for the due and faithful performance and observance of its obligations under the Contract ("**Contract Deposit**"), to be payable either in cash or in the form of a bank guarantee issued by a bank with a valid banking licence under the Banking Ordinance, Cap. 155 of the Laws of Hong Kong in the form set out in Annex A to this Part ("**Bank Guarantee**"). Such Contract Deposit shall be non-interest bearing; and

28.1.2 where the Contractor has elected to receive an Optional Instalment (as defined in Schedule 3), an advance payment bond as security for the due and faithful performance and observance of its obligations under the Contract ("**Advance Payment Bond**") which shall be in the form set out in Annex A to this Part and in the amount equal to that Optional Instalment to which it relates as specified in Schedule 3. Each Advance Payment Bond shall be non-interest bearing; and

28.1.3 if expressly required in the Notification of Conditional Acceptance, deliver to the



Government a parent guarantee in the form appearing in Annex B to this Part (“**Parent Guarantee**”) subject only to such amendments as the Government may approve in writing to be duly executed by each of the individual shareholders or ultimate holding company (direct or indirect) or joint venture parties (as the case may be).

- 28.2 The Contract Deposit, if in the form of cash, will be retained by the Government, or if in the form of a Bank Guarantee, must remain in force from the date of the issue until the date of Acceptance Certificate of the Vessel (and if more than one Vessel are to be supplied, the Acceptance Certificate in respect of the last Vessel). For the avoidance of doubt, if no Acceptance Certificate in respect of all or any of the Vessel can be issued, the Contract Deposit shall be retained (if it is in the form of cash) or shall remain in force (if it is in the form of Bank Guarantee) from the Contract Date until the scheduled Delivery Date (if more than one Vessel are originally contracted to be supplied, the original scheduled Delivery Date in respect of the last Vessel) plus 24 months. The aforesaid period (depending on whichever is applicable) is hereinafter referred to as the “Guarantee Period”.
- 28.3 All Advance Payment Bonds and the Parent Guarantee shall share the same **Guarantee Period** as specified in Clause 28.2 above.
- 28.4 Notwithstanding the expiry or early termination of the Contract, only upon the expiry of the Guarantee Period will the Contract Deposit (if in the form of cash and if any is remaining) be refunded to the Contractor without interest; or if in the form of a Bank Guarantee, it together with the Advance Payment Bonds and the Parent Guarantee (if any), will be discharged or released.
- 28.5 The Government Representative shall have the right to call on all or any of the Contract Deposit or call on the Bank Guarantee or Advance Payment Bonds (irrespective of whether or not a demand for payment has been made against the Contractor) any amount due or payable by the Contractor to the Government under the Contract but which remains outstanding, in such order as the Government in its absolute discretion deems fit. The Contract Deposit (whether in cash or in the form of the Bank Guarantee) or the Advance Payment Bonds and/or the Parent Guarantee may be deducted or called on, without the Government first having recourse to any other security or rights or taking any other steps or proceedings against the Contractor or any other person, or may be enforced for any balance due after resorting to any one or more of other means of obtaining payment or discharge of the monies, obligations and liabilities owing by the Contractor to the Government.
- 28.6 If any deduction shall be made by the Government from the Contract Deposit or a call shall be made on the Bank Guarantee or Advance Payment Bond during the Guarantee Period, the Contractor shall, within 21 days on demand in writing by the Government, deposit a further sum or provide a further Bank Guarantee or Advance Payment Bond, in a sum equal to the amount so deducted or so called and such further sum shall be added to the residue of and form part of the Contract Deposit and/or Advance Payment Bonds for the security amount required under Clause 28.1 above.
- 28.7 Where by the time of expiry of the Guarantee Period, any claim of the Government or any liability of the Contractor, whether under or arising from or in relation to the Contract cannot yet be quantified, the Government may, without prejudice to its other rights and remedies, pay the entire Contract Deposit or any part thereof (whether in cash or in Banker’s Guarantee), Advance Payment Bond(s) and Retention Money into a suspense account, for so long as it considers necessary, and pending the quantification of the amount of the claim or liability. Upon quantification of the amount of all or any claims or liabilities, the Government shall apply the amount in the suspense account in or towards satisfaction of the quantified amount. Where there is any remaining amount in the suspense account after such application, the Government will return the remaining amount to the Contractor without interest. Where the amount in the suspense account is insufficient to cover all or any claims or liabilities, the Government reserves all rights and remedies against the Contractor in respect of such claims and liabilities.

## **29 TERMINATION OF THE CONTRACT AND CHANGES TO THE WORK**

- 29.1 Without prejudice to other rights and claims of the Government under the Contract or at law, the Government shall be entitled to terminate the Contract by serving a 14 days’ notice in writing on the Contractor if:
- 29.1.1 the Contractor persistently or flagrantly fails to carry out the whole or any part of the Work punctually or in accordance with the terms and conditions of the Contract; or
  - 29.1.2 the Contractor fails to observe or perform any of its obligations under the Contract and (in

- the case of a breach capable of being remedied) has failed to remedy the breach to the satisfaction of the Government Representative within 14 days (or such longer period as the Government Representative may, in its sole discretion, allow) after the issuance by the Government Representative to the Contractor of a notice in writing requiring it to do so; or
- 29.1.3 the Contractor fails to pay any of the sums payable by the Contractor under the Contract; or
- 29.1.4 any of the warranties, representations or undertakings made or deemed to have been made by the Contractor to the Government in the Contract or in its tender for the Contract or otherwise during the continuance of the Contract (including without limitation any of the Warranties) is untrue or incomplete or inaccurate; or
- 29.1.5 a petition is presented or a proceeding is commenced or an order is made or an effective resolution is passed for the winding-up, insolvency, bankruptcy, administration, reorganisation, reconstruction, or dissolution of the Contractor otherwise than for the purpose of a solvent reconstruction or amalgamation previously approved by the Government Representative in writing, or the Contractor makes any composition or arrangement with creditors; or a receiver, administrator, trustee or similar officer has been appointed in respect of the Contractor or all or any part of its business or assets; or
- 29.1.6 the Contractor abandons the Contract in part or in whole; or
- 29.1.7 the Contractor has failed to complete any activity in any of the Timetables (as defined in Clause 11.3) for more than six (6) weeks from the original scheduled completion date as specified therein; or
- 29.1.8 the Contractor assigns or transfers or purports to assign or transfer all or any part of the Contract or all or any of its rights or obligations thereunder without the prior written consent of the Government; or
- 29.1.9 without prejudice to the generality of the foregoing grounds for termination, if any event or circumstance occurs which enables the Government to terminate the Contract under any one of the following provisions in these Conditions of Contract:
- Clause 12.6.7 (Acceptance Tests and Trials);
  - Clause 14.4 (Rejection after Acceptance);
  - Clause 21.7 (Indemnities);
  - Clause 32.1 (Illegal Workers); and
  - Clause 34.3 (Prevention of Bribery).
- 29.2 Notwithstanding anything herein to the contrary, the Government may at any time during the continuance of the Contract, and by not less than one month's prior written notice to the Contractor, make such changes (whether addition or reduction) as the Government deems appropriate to the scope of the Work to be carried out or the Vessel, Equipment and/or Deliverables to be procured. The cost of such changes (if any) shall be deduced, where applicable, on the basis of the unit price specified in the applicable Schedule, or in the absence of which it shall be agreed between the Government and the Contractor. For the avoidance of doubt, any changes may include without limitation changes (addition or reduction) of the number of Vessel to be procured, addition or deletion of the Equipment or Deliverables to be procured, or changes in the scope of the Work.
- 29.3 If any of the events specified in Clause 29.1 occurs, or pursuant to Clause 12.6.7 or 14.4, the Government may choose only to effect partial termination of the Contract whereupon the Government shall partially terminate the Contract by giving a notice to this effect to the Contractor ("**Partial Termination**" or "**partial termination**") in relation to those Vessel, Equipment and Deliverables in relation thereto, and/or Spare Parts and/or other Deliverables as specified in the Partial Termination notice (collectively, "**Rejected Items**").
- 29.4 Where there is a Force Majeure Event, pursuant to Clause 31.6, the Government may terminate the Contract in part or in whole.
- 29.5 Each of the grounds entitling the Government to terminate the Contract as specified in Clauses 29.1 to 29.4 above shall be construed independently and shall not be limited or restricted by reference to or inference from any other ground or any other provision of this Contract.

