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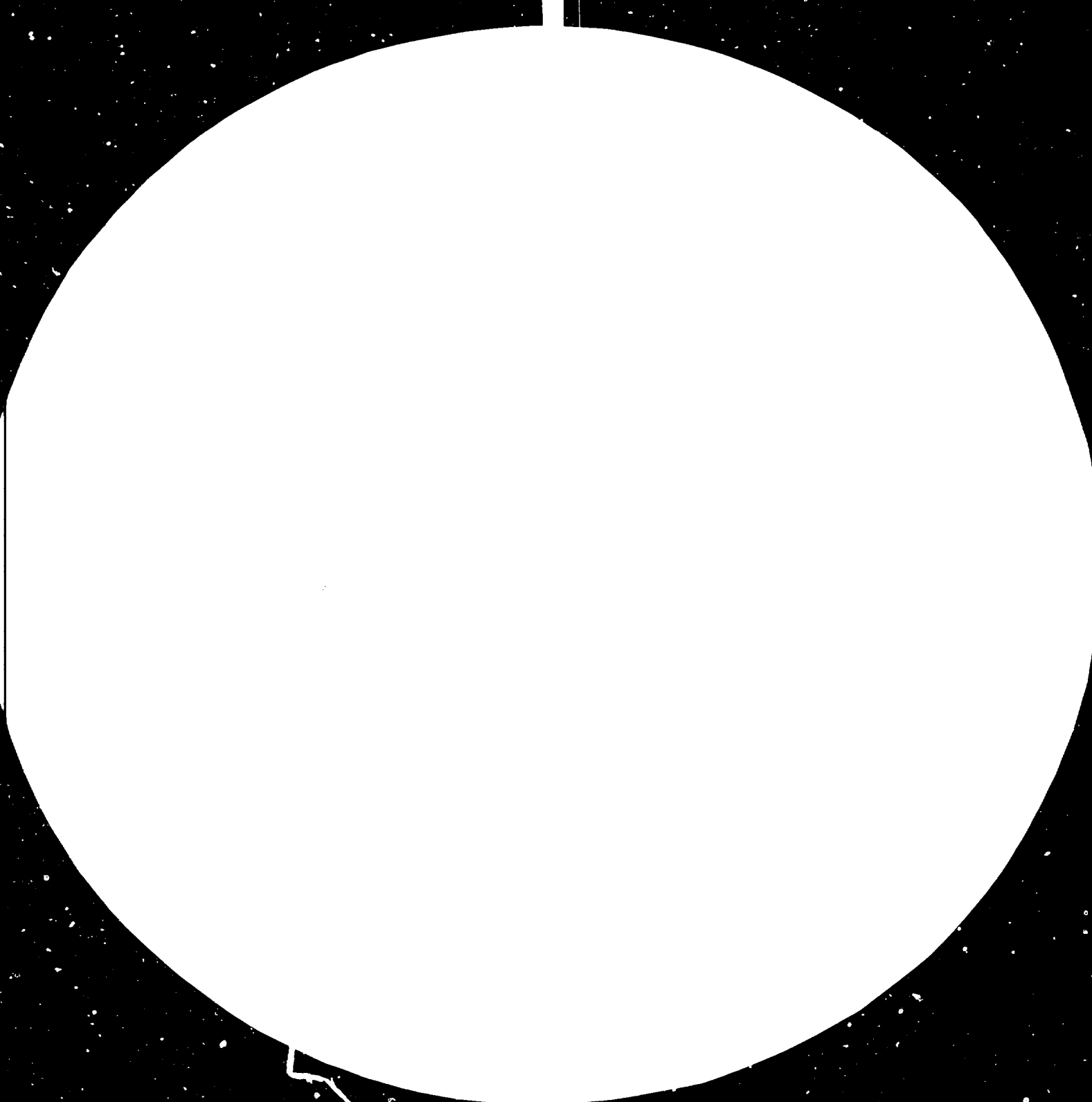
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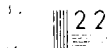
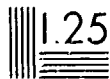
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FEATURES AND ISSUES IN TURNKEN CONTRACTS
IN DEVELOPING COUNTRIES *

(Part II)

Prepared by
United Nations Centre on Transnational Corporations

* The paper has been prepared as a special contribution of the Secretariat of the United Nations Centre on Transnational Corporations for the Meeting of the Ad Hoc UNCTAD/UNIDO Group of Experts on Trade and Trade-related Aspects of Industrial Collaboration Arrangements.

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INTRODUCTION

1. The study by the United Nations Centre on Transnational Corporations (UNCTC) on turnkey contracts in developing countries is comprised of two parts: Part I was directed to the identification of the principal features and trends in the nature of turnkey contracts in developing countries and to certain basic issues that need to be considered by governmental, as well as semi-governmental or private purchasers (Owners/Purchasers) from these countries before entering into such contracts. Part II of the study contains an analysis of specific contractual provisions in existing turnkey contracts dealing with the design and construction of a variety of processing, manufacturing, and power-generating facilities.

2. In both parts of the study, the concept of a turnkey contract has been viewed not only in terms of traditional turnkey arrangements for establishment of plant facilities but also extended to various functional responsibilities in respect of production, training and operations during the post-construction stage of project implementation. The traditional or single-purpose turnkey contract is to acquire and establish physical facilities up to the completion of project construction, including test runs; in many instances, however, it has and can be extended to multiple purposes extending to the stage of initial project operations and ensuring guaranteed levels of output of products of defined quality through adequate training programmes and supervision for a specified period after plant facilities have been established. Accordingly, while the turnkey concept

is understood in industrialized countries as merely combining the separate functions of design and construction so that they are the responsibility of a single contracting entity, the more expanded focus of a multiple-purpose turnkey contract, where such an arrangement is entered into in developing countries should be considered in terms of the contract's effectiveness as an agreement covering technical assistance, training, and licensing to achieve the multiple purposes intended through such a contract, in addition to its primary focus as an engineering and construction agreement.

3. In addition to identifying the basic issues to be considered by Owners/Purchasers, Part I of the report set forth general advantages and disadvantages of the multiple-purpose turnkey contract as a commercial arrangement that developing countries might look to for achieving successful operations of a plant in the post-construction stage. It also identified the principal issues and implications in adopting this form of contractual arrangement in terms of its impact on domestic technological absorption and development at the stages of both project construction and post-construction operations.

4. The following report, which constitutes Part II of the study on turnkey contracts, was prepared following an analysis of fifteen turnkey arrangements. The contracts reviewed (while edited to avoid disclosure of the parties) involved facilities to be constructed in several countries of Africa, Asia, Latin America, and the West Asia.

5. The review of the contracts indicated that Owners/Purchasers approached the various projects with one or more identifiable purposes in mind. These may include (1) the single purpose of realization of the physical facility (the "bricks, mortar, and machinery" purpose); (2) multiple purposes, apart from design and construction and including post implementation operations involving performance over a period of time, product-in-hand, compensation arrangements¹, licensing and other functional aspects.

6. Not all of the contracts reflected all the multiple purposes referred to above. Several were, on the basis of their provisions, entered into with the Owner/Purchaser having only the bricks, mortar, and machinery purpose in mind. These traditional or single purpose turnkey contracts were accordingly analyzed in terms of their effectiveness in protecting the Owner/Purchaser vis-a-vis this limited purpose, that is, the design and construction of the plant facilities. A number of the contracts analyzed, however, contain provisions which offer clear evidence of the Owner/Purchaser's intention to achieve several purposes beyond the establishment of plant facilities. These contracts were analyzed in terms of their effectiveness in affording protection to the Owner/Purchaser with respect to the various purposes intended to be achieved.

7. Because of the multiple purposes sought to be covered in many of these contracts, Part II of the study reviews first those provisions affecting the multiple objectives sought to be achieved and is followed by an analysis

¹ Compensation trade agreements, sometimes referred to as counter-trade or buy-back agreements, is a variation of a straight barter agreement. Payments under these contracts consist wholly or substantially of future supplies of profits.

of those provisions relating to the more limited issues affecting the establishment of the physical facility. Reference has been made, in respect of several issues, to the model contract provisions in fertilizer contracts which have been prepared by UNIDO (UNIDO draft)¹.

8. The format of the report presents separate sections relating to the significant issues. Each section includes (1) an introductory overview describing the nature of the issue; (2) a review of the provisions of the contracts which analyzes the extent to which they afford effective protection to the Owner/Purchaser as to such issue; (3) a sample clause taken from one of the contracts that appears to afford relatively effective protection to the Owner/Purchaser regarding the issue; (4) comments upon the degree of effectiveness of such sample clause; and (5) a note setting forth special considerations, if any, that should be taken into account if the contract has only the more traditional single purpose of "bricks, mortar and machinery."

9. Following the discussion of the specific provisions of the contracts, there is a conclusion to this report, which is intended to serve as an overall conclusion for both Parts I and II. A tentative draft single-purpose turnkey contract is set forth as Annex A. This tentative draft is intended as a suggested checklist of major issues that an Owner/Purchaser may wish to consider. Finally, Annex B is a checklist for issues relating to international licensing agreements that should be considered by Owners/Purchasers if the turnkey contract has an emphasis on the acquisition of a license.

¹Ref. ID/WG.318/1 "Second Draft of the UNIDO Model Form of Turnkey Lump-sum Contract for the Construction of a Fertilizer Plant".

A.

COST OF THE PROJECT

Overview

10. If the Owner/Purchaser approaches the turnkey project with more than the physical facility in mind, the cost of the project is likely to be significantly higher. There is no doubt that, as the turnkey contract is modified to place additional responsibilities and risks on the contractor, the Owner/Purchaser will be asked to pay a higher price. To the extent the contractor assumes responsibilities for training that are linked to effective guarantees of the "product in hand" nature (see "Performance Guarantees") and must prove performance prior to final payment (see "Payment Terms"), he will in the usual case exact a greater price to cover these responsibilities and risks. How much greater a price will ordinarily depend upon (1) the contractor's experience in similar projects, his ability to allocate risk among several projects with different Owners/Purchasers, the contractor's evaluation of locally available human resources, and (2) contractual factors, such as those provisions requiring that a percentage of payment be withheld until all performance guarantees have been met, the basic price formula (that is, lump sum or cost plus), and other provisions that effectively place the risk of ultimate failure of the project on the Contractor.

11. Given the above, the lump-sum turnkey contract may be inappropriate for those turnkey contracts having multiple purposes in mind, in addition to that of bricks, mortar, and machinery. The lump-sum contract, again assuming meaningful guarantees and payment terms intended to create features

for self-execution of the agreement, places the risk of cost overruns on the Contractor and will accordingly serve as an incentive to either well-padded estimates prior to execution of the contract, improvident cost cutting during the carrying out of the contract, or abandonment of the project in case of a significant underestimation of the costs.

12. A "cost plus percentage costs" formula is also likely to be unfavorable to the Owner/Purchaser, due to its open-ended nature. However, alternative cost formulae such as guaranteed maximum, incentive contracts, or mixed lump sum/cost plus are available. These alternative methods should be considered as means to reduce the cost of a project by reducing the Contractor's risks as to those more intangible factors that might lead to the partial or complete failure of a turnkey project intended to achieve multiple purposes.

Review of the Contracts

13. All of the contracts reviewed were of either a lump-sum or mixed lump-sum nature, regardless of whether the apparent purpose was bricks, mortar, and machinery or included the multiple purposes. Most of the contracts also provided some breakdown between foreign exchange and local currency costs. Moreover, most of the contracts provided for at least a rudimentary itemized breakdown of particular costs such as engineering, machinery, and transportation.

14. The major weaknesses in the contracts' provisions for costs, aside from the general reservation as to the lump-sum approach itself, involved (1) their failure to go far enough in specifying a more complete itemization and (2) an absence of any indication that foreign exchange availability or reserves had received appropriate consideration. An example of a relatively weak provision dealing with costs is as follows:

The price for construction of a complete factory on turnkey basis, subject of this contract, as stated in Article 2 of this contract, amounts to:

- for delivery and work from
DM 8.882.468,--

(in words: Deutschmarks eightymillion
eightyhundredeightytwothousandfourhundred
sixtyeight)
- for delivery and work from
DIN 69.078.040,--

(in words: Dinars sixtyninemillionseventy
eightthousandandforty)
- for customs duties: DIN 24.469.876,--

(in words: Dinars twentyfourmillionfour
hundredsixtyninethousandandeighthundred
seventysix)

The above price is firm and is not subject to any escalation, and the same is to be understood for a completely constructed factory included transport and packing free.

15. The above-quoted clause raises several major questions:

- o Because of the lack of itemization, it is not clear as to how much the Owner/Purchaser is really paying for the training services, It is also not clear as to whether the figures relate to expenditure on transportation of trainees nor whether the training to be imparted relates to the construction stage or to project operations or to training in designs and engineering.
- o It does not indicate the extent to which the "no escalation" clause caused the contractor to pad the cost to cover unforeseen contingencies.
- o Will the local currency portion of the cost be immediately repatriated or is it impliedly subject to foreign exchange controls?
- o To what extent does the lump-sum amount incorporate discounted future royalties?
- o Does the lump-sum figure reflect a discounting of contractor's costs for possible maintenance work during the guarantee period, which may or may not be required?

Samples of More Adequate Cost Provisions

16. Relatively few of the contracts contained cost provisions which were, at least on the basis of format, more favorable to the Owner/Purchaser than that quoted in paragraph 14 above. While no judgments can be made on the substance of the cost (that is, the fairness or unfairness of the actual amount Owner/Purchaser has agreed to pay) from the contracts alone, the critical issues from the drafting point of view are (1) the extent to which the cost provisions are itemized with specificity so that the Owner/Purchaser is able to evaluate the cost of each good or service to be acquired from the Contractor and (2) the extent to which incentives for cost savings are held out to the Contractor and passed on to the Owner/Purchaser. Two sample clauses relating to cost are set forth below:

a. The UNIDO Draft

17. The following provisions of Article 20 of the Unido draft relate only to the cost of the facility. The provisions dealing with payment terms are included in the next section of this report:

ARTICLE 20

CONTRACT PRICE, TERMS OF PAYMENT,
BONUSES AND INCENTIVES

20.1 The PURCHASER shall pay to the CONTRACTOR, as consideration for the execution of the Contract, the performance of the CONTRACTOR's services and completion of the Works, the total amount of

(Insert Price and Currency)

hereinafter referred to as the Contract Price. The Contract Price shall be subject to the provisions of Article 20.2 below.

20.1.1 Insofar as these presents constitute a lump-sum Turn-Key Contract the Contract Price mentioned in Article 20.1 above shall be final and conclusive as to the total amount payable under this Contract, its being expressly agreed that, for the purposes of a more detailed price-citation, there is provided hereinbelow a breakdown of the Contract Price (as categorized in Articles 20.2 to 20.8 hereunder) to the intent that such amounts broken down shall be valid only to the extent that the total of the amounts in the said categories do not exceed the Contract Price payable as abovementioned, subject to the provisions of the terms of the payment herein.

20.1.2 The Contract Price mentioned in Article 20.1 above shall be modified only if the PURCHASER acknowledges that additional services and/or equipment outside the scope of this Contract and/or improvements to the specifications, pursuant to Article 15, justify an increase or decrease in the Contract Price, or as otherwise formally agreed in writing between the PURCHASER and CONTRACTOR as regards work, services, equipment, materials or responsibilities hereinbefore not included within the scope of the Contract, and the aforementioned Contract Price may in the proper case be increased or decreased to a Total Adjusted Contract Price. The CONTRACTOR acknowledges that costs arising out of changes in material and equipment due to modifications and/or rectifications required shall not be treated as changes and extra within the provisions of Article 15.

20.1.3 The Contract Price mentioned in Article 20.1 above shall (for the purposes of convenience) be divided into the categorized amounts stated in each of

Articles 20.2 to 20.8 below respectively to facilitate the identification of payments required to be made when due at progressive stages.

20.2 For the granting of the licenses, know-how and supply of basic engineering for the Plant referred to in Article _____:

For the Ammonia Plant	(Amount)	(Currency)
For the Urea Plant	(Amount)	(Currency)
For Utilities	(Amount)	(Currency)

20.3 For the supply of Plant, equipment, materials, ex-Site (inclusive of the engineering and related services) referred to in Article _____:

(Amount) (Currency)

20.4 For the detailed civil engineering design work, and completion of all civil works, including road, (rail) and telephone connections and related services, referred to in Article _____:

(Amount) (Currency)

20.5 For complete erection of plant and equipment including the supply of erection materials and hire of erection equipment and related services:

(Amount) (Currency)

20.6 For services related to Management, Operations and Supervision:

(Amount) (Currency)

20.6.1 For Management, Supervision, Pre-commissioning and Commissioning Operations from Mechanical Completion of the Plant until completion of Guarantee Tests and issue of Provisional Acceptance Certificates as provided by Articles 13, 17.1, 18.13 and Annexure XX, and as elsewhere provided in this Contract, the Start-up of the Plant, as provided in Annexure XX; and for the services to be performed by the CONTRACTOR in connection therewith:

(Amount) (Currency)

20.6.2 For providing Management Assistance from the completion of Guarantee Tests until Final Acceptance of the Plant as required by Articles 17.2 to 17.5 (inclusive); and for providing mechanical warranties in accordance with the Contract:

(Amount) (Currency)

20.7 For providing training facilities for the PURCHASER's personnel as provided in Annexure XVIII:

(Amount) (Currency)

20.8 For the supply of two (2) years requirement of spare parts, and services related thereto as required by Article 10:

(Amount) (Currency)

20.9 All the prices contained in Articles 20.2 to 20.8 above are fixed and firm for the duration of the Contract and any extension(s) thereof and shall not be escalated in any manner. The amounts stated in this Article shall be payable on the dates due in the Contract in the currencies mentioned. The schedule of payments and the amounts stated to be payable by the PURCHASER to the CONTRACTOR herein, shall in all cases be subject to adjustments due to the causes referenced in Article 20.24 below, which are exemplified in the provisions of the Contract herein.

* * *

20.30 The CONTRACTOR hereby agrees to perform the work in well-planned and expeditious manner so that the completion of the work at various stages and that of the whole Works is achieved according to the time schedules given in Article 2 and detailed in Annexure XV of this Contract. In the event that the CONTRACTOR fully accomplishes the Mechanical Completion of the Plant work under Article 18 and demonstrates the Guarantees required pursuant to Article 26 during a period before the end of thirty-six (36) months after the Effective Date of the Contract as required by the provisions of Article 4.26 the CONTRACTOR shall be entitled to receive Bonus or Incentive as hereunder specified for each complete week of saved time in terms of the Completion of the Works:

20.30.1 (____) % of fixed price(s) under Article 20.1 subject to a maximum of (____) amount.

Payments under this Article shall (subject to Article 4.22) be made within twelve (12) months after Provisional Acceptance of the Plant provided no defects appear in the Plant as expressed in Article 18 and/or equipment during this period affecting its capacity, performance and/or operations.

20.31 Should the Mechanical Completion of the Works be accomplished by the CONTRACTOR within thirty-two (32) months of the Effective Date, and if for reasons attributable solely to the PURCHASER, the Plant cannot be started-up within four (4) months thereafter, the CONTRACTOR shall be entitled to a Bonus or Incentive as below for each complete fifteen (15) days of saved time:

20.31.1 (____)% of the fixed price under Article 20
subject to a maximum of (_____) amount.

b. An Alternative Approach

18. The following clause, while an improvement over the majority of the contracts insofar as it provides at least a rudimentary cost breakdown, lacks the greater specificity of the Unido draft's clause and also affords no incentive at all for cost savings:

CHAPTER 2: PRICE

2.1 In accordance with Clauses 1.1, 1.2 and 1.3 of the Contract, the total price for the Equipment Materials and Technical Documentation to be supplied by the Sellers, including the license fee and know-how fee is _____.

The break down prices of the total price are:

_____ for Equipment and Materials
 _____ for Spare Parts
 _____ for Technical Documentation
 _____ for License and Know-how

2.2 The above total price is a fixed price.

2.3 The prices for the Equipment, Materials and Spare Parts are for delivery F.O.B. including all expenses for loading the goods on board the vessel assigned by the Buyers but not including any stowing fee.

2.5 The total price does not include the remuneration and any other expenses for the Seller's technical personnel to be sent to the Contract Plant for service, but include the expenses with the exception of travelling and living costs, for training the Buyers' technical personnel by the Sellers in one of the plants of _____.

2.6 With the exception of the stipulations as per Annex 7 of the Contract, all expenses for expatriating their personnel for the execution of the Contract shall be borne by the party itself.

Commentary

19. The cost provisions of the contracts demonstrated weaknesses in the areas of (1) specificity and (2) lack of incentives for cost savings. The Unido draft goes further than any other contract examined with respect to specificity, but does not significantly address the area of cost savings. For while the title of Unido draft Article 20 is "Contract Price, Terms of Payment, Bonuses and Incentives," the provisions of the Article (20.30 and 20.31) address the question of time savings rather than any overall cost savings. None of the contracts examined thus contained any method of avoiding the weaknesses of the lump-sum approach discussed in the overview.

20. As to the substance of the cost provisions, a further comment should be added. Where a lump sum approach is used, very detailed preparation work must be performed both by the Owner/Purchaser (or his agents or the lending institutions providing the financing) as well as the Contractor. No lump-sum figure can be meaningfully arrived at by either party unless such preparatory work has been done. Any model contract, such as the Unido draft, would be significantly more helpful to the Owner/Purchaser if it set forth guidelines for establishing ultimate cost figures.

21. An example of the higher project cost attributable to the lump-sum turnkey approach is the case of a power facility which according to preliminary estimates would have required approximately U.S. \$100 million, but which ultimately cost the developing-country Purchaser one-third in excess of that amount by the time the lump-sum contract was signed. Among the reasons given for the startling price increase were:

- o additional unanticipated equipment and other new or expanded items;
- o increased engineering services cost; and
- o increased foreign exchange costs due to the Purchaser's decision to seek full turnkey responsibility on the part of the Contractor for civil works construction as well as for supply, erection, and installation of the equipment. In other words, the Owner/Purchaser's decision to utilize a lump-sum turnkey contract had the effect of increasing the cost of the project significantly.

Special Considerations Relating to
Single-Purpose Turnkey Contracts

22. If the contract is of the single-purpose type, it will be subject to the same considerations indicated above, with two exceptions. As the Contractor is not assuming greater than usual risks, the ultimate cost should be lower. Moreover, there is less reason to resist the lump-sum approach with a contract of this nature as there is the possibility of more clearly identifying each item of cost. The contract set forth in Annex A contains cost provisions of an itemized nature.

B.

PROVISIONS AS TO PAYMENT TERMS

Overview

23. As indicated in the previous section of this report, the cost provisions of a turnkey contract are of critical importance. With respect to multiple-purpose turnkey contracts, the terms according to which such cost is paid may be of even greater importance. The payment terms should be linked to provisions dealing with both the work to be performed and the performance guarantees in order to assure satisfactory compliance by the Contractor. In many instances, the payment terms of the turnkey contract may, as a practical matter, afford the Owner/Purchaser the greatest protection in achieving his goals.

24. Assuming the lump-sum approach, three general methods are available for arranging the payment provisions in a turnkey contract:

- (a) Fixed-amount cash payment to the Contractor in pre-arranged installments over a period of time with the final installment payable following the end of at least the initial guarantee period;
- (b) Fixed-amount cash payment as above with additional cash payments made to the Contractor if the production or profits from the facility reach or exceed a specified amount; and

- (c) All or part of the payment to the Contractor made in the products manufactured by, or raw materials extracted with, the facility.

Review of the Contracts

25. Only one of the Contracts reviewed varied in its payment provisions from paragraph 24(a) above. The contract, dealing with an electrolytic copper refining facility, contained payment terms of the "resultant product" approach of paragraph 24(c) above, and will be discussed in paragraph 28. The other contracts followed essentially the same basic pattern of (1) payment of an advance to the Contractor, which is usually held in escrow or guaranteed by a third-party bank for a given period of time; (2) progress payments made to the Contractor dependent upon certification of work completion by the Owner/Purchaser, and (3) a final payment of a percentage of the price payable following a guarantee period of varying length. While following the same basic pattern, the contracts varied significantly in terms of the protection afforded to the Owner/Purchaser. An example of relatively weak payment provisions from the Owner/Purchaser's point of view are set forth below:

Article 25

Employer (Purchaser) has undertaken obligation to pay to contract, before commencement of works, advance without interest rate in the amount of 20% for the value of Din 118.267.906 making Din 23.653.581

in the course of 15 days from the day of contract signing, for the value of technological equipment services and so on from abroad, which will be paid to contractor's subcontractor in the value of Lit 4.292.528.000 in currency stated by the contract, to the effect of delivery of foreign equipment. The advance will be paid according to Contractor's order.

* * *

Article 26

When importing the goods, Bank will get payment orders for payment of custom duties, directly from contractor with Employer's approval.

Article 27

For remainder of the contract price--80% of civil, civil-handicrafts and other works, the Employer will deliver to Contractor bank guarantee as instrument for securing of payment.

For remainder of the contract price 70% for foreign equipment, Employer will open through IBT-IBRD-Washington, irrevocable devisable documented letter of credit, in favor of subcontractor being in charge of foreign equipment.

PAYMENTS FOR THE EXECUTED WORKS:

Article 28

Remainder of the contract price amounting further 80% of the value, Employer will pay to Contractor per monthly temporary statements of Contractor, certified by

Employer's supervisory body, according to scope of the works performed on the facility, on the basis of elements from the programme of execution of the works and financial plan, within the course of 20 days from the day of delivery of statement.

Article 29

The Employer shall make payments to the Contractor for transportation, forwarding, insurance and customs on the bases of statements of bills.

Payment for foreign equipment will follow after contractor (i.e. his importer) presents usual certificates that the goods-equipment arrived to determined place i.e. that the service were done according to time schedule.

Article 30

According to regulations on securing of payment between the users of social proceeds parties to the contract state that obligatory relationship established by this contract for undisputable amount, starts by the day when temporary statements are delivered to Employer, provided that Employer is bound to pay undisputable amount within the period of 20 days from the day of statement reception.

Date of delivery of statement is the day when statement is received for Employer's protocol.

Parties to the contract agree that temporary statements for executed works are delivered till 5th day of the month for previous month.

Immediately after reception, and within the period of 8 days at the latest, Employer is bound to certify temporary statements if the works were executed and accounted in stipulated manner. Within the same period Employer and Contractor are bound to settle possibly disputable amount of statement.

If Contractor delays with time schedule for work executions provisions from Contract documents shall be fully applied (para. 10.2. General Conditions).

From all payments for foreign equipment, 5% of the equipment value will be retained on behalf of guarantee deposit.

FINAL ACCEPTANCE OF WORKS

Article 41

After expiring of guarantee date (two years) and at the latest within the course of 30 days after expiring of guarantee date, Employer forms joint commission, consisting of the representatives of the parties to the contract, which carries out inspection of investment works. On the basis of the statement of commission on quality of executed works, i.e. the work of the facility as a whole within guarantee date, Employer issues "certificates 2" on final acceptance of works as well as final on accounting of works is also done (II final statement).

Article 42

After issuing of "Certificate 2" on final acceptance of works, retained deposit for technological equipment as well as bank guarantee for civil-handicraft works, by which Contractor guaranteed quality of works, is returned to Contractor completely or partially according to final account.

After issuing of "Certificate 2", performance guarantee is returned to Contractor.

26. The payment provisions set forth above are weak for the following reasons:

- o Timing of the periodic payments is not directly related to the Contractor's completion of a specified portion of the work. Contractor is to be paid on a monthly basis, according to the amount of work completed and certified by Owner/Purchaser. This leaves the monthly amount to be paid very uncertain and does not serve as a significant incentive for performance during the course of the contract.
- o The progress payments, coupled with the advance payment, account for 100% of the cost of the facility. This pattern of progress payment does not afford any incentive to the Contractor, or assurance to the Owner/Purchaser, for performance by the Contractor on the guarantees after the completion of the Contract.
- o The Owner/Purchaser's sole protection during the two-year guarantee period are the bank guarantees running on his favor to the extent of 20% of the overall cost and 5% of the equipment value.

- o Nothing other than the Contractor's reputation makes him concerned about the facility's performance beyond the two-year guarantee period. To the extent the 20+% represents padded costs, the Contractor may show an insignificant interest in the ultimate success of the facility.

- o Nothing in the payment provisions addresses Purchaser's ability to secure foreign exchange.

- o The 20+% protection to the Purchaser is not directly linked to performance by the local staff. Assuming possible failure of the project attributable to poorly trained management or staff, the Contractor may nevertheless be entitled to final payment. As stated in paragraph 54, if poorly trained staff is unable to operate and maintain the equipment without the Contractor's supervision, and since this aspect is not covered by the bank guarantee, the cost of any resultant project failure would accordingly be borne by the Owner/Purchaser alone.

Samples of More Adequate Payment Provisions

27. The payment provisions of those turnkey contracts that have the multiple purposes described in the Introduction should be considered as providing effective protection to the Owner/Purchaser only to the degree they are meaningfully linked to the successful operation of the facility. This linkage may be accomplished by relating the payment terms to well-drafted performance guarantees or by otherwise giving the Contractor an interest in the facility's performance.

a. Payment in Resultant Products

28. The mode of payment provisions which were, on the face of the contract, most favorable to the Owner/Purchaser were contained in the contract for the electrolytic copper refinery. The contract provided for a fixed lump-sum cost, with pre-established foreign and local currency breakdowns. It also provided that the Contractor was to receive 10% of the foreign currency amount and 20% of the local currency amount as an advance payment following Contractor's posting of a bond. The remaining 90% foreign currency amount was payable in 118 monthly installments over a ten-year period following delivery of the plant with interest of 6.75% on the outstanding balance, and the remaining 80% local currency amount was payable in 30 monthly installments following delivery without interest. While the aforesaid terms are by themselves subject to the same criticism as the provision quoted in paragraph 25 above, the form of payment was in cathodes produced by the facility. The only unfavorable clause as to this payment in resultant products approach was that in the event the facility

did not produce sufficient cathodes, the contract required the Purchaser to secure them from another source. This may, however, be a feature of such compensation agreements except where compensation can be provided in cash.

b. Cash Payment

29. Two alternative approaches can be considered in respect of payments of a lump sum amount as suggested in the following provisions:

Unido draft

20.10 The payment due to the CONTRACTOR under Article 20.2 above shall be made as follows:

20.10.1 (25%) (amount) as an advance payment.

20.10.2 (50%) (amount) on receipt by the PURCHASER of a copy of the know-how and basic engineering documents as listed in Articles 3.1.2 and 4.5.

20.10.3 (25%) (amount) on completion of the Guarantee Tests of the Plant and issuance of the Provisional Acceptance Certificate by the PURCHASER.

20.11 Payments due under Article 20.3 shall be made as follows:

20.11.1 10% as an advance payment.

20.11.2 10% at the end of the sixth (6) month from the Effective Date, provided that the meetings contemplated under Articles 6.5 and 6.8 have been held and all related matters completed in all respects.

20.11.3 60% shall be paid pro rata on shipments of the plant and equipment.

20.11.4 10% shall be paid on completion of the Guarantee Test of the Plant and issuance of the Provisional Acceptance Certificate by the PURCHASER.

- 20.11.5 10% shall be paid on the issuance of a Final Acceptance Certificate by the PURCHASER.
- 20.12 Payments under Article 20.4 shall be paid as follows:
 - 20.12.1 10% as an advance payment.
 - 20.12.2 10% on completion of the design work for the main buildings and structures of the Plant.
 - 20.12.3 65% shall be paid as progressive payments in monthly installments against actual progress of work on Site as reported and approved by the Engineer.
 - 20.12.4 15% on completion of the Guarantee Tests of the Plant and issuance of the Provisional Acceptance Certificate by the PURCHASER.
- 20.13 The payment due under Article 20.5 shall be paid as follows:
 - 20.13.1 10% as an advance payment.
 - 20.13.2 15% on the arrival of CONTRACTOR's erection equipment at the Site.
 - 20.13.3 50% as progressive payments in monthly installments against actual progress of erection work on Site as reported in the CONTRACTOR's monthly progress report and certified by the Engineer.
 - 20.13.4 10% on mechanical completion of the Plant and issue of a Mechanical Completion Certificate.
 - 20.13.5 10% on completion of the Guarantee Tests of the Plant and issuance of the Provisional Acceptance Certificate by the PURCHASER.
 - 20.13.6 5% on issuance of the Final Acceptance Certificate.
- 20.14 The payments under Article 20.6 will be made as specified herein:
 - 20.14.1 Pursuant to Article 20.6, the payments shall be made as follows:

- 20.14.1.1 25% of the amount stated in Article 20.6.1 on the Mechanical Completion of the Plant.
 - 20.14.1.2 25% of the amount stated in Article 20.6.1 on the first input of feed-stock to the Plant.
 - 20.14.1.3 25% of the amount stated in Article 20.6.1 on commercial production of specification grade urea as defined in Article 18.
 - 20.14.1.4 25% of the amount stated in Article 20.6.1 on completion of the Guarantee Test of the Plant and issuance of the Provisional Acceptance Certificate by the PURCHASER.
- 20.14.2 Pursuant to Article 20.6.1 the payments shall be made as follows:
- 20.14.2.1 25% following three (3) months after satisfactory fulfillment of the Performance Guarantee Tests.
 - 20.14.2.1 25% following six (6) months after satisfactory fulfillment of the Performance Guarantee Tests.
 - 20.14.2.3 25% following nine (9) months after satisfactory fulfillment of the Performance Guarantee Tests.
 - 20.14.2.4 25% upon issuance of the Final Acceptance Certificate.
- 20.15 The amount(s) due under Article 20.5 (this should be 20.7) shall be payable as follows:
- 20.15.1 15% upon agreement of the program of training.
 - 20.15.2 65% during training as specified in Annexure XVIII.
 - 20.15.3 25% on completion of the overseas training of the PURCHASER's personnel, in accordance with Annexure XVIII.

- 20.16 The payments under Article 20.8 shall be paid as follows:
- 20.16.1 10% on approval by the PURCHASER of the list of spare parts.
 - 20.16.2 65% pro rata on shipments of the spare parts.
 - 20.16.3 25% on the successful completion of the Guarantee Tests of the Plant and issuance of a Provisional Acceptance Certificate by the PURCHASER after deducting the value of the spare parts consumed by the Plant before the Guarantee Tests have been completed unless such spare parts have been fully replaced by the CONTRACTOR.
- 20.17 The provisions of Article 27 (Liquidated Damages) shall apply mutatis mutandis in relation to any delays suffered in the fulfillment of the Contract pursuant to the requirements of this Article and time overruns.
- 20.18 All the advance payments due from the PURCHASER to the CONTRACTOR pursuant to Articles 20.10 to 20.13 inclusive shall be made in accordance with Article 21.2 upon the satisfactory fulfillment by the CONTRACTOR of its obligations as stated in the provisions of Articles 21.1 and 21.2.

30. The above provisions of the Unido draft are favorable insofar as percentage payments are made as to itemized costs. Most of the contracts did not use such a format and instead followed a non-itemized approach. One of the better drafted provisions of such an approach which could be considered as a more simplified alternative is as follows:

CHAPTER 3: PAYMENT TERMS

- 3.1 All payments by the Buyers to the Sellers under the Contract shall be made by telegraphic transfer in _____ through the Bank of (Purchaser's home country) and all payments, if any, by the Sellers to

the Buyers shall be made by telegraphic transfer in _____ through the _____. All banking fees incurred in (Purchaser's home country) shall be borne by the Buyers, and those incurred in _____ shall be borne by the Sellers.

3.2 The Buyers shall pay the amount of _____ (Say: _____) in Clause 2.1 of the Contract to the Sellers in the following manner and rate:

3.2.1 10% of the total price, viz. _____ (Say: _____) shall be paid not later than 20 days after the Bank of (Purchaser's home country) has received the following documents and the Buyers have found them in order:

- A. An export license issued by the relevant authorities of the Seller's country authorizing them to export the Equipment, Materials, License, and Technical Documentation or a certificate issued by the relevant authorities stating that an export license is not necessary;
- B. An irrevocable Letter of Guarantee issued by _____, in favour of the Buyers, covering 10% of the total price of the Contract (Specimen as per Annex 9);
- C. Proforma invoice covering the total price of the Contract in quadruplicate;
- D. Commercial invoice in quadruplicate;
- E. Sight draft to be drawn on the Buyers to the Bank of (Purchaser's home country) in duplicate.

3.2.2 _____% of the total price, viz. _____ (Say: _____) shall be paid pro rata shipment within 30 days after the Bank of (Purchaser's home country) has received the following documents and the Buyers have found them in order:

- A. Full set of 3/3 clean on board Bill of Lading made out to order and blank endorsed, marked "notifying National Foreign Trade Transportation Corporation".

- B. Commercial invoice covering the price for the delivered Equipment and Materials, and the proportional amount of License and Know-how fee and Technical Documentation fee in quadruplicate;
- C. Detailed packing list in quadruplicate;
- D. Quality certificate issued by the manufacturers or the Sellers in duplicate;
- E. Sight draft to be drawn on the Buyers to the Bank of (Purchaser's home country) in duplicate.

3.2.3 _____% of the total price of the Contract, viz. _____ (Say: _____) shall be paid within 20 days after the Bank of (Purchaser's home country) has received the following documents and the Buyers have found them in order:

- A. Commercial invoice in quadruplicate;
- B. Photostat copy of acceptance certificate of the Contract Plant signed by both parties in quadruplicate;
- C. Sight draft to be drawn on the Buyers to the Bank of (Purchaser's home country) in duplicate.

3.2.4 _____% of the total price of the Contract, viz. _____ (Say: _____) shall be paid within 20 days after the expiration of the mechanical guarantee period as set forth in Chapter 9 hereof, and after the Bank of China, Peking has received the following documents and the Buyers have found them in order:

- A. Commercial invoice in quadruplicate;
- B. A letter issued by the Sellers certifying the expiration of the mechanical guarantee period, in one original and three copies;
- C. Sight draft to be drawn on the Buyers to the Bank of (Purchaser's home country) in duplicate.

- 3.3 In the case as stipulated in Clause 4.7, the Buyers shall, within 20 days after receiving and checking up the original documents signed by the warehouse and the insurance company respectively, pay the storage charges and premium for the stored goods from the 31st day commencing within the actual date of the goods' readiness for shipment. At the same time, the Buyers shall pay an interest of _____% per annum on the _____% of the shipment value, on the proportional amount of License and Know-how fee, and on Technical Documentation fee counting from the 31st day of the goods' readiness for shipment up to the date of actual shipment.
- 3.4 In case of any penalty as stipulated in Chapter 9 hereof in the course of executing the Contract, the Buyers shall have the right to deduct the sum from the payment due or from the next payment when they deem it justifiable.
- 3.5 In case any document is found incorrect by the Buyers, the Buyers shall cable the Sellers to this effect, indicating the wrong items, within 20 days after the Bank of (Purchaser's home country) has received such document.
- 3.6 When making the payment under Subclause 3.2.1 the Buyers shall submit to the Sellers an irrevocable Letter of Guarantee issued by the Bank of (Purchaser's home country) in favour of the Sellers (Specimen as per Annex 10).

Commentary

31. Of the approaches taken in paragraphs 28, 29 and 30 above, the payment in resultant products approach appears preferable. It is interesting to note that while this approach is being used with some frequency in joint East-West industrial projects, it was used in only one of the projects that were subject of this review. It is an approach favorable to the Owner/Purchaser because:

- o it establishes the confidence of the Contractor in the ultimate feasibility and success of the project. His payment is directly related to the quality of the product produced by the facility he has undertaken to design and construct and the staff he has undertaken to train;
- o it serves as built-in enforcement of the Contractor's performance guarantees;
- o it reduces pressure on foreign exchange reserves.

32. Of the two cash payment approaches, the Unido draft is preferable. While several of the contracts contain some itemization of separate items of cost, only the Unido draft contains a significant corresponding itemization as to payment terms. This is favorable to the Owner/Purchaser because it provides a means of controlling payment for specific items of the various aspects of work undertaken by the Contractor.

C.

PROVISIONS AS TO PERFORMANCE AND COMPONENT GUARANTEES

Overview

33. While it is possible for a turnkey contract's payment terms to provide incentives to assure the contractor's performance, most of the contracts reviewed did not do so. Accordingly, linkage between the

payment terms and guarantees as to performance becomes critically important. Assuming that the contract describes with specificity the scope of the performance requirements, guarantees of that performance must be established for the protection of the Owner/Purchaser. In the usual case, the contract will provide for guarantees or warranties of two types: warranties as to the individual components and warranties as to overall performance. With respect to warranties of the latter type, the contract will provide either warranties of a short-term or demonstration run nature or a longer-term "product in hand" warranty.

Review of the Contracts

(a) Use of the Word "Turnkey"

34. As indicated in the Part I report, it is important for the contract to contain the specific word "turnkey" in describing the contract. The word itself carries with it, according to the jurisprudence of some industrialized countries, a varying degree of protection for the Owner/Purchaser that is lacking in traditional construction contracts. Some jurisdictions in the United States, for example, treat the turnkey contractor as a seller bound by an implied warranty of fitness for a particular purpose. Most of the contracts were satisfactory in this respect, setting forth with varying degrees of emphasis, the turnkey nature of the project.

(b) Warranties as to Components

35. One principal concern of the Owner/Purchaser with respect to the warranties covering individual components of the facility is that whatever

their nature, they protect him as the ultimate consumer of the item. Such a right would be in addition to any warranty given by the Contractor.

36. Several of the contracts failed to address this issue. Some contracts dealt with this by inserting a relatively brief clause such as:

"Contractor will pass on to (the Purchaser) all manufacturer's warranties on Contractor furnished material and equipment."