**30 CONSEQUENCES OF EARLY TERMINATION AND CONTRACT EXPIRY OR CHANGES TO THE WORK**

30.1 Upon early termination (howsoever occasioned) or expiry of the Contract (“**Termination**”):

30.1.1 the Contract shall be of no further force and effect but without prejudice to:

- (a) the Government’s rights and claims under the Contract or otherwise at law against the Contractor arising from antecedent breaches of the Contract by the Contractor (including any breach(es) which entitle the Government to terminate the Contract);
- (b) the rights and claims which have accrued to a party prior to the Termination; and
- (c) the continued existence and validity of those provisions which are expressed to or which in their context appropriately survive Termination and any provisions of the Contract necessary for the interpretation or enforcement of the Contract including without limitation the following Clauses in these Conditions of Contract: Clause 1 (Interpretation), Clauses 2.8 and 2.10 (Products and Work to be Provided), Clause 6 (Title and Risks), Clause 19 (Contractor’s Warranties and Undertakings), Clause 20 (Intellectual Property Rights), Clause 21 (Indemnities), and all remaining Clauses thereafter; the obligations of the parties under these provisions shall continue to subsist notwithstanding the Termination regardless of whether or not it is so expressly stated in these individual provisions;

30.1.2 the Government shall not be responsible for any claim, legal proceeding, liability, loss (including any direct or indirect loss, any loss of revenue, profit, business, contract or anticipated saving), damage (including any direct, special, indirect or consequential damage of whatsoever nature) or any cost or expense, suffered or incurred by the Contractor due to the Termination;

30.1.3 in the event of Termination pursuant to Clause 29.1, the Contractor shall be liable for all losses, damage, liabilities, costs and expenses thereby incurred or sustained by the Government arising from the Termination including without limitation (a) the amounts payable to subsequent contractors and/or suppliers for the procurement from third party contractors of the items in replacement of the Vessel, Equipment, Deliverables, Spare Parts and/or the Work (collectively, “replacement items”), and/or the cost of maintaining an in-house team for performing all or any of the Work, which are in excess of the Total Purchase Price or such portions thereof attributable to such replacement items (where applicable) ; (b) all administrative and legal costs incurred in monitoring the Contract over any delayed period and in the Termination and the costs for procurement the replacement items as mentioned in (a) above or the costs of setting up an in-house team as mentioned in (a) above; (c) the costs of all stop-gap measures to be implemented including those to provide services which the Vessel, Equipment and/or Deliverables were intended to provide before the replacement items come into operation and the costs for procuring such stop-gap measures; (d) any delay or failure in realisation of saving which could have been realised had the Vessel, Equipment and/or Deliverables been delivered in accordance with the Contract; (e) the extra costs arising from the maintaining and operating the existing vessel(s) and equipment with which the Vessel and Equipment were intended to replace which could have been avoided had the Vessel and Equipment been delivered in accordance with the Contract including costs in relation to maintenance, Warranty Spare Parts, fuel and consumables; (f) the difference between the maintenance costs, Warranty Spare Parts, fuel and consumables of the replacement items, and the Vessel and Equipment which could have been delivered under the Contract; and (g) any costs incurred by the Government which have become wasted due to the Termination including staff costs, travelling and accommodation incurred for attending any meeting, inspection and/or testing and/or trials throughout the Contract Period; interim and/or final statements of these losses, damage, liabilities, costs and expenses may be issued from time to time after the Termination by the Government to the Contractor whereupon the Contractor shall be liable to pay such amount as demanded in each of these statements within seven days;

30.1.4 the Contractor shall refund to the Government forthwith any sums previously paid under

- the Contract as part of the Total Purchase Price plus interest to accrue at the rate as follows: interest shall accrue from the original date of payment of such sum by the Government to be refunded up to the date of actual refund in full by the Contractor (as well after as before judgment) at the rate of 5% above the simple average of the rates per annum announced by all note-issuing banks of Hong Kong from time to time to be their prime lending rates for Hong Kong dollars. Such interest shall accrue on a daily basis in year of 365 days;
- 30.1.5 for the avoidance of doubt, the Government may exercise its right under Clause 37 (Recovery of Sums Due) in relation to any sum payable to the Contractor;
- 30.1.6 notwithstanding anything herein to the contrary, and regardless of the cause (or the absence thereof) or basis for the Termination, the Government shall have no obligation to pay to the Contractor any money whatsoever including any unpaid portion of the Total Purchase Price;
- 30.1.7 the Contractor shall make good, to the satisfaction of the Government, any damage to the Vessel or any part thereof or the Equipment or the Deliverables or the Government Data;
- 30.1.8 at the request of the Government, the Contractor shall enter into and perform all deeds of assignment, transfer or novation in favour of the Government or in favour of any person whom the Government may designate, for the assignment, transfer or novation of any contract, arrangement or other subject matter whatsoever (including insurance policy, equipment lease, software licence) on such terms and conditions as the Government may stipulate; and procure any other third party whom the Government considers necessary for effecting or perfecting such assignment, transfer or novation to enter into and perform any such deeds of assignment, transfer or novation; and
- 30.1.9 if more than one Vessel is originally contracted to be supplied under the Contract, and the Termination relates to the first or an earlier batch of Vessel, the Contract in relation to the subsequent Vessels shall be of no further force and effect regardless of whether or not the Contractor has commenced Work thereon.
- 30.2 Upon any changes pursuant to Clause 29.2 (“**Changes**”):
- 30.2.1 there shall be changes to the Contract on the terms set out in the notice issued by the Government pursuant to Clause 29.2, but save to that extent the remaining parts of the Contract shall remain in full force and effect;
- 30.2.2 the Changes shall not prejudice the rights and claims mentioned in Clauses 30.1.1 (a) and (b) save that references therein to Termination shall mean Changes;
- 30.2.3 Clause 30.1.2 shall apply to any kinds of Changes save that reference therein to Termination shall mean Changes; and
- 30.2.4 in the case the Changes involve reduction of scope of, or early termination of, any part of the Work (“**Terminated Work**”) or reduction of the parts of the Vessel or Equipment or Deliverables, Clauses 30.1.4 to 30.1.8 shall, unless and to the extent waived by the Government, apply save that references therein to Termination shall mean Changes, and references therein to Work shall mean the Terminated Work; and references therein to Vessel, Equipment and/or Deliverables shall mean such parts of the Vessel, Equipment and/or Deliverables which the Government is no longer procuring from the Contractor after the Changes.
- 30.3 Upon a Partial Termination pursuant to Clause 29.3, the provisions in the Contract to the extent they apply or concern or relate to the Rejected Items shall be of no further force and effect, but without prejudice to:
- 30.3.1 the Government’s rights and claims under the Contract or otherwise at law against the Contractor arising from antecedent breaches of the Contract by the Contractor;
- 30.3.2 the rights and claims which have accrued to a party prior to the Partial Termination;
- 30.3.3 the continued existence and validity of all remaining provisions of the Contract; and
- 30.3.4 the same consequences specified in Clause 30.1 (apart from Clauses 30.1.1) shall, save to the extent waived by the Government, apply save that references to “Termination” shall mean “Partial Termination”; references to “Vessel”, “Equipment” and “Deliverables” shall mean “Rejected Items”; references to “Total Purchase Price” shall

mean such portion of the Total Purchase Price attributable to the Rejected Items; and references to “Work” shall mean the Work in respect of the Rejected Items (including without limitation the design and construction, and subsequent Warranty Services and Guarantee Slipping).

**31 FORCE MAJEURE**

- 31.1 Within seven days after the occurrence of a Force Majeure event, the Contractor shall notify the Government in writing of the full particulars of the Force Majeure event including its nature, extent, reasons why the Force Majeure event has and/or will materially prevent it from performing the Contract or such part thereof, and likely duration of such material prevention. A notice issued by the Contractor pursuant to this Clause is hereinafter referred to as the “**Suspension Notice**”.
- 31.2 Provided that the Government is satisfied with the Contractor’s claim of a Force Majeure which has materially prevented and/or will continue to materially prevent it from performing its obligations under the Contract or such part thereof, the Contract or such part thereof strictly to the extent of such prevention shall be suspended during the subsistence of such Force Majeure commencing from a date to be agreed between the parties (“**Suspension due to the Force Majeure**”).
- 31.3 Without prejudice to the generality of Clause 31.2, whilst the Suspension due to the Force Majeure subsists:
- 31.3.1 the Contractor shall not be required to perform any part of the Services to the extent it is materially prevented from doing so by the Force Majeure event (“**Affected Services**”) but it shall use its best endeavours to remove or mitigate the effect of the Force Majeure event on the Affected Services and no obligations of the Contractor under the Contract shall be subject to any change save with the prior written consent from the Government;
- 31.3.2 the Government may make alternative arrangements for the procurement of the Affected Services, whether from another person or in-house, without compensation to the Contractor;
- 31.3.3 the Contractor shall not be entitled to any payment of money in respect of the Affected Services;
- 31.3.4 notwithstanding anything in the Contract to the contrary, no compensation shall be payable by either party to the other due to any losses or damage arising from the Suspension due to the Force Majeure; and
- 31.3.5 the Contractor shall continue to fully and punctually perform and observe all of its other obligations which are not affected by the Force Majeure event in full accordance with the requirements of the Contract including those Services which are not Affected Services, and to that extent, all terms and conditions of the Contract shall continue to apply and be in full force and effect.
- 31.4 Following the issue of a Suspension Notice, the Contractor shall keep the Government informed once every two weeks or at such longer frequency as may be allowed by the Government, and in any event from time to time upon the request of the Government, of:
- 31.4.1 the likely duration of the relevant Force Majeure event and of its effect of materially preventing the Contractor from performing the Affected Services;
- 31.4.2 the actions taken or proposed to be taken by the Contractor to mitigate or minimise the effects of that Force Majeure event; and
- 31.4.3 any other matters relevant to that Force Majeure event or the Contractor’s performance affected by that Force Majeure event.
- 31.5 As soon as the relevant Force Majeure event has terminated, the Contractor shall forthwith notify the Government of such termination, or the Government may on its own, after consultation with the Contractor, by notice in writing to the Contractor, determine the appropriate date for resuming the Affected Services (“**Resumption Date**”). The Contractor shall immediately after the termination of the Force Majeure event or with effect from Resumption Date as determined by the Government in the aforesaid manner, resume performance of the Affected Services in accordance with the terms and conditions of the Contract. In the event of any disagreement between the Government and the Contractor on the appropriate Resumption Date, Government’s decision shall be final in the absence of manifest error.