37. The above language should be improved; it does not speak to assuring the binding nature of the warranties nor does it address the question of the Contractor's responsibility as to the individual components.

38. The other area of concern to the Owner/Purchaser will be the wording of the guarantee as to individual components made by the Contractor himself. The contracts varied significantly as to this matter. A sample of a relatively weak clause is as follows:

Guarantee for the machines

The Contractor guarantees that the equipment delivered by him will be manufactured of first-class quality and material. Particularly, the Contractor guarantees for the construction and technical performance and function of the equipment. In this sense, the Contractor grants to the Investor a guarantee for a period of 12 months from the date of final acceptance of the factory, but not longer than 18 months counted from the last essential delivery, if the delay is due to reasons for which the contractor is not responsible, and 24 months for the construction work and civil engineering, counted from the date of the final acceptance of the factory.

The Contractor guarantees that the equipment produced by him corresponds to the latest technical development at the time when the contract is signed.

All machines and parts manufactured by the Contractor will correspond to the existing DIN-norms and/or to VDE-regulations.

In case of some damages on the machines and parts within the term of this article, the Investor is obliged to inform the contractor for the same, immediately latest within 15 days, by telex which will be confirmed by the latter. The Contractor is obliged to undertake immediately the necessary steps for removing of all defects, in the way of repairing or replacement of new parts or machines within the shortest possible time, i.e. not later than 4 weeks. All expenses from the replacement of the parts and machines as well as from the erection of the same free factory will be on the account of the Contractor.

Each new part and machine that will be replaced or repaired within the guarantee time will have a new guarantee time of 12 months starting from the date of its installation.

In connection with this, any required visits of the Contractor's experts to factory will be at the account of the Contractor.

The parts subject to a natural wear and tear are excluded from this guarantee. Also in this guarantee are not included the damages for which the Contractor is not responsible.

Any further claims by the Investor, as for example from consequential damages and loss of profit are expressly excluded.

39. Among the weaknesses of the quoted provision are:

- o The 12 month period may be either shorter or longer than manufacturers' warranties;

- o It is not stated to be a warranty of fitness for the particular purpose of the facility;
- o The "latest technical development" may or may not be most appropriate for the purchaser;
- o Its limitation of damages provision is extremely limited;
- o It is rendered ineffective if the Purchaser's newly trained staff is unable to maintain or operate the equipment in accordance with the "escape" clause referred to in paragraph 15 of this report: "The (Purchaser) will be responsible for any mechanical defects appearing in case of failure to keep strictly to the instruction for operation and maintenance of the equipment."

(c) Overall Performance Guarantees

40. Most of the contracts established the obligation of the Contractor to deliver a facility that was capable of a defined level and quality of production. This obligation was then guaranteed by the Contractor in the "Performance guarantee" provision of the contract. The principal variation in these provisions related to the manner in which the Contractor was said to have met the guarantees.

41. In those contracts having the broader purposes that are discussed in paragraph 5 of this report, it is important to assure that the performance guarantees are clearly linked to the Contractor's obligation to train the staff. Many of the contracts contained weaknesses in this area.

42. One pattern of testing and performance guarantees that does not appear well calculated to protect the Owner/Purchaser is as follows:

1. Contractor is obligated to train Owner/Purchaser's staff "expertly" (but it is the Owner/Purchaser who is obligated to furnish competent persons to be trained);
2. Contractor is obligated to deliver a facility having a pre-established level and quality of production;
3. Prior to delivery of the facility, the Contract requires test operations both with and without raw material. However, the duration (length) of the tests is not set forth in the contract.
4. During the test operations, the Owner/Purchaser's newly trained staff are performing their duties, but they are working "under management and control of the Contractor."

5. The test operations are supervised and certified by a commission of experts selected by the Owner/Purchaser.
6. Following certification by the commission (within 60 days after completion of the test operations) the Contractor receives payment for the facility.
7. The guarantee term of two years following delivery is limited to "civil and civil-handicraft works and installation works on the facility" with no guarantee covering the training program.
8. Following the two year guarantee period, the Owner/Purchaser and the Contractor form a joint commission for final acceptance of the facility.
9. Following certification by the joint commission, the "retained deposit for technological equipment as well as bank guarantee for civil handicraft works by which Contractor guaranteed the quality of the works is returned to the Contractor completely or partially according to final account."
(The amount the Contractor has at risk during the two year guarantee period appears to be approximately 10-15% of the total cost.)

43. While the above pattern may result in the Owner/Purchaser's acquisition of a well designed and constructed facility operated by a well-trained staff, this will not result from the provisions or protections available to the Owner/Purchaser in the contract. While the provision as to the two year output and quality guarantees are on first impression very harsh from the Contractor's viewpoint, they do little to assure the Owner/Purchaser of anything except disputes as to the Contractor's responsibilities. The performance guarantees are weak because:

- o The test operations are for an unspecified period of time;
- o Contractor has management and control during the tests which thus may not, even though the Owner/Purchaser's staff is on-site, be providing a true test of the training program;
- o The Contractor may in fact have very little at risk during the two year period. If the 10-15% amount reflects "soft" or padded costs, the Purchasers only real protection is the reputation and good faith of the Contractor;
- o Even if the 10-15% amount represents significant value to the Contractor, the guarantee may be met if it is the newly trained staff that is the cause of the failure to meet quality and quantity levels.

Samples of More Adequate Performance
Guarantee Provisions

44. Most of the contracts that contained performance guarantees of significance to the Owner/Purchaser were of "test operation" or a "product in hand" approach and were both subject to the same weaknesses discussed above. The only substantial difference between the two approaches was that the "product in hand" guarantee provides for a longer period of test operation before the Contractor is said to have met his obligations.

45. The principal improvements of the Unido draft are as follows:

- o The guarantees cover the totality of the undertakings of the Contractor, including the training program;
- o minimum time periods for the tests are set forth;
- o after the tests, the Owner/Purchaser provisionally accepts the facility. For 12 months following this provisional acceptance, the Contractor is required (Article 17) to provide management assistance services prior to final acceptance. During this twelve monthly period, the facility must be operated at pre-established levels of performance;
- o according to the payment terms (Article 20) a significant portion of the purchase price is withheld until final acceptance of the facility.

Commentary

46. It is questionable whether a turnkey contract, even with carefully drafted performance guarantees such as those attempted by the Unido draft, is capable of meeting the expectations of the Owner/Purchaser as to the multiple purpose contracts covered in this report. Encumbering the contract with specific and rigorous performance guarantees may serve to create an expectation on the Owner/Purchaser's part that he is contracting for several objectives to be achieved besides the establishment of the physical facilities; it may, as a practical matter, however, eventually lead only to higher costs and a greater likelihood of disputes with the Contractor.

47. The Unido draft's twelve month period between provisional and final acceptance offers a potentially practical method of assuring Owner/Purchaser satisfaction. If the Contractor and the Owner/Purchaser work together on both operational training and transfer of management skills, the performance guarantees may result in a superior facility for the Owner/Purchaser.

Special Considerations Relating to
Single Purpose Turnkey Contracts

48. With respect to use of the phrase "turnkey contract" and guarantees as to individual components, the single purpose turnkey contract should contain the same provisions as discussed above. With respect to performance guarantees and testing, however, the test run approach, coupled with quantity

and quality guarantees, should meet the Purchaser's needs. The Contract in Annex A refers to performance guarantees and tests (Special Condition SC-12), but does not describe them. This along with the contract's failure to expressly identify itself as a turnkey contract, is a weakness.

D.

TRAINING PROVISIONS

Overview

49. In those cases in which the Owner/Purchaser's purpose is broader than the acquisition and establishment of the physical facility, the contractual provisions must be drawn to assure successful realization of these broader purposes of the project. If a critical aspect of the project involves the training of local personnel by the Contractor, the contract should create linkages between such training programs and ultimate payment. Several other provisions, such as payment terms and performance guarantees, may impact directly on the adequacy of the training provisions and should be considered as protecting the Owner/Purchaser only if they serve to implement and enforce the training provisions.

50. In some cases, training provisions could increase the project's cost significantly, where the Contractor's risk is increased by a factor which is difficult to precalculate. This will normally result in overestimation of cost intended by the Contractor to protect himself from this risk. To the extent the Contractor's risk can be reduced by contractual provisions clearly defining his responsibilities, the initial cost to the Owner/Purchaser may be reduced. However, if the Owner/Purchaser agrees to terms

which eliminate all substantial risk to the Contractor for any failures of the training program, the Owner/Purchaser is likely to have merely traded the high front-end cost for the even higher cost of ultimate project failure. Accordingly, a primary consideration of the Owner/Purchaser should be assuring, in the most cost-effective manner possible, the availability of the human resources to operate and maintain the facility once it is constructed.

Review of the Contracts

51. A majority of the contracts reviewed revealed major weaknesses as to the provisions dealing with the training of local operating personnel. Several of the contracts omitted any reference at all to a requirement on the part of the Contractor to train local staff and will therefore be assumed to have been entered into by the Owner/Purchaser with only the physical facility in mind; many of the other contracts, however, while containing a training provision, were likely to be ineffective as a result of the contract's failure either to describe the training provision with specificity or to link the provision to meaningful guarantees. Accordingly, the Owner/Purchaser appears to lack effective contractual protection in those areas set forth in the overview. The projects may have been realized successfully, but if they were, it was because of factors of a non-contractual nature. A sample of an ineffective clause is the following:

During erection and commissioning of the contract plant the operating personnel of the investor, which is designated for handling the contract plant after acceptance, shall be instructed and trained on the machines by the skilled personnel of the Contractor. Number and duration of training the personnel as well as kind of training will

be fixed together with the programme. Number and qualification of the personnel of the Investor to be trained correspond to the specification of the Contractor.

The costs for the training are included in the contract price are to be borne by the Contractor.

The technical personnel of the Investor designated for operating the plant has to be present during the whole time of final assembly and commissioning according to time schedule.

The Contractor will elaborate for the Investor an acceptable programme for training within 30 days after signing the contract.

The training provisions of the contract from which the above clause was excerpted are weak for two reasons: (1) it is on its face insufficiently specific, and (2) in the context of the contract as a whole the clause's training requirements are not significantly linked to either performance guarantees or payment terms.

a. Lack of Specific Terms

52. The quoted provision is merely an "agreement to agree." While a more detailed training program is contemplated by the provision, its substance is left unsettled. How many workers are to be trained? Where will the training take place? Of what various skills level must any particular group of workers be possessed? How many hours of training will the workers undergo? At what language level? How many workers does a similar plant previously built by the contractor require? What is the general pattern of employee turnover? etc. The Owner/Purchaser should, prior to executing the contract, know substantially more about staffing requirements than the quoted provision would indicate.

b. Insufficient Linkage to Performance
Guarantees and Payment Terms

53. In the context of the entire agreement, the quoted provision puts the true risk of an inadequately trained staff upon the Owner/Purchaser, not upon the Contractor. While the civil engineering, construction work, and equipment are subjects of specific guarantees, the only guarantee affecting the performance of the trained staff is that one which guarantees capacity. With a poorly trained staff, the premise is that the capacity guarantee cannot be met.

Guarantee for Capacity

The Contractor guarantees that the plant constructed by him will be capable to reach the specified capacity of the raw material according to Annex I of the contract, working in 3 shifts, i.e. 20 hours working time per day. This capacity will be reached in assortment, proposed by the Contractor within Annex I of this Contract.

The Contractor is obliged to prove this capacity during the definitive acceptance of the factory. If the Contractor is not able to prove the capacity within the first trial period, the Investor is prepared to allow an additional reasonable period of 30 days so that all preparations can be executed and to put the factory in a correct condition for definitive acceptance. All expenses caused within this period will be paid by the Contractor.

If the Contractor is not able to prove the capacity within the additional period, due to reasons for which he is responsible, he is obliged to pay penalty to the Investor as follows:

- for each percentage of the reduction of capacity 1% of the contract price, however, max. 5% of the contract price.

If the reduction of capacity exceeds 5%, the Investor has the right to put the factory at Contractor's disposal. Also, the Contractor is obliged to reimburse the paid

amounts plus reasonable interest to the Investor. Any further claims by the Investor, as for example from consequential damages and loss of profits are expressly excluded.

54. The above guarantee is not, as a practical matter, made on a long-term basis, however, because the contract requires only test runs, with the Contractor's employees managing the local staff during such tests. Moreover, all but 10% of the purchase price is required to be paid to the Contractor by the Owner/Purchaser after the test runs. The Contractor may be able to secure payment of even this 10% amount, payable within 18 months following acceptance by reference to the following clause:

"The investor will be responsible for any mechanical defects appearing in case of failure to keep strictly to the instructions for operation and maintenance of the equipment." If poorly trained staff is unable to operate and maintain the equipment without the Contractor's supervision, then many of the guarantees will be rendered ineffective. The Contractor could then go into arbitration and attempt to require payment of the final 10% of the purchase price 18 months after the tests runs even if the facility is not operational.

Samples of More Adequate Training Provisions

55. The review of the contracts indicated that there are at least two alternative contractual methods available to the Owner/Purchaser for more effective assurance of an adequately trained staff. One alternative, suggested by a contract for a Latin American electrolytic copper refining plant, is to link payment to the Contractor to the item produced by the facility. This "payment in resultant products" approach (discussed more

fully under this report's heading "Payment Terms") gives a significant incentive to the Contractor to assure the availability of a well-trained staff. It is important to note that this approach is likely to protect the Owner/Purchaser even though the contract's training clause itself was not significantly specific and suffered many of the same weaknesses pointed out in the contract discussed above. The other alternative approach to the training issue that seemed promising was set forth in both the UNIDO draft and, somewhat less effectively, an agreement for a turnkey facility (processing) in Asia. Neither contract anticipates that there will be payment in resultant products, but both contain or refer to specific training programs that the Owner/Purchaser requires. The cost of such programs is accordingly more capable of calculation by the Contractor.

a. The UNIDO Draft

56. The UNIDO draft contains numerous provisions relating to training. The central provision is article 16.

Training

- 16.1 The CONTRACTOR agrees and acknowledges that the adequate training of the PURCHASER's personnel is a necessary condition for the fulfillment of the objectives of the Contract.
- 16.2 The CONTRACTOR shall provide for the PURCHASER's personnel both at Site and at plants outside (PURCHASER's country) in accordance with the requirements of Annexure XVIII, Article 4 and Article 16.3.
- 16.3 Training facilities to be provided by the CONTRACTOR shall be as detailed in Annexure XVIII.

- 16.4 The PURCHASER and the CONTRACTOR shall agree at the first co-ordination meeting contemplated under Article 6.8, the time, place and details to be established for the training of the PURCHASER's personnel and final details for training shall be forwarded to the PURCHASER with _____ months following the Effective Date. The CONTRACTOR covenants that he shall competently train the PURCHASER's personnel for the purposes and on the basis referred to herein for the periods contemplated in Article XVIII at a plant or plants, using the Processes of the Licensors identified in Article 4.5 which have commenced production in the five years immediately preceding the Effective Date of this Contract.
- 16.5 The PURCHASER shall undertake to provide personnel for training with qualifications and experience recommended by the CONTRACTOR and agreed to by the PURCHASER.

Other provisions of the UNIDO draft relating to training are set forth in, for example, arts. 2.3, 3.1.24, 3.3, 4.24, 4.26, 4.30, 4.32, 5.9, 6. The training provisions are linked to both separate cost amounts (Article 20.7) and payment terms (Article 20.15) as well, thus allowing for easy determination of the cost for such training. The guarantees of the effectiveness of the training program and performance tests described in Articles 26.10 and 26.10.3, serve as additional incentive to the Contractor to develop a well-trained staff. Moreover, the Contractor's "escape clause" in Article 28.7.1 is limited to Owner/Purchaser's disregard of written instructions, which offers the Owner/Purchaser more security than the looser language quoted in paragraph 54 above.

b. An Alternative Approach

57. The processing contract provides somewhat less protection to the Purchaser as the following clause indicates:

The Sellers are responsible to accept and arrange the technical training of the Buyer's personnel free of charge in one of the plants, however the travelling and living costs shall be borne by the Buyers. The training extent and treatment conditions for the Buyer's technical personnel are stated in Annex 8.

....

After signing the Contract and before the delivery of the preliminary design, the Buyers shall have the right to send at their own expense design liaison personnel to the Sellers' design office to study with the Sellers' technical personnel various technical problems in relation to the Contract, to look into the state of design work and to discuss views on the design with the Sellers.

The Sellers shall also arrange their visit to _____ . The purpose of this visit is to give the Buyers' personnel a detailed understanding of _____ plant. The Sellers shall assist them in arranging their living and working and shall provide them free of charge with all necessary technical documentation, drawings and office rooms in the Sellers' office.

Commentary

58. The clauses referred to under (a) and (b) above are considered more effective from the Owner/Purchaser's viewpoint for the following reasons:

- o They encourage an exchange of skills beyond the merely technical skills of the newly trained operating personnel. A major weakness of the provisions, however, is their failure to assure development of management skills. Even assuming the availability of a well-trained technical staff, a project may fail if it is not managed by well-trained managers;

- o They address the question of determining staff requirements at similar plants already in existence;
- o Presumably (the particular annex containing the specific training program was not available) the questions left unanswered by the weaker clause quoted in paragraph 57 were addressed in the annex;
- o There was meaningful linkage between payment terms, guarantees and the training program which provide an incentive to the Contractor to assure successful implementation of the program. For example, in the case of the contract referred to in paragraph 57, one of the payment terms provided that a given percentage would be withheld until 20 days following the expiration of the guarantee period. One of the guarantees then provided:

Provided that operation and maintenance of the Equipment and Materials of the Contract Plant is done according to the Sellers' Technical Documentation the guarantee period shall be 12 (twelve) months from the date of acceptance of the Contract Plant or _____ months after the date of signing the Contract, whichever is earlier. The period of guarantee for repaired or replacing parts of Equipment and Materials shall be 12 (twelve) months from the date of readiness for operation or

after arrival at the Contract Plant site, or airport. Should any other equipment be out-of-action because of repair or replacement due to the Sellers' fault then the guarantee period of the out-of-action equipment shall be extended correspondingly, provided such out-of-action exceeds 14 (fourteen) days.

While the underlined language is susceptible to criticism, it is a specific phrase that could be tied to the training program and is less likely to give the Contract an escape provision than the clauses quoted in paragraph 54.

59. Despite the above, the most effective assurances as to the availability of both management and operating human resources would appear to be in the contractual provisions relating to payment terms rather than even the best-drafted training program. If the Contractor is paid according to a scale of production or in resultant products (see "Payment Terms"), this may give him a greater incentive to undertake the training program with serious effort. In the event where neither payment according to production nor in resultant products is practically feasible, the approach taken in paragraphs 56 and 57 above are possible alternatives; their very comprehensiveness, however, may result in significant increase of the project's overall cost.

Special Considerations Relating to
Single Purpose Turnkey Contracts

60. The traditional turnkey or design-build contract does not generally anticipate that the Contractor will have responsibilities to train Owner/Purchaser's staff. Three of the contracts reviewed were reflective of this type of contract and contained no training provision. While the general conditions of the contract in Annex A also contains no such training provisions, it is referred to as Special Condition SC-15. If the contract's subject matter is a housing project, training provisions may be omitted; in cases involving processing or power generation, however, local staff will require at least some minimal training in order to familiarize themselves with the new facility. Accordingly, while training is not the principal focus of such contracts, and need not be as carefully linked to payment terms or performance guarantees, a basic training provision should be included.

E.

PROVISIONS RELATING TO BOND REQUIREMENTS

Overview

61. Most large scale construction contracts, whether or not of the turnkey type, involve the Contractor's securing one or more bonds.

Normally, the Contract will require that the Contractor secure both performance and payment bonds; the latter assures the Owner/Purchaser that the Contractor will pay his materialmen and subcontractors and avoids the eventuality of such persons making effective claim against the Owner/Purchaser. The former, for an amount which normally ranges from 50% to 100% of the Owner/Purchaser's cost, is intended to assure the Owner/Purchaser that the Contractor will meet his obligations under the Contract in terms of delivering a facility of a certain quality.

62. Two matters are of concern to the Owner/Purchaser regarding bonding requirements: (1) ultimately the cost of the bond (which approximates 1% of the total cost of the project) is borne by him. As the turnkey method tends to involve greater costs, the cost of a performance bond will be proportionately higher; and (2) the bonding company should be regarded only as furnishing additional financial security to the Owner/Purchaser in the event of Contractor breach; the bonding company will look to the contract itself in order to determine coverage. In other words, the same weaknesses in the contracts discussed in earlier parts of this report may serve to exclude the Contractor's failure of performance from the coverage of the bond.

Review of the Contracts

63. There was little emphasis on bonding indicated by the Contracts. The pattern that emerged was that a percentage of the value of the facility, ranging between 5% and 20% (expressed sometimes with a breakdown between

foreign exchange and local currency costs), was made the subject of a bank guarantee running in favor of the Owner/Purchaser. This guarantee appears to be an alternative (and less expensive) means of assuring performance security to the Owner/Purchaser. Several of the Contracts which anticipated financing by International Bank for Reconstruction and Development (IBRD) used this approach in lieu of the traditional bond.

64. No conclusion can be made as to the adequacy or inadequacy of the above approach. If the Contractor has a superior performance and financial stability, it may be suitable for the Owner/Purchaser in view of the remarks made in the overview above.

More Adequate Bonding Provisions

65. The only "more adequate" contractual provisions concerning bonding or Contractor's performance security, in view of the discussion above, are those provisions calculated to assure the Owner/Purchaser that he will have some financially responsible source to look to in the event of the Contractor's failure of performance.

66. The Unido draft adopts the following approach in Article 21:

PERFORMANCE BONDS AND BANK GUARANTEES

21.1 Upon the execution of the Contract, the CONTRACTOR shall provide to the PURCHASER, a Performance Bond guaranteed by an approved Bank and/or Bonding Institution in (PURCHASER's country) in the form given in Annexure XXII for the amount of (Amount) in favor of the PURCHASER. The Performance Bond shall be valid for the period required under the Contract and such extensions thereof, and the

CONTRACTOR shall take any and all actions including renewals at the appropriate time to keep the said Bond current and valid for the said period. This Performance Bond shall be released upon Final Acceptance of the Plant.

- 21.2 In consideration of the advance payment remitted by the PURCHASER (as provided for herein) the CONTRACTOR shall provide an adequate Bank Guarantee or in lieu an Advance Payment Bond shall be for an amount equivalent to the sum total of the advance payment required to be made by the PURCHASER pursuant to Articles 20.10 to 20.13 (inclusive). The advance payments due from the PURCHASER shall be remitted directly to (Name of Bank) for the CONTRACTOR's account. The amount of the Bank Guarantee or Advance Payment Bond shall be released within _____ () months after the Effective Date of the Contract.
- 21.3 Upon Mechanical Completion of the Plant, and provided the CONTRACTOR elects to exercise his option under Article 20.20, the CONTRACTOR shall deliver a Bank Guarantee for an amount equal to (Amount) at least equivalent to the amount of retention monies requested to be released by the PURCHASER under Article 20.20 from the (Name of Bank) and confirmed by a BANK in (COUNTRY OF PURCHASER) in the form given in Annexure XXIII. This Bank Guarantee shall remain valid and in force up to the date of the Final Acceptance of the Plant, or any extension(s) thereof.
- 21.4 The Bank Guarantee envisaged in Article 20.23 shall be in like form as that specified in Article 21.2 above and such Bank Guarantee shall remain valid for the period(s) mentioned in Article 20.23.

Commentary

67. It is unrealistic to comment specifically on the above provisions without a prior determination of their effect upon the overall cost of the project. To the extent the particular contract reflects purposes other than the "bricks, motor and machinery purpose," it may be impractical to

expect adequate protection for a bonding company. Even assuming it is available, the cost of any such bond is very likely to have the effect of significantly increasing the total cost of the project. Moreover, those provisions going to securing bank guarantees for the Owner/Purchaser, assuming effective linkage to the Contractor's performance guarantees, may also serve to increase the overall cost significantly.

Special Considerations Relating to
Single Purpose Turnkey Contracts

68. The observation made in the overview are directly applicable to single-purpose turnkey contracts. Moreover, assuring Contractor performance in this case is not complicated by additional contractual responsibilities and can be dealt with by traditional means. A good example of a provision dealing with obtaining security for the Owner/Purchaser is set forth in clause CC-53 (p. A-47) of Annex A.

F.

PROVISIONS A; TO LICENSES AND SECRECY

Overview

69. International licensing of industrial property rights such as patents, trademark designs, and know-how is a subject that has been traditionally considered to be specialized and to be covered by separate agreements between the licensor and the licensee. To the extent that licensing of technology and know-how is covered in a turnkey contract, whether of a single-purpose or multiple-purpose nature, the provisions in this regard

should extend to all the issues normally covered in a technology license agreement. These issues relate to description of the rights conveyed; payments for technology, whether lump sum or royalty or a combination and the method of computation in the case of royalty payments; duration of agreement and use of non-patented know-how after expiry of agreement; warranties; use of patents and trademarks and indemnification of licensee for violation of third-party rights; territorial sales rights; right to use competing technologies and of purchase of processed materials, components and spares from third-party sources; access to improvements; confidentiality; sublicensing; assignability; governing law; language; settlement of disputes, and Contractors' obligations to protect the rights conveyed. The contractual provisions in this regard can either be covered in a separate agreement between the contractor licensor and the Owner/Purchaser or constitute an integral part of the turnkey contract.

Review of the Contracts

70. None of the contracts contained comprehensive provisions relating to the above-mentioned issues, which are normally covered by well-drafted licensing agreements in respect of technology and know-how. While several of the contracts addressed basic issues of licensing and confidentiality, the provisions dealt with the issues in a summary fashion. The impression is that either the processes accompanying the turnkey facility were not of the sort requiring more comprehensive treatment or the provisions failed to address licensing in an adequate manner.

71. Those of the contracts that contained no provision at all as to this issue, even one relating to Contractor's obligation to indemnify the Owner/Purchaser against claims by third parties for infringement of third-party rights, fail to protect the Purchaser adequately.

72. Several of the contracts contained a basic licensing/secretcy provision that was ineffectively drafted. An example is the following:

- 10.1 The Sellers, on behalf of _____ hereby grant to the Buyers the non-exclusive license and right to use in (Purchaser's Country) _____.
- 10.2 Within 1-1/2 (one-and-a-half) months after signing the Contract the Sellers shall submit to the Buyers 2 (two) photostat copies of certificates of all of _____ patents pertaining to the above-mentioned process registered in _____.
- 10.3 Should any question or claim arise in (Purchaser's Country) from any third party having patents registered in (Purchaser's Country) due to use of the process by the Buyers, the Buyers will handle the matter concerned. Should any question or claim arise outside of (Purchaser's Country) from any third party due to use of the process by the Buyers, the Sellers will handle the matter concerned.
- 10.4 The Sellers shall inform the Buyers about improvements and new information on the process up to the acceptance of the Contract Plant. After that date the parties are prepared to exchange informations on experience and improvements of the process.
- 10.5 Within _____ years after signing the Contract the Buyers shall not disclose in whole or in part to any third party the know-how, Technical Documentation and other information of the process obtained under the Contract. The secrecy does not apply to those parts of the know-how, Technical Documentation or other information of the process which becomes part of the public knowledge of literature.

- 10.6 The license, know-how, Technical Documentation and other information are to be used only for the construction, operation, and maintenance of the Contract Plant.
- 10.7 The obligations contained in Clauses 10.5 and 10.6 shall neither be affected by the liquidation of the Contract nor by a premature termination of the same.

73. The clause has the following weaknesses:

- o It does not deal with several issues which need to be covered in licensing agreements for technology and know-how and consequently provides inadequate protection to the Owner/Purchaser.
- o The "indemnity clause" (10.3) is not a true undertaking on Contractor's part to indemnify and hold the Owner/Purchaser harmless from potential third party claims. No protection at all is available for actions within the Owner/Purchaser's home country and, even outside Owner/Purchaser's home country, the Contractor's obligation is merely to "handle" the matter. Moreover, no mention of the measure of damages available to the Owner/Purchaser is set forth. This is very weak protection;

- o The secrecy/confidentiality clause (10.5) would prohibit the Owner/Purchaser from leasing or assigning the facility to others. In the event the Owner/Purchaser finds it necessary to turn over operations of the facility to a third party, it would be prohibited from doing so under this clause;
- o The licenses and know-how that the Owner/Purchaser is acquiring under the contract is limited (clause 10.6) to the single facility. If the Owner/Purchaser decides to construct other plants, he is prohibited from doing so;
- o There is no indication of the number of countries in which Contractor has previously granted licenses;
- o There is no requirement that the Contractor will not compete with the Owner/Purchaser after completion of the facility.

74. Annex B to this report sets forth a detailed checklist of issues to be covered when the Owner/Purchaser is concerned with the nature of the license he is acquiring from the Contractor and/or the ultimate licensor. To the extent the Owner/Purchaser's purpose in entering into a turnkey contract is focussed on the acquisition of rights under a license. Annex B should be considered and the terms included in the turnkey contract.

Special Considerations Relating to Single Purpose
Turnkey Contracts

75. When the Owner/Purchaser's purpose in entering into a turnkey contract is limited to the physical facility, the sole issues are (1) the right to be indemnified by the Contractor against actions by third parties, and (2) freedom from an unduly restrictive confidentiality/secretcy clause. The contract in Annex A contains clauses GC-7 (p. A-9), GC-54 (p. A-48) and GC-6 (p. A-8) which offer effective protection to the Owner/Purchaser as to these matters.

76. When the Owner/Purchaser's purpose includes the acquisition of a license, then a comprehensive licensing agreement which addresses the issues suggested by the checklist in Annex B should be executed along with the single purpose turnkey contract.

G.

PROVISIONS RELATING TO THE RESOLUTION OF DISPUTES

Overview

77. Provisions describing a method of settling disputes between the Contractor and the Owner/Purchaser both during construction and after completion of the facility will be found in turnkey contracts, almost

without exception. The purpose of such dispute resolution provisions is to assure both the speed and the fairness of the ultimate decision. As arbitration panels are considered capable of a greater expertise regarding the subject matter of the dispute and are less encumbered by rules of evidence and procedure, most large scale international agreements refer this method. The insertion of arbitration provisions, while common even in construction contracts involving nationals of the same country, does to some degree reflect an uncertainty on the part of the Contractor that the Owner/Purchaser's home country judicial system will provide him with an adequate hearing in the event of a dispute. Rather than dismissing the arbitration provision as "boilerplate" or as a merely pro forma clause that requires no special consideration, however, the Owner/Purchaser should assure that the clause adequately deals with (1) the subject matter, (2) locale, (3) enforceability, (4) cost of any arbitration resulting from a dispute, and (5) the governing law.

Review of the Contracts

78. All of the contracts, with one exception, contained provisions which at least on their face were intended to remove resolutions of disputes from either the Contractor's or the Owner/Purchaser's home country judicial forums and place them with an arbitration panel of either a national (Owner/Purchaser's home country) or international nature (such as that of the International Chamber of Commerce). It is interesting to note that the one exception to the pattern calling for binding arbitration was found in the contract for the electrolytic copper refinery discussed under "payment terms"

above. That contract, in its provision concerning dispute resolution, required both the Owner/Purchaser and the Contractor to name an expert, who would in turn name a third party conciliator. If the three persons so selected were unable to reach agreement, the dispute was to be referred to a local court which would apply local law. This provision is highly favorable to the Owner/Purchaser and unique to this contract of all the contracts reviewed.

79. Most of the contracts (other than the one indicated above) approached the dispute resolution provision mechanically and with little indication of careful consideration. An example of a weak provision is the following:

ARBITRATION

All disputes or differences of any kind whatsoever between PGC and the contractor arising out of this contract shall be settled exclusively by means of arbitration in the city of Zurich, Switzerland under the rules and conciliation and arbitration of the International Chamber of Commerce. The arbitration award shall be final and binding to both parties and liable for execution as final judgment.

80. The following questions should be carefully considered before adopting an international arbitration clause:

- o Who bears the cost of the proceedings? Is the panel authorized to allocate costs or must each party bear his own regardless of the outcome?

- o Have the parties made due inquiry into the nature of the rules referred to? Do such rules provide sufficient protection to the Owner/Purchaser?
- o What law is the governing law of the contract?
- o To what extent is the clause enforceable against either the Owner/Purchaser or the Contractor? Has inquiry been made as to the effect of arbitration clauses in the legal system of the Owner/Purchaser's and the Contractor's countries?
- o Why are the proceedings to be conducted abroad? This may result in a significant drain of the Owner/Purchaser's foreign exchange reserves.
- o On the whole, the clause appears to be too open-ended to provide effective protection to the Owner/Purchaser.

Samples of More Adequate Dispute
Resolution Provisions

81. The contracts reviewed revealed two alternative approaches that are likely to lead to more effective resolution of disputes than the short quote given in paragraph 79 above. One approach is to require that ultimate resolution of the dispute rest with either a judicial or arbitral forum in the Owner/Purchaser's home country:

CONTRACT INTERPRETATION AND DISPUTES

All claims of Contractor, all questions of Contractor concerning interpretation or clarification of this Contract or the acceptable performance of this Contract or the part of Contractor and all questions as to compensation and extension of time shall be submitted in writing to (the Purchaser) for determination. (The Purchaser) shall respond within a reasonable period of time, and all determinations, instructions, and clarifications of (The Purchaser) shall be final, unless Contractor files with (The Purchaser) within fourteen (14) days after (The Purchaser) notifies Contractor of any such determination, instruction or clarification, a written protest, stating clearly and in detail the basis thereof. Within a reasonable period of time, (The Purchaser) will issue a decision in writing upon each such protest.

Contractor's failure to protest (The Purchaser's) determinations, instructions or clarifications within fourteen (14) days after receipt thereof shall constitute a waiver by Contractor for all of its rights to further protest to (the Purchaser) or otherwise.

If, after timely protest to (The Purchaser) Contractor disputes the (The Purchaser's) decision or if (The Purchaser) has an unresolved claim against Contractor, the parties shall make a good faith effort to settle such dispute or claim by whatever means they deem appropriate including conciliation and seeking the assistance of technical, accounting or other experts. Any dispute or claim which the parties are unable to settle after such efforts shall be referred to (choice between arbitration or judicial proceedings in Purchaser's home country) for final determination, and Contractor hereby consents to the jurisdiction of (such panel or court) for the purpose of final determination of any dispute or claim arising hereunder.

Notwithstanding any such protest, dispute, claim, settlement effort or (arbitration or judicial) proceeding relating directly or indirectly to this Contract, at all times Contractor shall proceed with the performance of the Work in accordance with the determinations, instructions and clarifications of (The Purchaser).

82. In the event that the Contractor resists such an approach as suggested above, or it becomes apparent that such an approach will involve additional costs and payment terms that are unfavorable to the Owner/Purchaser, the Unido draft suggests a possible middle ground. Articles 36 and 37 of the Unido draft set forth the relevant provisions:

ARTICLE 37

SETTLEMENT OF DISPUTES AND ARBITRATION

37.1 In the event of any dispute, difference or contention in the interpretation or meaning of any of the Articles to this Contract or reasonable inference

therefrom, both parties shall promptly make endeavour to resolve the dispute or differences by mutual discussions and agreement. Should the dispute or differences continue to remain unresolved, both parties may each nominate a person to negotiate and reconcile the dispute or differences to resolve thereby the matter of contention between the parties arising out of the Contract. In the event that these two persons referred to cannot agree, they shall nominate a third neutral person to reconcile the dispute or difference. In case the efforts of the neutral person nominated by the two parties fail to resolve the differences, both parties to the Contract shall proceed to Arbitration as provided for herein.

- 37.2 Pending resolution of any such claim or dispute, the CONTRACTOR shall perform in accordance with the Contract without prejudice to any claim by the CONTRACTOR for additional compensation and/or time to complete the work if such instructions (are in his opinion) above and beyond the requirements of the Contract.
- 37.3 Notwithstanding the existence of a dispute, the CONTRACTOR and PURCHASER shall continue to carry out their obligations under the Contract, and payment(s) to the CONTRACTOR shall continue to be made in accordance with the Contract that in the appropriate cases qualify for such payment(s).
- 37.4 Subject to the provisions of this Article, either the PURCHASER or the CONTRACTOR may demand arbitration with respect to any claim, dispute or other matter that has arisen between the parties.
- 37.4.1 However, no demand for arbitration of any such claim, dispute or other matter shall be made until the later of (a) the date of which the PURCHASER, or the CONTRACTOR, as the case may be, has indicated its final position on such claim, dispute or matter, or (b) the twentieth day after the CONTRACTOR or PURCHASER, as the case may be, has presented its grievance in written form to the other, and no written reply has been received within twenty days after such presentation of the grievance.

- 37.4.2 No demand for arbitration shall be made after the ninetieth (90) day following the date on which the PURCHASER has rendered his written final decision in respect of the claim, dispute or other matter as to which arbitration is sought. The PURCHASER shall be obliged to specify that the written decision is in fact the final decision within the meaning of this Subarticle. Failure to demand arbitration within said ninety (90) days period shall result in the PURCHASER's decision being final and binding upon the CONTRACTOR.
- 37.5 All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof which cannot be resolved by the parties shall be decided by arbitration in accordance with the terms contained in Annexure _____¹ attached hereto. This agreement so to arbitrate shall be enforceable under the prevailing arbitration law. The award rendered by the arbitrator shall be final, and judgments may be entered upon it in any court having jurisdiction thereof.
- 37.6 Notice of the demand for arbitration shall be filed in writing with the other party to the Contract in accordance with the conditions contained in the Annexure referred to in Article 37.5 above. The demand for arbitration shall be made within the period specified in Article 37.4 and in all other cases, within the time specified in Annexure _____, after the claim, dispute or other matter in question has arisen, and in no event shall the demand for arbitration be made after institution of legal or equitable proceedings based on such claim, dispute or other matter in question if it would be barred by the applicable statute of limitations.
- 37.7 The CONTRACTOR shall continue the work and undertake his obligations under the Contract and maintain the progress schedule during any arbitration proceedings, unless otherwise agreed by the PURCHASER in writing.
- 37.8 In the event of Arbitration, the CONTRACTOR and PURCHASER agree that the Arbitrator(s) shall have unrestricted access to the Fiant (notwithstanding the secrecy provisions of Articles 7.8 to 7.13 inclusive) for the purpose of the said Arbitration.

¹To be drafted by the UNIDO Secretariat.

37.9 Arbitration shall be at (Town) and all proceedings will be in language. The Governing Law shall be in accordance with Article 36. (choice of law is left open to negotiation).

Commentary

83. The first provision set forth in the above section has the merits, according to the Owner/Purchaser, of keeping the dispute resolution proceedings in the Owner/Purchaser's home country. This will afford a foreign exchange savings and will also assure that the persons involved in settling the dispute have a familiarity with local conditions. It's weakness lies in its failure to specify the exact nature of the proceedings: if binding arbitration is the method agreed upon by the parties, no express reference is made to any local arbitration statutes or regulation; if judicial proceedings are agreed upon, there is no indication that there has been consideration of the substantive law that will be applied nor the efficiency of such proceedings.

84. The Unido draft, by reference to the Annexure (37.5) clearly anticipates the development of specific terms for the arbitration proceedings, which is a positive step. Moreover, the draft (37.9) makes language, locale, and applicable law matters of negotiation. To the extent the Owner/Purchaser makes due inquiry into the substantive legal protection afforded to turnkey Owner/Purchaser within his, the Contractor's or a neutral third country's legal system, he will be able to evaluate which system best protects his interests.

Special Considerations Relating to
Single Purpose Turnkey Contracts

85. The only separate consideration with respect to turnkey contracts having a single purpose is that the dispute resolution clause may be resorted to with less frequency than is likely to be the case with a more complex turnkey arrangement. The contract in Annex A (Clause GC-9, p. A-10) sets forth a suitable provision and has been commented upon in the Commentary above.

H.

PROVISIONS CONCERNING FORCE MAJEURE

Overview

86. Both the Contractor and the Owner/Purchaser will generally agree that the turnkey contract contain a provision dealing with force majeure, which is intended to excuse failure or delay of performance due to events such as floods, earthquakes, etc., which are beyond the control of the parties. The wording of the provision should address at least the following issues:

- (1) the definition of events falling within the coverage of the clause;
- (2) definition of the rights of the parties in the event a force majeure event occurs.

Review of the Contracts

87. All of the contracts without exception contained a force majeure provision. While there was little uniformity among the provisions, the majority of them appeared to be more favorable to the Contractor than the Owner/Purchaser. Many of the provisions, were over-inclusive in their

description of events that were covered by the provision. For example, an "accident" or "unavailability of materials" were included as force majeure events (Article 34.1 Unido draft) whereas very few events were expressly excluded from the provision. An example of an exclusion favoring the Owner/Purchaser was a provision stating: "Lack of labour and material on the part of the Contractor will not be considered as a case of force majeure."

88. While most of the force majeure clauses did establish a requirement for the Contractor to stand by until the end of the force majeure event (usually limited to a six month period), there was little coverage of items such as the allocation of costs resulting from the event, duty to rebuild destroyed facilities, rights under insurance policies or subcontractor claims under the clause.

89. An example of a relatively weak clause from the Owner/Purchaser's point of view is the following:

Contractor has the right to prolong stipulated deadline for execution of works, due to force majeure.

Occuring, duration and ending of force majeure is to be recorded in civil diary.

Contractor is bound to inform Employer in writing, about extention of deadline for execution of work due to occuring of force majeure, according to manner and deadlines specified in Contract documents.