31.6 Should a Suspension due to the Force Majeure subsists for more than 30 days, the Government shall be entitled to terminate the Contract pursuant to Clause 29.4 of the Conditions of Contract.

31.7 For the purpose of this Clause, “Force Majeure” means:

31.7.1 any supervening outbreak of war affecting Hong Kong, or acts of God; or

31.7.2 any supervening catastrophic event which is similar to the foregoing if not caused or contributed to by the Contractor, its associates or associated persons or any employee or agent or ex-employee or ex-agent thereof;

and which materially prevents the performance of a party’s duties and obligations under the Contract. For the avoidance of doubt, none of the following shall be taken as a Force Majeure event: (a) change of any applicable law and regulation; (b) any failure to obtain any consent licence or approval as required under Clause 19.1.17; and (c) change of any rules and regulations of any Recognised Organisation.

## **32 ILLEGAL WORKERS**

32.1 The Contractor undertakes not to employ illegal workers in the execution of this Contract or any other Government contract in Hong Kong. Should the Contractor be found to have employed illegal workers in breach of this undertaking, the Government may, by notice in writing, terminate the Contract in accordance with Clause 29.1 of this Part.

## **33 ADMISSION TO GOVERNMENT’S PREMISES**

33.1 The Government Representative reserves the right to refuse admission to any premises of the Government any person employed or engaged by the Contractor, whose admission would be, in the sole and absolute opinion of the Government Representative, undesirable.

33.2 If and when directed by the Government Representative, the Contractor shall provide to the Government a list of the names, posts, staff identity card numbers, addresses and telephone numbers of all Contractor Personnel who may at any time require admission on behalf of the Contractor to any premises of the Government (including in particular the Delivery Location) for performing the Work. Such list shall specify the capacities in which these persons are employed or appointed by or otherwise connected with the Contractor and shall contain such other particulars as the Government Representative may reasonably require.

33.3 The Contractor shall procure that all its Contractor Personnel who have been given access to any premises of the Government (including in particular the Government Dockyard or the maintenance base of the user department) comply with any security, health and safety or other policies and regulations that apply to such premises. The Contractor shall also ensure that its operation does not disrupt the orderly operation of the Government’s premises.

## **34 PREVENTION OF BRIBERY**

34.1 The Contractor shall inform all of the Contractor Personnel and its associates and associated persons (“**Relevant Group**”) in writing, and keep them informed in writing regularly and not less than once every three (3) months, that soliciting or accepting advantages, as defined in the Prevention of Bribery Ordinance (Cap. 201 of the Laws of Hong Kong), is a serious crime and may in addition result in substantial civil liability. Without limitation, the Contractor shall inform each member of the Relevant Group that offering any advantage to a public servant, as defined in the Prevention of Bribery Ordinance (Cap. 201 of the Laws of Hong Kong), as an inducement to or reward for or otherwise on account of that public servant’s performing or abstaining from performing any act in his capacity as a public servant, or expediting, delaying, hindering or preventing the performance of an act, or assisting, favouring, hindering or delaying any person in the transaction of any business with a public body, is an offence under section 4 of the Prevention of Bribery Ordinance (Cap. 201 of the Laws of Hong Kong).

34.2 The Contractor shall arrange to circulate among all Contractor Personnel regularly and not less than once every three months the information contained in such internal guidelines concerning prevention of bribery as the Government may distribute to the Contractor (“**Internal Guidelines**”), and extracts of relevant provisions of the Prevention of Bribery Ordinance (Cap. 201 of the Laws of Hong Kong).

34.3 Notwithstanding anything herein to the contrary, if the Contractor or any of its employees, officers (including directors), agents, sub-contractors or representatives shall be convicted (whether or not such conviction is subject to any appeal to a higher court) to have offered or given any advantage, gratuity, bonus, discount, bribe or loan of any sort to any officer, employee, contractor, agent or representative of the Government, the Government shall be at liberty forthwith to terminate the Contract in accordance with Clause 29.1 of this Part.

**35 NON-ASSIGNMENT**

35.1 The Contract shall be binding upon and ensure for the benefit of the respective successors and permitted assigns of the parties hereto provided always, unless otherwise in accordance with Clause 36, the Contractor may not assign, novate, sub-contract, transfer or otherwise dispose of the Contract or any of its rights and obligations hereunder, whether in whole or in part, without the prior written consent of the Government.

35.2 The parties agree that the Government is entitled to assign, novate, sub-contract or otherwise dispose or any or all of its rights and/or obligations under this Contract to any person (or any right of an Indemnified Party). Upon request by the Government, the Contractor shall enter and/or procure the relevant third parties to enter into a novation agreement in the form and substance as prescribed by the Government.

**36 SUB-CONTRACTS**

36.1 The Contractor shall not, without the prior written consent of the Government, enter into any sub-contract with any person for the performance of any part of this Contract including any sub-contracting proposal specified in Schedule 8.

36.2 The Contractor shall not be relieved from any of its obligations hereunder by entering into any sub-contract for the performance of any part of the Contract. All acts, omission and defaults of the sub-contractor(s) (including those of their employees) shall be deemed as those of the Contractor. If requested by the Government:

36.2.1 the Contractor shall within one day (or such later date as may be granted by the Government) provide the Government with copies of any sub-contracts; and

36.2.2 the Contractor shall procure that, at the time of entering into the written sub-contract, the sub-contractor shall enter into a warranty agreement with the Government in the form appearing in Annex C to the Conditions of Contract.

**37 RECOVERY OF SUMS DUE**

37.1 If any sum of money shall be due or payable from the Contractor to the Government under the Contract, the same may be deducted from or set off against any sum then due or payable or which at any time thereafter may become due or payable to the Contractor by the Government under the Contract or any other contract with the Government.

**38 SERVICE OF NOTICE**

38.1 Subject to Clause 39, all notices, demands or other communications given or made under the Contract shall be in writing and delivered or sent to the Contractor at its address or facsimile number set out in the Articles of Agreement (or such other address or facsimile number as the Contractor has by five days' prior written notice specified to the Government Representative). The Government will not accept the use of a postal box, an address outside Hong Kong or facsimile number as the Contractor's correspondence address. Notices and other communications given or made under the Contract by the Contractor to the Government shall be in writing and delivered or sent to the Government Representative at its address or facsimile number set out below:

Address: Government New Construction Section  
Government Dockyard  
Ngong Shung Road

Stonecutters Island  
Shamshuipo  
Hong Kong  
Fax No.: +852 2746 0518  
Attention: Senior Surveyor/Government New Construction (SS/GNC)

- 38.2 Such notices, demands or other communications shall be addressed as provided above and, if so addressed, shall be deemed to have been duly given or made as follows:
- 38.2.1 if sent by personal delivery during normal business hours on a working day, upon delivery at the address of the relevant party;
  - 38.2.2 if sent by ordinary post or registered mail, on the second business day after the date of posting; or
  - 38.2.3 if sent by facsimile during normal business hours on a working day, when despatched with confirmed receipt as evidenced by the transmission report generated at the end of the transmission of such facsimile by the facsimile machine used for such transmission.
- 38.3 For the avoidance of doubt, nothing herein shall affect the validity of any notice, demand or communication despatched by personal delivery or by facsimile outside normal business hours. Any such notice, demand or communication fulfilling the conditions specified in Clause 38.2.1 or Clause 38.2.3 (apart from conditions as to time) shall be deemed to have been duly given or made on the next working day. The expression “normal business hours” shall mean 9:00 a.m. to 5:00 p.m.

### **39. PROCESS AGENT**

- 39.1 Where the Contractor does not have a place of business in Hong Kong, the Contractor shall irrevocably appoint the person whose name and address are set out in the Schedule 8 as its process agent to receive on its behalf service of process of any legal action or proceedings arising out of or in connection with the Contract in Hong Kong. Service upon the process agent shall be good service upon the Contractor whether or not it is forwarded to and received by the Contractor. If, for any reason, the process agent ceases to be or ceases to be able to act as process agent, or no longer has an address in Hong Kong, the Contractor hereby agrees to appoint a substitute process agent with an address in Hong Kong acceptable to the Government and to deliver to the Government a copy of the substitute process agent's acceptance of that appointment within thirty (30) days. In the event that the Contractor fails to appoint a substitute process agent, or fails to notify the Government of the name and address for service of that substitute process agent, it shall be effective service for the Government to serve the process upon the last known address in Hong Kong of the last known process agent for the Contractor notified to the Government notwithstanding that such process agent is no longer found at such address or has ceased to act or has ceased to be able to act.

### **40 WAIVER**

- 40.1 Time is of the essence of the Contract but no failure or delay by either party to exercise any right, power or remedy available to it under the Contract or at law shall operate as a waiver thereof; nor shall any single or partial exercise of the same preclude any other or further exercise thereof or the exercise of any other right or remedy. A right or a remedy of each party under the Contract shall be cumulative and not exclusive of any other rights or claims provided by the Contract or at law. Without limiting the foregoing, no waiver by either party of any breach by the other party of any provision hereof shall be deemed to be a waiver of any subsequent breach of that or any other provision hereof.
- 40.2 Without prejudice to the generality of the foregoing, any right of termination of the Contract or any other right or power of whatsoever nature conferred upon the Government by the Contract shall be exercisable by it in addition to and without prejudice to any other rights and claims available to it under the Contract or at law (and, without prejudice to the generality of the foregoing, shall not extinguish any right to damages to which the Government may be entitled in respect of the breach of the Contract) and no exercise or failure to exercise such a right of termination shall constitute a waiver by the Government of any such other right or remedy.

### **41 SEVERABILITY**

- 41.1 If any provision or part of a provision of the Contract is found by any authority or court of competent



jurisdiction to be illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the other provisions or parts of such provisions of the Contract, all of which shall remain in full force and effect.

**42 AMENDMENT**

42.1 Save and to the extent expressly provided for in the Contract which enables the Government to, on its own, make such supplement or amendment to the terms of the Contract in accordance with the terms thereof, no variation of the Contract shall be valid unless it is in writing and signed by or on behalf of each of the parties hereto.

**43 ENTIRE AGREEMENT**

43.1 The Contract constitutes the whole agreement between the parties thereto and supersedes any previous agreements or arrangements between them relating to the subject matter hereof. The Contractor acknowledges that in entering into the Contract, it has not relied on any statements, warranties, or representations given or made by the Government.

**44 INDEPENDENT CONTRACTORS**

44.1 The Contractor enters into the Contract with the Government as an independent contractor only and shall not represent itself, and shall ensure each Contractor Personnel shall not represent himself, as an employee, servant, agent or partner of the Government. Neither the Contractor nor any of the Contractor Personnel shall have power to bind the Government to any obligation whatsoever.

44.2 Nothing in the Contract shall create or be deemed to create a partnership between the parties thereto.

**45 FURTHER ASSURANCE**

45.1 The Contractor shall, at its own costs and expenses, forthwith upon the first written request of the Government, do all such things and execute all such deeds and documents (or procure that the same be done or executed) as the Government may deem necessary or desirable to implement or to give legal effect to the provisions of the Contract and transactions provided for or contemplated under the Contract.

45.2 The Contractor shall provide all such documents and materials specified in Clause 45.1 to the Government within fourteen days of the date of the Government's written request or such longer period as may be agreed by the Government in writing.

**46 GOVERNING LAW AND JURISDICTION**

46.1 This Contract shall be construed and interpreted in accordance with the laws of Hong Kong.

46.2 The parties to the Contract shall attempt to amicably resolve any dispute, controversy, or claim relating directly or indirectly to, or arising out of or in connection with this Contract (the "**Dispute**"). In the event the parties have failed to resolve such Dispute within thirty days after receipt of a notice from one party to another requesting an amicable resolution of a Dispute or within such longer period as the parties may agree in writing, then such Dispute shall be referred to and determined by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when a notice of arbitration is submitted by either party in accordance with such Rules ("Arbitration Rules"). The arbitration shall be conducted by one arbitrator. The arbitration shall be conducted in English. Sections 1 to 7 of Schedule 2 of the Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong) shall apply to the arbitration.

46.3 The award shall be enforceable before any court of competent jurisdiction upon the application to such court by either party. Each party acknowledges that it shall have the right to seek injunctive, provisional or interim relief before any court of competent jurisdiction to restrain the other party from breaching this Contract or improperly using or disclosing proprietary information.

46.4 Notwithstanding anything in the Arbitration Rules to the contrary, the Government may disclose or communicate any information relating to the arbitration or award of the arbitration in the manner specified in Clause 30.2 of the Conditions of Tender as if that Clause is incorporated herein, mutatis mutandis.

**47 ORDER OF PRECEDENCE**

47.1 In the event that there is any conflict, contradiction or ambiguity between any documents which form part of the Contract, the following order of precedence shall be applied in order to resolve any such conflict, contradiction or ambiguity:

47.1.1 Part IV - Conditions of Contract and their Annexes;

47.1.2 Part VII - Technical Specifications and their Annexes;

47.1.3 Part V - Schedules (but in the event of any amendment or insertion to the original form as found in the Tender Documents by the Contractor, such amendment or insertion shall not be acceptable to the Government unless the Government has specifically agreed to such amendment or insertion on a case by case basis)

47.1.4 Part III - Articles of Agreement;

any other materials which form part of the Contract including those which were submitted by the Contractor as part of its tender and form part of the Contract.

47.2 For the avoidance of doubt, any provisions in the Contractor's tender which are to be excluded or ignored pursuant to the Conditions of Tender or other provisions of the Tender Documents will not form part of the Contract even if they can be found in any copy of the documents forming part of the Contract.

**48 LANGUAGES**

48.1 All notices, correspondence and other communications, and all documents prepared or provided, under or in connection with communication the Contracts shall be in the English or Chinese language. If documents are originally prepared in any other language, the Contractor shall at its own cost provide the Government with an English or Chinese language translation.

**49 NO WARRANTY ON THE PART OF THE GOVERNMENT**

49.1 The Government gives no warranty, representation or undertaking that (a) any information, statistics and forecast provided in the Tender Documents or in the Contract are sufficient, accurate, complete, suitable or timely for any purpose whatsoever; or (b) there will be any purchase of any equipment, hardware, software, program or service from the Contractor which are specified in the Contract to be provided upon request or demand; or (c) even in relation to those items which the Government is committed to procure under the Contract, such commitment will be on any term and condition other than those set out in the Contract.

49.2 To the maximum extent permitted by laws, the Government does not accept any liability or responsibility for (a) any claim, legal proceeding, liability, loss (including any direct or indirect loss, any loss of revenue, profit, business, contract or anticipated saving), (b) damage (including any direct, special, indirect or consequential damage of whatsoever nature) or (c) any cost or expense, suffered or incurred by the Contractor arising from the use of, or reliance on, any information, statistics or forecast provided in the Contract or in the Tender Documents, or otherwise that the Total Purchase Price payable under the Contract does not recoup the investment cost of the Contractor by any margin or has not met the expectation or projection of the Contractor.

49.3 The Contractor acknowledges to the Government that it has not relied on or been induced to enter into the Contract by any representation, warranty, forecast, estimate, or projection given by the Government or any of its officers, employees, agents or advisers.

49.4 The Contractor shall not in any way be relieved from any obligation under the Contract nor shall it be entitled to claim against the Government on grounds that any information, whether obtained from the Government or otherwise (including information made available by the Government), is incorrect or insufficient. The Contractor shall, at its own cost and expense, make its own enquiries as to the accuracy and adequacy of all such information.

49.5 Notwithstanding anything in this Contract to the contrary, whether during the Contract Period or thereafter the Government shall not be liable to the Contractor whether in tort (including, but not limited to, negligence), contract, strict liability or otherwise for lost profits, lost revenues, lost saving, delay in realisation of saving, lost business opportunities or lost goodwill, exemplary, punitive, special, incidental, indirect or consequential damages, regardless of whether such damages were

foreseeable or whether the Government or any other person has been advised of the possibility of such damages.

**50. CONTRACTS (RIGHTS OF THIRD PARTIES) ORDINANCE**

- 50.1 It is noted that there is no provision in Contracts (Rights of Third Parties) Ordinance (Chapter 623 of the Laws of Hong Kong) (“Cap. 623”) which states that the Ordinance applies to the Government or contracts entered into by the Government.
- 50.2 Notwithstanding Clause 50.1, it is hereby declared that no person may be treated as a third party who or which may enforce any term of the Contract under or for the purposes of section 4 of Cap. 623.
- 50.3 Nothing in Clause 50.2 is intended to affect the following:
- 50.3.1 the power of the Government Representative to act for the Government including the exercise of any right under, or the enforcement of any claim or remedy, arising from or in connection with or in relation to, this Contract;
  - 50.3.2 the power of a public officer under any law or regulation including any Ordinance or subsidiary legislation or any other legal instrument;
  - 50.3.3 the power of a public officer to act by his own title or for the Government Representative or for the Government in any legal proceedings arising from or in connection with or in relation to the Contract (including the Secretary for Justice);
  - 50.3.4 the rights and obligations of any personal representative, administrator or other successor-in-title of the Contractor;
  - 50.3.5 the rights and obligations of any assignee or transferee of the Contractor under any assignment or transfer which has been approved by the Government pursuant to Clause 35 but not otherwise;
  - 50.3.6 the rights and obligations of any Government’s successor-in-title and person deriving title under any of them, and the Government’s assignee and transferee (and in the case of assignee or transferee, in accordance with the terms of the assignment and transfer agreed by the Government); and
  - 50.3.7 the rights of the Government and Government Representative under any guarantee or undertaking or insurance policy or other collateral contract granted or issued or entered into by any person other than the Contractor pursuant to the terms of the Contract.