Sample of a More Adequate Force Majeure Provision

90. The force majeure provision that was most comprehensive and most favorable to the Owner/Purchaser, while still requiring some improvement, is the following:

In cases of force majeure, the contracting parties shall be (partly or entirely) released from the responsibility for performance of the obligations of this contract.

If the consequences of force majeure do not last more than 6 months, the contracting parties are obliged to fulfill the contract. In this case, times of delivery and other dates will be (extended) for the duration of force majeure and/or their consequence.

If force majeure and/or their consequences shall last longer than 6 months and there is no possibility for an adequate agreement within 2 months after the expiry of a period of 6 months, that contracting party, not referring to force majeure, is, entitled to withdraw partly or entirely from this contract.

Force majeure are circumstances occurred after conclusion of the contract, as a result of exceptional, unforeseen, unexpectable and/or inevitable incidents such as war, revolution, natural catastrophe, strike and others, accepted as force majeure by the court of arbitration.

In case of sub-supplier's delay, force majeure is not accepted, except this delay is caused due to circumstances, which are to be regarded as force majeure between Investor and Contractor in the sense of this contract.

In case of force majeure the contracting parties are obliged to inform each other as to the beginning and expiring of this fact by telex within 10 working days, to confirm telex information by letter to prove the pretended circumstances.

In case of non-observance of this obligation, the contracting parties will have no right to refer to force majeure.

Lack of labour and material on the part of the Contractor will not be considered as case of force majeure.

Commentary

91. The clause quoted above, while superior to the other force majeure provisions, requires additional consideration. Among the problems raised by the clause are the following:

- o Is the Contractor required to repair or rebuild all or any part of the facility destroyed by a force majeure event?
- o To what extent do insurance provisions affect the Contractor's duties after a force majeure event? As most of the contracts required the Contractor to keep the facility adequately insured as construction progressed, the proceeds of the policy should be expressly stated to be a fund available for the cost of rebuilding or repairing;
- o The clause referring to sub-supplier's delay is ambiguous. The provision probably means that the Contractor can claim force majeure if a sub-supplier claims it. This may not be appropriate where the Contractor has alternate sources of supply;
- o The contracting party not invoking the force majeure event is entitled to withdraw from the contract. The party invoking the event is not given this right. This may be highly unfavorable to such party because he remains obligated under the contract yet is unable to perform;

- o There should be an express affirmative duty, on the parties to seek prompt elimination of the force majeure event;
- o While containing exclusions to force majeure, that part of the provision allowing the "court of arbitration" to define what events constitute force majeure may be too open-ended.

Special Considerations Relating to
Single Purpose Turnkey Contracts

92. Force Majeure provisions are commonly found in construction contracts of any nature. Accordingly, similar considerations regarding the issue should be taken into account if the turnkey contract is of the single purpose type. The contract set forth in Annex A (Clause GC-45; p.A-36) contains a force majeure provision, but is subject to similar weaknesses discussed under paragraph 91 above.

CONCLUSIONS

93. The study, covered in Parts I and II of the United Nations Centre on Transnational Corporations' analysis of Features and Issues in Turnkey Contracts in Developing Countries leads to the conclusions set forth below.

94. Turnkey contracts of either a single or multiple purpose offer a form of contractual arrangement which needs to be applied with great care and caution in view of their implications, both in terms of costs and their impact on domestic technological absorption and development. While such contracts can be utilized by developing countries, particularly at intermediate stages of industrial and technological development, the contractual responsibilities and provisions need to be formulated and negotiated with great care.

95. Most of the turnkey contracts reviewed did not afford adequate protection to those Owners/Purchasers who entered into the contract with the purpose of acquiring more than the physical facility. There were substantial gaps in the protections afforded by performance guarantees and payment terms.

96. Payment terms linked to the performance of the facility, such as the "payment in resultant products" approach may offer more practical assurance of ultimate success of the project than even well-drafted performance guarantees.

97. Turnkey contracts that afford comprehensive protection to the Owner/Purchaser, by virtue of their placing a high degree of responsibility on the Contractor will, in the usual case, result in the Owner/Purchaser's paying a higher initial purchase price for the facility.

98. Reducing the initial purchase price by reducing contractual protection of the Owner/Purchaser may lead to substantially higher costs to the Owner/Purchaser in the event of failure of performance.

99. Greater emphasis should be placed on developing a longer term and mutually beneficial working relationship between the Contractor and the Owner/Purchaser following completion of the facility. A one or two year "transition period" may be a more practical method to achieve effective absorption of operational and management skills than a short term, fixed fee technical training program. However, where operational management is the responsibility of the Contractor for an extended period of time, a short term management contract may be a more suitable contractual arrangement.

100. The single purpose turnkey contract, unless limited to housing or very low technology projects, is subject to significant risks. While it will normally be of lower initial cost than more expanded versions of the turnkey concept, it is nevertheless of higher cost than traditional non-turnkey construction arrangements and should be undertaken only after serious consideration of human resource and technological infrastructure factors.

101. In the multiple purpose contracts more emphasis should be placed on the development of managerial and operational skills. Even those contracts with comprehensive requirements as to training for technical skills did not adequately address management requirements.

102. The licensing provisions of the turnkey contracts reviewed were not as comprehensive as is usual in international licensing arrangements. While this may be a result of the nature of the particular licenses issued, it may also be caused by a tendency to "overload" the turnkey contract with coverage of areas traditionally subject to separate agreements.

103. It is likely that factors of a non-contractual nature may impact either positively or negatively on the resultant facility. The extent to which turnkey contracts offering little protection to the purchaser result in ultimately problem-ridden operating facilities, and the extent to which turnkey contracts favorable to the purchaser result in superior facilities should be considered. While a reasonable hypothesis is that bad contracts lead to inferior facilities, actual case studies of operational facilities should be prepared. An empirical review of projects developed on a turnkey basis would be necessary in order to evaluate the practical effectiveness of a turnkey contract as a means of achieving the overall and specific objectives for which they are sought to be utilized.

ANNEX A

Sample "Single Purpose" Turnkey Contract*

*N.B. The attached should not be considered as a "model" contract from the LDC's point of view. It does, however, represent an adequate checklist and when read with the commentary contained in the Phase II Report may be helpful to the LDC Purchaser.

CONTRACT

FOR

ENGINEERING, PROCUREMENT AND CONSTRUCTION

No. _____

(Insert title of package and facility
or project)

BETWEEN

AND

(Insert name of firm)

CONTRACT
FOR
ENGINEERING, PROCUREMENT AND CONSTRUCTION

No. _____

FORM OF CONTRACT

THIS CONTRACT is entered into in _____,
this _____ day of _____, 139 ____ A.H.,
corresponding to the _____ day of _____, 197__
A.D., between:

ON THE ONE HAND,

The _____ established by _____
_____, (the " _____"),
represented by _____ (Name of Official) _____, duly authorized
to enter into this Contract;

AND ON THE OTHER,

_____ (Insert Contractor's name) _____, a corporation
organized under the laws of _____, (the
"Contractor"), represented by _____ (Name of Official) _____,
duly authorized to enter into this Contract.

WITNESSETH:

WHEREAS, the _____ has been given the responsibility
by the above-mentioned _____ to implement the
infrastructure requirements for an industrial complex (the "Complex")
to be established in _____; and

Whereas, _____ desires Contractor to perform, and
Contractor is willing and able to perform certain work in connection
with implementation of the infrastructure requirements of the Complex
upon the terms and conditions set forth in this Contract;

NOW THEREFORE, the parties hereby agree as follows:

1. WORK TO BE PERFORMED: Except as otherwise provided in this Contract, Contractor shall furnish all services, equipment and materials and shall perform all operations necessary and required to satisfactorily carry out and perform the following Work, as hereinafter more fully defined:

(Insert a summary statement covering the scope of work. When the space provided here is less than, or greater than, the space required - retype the entire form)

2. DOCUMENTS INCORPORATED: The following attachments are by this reference incorporated herein and made a part of this Contract:

Attachment "A" - General Terms and Conditions,

Attachment "B" - Special Conditions, Form

Attachment "C" - Price and Payment Provisions,

Attachment "D" - Technical Specifications,

Attachment "E" - Drawings and Data, Form

3. PERIOD OF PERFORMANCE: Contractor shall perform and complete all Work under this Contract within (number) weeks of the date of (Notice to Proceed, or other action.)
4. COMPENSATION: Except as otherwise provided in this Contract, shall pay to Contractor, as full consideration for the satisfactory performance by Contractor of this Contract, the following compensation in accordance with the price and payment provisions set forth in Attachment "C" of this Contract:

Contract

No. _____

(State amount in both words and numbers.
Also include brief summary of payment
provisions; i.e. fixed unit prices,
estimated value - not to exceed, progress
payments conditions, against Letter of
Credit, etc.)

5. DESIGNATION OF AUTHORIZED REPRESENTATIVE:

hereby designates []

as its authorized
representative for purposes of this Contract []; provided,
however, that [] may delegate its
authority as authorized representative hereunder to

or any wholly owned subsidiary

of

[]

6. NOTICES: All notices required or permitted under this Contract shall be considered as duly given if in writing and hand delivered or sent by registered mail to the Contractor at their office addresses set forth below, or to such other address as may be designated by notice given as herein required. Notices may, however, be given initially by telex, telegram or cable provided that confirmation of such notice is received in compliance with the foregoing provisions within fifteen (15) days of the date of the initial notice. All notices shall be effective upon first receipt.

[]

Contract

No. _____

Copy to:

Contractor - _____ (Insert address and name
_____ for Contractor)

7. HOUSING: If applicable, Contractor shall comply with

(relating to

To the extent available,
Contractor shall use housing facilities provided by
and shall pay for such usage in
accordance with terms and conditions established by

8. LANGUAGE OF CONTRACT: Unless otherwise provided in this Form
of Contract, this Contract has been signed in quadruplicate,
two of such signed originals (except Attachments "B" through
"E") being in _____ and two of such signed
originals being entirely in the
One original of each version of the Contract shall be retained
by both _____ and Contractor. In the event of
a dispute concerning the intent of this Contract, both
_____ versions of the text will be applied
equally in interpreting the objective meaning. If the two
cannot be reconciled,

Contract

No. _____

in witness WHEREOF, the parties hereto have executed this contract
on the day and year first written above.

(NAME OF CONTRACTOR)

By: _____	By: _____
Signature _____	Signature: _____
Name _____	Name _____
Title _____	Title _____

Contract

No. _____

ATTACHMENT "A"

GENERAL TERMS AND CONDITIONS

ATTACHMENT "A"
GENERAL TERMS AND CONDITIONS

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ATTACHMENT "A"

GENERAL TERMS AND CONDITIONS

GC-1 DEFINITIONS

Wherever in this Contract the following terms are used they shall have the meanings hereinafter set forth unless specifically noted otherwise in the text:

The "Work": All the engineering, design, procurement and construction services and responsibilities to be performed by Contractor as specified, stated, indicated or implied in this Contract, including the furnishing and supervision of all labor and personnel and the procurement and supply of all equipment, materials and supplies necessary or required to perform this Contract.

The "Permanent Works": That portion of the Complex, including all buildings, structures, improvements, equipment, materials and other things of a permanent nature, for which Contractor's services are engaged hereunder and which is more particularly set forth in Attachments "D" and "E" hereto.

"Construction Plant": All materials, supplies, plants, machinery, equipment, tools, buildings and structures, including warehouses, offices, camps, garages, shops, scaffolding, temporary roads, parking and work areas, and all other

GC-1 (Continued)

items consumed or used or intended to be consumed or used in the performance of the Work but not built into or forming a part of the Permanent Works.

The "Work Site": The location or locations in where the Complex is to be constructed or which are to be used in the construction of the Complex.

The "Contract Schedule": The approved, updated work schedule in effect at any given time, as more fully described in the Special Condition hereof entitled "Contract Schedule".

The "Contract Price": The total compensation to be paid to Contractor in accordance with the terms of this Contract.

"Days and Calendar": Unless otherwise expressly designated, "days" as used in this Contract shall mean calendar days and all references to calendar days or months shall be to the Gregorian Calendar.

GC-2 REPRESENTATIONS

Contractor hereby represents that it has made the necessary commitment, that it possesses the necessary professional capabilities, qualifications, licenses, skilled personnel, experience, expertise, and financial resources, and that it has available or will make available the necessary equipment, materials, tools, facilities and services to perform the Work in an efficient, workmanlike and timely manner in accordance with the terms and conditions of this Contract.

Contractor further represents that this Contract is entered into without the assistance or intervention, direct or indirect, of any broker, intermediary, commission agent or any similar person, firm or corporation, whether or non except the established representative of Contractor in the provided that Contractor has not engaged the services of such representative for purposes of exercising or obtaining improper influence;

and Contractor represents that it has the right to perform the Work free of any right, title or interest of, or any obligation to, or undertaking or arrangement with, any third party, except as expressly provided for in this Contract.

GC-3 INDEPENDENT CONTRACTOR

In performing the Work, Contractor shall act as an independent contractor and not as the agent of _____ maintaining complete control over its employees, representatives and subcontractors of any tier. All persons employed by Contractor in connection with this Contract shall be its employees and not employees of _____ and nothing contained in this Contract, or any subcontract awarded by Contractor, shall create any contractual relationship between any such subcontractor and _____. Contractor shall perform the Work in accordance with its own methods subject to compliance with this Contract.

If Contractor is a partnership, joint venture or consortium, then for the purposes of this Contract the members of such partnership, joint venture or consortium shall be jointly and severally liable hereunder notwithstanding any agreement as between themselves to the contrary.

GC-4 LAWS AND REGULATIONS

In the implementation of this Contract, Contractor and its employees and representatives at all times shall comply with all laws, decrees, decisions, ordinances, statutes, regulations, rules and traditions and customs of _____ or any political subdivision or public authority thereof, including without limitation, tax, tariff, labor, safety, security and social security laws, and regulations. In addition, Contractor and its employees and representatives shall comply with all personnel rules, plant rules and other rules and instructions of _____ and shall perform the Work hereunder in such a manner as to avoid endangering the safety or unlawfully interfering with the convenience of the public.

If any discrepancy or inconsistency should be discovered between this Contract and any such law, decision, ordinance, regulation, order or decree, Contractor shall immediately report the same in writing to _____ which will issue such further instructions as may be necessary.

GC-5 PERMITS

Except as otherwise provided herein, Contractor shall procure and pay for all permits, authorizations, registrations and inspections and shall furnish any bonds, security or deposits required to perform the Work. In addition, Contractor shall, at its expense, assist in obtaining any permits or authorizations necessary for the performance or implementation of the Work which must formally be issued in the name of

GC-6 CONFIDENTIALITY

Contractor shall not, without the prior written consent of
disclose or make available to any person, other than
or use, directly or indirectly, except for the performance and implementation of the Work, any Confidential Information (as hereinafter defined) acquired from an Information Holder (as hereinafter defined) in connection with the performance of this Contract, unless: (i) the information is known to Contractor (as evidenced by its written records) prior to obtaining the same from an Information Holder and is not otherwise subject to disclosure restrictions on Contractor; (ii) the information is in the public domain prior to the time of disclosure by Contractor; or (iii) the information is disclosed to Contractor by a third party who did not receive the same, directly or indirectly, from an Information Holder and who has no obligation of secrecy with respect thereto.

As used herein, the term "Confidential Information" shall mean any information, written or oral, concerning the Complex, relating to or consisting of processes, techniques, procedures, designs, drawings, plans, diagrams, specifications, computer programs, systems, know-how, trade secrets and other technical data, project information, policies and agreements, including this Contract. The term "Information Holder" shall mean

its vendors, contractors and subcontractors of any tier, any authority carrying on activities in with regard to the Complex, and any other party dealing with or such authority.

Contractor further agrees that it shall not make any announcements or release any information or photographs concerning this Contract or the Complex or any part thereof to any member of the public or the press or any official body, unless prior written consent is obtained from

GC-6 (Continued)

Contractor shall take all steps which may be necessary or appropriate in order that its employees and all subcontractors, vendors and consultants adhere to the provisions of this General Condition. Appropriate clauses to carry out the purpose and intent hereof shall be included in all subcontracts, purchase orders and consulting agreements entered into by Contractor pursuant to the performance of this Contract.

GC-7 PATENT INDEMNITY

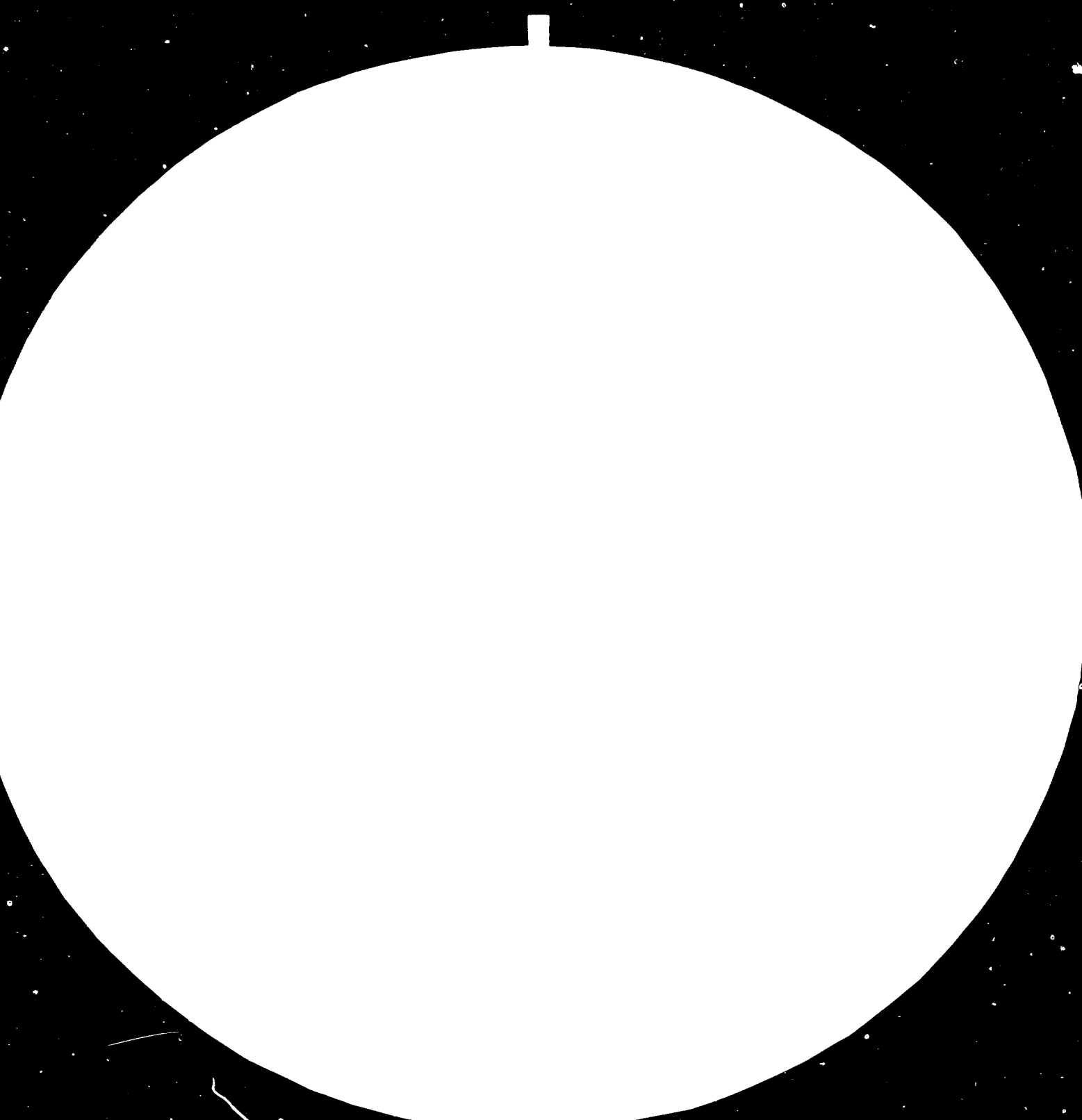
Contractor shall indemnify, defend and save harmless and its authorized representatives and each of them from and against all liabilities, claims, losses, costs, damages and expenses, including attorneys' fees, incurred by _____ or its authorized representatives as a result of or in connection with any claims or actions based upon infringement of any patent or copyright and arising out of the use of the equipment or materials furnished under this Contract by Contractor or out of the processes or actions employed by or on behalf of Contractor in connection with the performance of this Contract. Contractor shall at its sole expense promptly defend against any such claim or action, provided that the parties indemnified and held harmless hereunder shall have notified Contractor upon becoming aware of such claims or actions. Contractor shall have the right, in order to avoid such claims or actions, to substitute at its expense non-infringing equipment, materials or processes or to modify at its own expense such infringing equipment, materials and processes so they become non-infringing, provided that such substitutions and modifications shall meet all the requirements and be subject to all the provisions of this Contract and are approved by

GC-8 INDEMNITY AND RELEASE

Contractor shall indemnify, defend, save harmless and release _____ and its authorized representatives and each of them and all of their employees, officers, directors and representatives from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interest, attorneys' fees, costs and expenses of whatsoever kind or nature, whether arising before or after completion of the Work, which are in any manner directly or indirectly

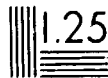
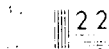
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2.8 2.5



GC-8 (Continued)

caused, occasioned or contributed to in whole or in part by reason of any failure, or alleged failure, to comply with the provisions of this Contract, any inaccuracy in the representations of Contractor hereunder or any act, omission, strict liability, fault or negligence, whether active or passive, of Contractor or of anyone acting under its direction, control or on its behalf in connection with or arising out of the performance of the Contract, whether or not caused in part by a party indemnified, held harmless or released hereunder. Without limiting the generality of the foregoing, the same shall include injury to or death of any person or persons and damage to any property, regardless of where located, including without limitation the property of its authorized representatives, Contractor, Contractor's employees and all other persons. Contractor's aforesaid indemnity, hold-harmless and release obligations shall not be applicable to any liability caused by the sole active negligence or wilful misconduct of a party indemnified, held harmless or released hereunder, except to the extent that Contractor shall have had the opportunity to prevent or reduce such liability and shall have negligently or wilfully failed to do so.