## Annex A - Form of Bank Guarantee

**The Government reserves the right to make further modifications when relevant information about the proposed Guarantor is available**

### **Supply of One (1) Aluminium Alloy Small Waterplane Area Twin Hull (SWATH) Hydrographic Vessel for the Marine Department**

THIS GUARANTEE is made on the ..... day of ..... 20 .....  
BY.....  
...of ....., a bank with a valid banking licence within the meaning of the Banking Ordinance, Chapter 155 of the Laws of Hong Kong (“Guarantor”)

IN FAVOUR OF

The Government of the Hong Kong Special Administrative Region of the People’s Republic of China (“Government”)

#### WHEREAS

- (A) By an invitation to tender (Tender Reference: Marine Department Shipbuilding Tender No. 7/2017), the Government invited tender for a contract in relation to the supply of the Vessel on the terms and conditions therein (“**Contract**”).
- (B) It is proposed that the Contract shall be awarded to <Name of the Contractor>, a company whose registered office is situated at <registered office address> (“Contractor”).
- (C) It is a condition precedent to the Government agreeing to grant the Contract to the Contractor that the Guarantor executes this Guarantee.]

OR

\*[This Guarantee is provided as an Advance Payment Bond. It is a requirement of the Contract that, inter alia, the Guarantor executes this Guarantee as an Advance Payment Bond in favour of the Government in relation to the \*[1<sup>st</sup>/2<sup>nd</sup> /3<sup>rd</sup> ] instalment of the Total Purchase Price.]

\*[Editorial Note: please delete the inapplicable part.]

Now this Deed witnesses as follows:-

- (1) Where applicable, words and expressions used in this Guarantee (including the recitals) shall have the meaning assigned to them in the Contract. The guarantor(s) under the Parent Guarantee shall hereinafter be referred to as “Parent Guarantor”. If there is more than one guarantor, references to Parent Guarantor shall mean all or any one of them. If there is no Parent Guarantee, all references to Parent Guarantee and Parent Guarantor shall be disregarded. The interpretation principles set out in Clause 1.2 of Part IV of the Contract shall also apply to this Guarantee.
- (2) In consideration of the Government agreeing to enter into the Contract with the Contractor (in the case this is Guarantee serves as a Contract Deposit), or in consideration of the Government approving the bank named above as the Guarantor (in the case this Guarantee serves as an Advance Payment Bond):–

- (a) The Guarantor hereby irrevocably and unconditionally guarantees, as a primary obligor and not as a surety, and as a continuing security, the due and punctual performance and observance by the Contractor of all of its obligations under the Contract and the Guarantor shall pay to the Government on demand and without cavil or argument all monies and liabilities which are now or at any time hereafter shall become due or owing by the Contractor to or in favour of the Government under or in connection with the Contract together with all costs, charges and expenses on a full indemnity basis which may be sustained or incurred by the Government by reason or in consequence of any default on the part of the Contractor in performing or observing any of its obligations under the Contract, notwithstanding any argument between the Government and the Contractor.
  - (b) The Guarantor, as a principal obligor and not as a surety, and as a separate and independent obligation and liability from its obligations and liabilities under sub-clause (a) above, and as a continuing security, irrevocably and unconditionally agrees to indemnify and keep indemnified the Government from and against and shall pay to the Government on demand and without cavil or argument all losses, damages, costs, charges and expenses on a full indemnity basis suffered or incurred by the Government arising from or in connection with the failure of the Contractor to perform or observe fully or punctually any of its obligations under the Contract.
  - (c) The Government may place and keep any monies received by virtue of this Guarantee to the credit of a suspense account for so long as the Government may think fit in order to preserve the rights of the Government to sue or prove for the whole amount of its claims against the Guarantor, the Contractor or any other person.
- (3) This Guarantee shall not be affected by any change of name or status in the company, firm or individual described as “the Contractor” or where the Contractor or the Parent Guarantor is a partnership, any change in the partners or where the Contractor or the Parent Guarantor is a company, any change in its members or directors.
  - (4) The Guarantor shall not be discharged or released from this Guarantee by any arrangement made between the Government and the Contractor or the Parent Guarantor or by any change in obligations of the Contractor under the Contract or by any forbearance granted by the Government to the Contractor or the Parent Guarantor as to payment, time, performance or otherwise whether or not such arrangement, change or forbearance may have been or is made or granted with or without knowledge or assent of the Guarantor.
  - (5) Without prejudice to Clause 4 above, the obligations of the Guarantor under this Guarantee shall remain in full force and effect and shall not be affected or discharged in any way by, and the Guarantor hereby waives notice of:
    - (a) any suspension of, variation or amendment or supplement to the Contract or the Parent Guarantee (including without limitation extension of time for performance) or any concession or waiver by the Government, in whole or in part, in respect of the Contractor's obligations under the Contract or the Parent Guarantor's obligations under the Parent Guarantee;

- (b) any provision of the Contract or the Parent Guarantee being or becoming illegal, invalid, void, voidable or unenforceable;
  - (c) the expiry or early termination of the Contract or the release of the Parent Guarantee for any reason;
  - (d) any forbearance or waiver of any right of action or remedy that the Government may have against the Contractor or the Parent Guarantee and/or the negligence, failure, omission, indulgence or delay by the Government in enforcing any right, power, privilege to or remedy available to the Government in relation to the obligations of the Contractor set out in the Contract or those of the Parent Guarantor under the Parent Guarantee;
  - (e) the voluntary or involuntary liquidation, bankruptcy, dissolution, sale of assets, receivership, general assignment for benefit of creditors, insolvency, reorganisation arrangement, composition, or other proceedings of or affecting the Contractor or the Parent Guarantor or its assets, or any change in the constitution or membership or shareholding of the Contractor or the Parent Guarantor;
  - (f) any assignment or sub-contracting by the Contractor of any or all of its obligations set out in the Contract, whether or not such assignment or sub-contracting has been consented to; and
  - (g) without prejudice to the generality of the foregoing, any fact or event (whether similar to any of the foregoing or not) which in the absence of this provision would or might constitute or afford a legal or equitable discharge or release of or defence to the Guarantor, other than an express release of its obligations by the Government.
- (6) This Guarantee shall extend to all obligations of the Contractor under the Contract as the same may from time to time be amended or supplemented and the Guarantor hereby prospectively consents to whatever amendment, variation or supplement which may be made to the Contract.
- (7) This Guarantee shall have immediate effect upon execution and is a continuing security. This Guarantee (regardless of whether it serves as the Contract Deposit or Advance Payment Bond) shall remain in full force and effect and irrevocable until:-
- (a) the date of the Acceptance Certificate in respect of the Vessel (or if there is more than one Vessel to be supplied under the Contract, in respect of the last Vessel); or
  - (b) until payment to the Government the full amount specified in Clause (14) below, whichever is earlier.

In the event that the Acceptance Certificate in respect of the Vessel (or if there is more than one Vessel to be supplied under the Contract, in respect the last Vessel) cannot be issued, and/or the Government terminates the Contract prior to such issuance, this Guarantee will only be released if the amount specified in Clause (14) below is paid to the Government, or 24 months after the scheduled Delivery Date in respect of the Vessel (or the last Vessel as the case may be) (i.e., [please specify the date]), whichever is earlier.

- (8) This Guarantee is in addition to and shall not merge with or otherwise prejudice or affect any contractual or other right or remedy or any guarantee, indemnity, lien,

pledge, bill, note, charge or any other security which the Government may at any time hold including the Parent Guarantee (collectively “Other Security”) and this Guarantee may be enforced by the Government without first having recourse to any of the Other Security or taking any steps or proceedings against the Contractor or the Parent Guarantee, and notwithstanding any release, waiver or invalidity of the Other Security.

- (9) Any demand, notification or certificate given by the Government specifying amounts due and payable under or in connection with any of the provisions of this Guarantee shall be conclusive and binding on the Guarantor.
- (10) The obligations expressed to be undertaken by the Guarantor under this Guarantee are continuing and those of primary obligor and not as a surety.
- (11) This Guarantee shall be governed by and construed according to the laws for the time being in force in the Hong Kong Special Administrative Region of the People’s Republic of China (“Hong Kong”) and the Guarantor agrees to submit to the exclusive jurisdiction of the courts of Hong Kong.
- (12) All documents arising out of or in connection with this Guarantee shall be served:-
  - (a) upon the Government, at \_\_\_\_\_, marked for the attention of \_\_\_\_\_, facsimile number \_\_\_\_\_;
  - (b) upon the Guarantor, at \_\_\_\_\_, Hong Kong, marked for the attention of \_\_\_\_\_, facsimile number \_\_\_\_\_.
- (13) Documents to be served under this Guarantee shall be deemed to have been duly served by one party if sent by letter or facsimile addressed to the other party at the address stated above or to the facsimile number set out above. The documents so served shall be effective (a) on the date of delivery if hand-delivered; (b) on the date of transmission if sent by facsimile (as evidenced by confirmed transmission report); and (c) if despatched by mail (whether registered or not), on the day on which they are tendered for delivery by the postal authority in Hong Kong.
- (14) Notwithstanding anything herein to the contrary, the aggregate amount of the Guarantor’s liability under this Guarantee shall not exceed \_\_\_\_\_.