GC-9 CONTRACT INTERPRETATION AND DISPUTES

All claims of Contractor, all questions of Contractor concerning interpretation or clarification of this Contract or the acceptable performance of this Contract on the part of Contractor and all questions as to compensation and extension of time shall be submitted in writing to
for determination.

shall respond within a reasonable period of time, and all determinations, instructions, and clarifications of shall be final, unless Contractor files with , within fourteen (14) days after notifies Contractor of any such determination, instruction or clarification, a written protest, stating clearly and in detail the basis thereof. Within a reasonable period of time, will issue a decision in writing upon each such protest. Contractor's failure to protest determinations, instructions or clarifications within fourteen (14) days after receipt thereof shall constitute a waiver by Contractor of all of its rights to further protest to or otherwise.

If, after timely protest to Contractor disputes the _____ decision or if _____ has an unresolved claim against Contractor, the parties shall make a good faith effort to settle such dispute or claim by whatever means they deem appropriate including conciliation and seeking the assistance of technical, accounting or other experts. Any dispute or claim which the parties are unable to settle after such efforts shall be referred to _____ for final determination, and Contractor hereby consents to the jurisdiction of _____ for the purpose of final determination of any dispute or claim arising hereunder.

Notwithstanding any such protest, dispute, claim, settlement effort or _____ proceeding relating directly or indirectly to this Contract, at all times Contractor shall proceed with the performance of the Work in accordance with the determinations, instructions and clarifications of _____

GC-10 CONTRACT DOCUMENTS

Except as otherwise provided herein, the provisions of Attachment "A", Attachment "B" and Attachment "C" hereof shall prevail over those of any other document forming part of this Contract. Subject to the foregoing, the several documents forming the Contract are intended to be correlative and mutually explanatory, and any Work required in one document and not mentioned in another shall be performed to the same extent and purpose as though required by all. The misplacement, addition or omission of a word or character shall not change the intent of any part of the Contract from that set forth by the Contract as a whole. Contractor shall be solely responsible for requesting any interpretation or clarification of the Contract and shall bear at its own expense any costs and expenses arising from its failure to do so.

If Contractor discovers any conflicts, ambiguities, errors, omissions or discrepancies among the various Contract documents, the matter shall be submitted immediately by Contractor in writing to _____ for clarification. Any work affected by such conflicts, ambiguities, errors, omissions or discrepancies which is performed by Contractor subsequent to discovery but prior to clarification by _____ shall be at Contractor's risk.

GC-11 CONTRACTOR'S ORGANIZATION AND KEY PERSONNEL

As required by _____, Contractor shall submit for _____ approval an organization chart showing the proposed organization to be committed by Contractor to the performance of the Work, including (i) lines of authority, responsibility and communication, (ii) division of responsibilities between Contractor's Work Site and off-site organizations, (iii) names, titles and functions of all supervisory and other key personnel, and (iv) the total number of non-manual personnel. In addition, if required by _____ Contractor shall submit a detailed resume (and originals or copies of supporting documentation which may be subsequently requested by _____) of the professional qualifications of each person proposed to occupy a position deemed by _____ to be significant within the organizational structure. Upon the approval of such organization chart and proposed personnel by _____, no changes shall be made without _____ prior written approval. Contractor's key personnel assigned to the performance of the Work shall not be reassigned without _____ prior written approval and until a satisfactory replacement has been approved by _____.

Before commencing work hereunder, Contractor shall appoint a competent, _____ speaking project manager acceptable to _____ to represent and act for Contractor at all times during the performance of the Work and shall inform _____ in writing of his address and telephone number and of the scope of his authority and of any and all limitations on such authority. Upon _____ approval of such project manager, no change shall be made without _____ prior written consent. Such project manager shall have overall responsibility for the Work performed in Contractor's home and branch offices, as well as at the Work Site, and shall be present at the Work Site during such periods as _____ may designate. Contractor shall also appoint a competent, _____ speaking construction manager acceptable to _____ to be present at the Work Site at all times when construction is in progress and to represent and act with full authority for Contractor at the Work Site in the absence of Contractor's project manager. All notices, determinations, instructions and other communications given to such project manager or construction manager by _____ shall be binding upon Contractor.

GC-12 AUTHORIZED REPRESENTATIVE

may designate by written notice to Contractor or by provision elsewhere in this Contract one or more persons, firms or corporations to act as its authorized representative in connection with the administration of this Contract. Except as otherwise provided in such written notice or elsewhere herein, such authorized representative shall have the authority to act for _____ with respect to the performance of this Contract by Contractor with the objective of achieving full compliance by Contractor with the terms and provisions of the Contract. Contractor shall accept and comply with instructions from such authorized representative as though such instructions had been given by _____ and Contractor shall deal directly with such authorized representative in all matters arising under this Contract, including but not limited to matters involving Contract interpretation, disputes and submissions for _____ approval. However, such authorized representative is authorized to act in connection with this Contract solely as the representative of _____ and not as principal hereunder.

GC-13 ENGINEERING AND DESIGN RESPONSIBILITIES OF CONTRACTOR

_____ has furnished Contractor. as a part of this Contract, the design criteria, performance specifications, and other data and information necessary to provide the basis upon which Contractor shall design and engineer the Permanent Works to the extent provided herein. Contractor shall verify and check all such criteria, specifications, data and information and shall promptly notify _____ of any errors, omissions or discrepancies. Apparent errors or omissions in such criteria, specifications, data and information, or the misdescription of Work which is manifestly necessary to carry out the intent thereof, or which is customarily performed, shall not relieve Contractor from performing such omitted or misdescribed Work, but such Work shall be performed by Contractor as if fully and correctly set forth and described therein. Contractor shall obtain approval from _____ for any deviation from such criteria, specifications, data and information prior to incorporating such deviation into the final design.

GC-13 (Continued)

Except as otherwise provided herein, Contractor shall perform all the design and engineering required to properly describe and detail the various parts of the Permanent Works and the Work to be performed in the construction and installation thereof, including the preparation of plans, specifications and drawings, the preparation of information for purchasing and manufacturing equipment and materials, the checking of vendors' drawings, and the preparation of construction and as-built drawings. Contractor shall also prepare and submit to

Operation and Maintenance Manuals for the Permanent Works in accordance with the requirements and specifications set forth in Attachment "D" hereof.

GC-14 CONTRACTOR PREPARED PLANS, SPECIFICATIONS AND DRAWINGS

All plans, specifications and drawings prepared by Contractor hereunder shall be available for review by _____ at all reasonable times during development and promptly upon completion. All such plans, specifications and drawings required to be submitted by Contractor for the approval of _____ shall be prepared and processed in accordance with the requirements and specifications set forth in Attachment "D" hereof.

approval of plans, specifications and drawings submitted by Contractor shall not relieve Contractor of its responsibility for the correctness thereof or of its obligation to meet all the specifications and requirements of this Contract. Contractor shall not modify or deviate from plans, specifications and drawings approved by _____ without _____ prior approval of such modification or deviation.

Contractor shall maintain at the Work Site, at all times when construction is in progress, a complete copy of all plans, specifications and drawings kept current with all changes and modifications. Contractor shall grant _____ free access thereto at all reasonable times for purposes of inspection and review.

GC-15 LOCAL CONDITIONS

Contractor shall have the sole responsibility for, and has investigated and satisfied itself concerning, the nature and location of all places where the Work shall be performed and the general and local conditions in _____ and particularly, but without limitation, with respect to the following: those affecting shipping and transportation, port facilities, port congestion, access, disposal, handling and storage of materials; availability and quality of labor, water and electric power; availability and condition of roads; climatic conditions and seasons; physical conditions, topography and ground surface conditions; subsurface geology and nature and quantity of surface and subsurface conditions to be encountered; equipment and facilities needed preliminary to and during performance of the Contract; local laws, regulations and customs; and all other matters which can in any way affect performance of the Work or the cost associated with such performance. The failure of Contractor to acquaint itself with any applicable condition will not relieve it from the responsibility for properly estimating either the difficulties or the cost of successfully performing the Work.

Where _____ has made investigations of conditions in areas where the Work is to be performed and where the records thereof are not included as a part of this Contract, _____ may make available such records solely for the purpose of general information and for the convenience of Contractor.

_____ assumes no responsibility whatsoever in respect to the sufficiency or accuracy of the investigations thus made, the records thereof, or of the interpretations set forth therein or made by _____ in its use thereof, and there is no warranty or guaranty, either express or implied, that the conditions indicated by such investigations or records thereof are representative of those existing throughout such areas, or any part thereof, or that unforeseen developments may not occur, or that materials other than or in amounts different from those indicated may not be encountered.

GC-16 DIFFERING SITE CONDITIONS

Contractor shall promptly, and before such conditions are disturbed, notify _____ in writing of:

GC-16 (Continued)

- (a) any subsurface or latent physical conditions at the Work Site differing materially from the conditions indicated in this Contract; or
- (b) any theretofore unknown physical conditions at the Work Site of an unusual nature differing materially from those foreseeable by an experienced contractor familiar with the Work Site area as inherent in work of the character provided for in this Contract.

will as promptly as practicable investigate such conditions and make a determination. If _____ judges that such conditions do materially so differ and will cause an increase or decrease in Contractor's costs of, or the time required for performing the Work, an equitable adjustment in the Contract Price and/or Contract Schedule will be made for the effect necessarily caused by such conditions. However, no claim for additional compensation or an extension of time shall be allowed if Contractor fails to give such notice or if Contractor proceeds with the Work affected by such conditions prior to investigation by

GC-17 WORK AREA AND ACCESS

Upon the execution of this Contract or within the time elsewhere provided herein, _____ shall make available to Contractor the Work Site, subject to the provisions contained in the General Condition hereof entitled "Temporary Access and Haul Roads". All Contractor's work areas at the Work Site will be assigned by

_____ and Contractor shall confine its Construction Plant to the areas so assigned. Should Contractor find it necessary or advantageous to use any additional land outside the Work Site for any purpose whatever, Contractor shall, at its expense, provide and make its own arrangements for the use of such additional land.

_____ shall at all reasonable times, for the purpose of determining compliance with the requirements of this Contract, have access to such work areas and premises used by Contractor.

GC-18 PROTECTION OF PROPERTY

Contractor shall so conduct its operations in _____ as not to damage, close or obstruct any utility installation, highway, road or other property until permits therefor have been obtained. If facilities are closed, obstructed, damaged or rendered unsafe by Contractor's operations, Contractor shall, at its expense, make such repairs and provide such temporary guards, detours, lights and other signals as necessary or required for safety and as will be acceptable to _____

Unless otherwise specifically provided for in this Contract, Contractor shall not do any work that would disrupt or otherwise interfere with the operation of any pipeline, telephone, electric transmission line, ditch or other excavation, or structure, nor enter upon lands in their natural state until approved by _____. Thereafter, and before Contractor begins such work, Contractor shall give due notice to _____ of its intention to start such work. Contractor shall not be entitled to any extension of time or extra compensation on account of any postponement, interference or delay caused by any such line, ditch or other excavation, or structure being on or adjacent to the Work Site.

Contractor shall preserve and protect all cultivated and planted areas, and vegetation such as trees, plants, shrubs and grass on or adjacent to the Work Site, which, as determined by _____ do not unreasonably interfere with the performance of the Work. Contractor shall be responsible for damage to any such areas and vegetation, including without limitation damage arising from the performance of its Work through operation of equipment or stockpiling of materials. All costs in connection with any repairs or restoration necessary or required by reason of any such damage or unauthorized cutting shall be borne by Contractor.

GC-19 TITLE TO MATERIALS FOUND

Unless otherwise provided herein, the title and interest in all water, soil, stone, gravel, sand, minerals, hydrocarbons, timber and all other materials at the Work Site developed or obtained in the excavation or _____

GC-19 (Continued)

other operations by Contractor or any of its subcontractors or any of their representatives or employees and the right to use or dispose of the same are hereby expressly reserved in _____ and neither Contractor nor any of its subcontractors nor any of their representatives or employees shall have any right, title or interest in or to any part thereof; neither shall they nor any of them assert or make any claim thereto. Contractor will, as determined by

_____ be permitted to use in the Work without charge any such materials which meet the requirements of the Contract and as to which _____ shall have the right to use and consume without payment to a third party.

In the event that any items with archaeological or historical value are discovered by Contractor or any of its subcontractors or any of their representatives or employees, Contractor shall immediately stop work, notify _____ and await

_____ decision before proceeding with any work. Neither Contractor nor any of its subcontractors nor any of their representatives or employees shall have any property rights in such items.

GC-20 MOBILIZATION AND DEMOBILIZATION

Except as otherwise provided herein, Contractor shall arrange and provide at its own expense for all mobilization and demobilization of its equipment and personnel, including but not limited to providing for temporary facilities, housing and accommodation, transportation, visas, residence permits, customs clearance and customs claims, work permits and all applicable licenses and authorizations, and for immigration and emigration of personnel as appropriate.

GC-21 LABOR AND PERSONNEL

Contractor shall provide and employ only competent, experienced and properly qualified personnel to perform the Work, but Contractor shall not employ any person who has resigned or been discharged from the employment of other contractors retained by _____ or their subcontractors without a written release from such employer or until a period of not less than twenty-six (26) weeks has elapsed since the person's last working day in such employment.

GC-21 (Continued)

Contractor shall be responsible for maintaining labor relations and discipline in such a manner that there is harmony and order among its personnel and among the personnel of its subcontractors of any tier, and Contractor shall comply with and shall cooperate in enforcing

Work Site procedures and instructions which affect the performance of the Work, including but not limited to starting and quitting time, smoking rules, labor procedures, check-in and check-out procedures, Work Site safety rules and daily clean-up.

shall have the right, in its absolute discretion, to require the removal of Contractor's personnel at any level assigned to the performance of the Work inside or outside.

GC-22 SUPPLY AND PROCUREMENT RESPONSIBILITIES OF CONTRACTOR

Except as otherwise provided herein, Contractor shall be responsible for the supply and delivery to the Work Site of all equipment, materials and supplies required to accomplish and perform the Work. Such responsibility shall include, but not be limited to, procurement, inspection, expediting, shipment, customs clearance, loading, off-loading and handling, and all transportation and storage in

Contractor shall also be responsible, at its own expense, for all necessary import and export licenses, handling charges, customs duties, port dues, surcharges, landing, pilotage, lighterage and other charges in connection with the shipment of materials, supplies and equipment to and from

GC-23 (LOCALLY PROCURED) GOODS AND SERVICES

With respect to any materials, supplies, goods, equipment or services purchased, leased, contracted for or otherwise obtained or required by Contractor in the performance of the Work, Contractor shall use its best efforts to utilize materials, supplies, goods, equipment or services of

origin or which may be obtained or acquired from entities organized under the laws of

Contractor shall also incorporate in its drawings, plans and specifications prepared hereunder standards, requirements and specifications allowing for the utilization of goods and services which originate and are produced in

GC-24 SUBCONTRACTS AND PURCHASE ORDERS

Contractor shall not contract with any subcontractor, or any vendor who is to furnish equipment or materials fabricated to a special design or who is to perform installation or other services at the Work Site, without the prior written consent of

Such consent shall not relieve Contractor or its surety of their responsibilities under this Contract. In addition, Contractor shall ensure that the terms and conditions of any such contract shall comply with and correspond to the terms and conditions of this Contract.

If any portion of the Work which has been sublet or contracted by Contractor is not prosecuted in accordance with this Contract, the subcontractor or vendor shall be removed or replaced on written request of _____; provided, however, that any failure of

_____ to make such a request shall not relieve Contractor of its obligations hereunder. _____ shall not be responsible for delays or costs incurred by Contractor because of disapproval of a subcontractor or vendor, or the late submittal of its name for approval or because of removal of a subcontractor or vendor.

Contractor shall, upon written request, furnish the _____ with two (2) copies of any or all of its subcontracts, purchase orders or similar documents, provided that the prices thereon may be deleted unless the compensation to be paid thereunder is reimbursable under this Contract.

GC-25 EXPEDITING

Contractor shall be responsible for the timely delivery to the Work Site of all materials and equipment furnished by Contractor under this Contract, including equipment and materials obtained from vendors and subcontractors. However, _____ and its representatives shall be allowed free access during working hours to Contractor's facilities and those of its vendors and subcontractors for the purpose of determining that such materials and equipment will be delivered as scheduled. As required by _____ Contractor shall supply schedules and progress reports for use in expediting and

Contractor shall cooperate with and require its vendors and sub-contractors to cooperate with _____ in such expediting; provided that nothing contained in this Contract shall create any contractual obligation on the part of _____ to any vendor or subcontractor employed or retained by Contractor.

GC-26 SAMPLES AND CERTIFICATES

Where samples or certificates are required by this Contract or requested by _____ they shall be submitted by and at the expense of Contractor in accordance with the specifications and requirements set forth in Attachment "D" hereof. Samples and certificates shall be subject to approval by _____ and material represented by such samples or certificates shall not be manufactured, delivered to the Work Site, used in the Construction Plant or incorporated into the Permanent Works without such approval.

GC-27 SHIPPING

One (1) month prior to the shipment to the Work Site of the first item of equipment or material to be used by Contractor in the performance of the Work, Contractor shall submit for approval by _____ a shipping program covering all intended shipments to the Work Site. Such program shall be related to the Contract Schedule and shall contain the following information:

- (a) Description of items to be shipped
- (b) Approximate tonnage and cubic size
- (c) Port of shipment
- (d) Date of shipment
- (e) Method of shipment
- (f) Port of Arrival
- (g) Estimated date of arrival
- (h) Method of transport from Port of Arrival to Work Site

Such shipping program shall be kept up-to-date and shall be submitted periodically for review and approval in accordance with _____ instructions. Such review and approval by _____ shall not, however, relieve Contractor in any way of its obligations hereunder to secure the timely shipment of materials and equipment to the Work Site.

GC-28 DELIVERY, UNLOADING AND STORAGE

Except as otherwise provided herein, Contractor shall deliver to the Work Site, receive, unload, store in a secure place, and deliver from storage to the construction area all materials and equipment required for the performance of the Work. Contractor's storage facilities and methods of storing shall meet _____ approval. Materials and equipment subject to damage, degradation or spoilage shall be stored in a suitable enclosure provided by Contractor.

Contractor shall keep complete and accurate records, for _____ inspection, of all materials and equipment received at the Work Site, stored, and issued for use in the performance of the Work.

GC-29 OWNERSHIP OF EQUIPMENT AND MATERIALS

All equipment and materials furnished by Contractor for incorporation into the Permanent Works shall become the property of _____ without any further formality upon payment therefor by _____ or upon delivery to the Work Site, whichever occurs earlier; and all parts of the Permanent Works accomplished at the Work Site shall be the property of _____

GC-30 RESPONSIBILITY FOR THE WORKS

Notwithstanding the provisions of the General Condition hereof entitled "Ownership of Equipment and Materials", Contractor shall be responsible for and shall bear any and all risk of loss of or damage to the Permanent Works, the Construction Plant, all materials and equipment delivered to the Work Site and all other materials and equipment provided or required in connection with the performance of the Work until Final Acceptance thereof by _____ unless such loss or damage results from the sole active negligence or wilful misconduct of _____ or its authorized representatives.

GC-31 INSPECTION AND TESTING

Except as otherwise provided herein, Contractor shall be responsible for all inspection and testing specified in this Contract or required by law, applicable codes, or sound engineering and construction practice. However, all Work performed hereunder, the Permanent Works and any portion thereof

GC-31 (Continued)

shall be subject at all times during development and upon completion to review, inspection and testing by _____ and Contractor shall grant _____ duly designated representatives free access at all reasonable times to Contractor's offices and plants and all other locations where the Work is being performed. In addition,

_____ shall have access, at all reasonable times, to Contractor's calculations, support materials, and data and information concerning the Work, including computer programs and printouts, which _____ determines are required to properly and expeditiously review the Work.