IN WITNESS whereof the Guarantor .....has caused its  
[Common Seal/ Seal\*] to be hereunto affixed the day and year first above written.

The [Common Seal/Seal\*] of the said )  
Guarantor was hereunto affixed )  
and signed by ..... )  
..... )  
[Name and Title] )  
duly authorised by its board of directors: )  
..... )  
..... )  
in the presence of:

Name of witness:

Title of witness:

Signature of witness:

Signed Sealed and Delivered )  
for and on behalf of and as )  
lawful attorney of the Guarantor )  
under power of attorney dated )  
..... and deed of delegation )  
dated ..... )  
by ..... )  
[Name and Title] )  
and in the presence of..... )

Name of witness:

Title of witness:

Signature of witness:

Please delete as appropriate.

See Powers of Attorney Ordinance, Cap. 31 of the Laws of Hong Kong.

When the bank guarantee is executed under power of attorney, a photocopy of the power of attorney, certified on each page by a Hong Kong solicitor that it is a true and complete copy of the original must be submitted.



## **Annex B - Form of Parent Guarantee**

**The Government reserves the right to make further modifications when relevant information about the proposed Guarantor(s) is available**

**Supply of One (1) Aluminium Alloy Small Waterplane Area Twin Hull (SWATH) Hydrographic Vessel for the Marine Department**

**THIS PERFORMANCE GUARANTEE** is dated the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_ and is made BY [insert name(s) of the guarantor(s)] whose registered office is at \_\_\_\_\_ (hereinafter [collectively] referred to as **“the Guarantor”**)

IN FAVOUR OF:

THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE’S REPUBLIC OF CHINA ( **“Government”**).

WHEREAS:-

- (A) By an invitation to tender (Tender Reference: Marine Department Shipbuilding Tender No. 7/2017), the Government invited tender for a contract in relation to the supply of the Vessel on the terms set out therein (**“Contract”**).
- (B) The Contractor’s tender for the Contract was accepted in principle by the Government by issuing a Notification of Conditional Acceptance to the Contractor pursuant to Clause 25 of the Conditions of Tender.
- (C) One of the conditions precedent to be fulfilled before the conditional acceptance becomes unconditional is the Guarantor executes this Performance Guarantee in favour of the Government.

NOW in consideration of the premises, this Performance Guarantee witnesses as follows:-

- 1. (a) All words and expressions, and rules of interpretation defined or used in the Contract shall, unless specifically defined or redefined herein or the context otherwise requires, have the same meaning or otherwise shall have equal force when used in or interpreting this Performance Guarantee. The bank guarantor(s) to the guarantees serving as Contract Deposit and/or Advance Payment Bond(s) (as defined in the Contract) shall be collectively referred to herein as **“Bank Guarantor”**. The guarantees are collectively referred to as **“Bank Guarantees”**.
- (b) For the purposes of this Performance Guarantee, each representation, warranty, declaration, agreement, undertaking and covenant by and each obligation of the Guarantors shall be joint and several, or is deemed to have been given by them jointly and severally and shall be binding on the Guarantors jointly and severally.
- 2. (a) At the request of the Contractor, [each of] the Guarantor(s) hereby [jointly and severally] irrevocably and unconditionally guarantees to the Government, as a primary obligor and not merely as a surety and as a continuing security, the due and punctual performance by the Contractor of all of its obligations under the Contract (collectively **“Guaranteed Obligations”**).
- (b) [Each of] the Guarantor(s) hereby [jointly and severally] irrevocably and unconditionally covenants and undertakes with the Government that:-
  - (i) [each of] the Guarantor(s) will ensure and procure that the Contractor will at all times duly and punctually perform all of its Guaranteed Obligations; and
  - (ii) in the event of any failure by the Contractor to perform all or any its Guaranteed Obligations after being called upon by the Government or its duly authorised representative to do so, or in the event of any breach or default by the Contractor of any of the Guaranteed Obligations, or if the Government is reasonably considers that the Contractor is unlikely to be able to fulfill its Guaranteed Obligations, the Government may give written notice of the same to [any of] the Guarantor(s) whereupon [each of] the Guarantor(s) shall forthwith

perform all such Guaranteed Obligations as if all such Guaranteed Obligations were entered into or given by [each of] the Guarantor(s) itself with effect from the date of commencement of the Contract. The Government's notification as aforesaid shall be conclusive and binding on [each of] the Guarantor(s).

- (c) [Each of] the Guarantor(s) acknowledges that if it fails, neglects or refuses to perform its obligations under Clauses (2)(a) and/or (b) above, or if at any time [any of] the Guarantor(s) is deemed (by reason of the foregoing provisions) to have assumed the Contractor's Guaranteed Obligations and it fails, neglects or refuses to perform such obligations, the Government shall be at liberty to apply to the Hong Kong court for a mandatory order declaring [each of] the Guarantor(s) to be liable as aforesaid and ordering [any of] the Guarantor(s) to specifically perform its obligations hereunder.
  - (d) The Government shall be at liberty to claim damages from [each of] the Guarantor either by way of primary remedy (without seeking a mandatory order as aforesaid in Clause 2(c) above) or (in the case the Government does seek a mandatory order as aforesaid but the court declines to make such order) as an alternative to a mandatory order.
3. (a) Without prejudice to the guarantee contained in Clause 2, [each of] the Guarantor(s) [jointly and severally,] unconditionally and irrevocably undertakes, as a separate, additional and continuing obligation, to indemnify the Government against all losses, liabilities, damages, costs and expenses which the Government may incur or sustain, and against all actions, proceedings, claims, demands initiated by or against the Government, and all costs, charges, and expenses (including legal expenses on a full indemnity basis) which may be incurred or sustained by the Government in all such actions, proceedings, claims and demands, arising out of or in respect of:
- (i) any failure by the Contractor to duly and punctually perform any of the Guaranteed Obligations;
  - (ii) any failure by [any of] the Guarantor(s) to perform any of its obligations hereunder; and
  - (iii) the enforcement by the Government of any of its rights or powers hereunder.
- (b) The indemnity set out in Clause 3(a) shall remain in effect notwithstanding that the guarantee under Clause 2 may cease to be valid or enforceable against [any of] the Guarantor(s) for any reason whatsoever.
4. The Government may place and keep any monies received by virtue of this Performance Guarantee to the credit of a suspense account for so long as the Government may think fit in order to preserve the rights of the Government to sue or prove for the whole amount of its claims against the [each of] the Guarantor(s), the Contractor or any other person.
5. [Each of] the Guarantor(s) agrees that the Government may from time to time without discharging or in any way affecting the liability of [any of] the Guarantor(s) hereunder and without the assent or knowledge of [any of] the Guarantor(s) grant to the Contractor or [the other of the Guarantor(s)] or the Banker's Guarantor any time or indulgence or give up, deal with, exchange, vary, realise, release or abstain from perfecting or enforcing any guarantees, liens, securities or other rights which the Government may now or hereafter have from or against the Contractor or [the other of the Guarantor(s)] or the Bank Guarantor whether hereunder or otherwise and may renew, determine or vary the terms or conditions in respect of any transaction with the Contractor or [the other of the Guarantor(s)] or the Bank Guarantor or compound with, discharge, release or vary the liability of the Contractor or [the other of the Guarantor(s)] or the Bank Guarantor or concur in accepting or varying any compromise, arrangement or settlement or omit to claim or enforce any payment or any composition or to effect or to agree to any amendment or supplement to the Contract when and in such manner as the Government may think expedient and no such act or omission on the part of the Government shall in any way discharge or diminish the validity of this Performance Guarantee or affect the liability of [any of] the Guarantor(s) hereunder. The Government may enforce this Performance Guarantee notwithstanding that the Government may hold any other guarantee (including the Bank Guarantees), lien or security or have any outstanding remedy against the Contractor. For the avoidance of doubt,