_____ shall have the right to reject in writing any part of the Work or the Permanent Works reasonably found to be unsatisfactory or not in conformity with the requirements of this Contract, whereupon such rejected Work or Permanent Works shall be satisfactorily corrected, revised or replaced at Contractor's expense.

Contractor shall provide safe and convenient facilities and equipment at the Work Site for inspection and testing by _____ and _____ shall furnish all necessary samples, drawings, lists and documents. If _____ finds that conditions are unsafe for inspection or testing at a particular location, it may, upon notice to Contractor, refuse to inspect or test at that location until such conditions are corrected. Contractor shall bear any additional costs resulting from such unsafe conditions including costs incurred to permit subsequent inspection or testing of any portion of the Permanent Works covered or completed at that location before correction of the conditions, whether or not such portion of the Permanent Works is found to meet Contract requirements. If Contractor covers all or any portion of the Permanent Works prior to any inspection or tests by _____ the cost of any necessary uncovering and replacing shall be borne by Contractor.

Inspection and testing of materials and equipment to be incorporated into the Permanent Works may also be made by _____ at the place of production, manufacture or shipment, including the facilities of Contractor's vendors and subcontractors, and Contractor shall provide and arrange free access thereto upon reasonable advance notice in writing. If such inspection or testing is to be performed, no such materials or equipment shall be shipped from the place of inspection or incorporated into the Permanent Works prior to such inspection or testing.

GC-31 (Continued)

Contractor shall bear any additional costs resulting from re-inspection or re-testing by _____ of any previously rejected portion of the Work or the Permanent Works. Such costs may be deducted, in whole or in part, from any money due or that may become due to Contractor under this Contract.

Neither the failure by _____ to conduct inspection or testing, nor the failure to discover defective engineering, workmanship, materials or equipment, nor payment to Contractor shall prejudice the rights of _____ to thereafter require and obtain from Contractor the satisfactory performance of the Work hereunder. No acceptance of any part of the Work or the Permanent Works shall be implied or construed to result from such inspection or testing by _____

GC-32 WITNESSING AND ADDITIONAL TESTING

_____ shall have the right at any time to witness any test performed hereunder by Contractor or its vendors or subcontractors, and Contractor shall give _____ reasonable advance notice of any such test in accordance with _____ requirements.

Should shop materials tests in addition to those required hereunder be desired by _____ Contractor will be advised in sufficient time to permit the preparation of test specimens during the shop manufacture. Unless otherwise provided, such additional tests shall be in accordance with the requirements of applicable codes, and the testing will be done by testing organizations approved by _____ and shall be at _____ expense.

The type and number of field tests in addition to those required hereunder shall be determined solely by _____ Contractor will be notified of _____ and may be represented at all such tests. The tests will be made at the expense of _____ provided that the expense of Contractor's representatives, if any, shall be borne by Contractor.

All of the provisions contained in this General Condition shall be extended to cover subcontractors and vendors employed or retained by Contractor. Contractor shall be responsible for informing its subcontractors and vendors of these requirements.

GC-33 CONTRACTOR'S CONSTRUCTION RESPONSIBILITIES AND CONSTRUCTION PLANT

Except as otherwise provided herein, Contractor shall furnish all construction services and Construction Plant required to accomplish and perform the Work, including but not limited to, all supervision, labor, erection and installation services, haulage, temporary structures, consumable materials, tools and equipment. Contractor shall provide and use in the performance of the Work only such services, Construction Plant and equipment as are capable of producing the quality and quantity of work and materials required by the Contract and within the time or times specified in the Contract.

Before proceeding with the shipment to the Work Site of any Construction Plant or with erection at the Work Site of any facilities, including but not limited to temporary structures, machinery, equipment, offices, warehouses, and camps, Contractor shall at its expense furnish

with such information and drawings relative thereto as
may request. Thereafter, upon written order of

Contractor shall discontinue operation of any
unsatisfactory Construction Plant previously admitted to the Work Site
and shall either modify the unsatisfactory items to meet

approval or remove the unsatisfactory items from the Work Site.

Contractor shall at the time any Construction Plant is moved on to the Work Site present to an itemized list of all equipment and tools, including but not limited to power tools, welding machines, pumps and compressors. Said list must include description and quantity, and registration and serial number where applicable. Prior to removal of any or all Construction Plant from the Work Site, Contractor shall clear such removal through No Construction Plant shall be removed from the Work Site without such prior clearance by

GC-34 LINES AND GRADES

Except as otherwise provided herein, all Work performed at the Work Site

GC-34 (Continued)

shall conform to the lines and grades specified in this Contract or required by _____ All survey control points shown herein will be established by _____ and Contractor shall complete any layout necessary for the Work and shall be responsible for all measurements necessary for the execution of the Work to the locations, lines and grades specified or required.

If Contractor or its subcontractors of any tier or any of their representatives or employees move or destroy or render inaccurate any survey control point, such control point shall be replaced by Contractor at its expense and no extension of time for completion of the Work will be made.

It may be necessary from time to time to interrupt temporarily portions of Contractor's Work in order that _____ may make measurements or surveys without interruptions or other interferences that may impair the accuracy of the results. At any such time, upon request of _____ Contractor shall interrupt its Work to such an extent as may be required for this purpose. No extension of time for completion of the Work nor claim for additional payment will be allowed as a result of such temporary interruption.

GC-35 TEMPORARY ACCESS AND HAUL ROADS

Except as otherwise provided herein, Contractor shall, at its expense, construct and maintain at the Work Site such temporary access roads, haul roads and track beds as may be necessary for the proper performance of the Work. Contractor shall submit a layout of all such proposed roads and track beds prior to construction. The layout shall show widths, direction of traffic, curves, grades and related information in sufficient detail for review by _____ Roads and track beds constructed on _____ land or rights-of-way shall be subject to the prior written approval of _____

GC-36 SAFETY

Contractor shall at all times conduct its operations at the Work Site in such a manner as to avoid any risk of bodily harm to persons or damage to property.

GC-36 (Continued)

Contractor shall promptly take all precautions which are reasonable or necessary to safeguard against such risks and shall make regular safety inspections of the Work, the Permanent Works, the Construction Plant and any other materials and equipment located at the Work Site. Contractor shall be solely responsible for the discovery, determination and correction of any unsafe conditions arising in connection with the performance of the Work.

In addition, Contractor shall comply with all applicable safety laws, standards, codes and regulations, including any safety program established by Contractor shall cooperate and coordinate with other contractors on safety matters and shall promptly comply with any specific safety instructions or directions given to Contractor by

Contractor shall maintain accurate accident and injury reports and shall furnish with a monthly summary of injuries and manhours lost due to injuries. Contractor shall inform its employees of safety practices and the requirements of any safety program. Contractor shall furnish suitable safety equipment and enforce the use of such equipment by its employees.

Upon the failure of Contractor to comply with any of the requirements set forth herein, shall have the authority to stop any operations of Contractor affected by such failure until the condition is remedied. No part of the time lost due to any such stop order shall be made the subject of a claim for extension of time or for increased costs or damages by Contractor.

GC-37 SECURITY

During the performance of the Work, Contractor shall be responsible for internal security and protection of all Construction Plant and Permanent Works. Contractor shall provide at its expense a security force at the Work Site and a lockable store for all portable tools, equipment and material required or used in the performance of the Work. The details of the security program proposed by Contractor shall be approved by

GC-38 FIRST AID FACILITIES

Contractor shall be responsible for the provision of adequate first-aid facilities at the Work Site for all personnel employed or retained by

GC-38 (Continued)

Contractor or any of its subcontractors in the performance of the Work. However, other first-aid facilities may be present at or near the Work Site which may, at its option, make available for the treatment of such personnel who may be injured or become ill while engaged in the performance of the Work.

If such first-aid facilities are made available by Contractor's personnel or the personnel of its subcontractors, then, in consideration for the use of such facilities and the receipt of such services, Contractor hereby agrees that:

- (i) It will release, defend, indemnify and save harmless its authorized representatives, their representatives, successors or assigns, and all of their directors, officers and employees from and against any and all claims, demands or liabilities arising from the receipt of such services by Contractor's personnel or the personnel of its subcontractors, except for claims arising out of the sole active negligence or wilful misconduct of a party released, indemnified or held harmless hereunder; and
- (ii) Upon receipt of written notice from a party released, indemnified or held harmless hereunder of any such claim, demand or liability being pursued against such party, Contractor shall undertake the defense of such claim, demand or liability and will upon entry of judgment or award make any and all payments necessary thereunder.

In the event any of Contractor's personnel or the personnel of a subcontractor requires the services of an ambulance, hospital or physician, Contractor or its subcontractor will promptly pay all charges therefor directly to the providers of such services.

GC-39 FIRE PREVENTION

Contractor shall be responsible for fire prevention and fire protection practices in connection with performance of the Work. Contractor shall not permit unauthorized fires within or adjacent to the limits of the Work

GC-39 (Continued)

Site and shall be liable for all damage from fire due directly or indirectly to its own activities or to the activities of its employees or of its subcontractors of any tier or their employees. Contractor shall provide fire extinguishers commensurate with the hazard of each work area and shall instruct its personnel in their location and use. Wherever welding or burning is conducted, flammable materials shall be protected and Contractor shall ensure that protective fire prevention measures are taken and that no fires result from such operations.

At the request of _____ Contractor shall immediately remove from the Work Site any material or structures which in the judgment are contrary to _____ fire prevention program.

GC-40 COMMERCIAL ACTIVITIES

Contractor shall not establish any commercial activity or issue concessions or permits of any kind to third parties for establishing commercial activities at the Work Site without the prior approval of _____

Contractor shall not allow its employees to engage in any commercial activities at the Work Site.

GC-41 COOPERATION WITH OTHERS

There may be other contractors, subcontractors, and agents or employees of _____ and its authorized representatives working at or adjacent to the Work Site during the performance of the Work by Contractor. Contractor must anticipate in its schedule and its expenses that the performance of the Work may be interfered with or temporarily delayed from time to time on account of the concurrent activities of others, and Contractor shall fully cooperate with _____ and other contractors and subcontractors to avoid any delay or hindrance of their activities and to assure the orderly completion of the Complex as a whole. _____ may also require that certain facilities and areas be used concurrently by Contractor and other persons. No extension of time for completion will be granted and no additional payment will be made to Contractor by _____

GC-41 (Continued)

as a result of such temporary interferences or delays arising from the activities of others at or adjacent to the Work Site.

GC-42 TAXES AND ASSESSMENTS

Contractor shall pay all taxes and assessments, including but not limited to income and franchise taxes, sales, use, excise and value added taxes, Zakat and real and personal property taxes, stamp duties, fines, tariffs, customs duties and levies of every nature, due or to become due in connection with the performance of the Work, and shall make any and all payroll deductions and contributions required by law or contract.

GC-43 ACCOUNTING AND AUDITS

Contractor shall, at its expense, keep and maintain in one place full and complete records and books of account of its costs and expenses relating to the performance of the Work in accordance with generally accepted accounting practices. Such records and accounts shall permit Contractor to furnish _____ upon written notice, an accurate written allocation of the total Contract Price to the various elements of the Work, as may be required by

and its representatives shall have the right to examine, upon reasonable advance notice in writing, any books, records, accounts and other documents of Contractor directly pertaining to costs when such costs are the basis of a claim or of reimbursement to Contractor hereunder. Contractor shall keep and preserve all such books, records, accounts and other documents for a period of at least three (3) years from and after completion of the Work.

GC-44 CHANGES AND EXTRA WORK

The term "Change", as used in this Contract, means substitutions, additions or deletions in the Work within the scope of the Contract. The term "Extra Work", as used in this Contract, means Work outside the scope of the Contract.

GC-44 (Continued)

may, at any time, without invalidating this Contract and without notice to Contractor's guarantor or sureties, if any, make Changes and may require Contractor to perform Extra Work. All the provisions of this Contract shall apply to Changes and Extra Work.

All Changes and Extra Work shall be administered in accordance with the procedure hereinafter set forth, consisting of the issuance of

instructions by the _____ the submittal of an estimate by Contractor and the issuance of a Change Order by _____

however, reserves the right to perform any Change or Extra Work with its own forces or to hire other contractors to perform such work.

A. Instructions Directing a Change or Extra Work

When, in the opinion of _____ a Change or Extra Work is required, _____ will issue written instructions regarding performance of the Change or Extra Work and requesting Contractor to submit in writing its estimate of the cost and time required for such Change or Extra Work and its proposed method of adjusting the Contract Schedule and the Contract Price; provided that in the event of an emergency which, as determined by _____ threatens to disrupt the orderly performance of the Work or endangers persons or property, _____ may issue oral instructions to Contractor to perform a Change or Extra Work and as soon as practicable thereafter, confirm such oral instructions in writing. Such instructions, whether written or oral, may be accompanied by any drawings and data which are necessary to show the extent and details of such Change or Extra Work.

If, however, Contractor receives an order from _____ which in its opinion constitutes a Change or Extra Work and which _____ has not so identified, Contractor shall immediately inform _____ in writing prior to commencing performance of such order. _____ will review Contractor's written notice and will advise Contractor if a Change or Extra Work has or has not been ordered. In the event that

GC-44 (Continued)

a Change or Extra Work has been ordered, reply to Contractor shall constitute written instructions directing a Change or Extra Work. Except as provided in the event of an emergency, Contractor shall not commence Work on such a Change or Extra Work prior to receiving such written instructions from the

B. Contractor's Estimate

In the case of any Change or Extra Work, Contractor shall commence and perform such Work in strict accordance with the instructions, written or oral, received pursuant to the foregoing and shall keep accurate records of the actual cost to Contractor of such Work, segregated from Contractor's other cost records. Unless otherwise directed in such instructions, Contractor shall also, within ten (10) days of the receipt thereof, submit in writing to a detailed estimate which shall set forth the increase or decrease, if any, in the time required for performance of the Work and in the cost to Contractor of such performance resulting from the Change or Extra Work. The estimate shall state the basis of compensation proposed for the Change or Extra Work involved; or if a Change causes a decrease in the cost of performing the Work, the amount of such decrease shall be stated. Sufficient detail shall be provided to permit thorough analysis of the estimate.

The basis of compensation for a Change or Extra Work shall be either the unit or lump sum prices set forth in this Contract, if applicable; or new unit or lump sum prices. If Contractor does not propose in its estimate the method of compensation for such Change or Extra Work, or any part thereof, or if any proposed method is not acceptable to

or if a method of compensation for such Change or Extra Work, or any part thereof, cannot be agreed upon, Contractor shall proceed with such Change or Extra Work, and compensation therefor shall be made on a cost-plus basis as set forth in paragraphs (i) through (vi) below. If, at any time after Contractor commences such Change or Extra Work a method of compensation other than cost-plus is agreed upon, such compensation will be made in accordance with such agreement.

GC-44 (Continued)

- (i) Design and Engineering Costs - Payment shall be made for design and engineering costs in accordance with the schedule of hourly rates for technical personnel set forth in Attachment "C" hereof. Such rates shall remain fixed throughout the performance of this Contract and shall include an allowance for all payroll burdens and employee benefits and an allowance for all operating costs. The design and engineering time charged to Changes or Extra Work shall be subject to the verification and approval of _____ and no charges shall be accepted unless evidence of such verification and approval is submitted by Contractor with its billing.
- (ii) Director Labor Cost - Payment shall be made for all manual classifications up to and including foremen, but shall not include superintendents, assistant superintendents, general foremen, surveyors, office personnel, time-keepers and maintenance mechanics. The time charged to Changes or Extra Work shall be subject to the daily approval of _____ and no charges shall be accepted unless evidence of such approval is submitted by Contractor with its billing. Labor rates used to calculate the direct labor costs shall be those rates in effect for the Work during the accomplishment of the Change or Extra Work. In addition to the direct payroll costs, the direct labor costs shall include payroll taxes and insurance, vacation allowance, subsistence, travel time and overtime premium and any other payroll additives required to be paid by Contractor by law. Copies of certified pertinent payrolls shall be submitted to the _____
- (iii) Equipment Costs - Payment for the rental and operation of the equipment furnished and used by Contractor shall be made for all construction and automotive equipment except equipment or tools with a new cost at point of origin of _____ (or equivalent) or less each.

GC-44 (Continued)

Equipment time charged to Changes and Extra Work will be subject to daily approval of and no charges will be accepted unless evidence of such approval is submitted with Contractor's billing.

The equipment rental and operation rates shall include costs for rental, fuel, oil, grease, repair parts, service and maintenance of any kind and necessary attachments. Such rates shall not include costs for operating labor and transportation to and from the location of the Change or Extra Work. If this Contract contains equipment rental and operation rates, such rates shall apply to Contractor's equipment used on Changes or Extra Work. If this Contract does not contain equipment rental and operation rates or if equipment is used for Changes and Extra Work which does not reasonably resemble any of the equipment having rental and operation rates set forth herein, the rental and operation rate shall be negotiated and agreed upon in writing before Contractor uses such equipment in connection with any Change or Extra Work.

If Contractor-owned equipment is not available and equipment is rented from outside sources, payment will be computed on the basis of actual invoice cost. Rental rates for non-owned equipment must be approved in advance in writing by

When equipment is used infrequently and, as determined by

need not remain at the Work Site continuously, payment shall be limited to actual hours of use. Equipment not operating but retained at the location of Changes or Extra Work at _____ direction shall be paid for at a standby rate.

GC-44 (Continued)

Transportation costs for bringing equipment to the Work Site and for returning equipment to the point of origin, exclusively for use on a Change or Extra Work, will be reimbursed to Contractor based on invoices, provided that such transportation of equipment to the Work Site has been approved in advance in writing by

- (iv) Material Costs - Payment for the cost of materials furnished by Contractor for used in performing the Change or Extra Work shall be made, provided such furnishing and use of materials is as specifically authorized in the instructions ordering such Change or Extra Work and the actual use is verified by _____ Charges must be the net cost to Contractor delivered at the Work Site and a copy of the vendor's invoice must accompany the billing along with the verification by _____ of such use of the materials.
- (v) Contract and Outside Service Costs - Charges for work and services subcontracted by Contractor in the performance or completion of the Change or Extra Work will be allowed only when both the subcontractor and the terms of payment to such subcontractor have been approved in writing by _____ before the subcontractor starts to work on the Change or Extra Work. Such charges will be allowed at net cost to Contractor, computed and verified on the same basis as set forth in paragraphs (i) through (iv) above.
- (vi) Tools, Supplies, Overhead, Supervision and Profit - A charge shall be allowed to cover tools and equipment with a new cost of _____ less each, and to cover supplies, overhead, supervision, profit and

GC-44 (Continued)

all other costs not otherwise provided for herein, in the amount of the following percentage of the total design and engineering costs and direct labor costs, as defined in paragraphs (i) and (ii) above:

(a) Forty percent (40%) when the total design and engineering costs and direct labor costs are less than _____ (or equivalent);
or

(b) Thirty-five percent (35%)
whichever is greater, when the total design and engineering costs and direct labor costs are _____ or over.

C. Issuance of a Change Order

When the basis of compensation and the required adjustments, if any, to the Contract Price and Contract Schedule have been determined by _____ pursuant to the foregoing provisions, the _____ shall issue a Change Order setting forth the total Contract adjustments to be made. Such Change Order, when signed by _____ and Contractor, shall constitute an amendment to this Contract.

Notwithstanding the provisions of this General Condition, if the aggregate price of the Changes and Extra Work hereunder exceeds twenty percent (20%) of the original Contract Price set forth in Attachment "C" hereof, _____ in its sole discretion, may review the Contract Price with Contractor for the purpose of negotiating a revised total Contract Price for all the Work performed under this Contract.

GC-45 DELAYS AND EXTENSION OF TIME

Either party shall be entitled to an appropriate extension of time for performance of its obligations under this Contract if such performance is prevented or delayed by any condition, existing or future, which is beyond the reasonable control and without the fault or negligence of such party and which condition was not foreseeable by such party at

GC-45 (Continued)

the time this Contract was entered into and by such party taking reasonable steps could not have been prevented such conditions shall include, without limitation, Acts of God, war, fire, floods, and interferences by civil or military authorities. Such party shall, within seven (7) days of the commencement of any such delay give to the other party written notice thereof and of the anticipated results thereof. Within seven (7) days after termination of any such delay, such party shall file an additional written notice with other party specifying the actual duration of the delay. Failure to give either of the above notices shall be sufficient ground for denial of an extension of time hereunder.

In the event of any such condition, the party whose performance is prevented or delayed thereby shall take all necessary measures to mitigate and minimize the effect of the delay and to continue with the prompt and diligent performance of its obligations under this Contract.