- (a) [each of] the Guarantor(s) hereby warrants and undertakes that its obligations, duties and undertakings under this Performance Guarantee shall not in any way be adversely affected or impaired by reason of the happening, from time to time, of any of the following, whether with or without notice to or further consent of [any of] the Guarantor(s):-
- (i) any waiver in whole or in part by the Government of the observance or performance of any of the obligations of the Contractor set out in the Contract or those of the Bank Guarantor under any of the Bank Guarantees;
  - (ii) any extension of the time for completion of the Contract or any other variation, modification or discharge of any of the obligations of the Contractor set out in the Contract or those of the Bank Guarantor under any of the Bank Guarantees;
  - (iii) any failure, omission, indulgence or delay on the part of the Government with respect to enforcing, asserting or exercising any right, power, privilege to or remedy available to it in relation to the obligations of the Contractor set out in the Contract or those of the Bank Guarantor under any of the Bank Guarantees;
  - (iv) the voluntary or involuntary liquidation, bankruptcy, dissolution, sale of assets, receivership, general assignment for benefit of creditors, insolvency, reorganisation arrangement, composition, or other proceedings of or affecting, the Contractor or the Bank Guarantor or their respective assets, or any change in the constitution of the Contractor or the Bank Guarantor;
  - (v) any assignment, transfer or sub-contracting by the Contractor of any or all of its obligations set out in the Contract, whether or not any such assignment, transfer or sub-contracting has been consented to;
  - (vi) any change of membership or shareholding or ownership or constitution or directorship of the Contractor or of [any of ]the Guarantor(s); and
  - (vii) without prejudice to the generality of the foregoing any fact or event (whether similar to any of the foregoing or not) which in the absence of this provision would or might constitute or afford a legal or equitable discharge or release of or defence to [any of] the Guarantor(s), other than the express release of its obligations.
- (b) [Each of] the Guarantor(s) further agrees and undertakes that its obligations, duties and undertakings under this Performance Guarantee shall remain binding on [each of] the Guarantor(s) notwithstanding that all or any of the obligations of the Contractor set out in the Contract may not be valid or binding on the Contractor by virtue of their being incapable of enforcement or not within the corporate powers of the Contractor or due to any other reason whatsoever whether related to the foregoing or not.
- (c) This Performance Guarantee may be enforced without the Government first having recourse to any of the Bank Guarantee or any other security or rights or taking any other steps or proceeding against the Contractor, the Bank Guarantor or any other person or may be enforced for any balance due after resorting to any one or more other means of obtaining payment or discharge of the monies, obligations and liabilities thereby secured.
6. (a) [Each of] the Guarantor(s) hereby represents and warrants to the Government that:-
- (i) it is a company duly incorporated with limited liability and validly existing under the laws of Hong Kong;  
AND/OR  
it is a company duly incorporated with limited liability and validly existing under the laws of Hong Kong and whose ordinary shares are primarily listed on the Stock Exchange of Hong Kong Limited;  
AND/OR

\_\_\_\_\_ is a company duly incorporated with limited liability and in good standing under the laws of \_\_\_\_\_ [and has been duly registered as a non-Hong Kong company in Hong Kong, under the Companies Ordinance (Cap. 622 of the Laws of Hong Kong) or under the predecessor Ordinance (as the term is defined under the Companies Ordinance, Cap. 622 of the Laws of Hong Kong) and such registration remains in full force and effect] [and whose ordinary shares are primarily listed on the Stock Exchange of \_\_\_\_\_];

- (ii) [each of] the Guarantor(s) has the necessary capacity to enter into and execute this Performance Guarantee and to perform and observe its obligations hereunder;
- (iii) the execution, delivery and performance of this Performance Guarantee by [each of] the Guarantor(s) has been duly authorised by all necessary corporate action of [each of] the Guarantor(s) under all applicable laws and regulations and this Performance Guarantee as executed and delivered, constitutes the valid and legally binding obligations of [each of] the Guarantor(s) enforceable in accordance with its terms;
- (iv) neither the execution and delivery of this Performance Guarantee nor the performance or observance by [any of] the Guarantor(s) of any of its obligations hereunder will or would:-
  - (a) conflict with, or result in any breach of or default under, any provision of any law, order, agreement, instrument, franchise, concession, licence, permit, liability, obligation or duty applicable to [each of] the Guarantor(s) or any of its assets or by which it is bound; or
  - (b) contravene any contractual restriction binding on [any of] the Guarantor(s) or any of its assets; or
  - (c) cause any limit on any of the guaranteeing, charging or other powers of [any of] the Guarantor(s) (whether imposed by memorandum or articles of association of [any of] the Guarantor(s), or by agreement, instrument or otherwise), or on any of the powers of the Board of Directors of [any of] the Guarantor(s) to exercise any of such powers, or any other limit affecting [any of] the Guarantor(s), to be exceeded; or
  - (d) create or result in or (except as may be provided herein) oblige [any of] the Guarantor(s) to create any lien, charge, security interest or other encumbrance on the whole or any part of the property, assets or revenues, present or future of [any of] the Guarantor(s);
- (v) all necessary government and other consents, authorities and approvals (if any) for [each of] the Guarantor(s) to execute this Performance Guarantee have been obtained and are in full force, validity and effect, and, as of the date of this Performance Guarantee, no further Government or other consents, authorities or approvals are necessary for the performance by [any of] the Guarantor(s) of its obligations hereunder;
- (vi) there are no proceedings pending before any court, tribunal, arbitrator, Government agency or administrative body against or, to [each of] the Guarantor(s)' knowledge, threatened against [any of] the Guarantor(s), the subsidiaries or any of the assets of [any of] the Guarantor(s) which if adversely determined would result in a material adverse change in the business or financial condition of [any of] the Guarantor(s) or the ability of [any of] the Guarantor(s) to pay, if due, any sums and/or to perform any obligations required by the terms and conditions of this Performance Guarantee;
- (vii) the obligations of [each of] the Guarantor(s) under this Performance Guarantee are direct, general and unconditional obligations of [each of] the Guarantor(s) and rank at least pari passu with all the Guarantor(s)' other present and future unsecured and unsubordinated indebtedness and other obligations (including contingent obligations) with the exception of indebtedness and other such obligations mandatorily preferred by law and not by contract;

- (viii) [each of] the Guarantor(s) is not in material default under any statutory or other requirements applicable to [each of] the Guarantor(s) or in breach of or in default under any other provision of any indenture, deed of trust, agreement or other instrument to which it is a party and (to the best of the knowledge and belief of [each of] the Guarantor(s) no event, condition or act which with the giving of notice or lapse of time, or both, would constitute an event of default under any such indenture, deed of trust, agreement or other instrument has occurred or is continuing which has not been properly waived or remedied thereunder; and
  - (ix) the information contained in all documents supplied to the Government relating to the Guarantor(s) is true and accurate in all material respects, and the opinions and forecasts expressed therein (if any) are honestly held and have been made on a reasonable basis, and there are no material facts relating to the Guarantor(s), which would affect the willingness of a reasonable party to rely on a performance guarantee from the Guarantor(s) in terms similar to the terms of this Performance Guarantee, which have not been disclosed to the Government.
- (b) [Each of] the Guarantor(s) further undertakes with the Government:-
- (i) that [each of] the Guarantor(s) will promptly inform the Government of the occurrence of any event of which [any of] the Guarantor(s) becomes aware which, in its reasonable opinion, would materially and adversely affect the ability of the Contractor or [any of] the Guarantor(s) to fully perform their respective obligations under the Contract and this Performance Guarantee; and
  - (ii) that [each of] the Guarantor(s) will endeavour to obtain or cause to be obtained every consent and approval and do, or cause to be done, all other acts and things which may from time to time be necessary or desirable for the continued due performance of all the Guarantor(s)' obligations hereunder.
7. (a) Every notice, request, demand, direction or other communication under this Performance Guarantee shall be in writing, but may be given or made by letter or fax.
- (b) Every notice, request, demand, direction or other communication shall be sent, in the case of a letter, to the other party at its address given below or such other address of which the other party may have previously given notice, and in the case of a fax message, to the fax number set out below:
- (i) the Government: \_\_\_\_\_  
Address:  
Attention:  
Facsimile Number:
  - (ii) the Guarantor(s): \_\_\_\_\_  
Address:  
Attention:  
Facsimile Number:
- (c) Every notice, request, demand, direction or other communication shall, except in so far as otherwise expressly provided by this Performance Guarantee, be deemed to have been received, if delivered by fax, at the time of despatch thereof (evidenced by confirmed transmission report) (and on the next working day if the date of despatch is not a working day), if delivered by mail (whether registered or not), on the day on which they are tendered for delivery by the postal authority in Hong Kong.

8. No provision hereof may be amended, waived, discharged or terminated orally, but only by an instrument in writing signed by the Government.
9. Time is of essence of this Performance Guarantee but no failure or delay by the Government in exercising or enforcing any power or right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise or enforcement of any power or right preclude any further exercise or enforcement thereof or the exercise or enforcement of any other power or right. The rights and remedies herein provided are cumulative and not exclusive of any rights and remedies provided by law.
10. Any provision of this Performance Guarantee prohibited by or rendered unlawful or unenforceable under any applicable law actually applied by any court of competent jurisdiction shall, to the extent required by such law, be severed from this Performance Guarantee and rendered ineffective so far as is possible without modifying the remaining provisions of this Performance Guarantee. Where however the provisions of any such applicable law may be waived, they are hereby waived by the parties hereto to the full extent permitted by such law to the end that this Performance Guarantee shall be a valid and binding agreement enforceable in accordance with its terms.
11. The Guarantor(s) shall from time to time forthwith on demand pay to or reimburse the Government for all costs, charges, and expenses (including legal and other fees on a full indemnity basis, and all other out of pocket expenses) incurred by the Government in exercising its rights or powers hereunder or in suing for or seeking to recover any sums due hereunder or otherwise preserving or enforcing its rights hereunder or in defending any claims brought against it in respect of this Performance Guarantee.
12. (a) This Performance Guarantee and the rights and obligations of the parties hereto shall be governed by and construed in all respects in accordance with the laws of the Hong Kong Special Administrative Region of the People's Republic of China, and if the Government so elects to use arbitration as the mode of dispute resolution or enforcement of any of its rights and claims under this Performance Guarantee, [each of] the Guarantor(s) hereby irrevocably submit to the arbitration agreement set out in Clauses 46.2 to 46.4 of Part IV – Conditions of Contract as if references to parties to the Contract shall mean [each of ] the Guarantor(s) and the Government and references to the Contract shall mean this Performance Guarantee.  
  
(b) If the Government does not elect to use arbitration as the mode of dispute resolution or enforcement of its rights and claims under this Performance Guarantee, the submission of the Guarantor(s) to the arbitration agreement as mentioned in Clause 12(a) shall not restrict the right of the Government to take proceedings against [any of] the Guarantor(s) in any courts (including the courts of Hong Kong) having, claiming or accepting, jurisdiction over [any of] the Guarantor(s) or any of its assets, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction whether concurrently or not.  
  
(c) \_\_\_\_\_ hereby appoints \_\_\_\_\_ of \_\_\_\_\_ Hong Kong to be its agent for the purpose of accepting service of any proceedings in Hong Kong courts in connection with this Performance Guarantee and the Government reserves the right to serve process on the Guarantor(s) or any of them in any other manner permitted by law.]

IN WITNESS whereof this Performance Guarantee has been duly executed on the date first above written.

The Common Seal of )  
)  
Name of Guarantor: ..... )  
was hereunto affixed and signed by )  
Name of authorised signatory: ..... )  
Title of authorised signatory: ..... )  
duly authorised by its board of directors )  
)  
)  
in the presence of: )  
Name of witness: )  
Title of witness: )  
Signature of witness: )

*<Please adopt and modify the execution clause in accordance with the execution requirements of the applicable laws of the place of incorporation of the Guarantor. For example, if the guarantor does not and is not required to keep a common seal under the law of its incorporation, it is not required that the guarantor affixes a common seal in the execution of this document but the execution of this document as a deed must be in accordance with the laws of the place of its incorporation.>*

## **Annex C - Form of Sub-contractor Undertaking**

**The Government reserves the right to make further modifications when relevant information about the proposed Sub-contractor is available**

### **Supply of One (1) Aluminium Alloy Small Waterplane Area Twin Hull (SWATH) Hydrographic Vessel for the Marine Department**

**THIS UNDERTAKING** is made on the ..... day ..... of 20 .....

BY

[.....] [of]/[whose registered office is at]

[.....] ("**Sub-contractor**")

IN FAVOUR OF

THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA ("**Government**").

#### WHEREAS

- (A) By a contract dated [.....] ("**Contract**") made between (1) the Government and (2) [.....] ("**Contractor**"), the Contractor has agreed to supply of the Vessel upon the terms and conditions contained in the Contract.
- (B) Pursuant to the Contract, the Contractor wishes to enter into an agreement with the Sub-contractor ("**Sub-contract**") for the Sub-contractor to carry out and complete a part of the Work as more particularly described in the Sub-contract ("**Sub-contract Work**").
- (C) It is a term of the Contract that the Contractor shall procure the Sub-contractor to execute this deed of undertaking ("**Undertaking**") in favour of the Government.

**IN CONSIDERATION OF THE GOVERNMENT APPROVING THE APPOINTMENT OF THE SUB-CONTRACTOR AS A SUB-CONTRACTOR FOR THE PURPOSES OF THE CONTRACT, NOW IT IS UNDERTAKEN BY THE SUB-CONTRACTOR** as follows:

- (1) the Sub-contractor warrants and undertakes to the Government that:
  - (a) it will execute and complete the Sub-contract Work, and will carry out each and all of the obligations, duties and undertakings of the Sub-contractor under the Sub-contract when and if such obligations, duties and undertakings shall become due and performable, in accordance with the terms of the Sub-contract (as the same may from time to time be varied or amended with the consent of the Government); and
  - (b) it will supply the Government with all information as the Government may reasonably require from time to time in relation to the progress of the Sub-contract Work.
- (2) The Sub-contractor undertakes to indemnify the Government on the same terms and conditions set out in Clause 21 of the Conditions of Contract provided that the Sub-contractor shall have no greater liability to the Government by virtue of this Undertaking than the liability of the Contractor to the Government under the Contract (which liability shall be joint and several) and provided further that so far as and to the extent that the relevant indemnity is triggered by reason of (a) any breach by the Sub-contractor of its obligations under the Sub-contract or of this Undertaking or (b) any negligence recklessness or wilful default on the part of the Sub-contractor, its employees, agents, and sub-sub-contractors (of whatever tier) or (c) (whether or not involving any element of fault or negligence on the part of the Sub-contractor) any act or omission of the Sub-contractor or of its employees, agents, and sub-sub-contractors (of whatever tier), in the discharge of the Services.



- (3) No allowance of time by the Government hereunder or by the Contractor under the Sub-contract nor any forbearance or forgiveness in or in respect of any matter or thing concerning this Undertaking or the Sub-contract on the part of the Government or the Contractor, nor anything that the Government or the Contractor may do or omit or neglect to do, shall in any way release the Sub-contractor from any liability under this Undertaking.
- (4) The Sub-contractor agrees that it will not without first giving the Government not less than 21 days' prior notice in writing exercise any right it may have to terminate the Sub-contract or treat the same as having been repudiated by the Contractor or withhold performance of its obligations under the Sub-contract.
- (5)
  - (a) In the event that the Contract or the employment of the Contractor under the Contract is terminated for any reason whatsoever and if so requested by the Government in writing within 21 days of such termination, the Sub-contractor shall carry out and complete its obligations under this Undertaking and shall enter into a novation agreement with the Government and the Contractor in which the Sub-contractor will undertake, inter alia, to perform the Sub-contract and be bound by its terms and conditions as if the Government had originally been named as a contracting party in place of the Contractor. The said novation agreement will be in such form as the Government may reasonably require.
  - (b) Regardless of whether the Government requires the Sub-contractor to enter into a novation agreement under Clause (5)(a) above, the Sub-contractor shall have no claim whatsoever against the Government for any damage, loss or expense howsoever arising out of or in connection with the termination mentioned in Clause 5(a) above.
- (6) The Sub-contractor hereby grants or procures there be granted for the benefits of each of the Government, its authorised users, assigns and successors-in-title a licence to use the Deliverables on the terms set out in Clause 2.8 of the Conditions of Contract, mutatis mutandis, to the extent the Sub-contractor or its associate or associated person is the owner of the Intellectual Property Rights in such Deliverables or otherwise has power to grant the aforesaid licence.
- (7) The Sub-contractor agrees to be bound by each of Clause 23 to Clause 27 in the Conditions of Contract as if references to Contractor therein refer to the Sub-contractor and references to Contractor Personnel refer to the employees, agents, and sub-sub-contractors (of whatever tier) deployed by or appointed by the Sub-contractor for performing work under the Sub-contract.
- (8) The provisions of this Undertaking shall be without prejudice to and shall not be deemed or construed so as to limit or exclude any rights or remedies which the Government may have against the Sub-contractor, whether in tort or otherwise.
- (9) In the event of any ambiguity or conflict between the terms of Sub-contract and this Undertaking, the terms of this Undertaking shall prevail.
- (10) Nothing contained in this Undertaking shall vary or affect the Sub-contractor's rights and obligations under the Sub-contract.
- (11) The Government shall be entitled to assign the benefit of this Undertaking at any time without the consent of the Sub-contractor being required.
- (12) The address for service of all documents arising out of or in connection with this Undertaking shall be:  
to the Sub-contractor at [.....] Fax Number:  
to the Government, at the address and fax number as specified in Clause 38 of the Conditions of Contract.
- (13) The Government and the Sub-contractor may change their respective nominated addresses to another address in Hong Kong but only by prior written notice to each other. All notices must be in writing. Clause 38.2 of the Conditions of Contract shall apply hereto, mutatis mutandis.
- (14) This Undertaking shall be governed by and construed according to the laws for the time being in force in Hong Kong, and each of the parties hereto submits to the non-exclusive jurisdiction of the courts of Hong Kong in relation to any dispute arising from this Undertaking.
- (15) Unless the context otherwise requires, terms and expressions appearing herein shall bear the same meaning given to them in the Contract.
- (16) Clauses 32 to 44 of the Conditions of Contract shall be deemed incorporated herein, mutatis mutandis.

**IN WITNESS** whereof this Undertaking was executed as a deed on the date first above written.

THE COMMON SEAL OF )  
Name of Sub-contractor: ..... )  
IS HEREUNTO AFFIXED and SIGNED by )  
Name of authorised signatory: ..... )  
Title of authorised signatory: ..... )  
duly authorised by its board of directors:  
in the presence of: )

Name of witness:  
Title of witness:  
Signature of witness:

*<Please adopt and modify the execution clause in accordance with the execution requirements of the applicable laws of the place of incorporation of the sub-contractor. For example, if the sub-contractor does not and is not required to keep a common seal under the law of its incorporation, it is not required that the sub-contractor affixes a common seal in the execution of this document but the execution of this document as a deed must be in accordance with the laws of the place of its incorporation.>*