GC-46 SUSPENSION

may for any reason whatsoever, at its sole option, suspend at any time and from time to time by notice in writing to Contractor, the performance of all or any portion of the Work. Such notice of suspension will designate the amount and type of construction Plant and labor which shall remain committed to the Work Site. During the period of suspension, Contractor shall utilize its Construction plant and labor in such a manner as to minimize cost associated with suspension and shall continue to prosecute and perform the unsuspended part of the work.

Upon receipt of any such notice, Contractor shall, unless the notice requires otherwise:

- (a) immediately discontinue Work on the date and to the extent specified in the notice;
- (b) place no further purchase orders or subcontracts for material, services, or facilities with respect to suspended Work other than to the extent required in the notice;

GC-46 (Continued)

- (c) promptly make every reasonable effort to obtain suspension upon terms satisfactory to _____ of all purchase orders, subcontracts and rental agreements to the extent they relate to performance of Work suspended; and,
- (d) continue to protect and maintain the Construction Plant and Permanent Works including those portions on which Work has been suspended.

As full compensation for such suspension, Contractor shall be reimbursed for the following costs, reasonably incurred, without duplication of any items, to the extent that such costs directly result from such suspension of Work:

- (a) a standby charge to be paid to Contractor during the period of suspension, which standby charge shall be sufficient to compensate Contractor for keeping, to the extent required in the notice, its organization and equipment committed to the Work Site on a standby status;
- (b) all reasonable costs associated with mobilization and demobilization of Contractor's Construction Plant and forces;
- (c) an equitable amount to reimburse Contractor for the direct cost of maintaining and protecting that portion of the Construction Plant and Permanent Works upon which Work has been suspended; and
- (d) an equitable adjustment with respect to the performance of the remaining portion of the Work, if as a direct result of any such suspension of Work the cost to Contractor of subsequently performing the Work is increased or decreased.

Upon receipt of notice to resume suspended Work, Contractor shall immediately resume performance of the suspended Work to the extent

GC-46 (Continued)

required in the notice. Any claim on the part of Contractor for time or compensation shall be made within ten (10) days after receipt of notice to resume Work, and Contractor shall submit for review and approval by _____ a revised Contract Schedule.

No additional compensation or extension of time shall be granted if suspension results from Contractor's non-compliance with the requirements of this Contract.

GC-47 TERMINATION FOR DEFAULT

If any or all of the Work to be performed under this Contract is abandoned by Contractor; or if the Contract or any part thereof is assigned in violation of the provisions hereof, or if any Work is sublet by Contractor without the required approval of _____ or if Contractor becomes insolvent or unable to meet its payroll or other current obligations, or is adjudicated a bankrupt, or has an involuntary petition in bankruptcy filed against it, or makes an assignment for the benefit of creditors, files a petition for an arrangement, composition or compromise with its creditors under any applicable laws, or has a trustee or other officer appointed to take charge of its assets; or if _____ determines that the Contract Schedule is not being maintained or that Contractor is violating any of the conditions or provisions of this Contract; or if _____ determines that Contractor is refusing or failing to perform properly any portion of the Work or that Contractor is performing any portion of the Work in bad faith or not in accordance with the terms of this Contract, and if Contractor fails to remedy such default within seven (7) days after receipt of a written notice of default from _____ or fails to provide satisfactory evidence that such default will be corrected, _____ may, without notice to Contractor's guarantor or sureties, if any, withhold any amounts otherwise due under the Contract and/or terminate by written notice Contractor's right to proceed with all or any portion of the Work.

GC-47 (Continued)

Upon such termination or withholding, shall
have the right to complete any Work by whatever method
may deem expedient, including employing another
contractor under such form of contract as may
deem advisable or having provide
any labor or materials and perform any part of such Work that has
been terminated; and shall
have the right to take possession of and to use any or all of the
materials and Construction Plant of any and every kind furnished by
Contractor for such work. The expense of so completing such Work,
together with a reasonable charge for administering any contract for
such completion, will be charged to Contractor, and such expense will
be deducted by out of such monies as may
be due or may at any time thereafter become due to Contractor. In
case such expense exceeds the sum which would have otherwise been
payable under this Contract, Contractor and its guarantors and
sureties, if any, shall be liable for and shall upon notice from
promptly pay to

the amount of such excess. shall not
be required to obtain proposals for completing such Work, but may
make such expenditures as in sole
judgment will best accomplish such reasonable completion.
The shall not be liable for any damages or
loss of anticipated profits on account of such termination.

Upon receipt of any such written notice of termination of right to
proceed, Contractor shall continue to prosecute and perform any
unterminated part of the Work and shall, at its expense, for that part
of the Work affected by any such termination:

- (a) immediately discontinue Work on the date and to the extent
specified in the notice;
- (b) assist in making an inventory of all
Construction Plant at the Work Site and all Permanent Works in
storage at the Work Site, en route to the Work Site, and on
order from vendors and subcontractors;

GC-47 (Continued)

- (c) remove from the Work Site all Construction Plant listed in said inventory other than the Construction Plant which is designated in writing by _____ to be used by _____ in completing such Work;
- (d) assign to _____ subcontracts, purchase orders, supply contracts and equipment rental agreements, all as designated by _____
- (e) deliver to _____ in the manner and to the extent determined by _____ any data, plans, drawings, specifications, reports, estimates, summaries, completed Work, Work in progress, and such other information and materials as may have been acquired or prepared by Contractor in connection with this Contract; and
- (f) make available to the _____ Commission the names and category of employment of all persons employed on the Work Site, other than Contractor's permanent staff, to enable _____ to employ such personnel as _____ may require to complete the Work.

For the part of the Work with respect to which Contractor's right to proceed has been terminated, all applicable provisions of this Contract shall continue in full force and effect as to all Work performed prior to the effective date of termination, provided that, subject to the provisions of the General Condition hereof entitled "Indemnity and Release" and the General Condition hereof entitled "Warranty", after such effective date _____ shall bear the risk of loss of or damage to any portion of the Permanent Works upon which Contractor's right to proceed has been terminated. For the remainder of the Work, this Contract shall remain in full force and effect.

The rights and remedies of _____ provided by this General Condition are in addition to any and all other rights and remedies provided by law or under this Contract, and nothing

GC-47 (Continued)

contained herein shall prejudice the rights of
to take whatever action it may deem necessary or appropriate to
obtain the satisfactory performance of this Contract.

GC-48 TERMINATION FOR CONVENIENCE OF

may, at any time and from time to
time, for any reason whatsoever, whether or not Contractor is in
default, and without notice to Contractor's guarantors or sureties,
if any, terminate this Contract in whole or in part by giving
written notice to Contractor specifying the part or parts of the Work to
be terminated and the effective date of the termination. Upon any such
termination, Contractor hereby waives any claims for damages,
including loss of anticipated profits, on account of such termination;
but as the sole right and remedy of Contractor,

shall pay Contractor an amount determined in
accordance with the following (without duplication of any item):

- (a) all amounts due and not previously paid to Contractor for Work
completed in accordance with this Contract prior to such notice,
and for Work thereafter completed as specified in such
notice;
- (b) the reasonable cost of settling and paying claims arising out of
the termination of Work under subcontracts or purchase orders
as hereinafter provided;
- (c) the reasonable costs incurred pursuant to the performance of
any specific written instructions received from
concerning such termination; and
- (d) any other reasonable costs incidental to such termination of
Work.

The foregoing amounts shall include a reasonable sum, under all of
the circumstances, as profit for all Work satisfactorily performed by
Contractor.

Upon receipt of any such notice of termination, Contractor shall
unless the notice requires otherwise:

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- (a) immediately discontinue Work on the date and to the extent specified in the notice;
- (b) place no further purchase orders or subcontracts for materials, services, or facilities, other than as may be necessary or required for completion of the portions of the Work that are not terminated;
- (c) Promptly make every reasonable effort to obtain cancellation upon terms satisfactory to _____ of all purchase orders and subcontracts to the extent they relate to the performance of Work terminated, or assign to _____ those purchase orders and subcontracts specified in such notice;
- (d) assist _____, as specifically requested in writing, in the maintenance, protection and disposition of property acquired by _____ under this Contract;
- (e) deliver to _____, in the manner and to the extent determined by _____, any data, plans, drawings, specifications, reports, estimates, summaries, completed Work, Work in progress, and such other information and materials relating to the terminated part of the Work as may have been acquired or prepared by Contractor in connection with this Contract; and
- (f) continue to prosecute and perform any unterminated part of the Work.

For the part of the Work terminated, all applicable provisions of this Contract shall continue in full force and effect as to all Work performed prior to the effective date of termination, provided that, subject to the provisions of the General Condition hereof entitled "Indemnity and Release" and the General Condition hereof entitled "Warranty", after such effective date _____ shall bear the risk of loss of or damage to any terminated part of the Permanent Works. For the remainder of the Work, this Contract shall remain in full force and effect.

GC-49 USE OF COMPLETED PORTION OF THE PERMANENT WORKS

Whenever, as determined by _____, any portion of the Permanent Works is in a condition suitable for use, _____ may take possession of or use such portion upon reasonable advance notice in writing given to Contractor.

Such use by _____ shall in no case be construed as constituting Final Acceptance, and shall neither relieve Contractor of any of its responsibilities under this Contract, nor act as a waiver by _____ of any of the conditions hereof; provided that Contractor shall not be liable for the cost of repairs, rework, or renewals which may be required due to ordinary wear and tear resulting from such use. However, if such use increases the cost or delays the completion of remaining portions of the Work, Contractor shall be entitled to an equitable adjustment in accordance with the Changes provisions contained in the General Condition hereof entitled "Changes and Extra Work".

If, as a result of Contractor's failure to comply with the provisions of this Contract, such use proves to be unsatisfactory to _____ shall have the right to continue such use until such portion of the Permanent Works can, without injury or undue inconvenience to _____, be taken out of service for correction of defects, errors, or omissions, or replacement of unsatisfactory materials or equipment, as necessary for such portion of the Permanent Works to comply with this Contract; provided that the period of such operation or use pending commencement of appropriate remedial action shall not exceed twelve (12) months unless otherwise mutually agreed upon in writing between the parties.

Contractor shall not for its own purposes use any portion of the Permanent Works unless such use is approved by _____ in writing. Where Contractor's request for use of a portion of the Permanent Works is granted, Contractor shall properly use and maintain and upon completion of its use, and at its expense, recondition such Permanent Works to the satisfaction of _____

If _____ furnishes an operator for such use by Contractor of the Permanent Works, such operator's services shall be

GC-49 (Continued)

performed under the complete direction and control of Contractor, and such operator shall be considered Contractor's employee for all purposes other than the payment of wages, workmen's compensation or other benefits paid directly or indirectly by the

GC-50 CLEANING UP AND REMOVAL OF PERSONNEL

Contractor shall, at all times, keep the Work Site areas used by Contractor in a neat, clean, and safe condition and shall dispose of all rubbish and other unwanted materials in specific areas to be designated by

Contractor shall also ensure that all labor and personnel employed by Contractor or its subcontractors in the performance of the Work are removed from the Work Site upon completion or termination of the Work. Upon completion of any portion of the Work, Contractor shall promptly remove all of its Construction Plant and surplus materials not to be used at or near the same location during later stages of work. Upon completion of the Permanent Works and before final payment is made, Contractor shall, at its expense, satisfactorily dispose of all Construction Plant, rubbish and unused materials belonging to it or used in the performance of the Work, including the return to the Commission's warehouse of any salvageable materials supplied by for use in the performance of the Work but not used; and Contractor shall leave the Work Site areas used by Contractor in a neat, clean, and safe condition. In the event of Contractor's failure to comply with the foregoing, the same may be accomplished by the Royal Commission at Contractor's expense.

GC-51 FINAL ACCEPTANCE

When Contractor considers that it has completed the Permanent Works, Contractor shall notify in writing that the Permanent Works are ready for final inspection and testing and turning over to Except as otherwise provided herein, within thirty (30) days from the date of receipt of such notice, will commence such inspection and testing and, upon completion thereof, either will give Contractor a Certificate of Final Acceptance or will advise Contractor in writing

GC-51 (Continued)

of any outstanding item or items which must be furnished; completed or corrected. This procedure will be repeated until such time as
is satisfied that the Permanent Works
have been completed in accordance with the requirements of this Contract.

Upon Final Acceptance, shall become responsible for the care and maintenance of the Permanent Works; provided, however, that notwithstanding the foregoing provisions of this General Condition and the issuance of a Certificate of Final Acceptance, Contractor shall remain obligated under all those provisions of this Contract, such as but not limited to the Confidentiality, Warranty, Indemnity and Taxes and Assessments provisions hereof, which expressly or by their nature extend beyond and survive Final Acceptance.

GC-52 WARRANTY

All design and detailed engineering performed hereunder shall be in accordance with sound engineering practice, all applicable codes and regulations, and the provisions of this Contract, and Contractor shall observe and exercise therein the professional standards of skill, care and diligence adhered to by recognized first-class international engineering contractors performing work of a similar nature. Unless otherwise expressly provided herein, all materials and equipment incorporated into the Permanent Works shall be new and shall conform to the specifications, drawings, samples and other descriptions as set forth in this Contract or provided by Contractor and approved by
and where not specified, such materials and equipment shall be of the most suitable grade of their respective kinds for their intended use; and all workmanship shall be in strict accordance with this Contract and with sound construction practices. Subject to the provisions hereof, Contractor warrants the Permanent Works against defects in the design, engineering, materials, equipment and workmanship furnished or performed under this Contract for a period of twelve (12) months from and after Final Acceptance or termination by
whichever is applicable, regardless of whether the same were furnished or performed by Contractor or by any of its vendors or subcontractors of any tier. Upon receipt of written notice from
any breach of warranty during the applicable

GC-52 (Continued)

warranty period due to defective design, engineering, materials, equipment, or workmanship, the affected item or part of the Permanent Works shall be reworked, including all necessary redesign, repair or replacement, by Contractor at a time acceptable to Contractor shall perform such tests as _____ may require to verify that such rework complies with the requirements of this Contract. Contractor warrants such reworked item or part of the Permanent Works against defects in design, engineering, materials, equipment and workmanship for a period of twelve (12) months from and after the date of completion and acceptance thereof. All costs incidental to such rework and testing thereof, including the removal, replacement and reinstallation of equipment and materials necessary to gain access, and all other costs incurred as a result of the breach of warranty shall be borne by Contractor. Should Contractor fail to promptly rectify the breach of warranty in accordance with _____ written notice, _____ may perform or cause to be performed the necessary rework at Contractor's expense.

The above warranties are not intended as a limitation but are in addition to all other express warranties and guarantees set forth in the Contract. Contractor, its guarantors, and its surety or sureties, if any, shall be liable for the satisfaction and full performance of the warranties as set forth herein.

GC-53 PERFORMANCE SECURITY

Within the time required by _____ but in no event later than ten (10) days after the date of this Contract or after the commencement date specified in the Notice to Proceed issued to Contractor hereunder, whichever is earlier, Contractor shall deliver to _____ a performance security in a form and issued by an entity or entities satisfactory to _____ consisting of either (i) a certified check or bank guarantee payable to the order of the _____ Commission, or (ii) an unconditional guarantee of two sureties jointly and severally liable with Contractor under this Contract.

GC-53 (Continued)

Such performance security shall be valid until the expiration of the warranty period specified in the General Condition hereof entitled "Warranty" and shall be in an amount equal to five percent (5%) of the total Contract Price if in the form of a certified check or bank guarantee, or in an amount specified elsewhere in this Contract if in the form of an unconditional guarantee.

If, at any time, the total Contract Price is increased or decreased by a Change Order issued pursuant to the General Condition hereof entitled "Changes and Extra Work", the amount of the performance security shall be adjusted in accordance with such increase or decrease.

GC-54 OWNERSHIP OF DOCUMENTS, DATA AND PROPRIETARY INFORMATION

All materials and documents prepared or developed by Contractor or its employees, representatives or subcontractors in connection with the performance of the Work, including all manuals, data, designs, drawings, plans, specifications, reports, calculations, summaries, maps, models and samples, shall become the property of _____ when prepared, and Contractor and its subcontractors shall not use such materials and documents for any purpose other than the performance of the Work without _____ prior written approval. Such materials and documents, together with any materials and documents furnished to Contractor or its subcontractors by _____ shall be delivered to _____ upon completion of the Permanent Works and before final payment is made to Contractor.

Subject to the provisions of the General Condition hereof entitled "Confidentiality", where such materials or documents contain technical information or know-how previously known to Contractor or its subcontractors or previously acquired by Contractor or its subcontractors from others, Contractor or its subcontractors shall have the unrestricted right to use or dispose of such information or know-how as they see fit. However, where such technical information or know-how is created or acquired by Contractor or its subcontractors in the performance of the Work hereunder, then Contractor or its subcontractors shall have the right to use, but not to disclose to others, such technical information or know-how, and _____ shall have the unrestricted right to use and disclose to others any and all such technical information or know-how.

Contractor shall take all steps which may be necessary or appropriate in order that its employees, representatives and subcontractors adhere to

GC-54 (Continued)

the provisions of this General Condition. Appropriate clauses to carry out the purpose and intent hereof shall be included in all subcontracts and similar agreements entered into by Contractor pursuant to the performance of this Contract.

GC-55 LANGUAGE

All notices and communications under this Contract and all technical material, documents and reports submitted to _____ shall be in _____ otherwise directed in writing by _____ Notwithstanding the foregoing, Contractor shall adhere to any decrees and regulations of _____ requiring submission of certain documents in _____ and in addition Contractor shall arrange, at its own expense, for such translations from _____ as may be required to facilitate the performance of the Work.

GC-56 STANDARDS AND CODES

When they exist, _____ standards and codes shall be used and specified by Contractor in the performance of the Work. Wherever references are made in this Contract to standards or codes in accordance with which the Work is to be performed or tested, the edition or revision of the standards or codes current on the date of this Contract shall apply, unless otherwise expressly set forth. In case of conflict between any referenced standards or codes, or between any referenced standards and codes and the Technical Specifications set forth in this Contract, _____ will determine which shall govern.

GC-57 METRIC SYSTEM

Contractor shall use the metric system of measurement for all designs, specifications, plans and drawings, except as otherwise approved in writing by _____

GC-58 INFORMATION FURNISHED BY _____

_____ shall furnish Contractor any general information and data readily available to _____ which may be of use to Contractor in the performance of the Work. However,

GC-58 (Continued)

except where included as a part of this Contract,
 makes no representations with respect to the reliability,
accuracy or completeness of any information or data it may furnish
hereunder; and assumes no responsibility for any
Work which is based upon such information or data. The failure of
 to furnish any such information or data
shall not affect the obligations of Contractor to perform the Work
hereunder.

GC-59 ENTIRE AGREEMENT AND APPROVALS

This Contract embodies the entire agreement between
 and Contractor relating to the Work, and the parties shall not
be bound by or be liable for any statement, representation, promise,
inducement or understanding of any kind or nature relating to the Work
which is not set forth or provided for herein. Any Work provided for
herein which was performed or caused to be performed by Contractor prior
to the date of this Contract shall be deemed to have been performed
under this Contract. Except as provided in the General Condition hereof
entitled "Changes and Extra Work", no changes, amendments or modifications
of any of the terms or conditions of this Contract shall be valid unless
reduced to writing and signed by both parties. In addition, all
approvals, consents and determinations by
shall be in writing, and such action, or failure to act, by
 shall not relieve Contractor of its responsibilities
for performance of this Contract.

GC-60 WAIVER

None of the provisions of this Contract shall be considered waived by
 unless such waiver is reduced to writing and
signed by No such waiver shall be construed
as a modification of any of the provisions of this Contract or as a
waiver of any past or future default or breach hereof, except as
expressly stated in such waiver.

GC-61 GOVERNING LAW

This Contract shall be governed by and interpreted under the laws
of

ATTACHMENT "B"
SPECIAL CONDITIONS

CONTRACT

No. _____

ATTACHMENT "B"

SPECIAL CONDITIONS

<u>ARTICLE NUMBER</u>	<u>DESCRIPTION</u>	<u>PAGE NUMBER</u>
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SC-2	PROGRESS REPORTS	B-3
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CONTRACT

No. _____

ATTACHMENT "B"

SPECIAL CONDITIONS

SC-1 CONTRACT SCHEDULE

Within the time required by _____ but in no event later than thirty (30) days from and after the date of this Contract, Contractor shall submit to _____ for approval a detailed schedule showing the activities and sequence of operations needed for the orderly performance and completion of every separable part of the Work.

The schedule shall be complete in all respects, covering, in addition to activities at the Work Site, offsite activities such as design, engineering, fabrication, procurement and Work Site delivery of Contractor-furnished equipment and materials, and the scheduled Work Site delivery dates of equipment and materials to be furnished by _____, if any, and shall include a manpower forecast by crafts. In addition, Contractor shall submit a detailed narrative description of its plan for performing the Work to meet the schedule.

Contractor shall promptly inform _____ in writing of any proposed change in the schedule or narrative and shall furnish _____ with a revised schedule and narrative within ten (10) days after approval by _____ of such change. The schedule and narrative shall be kept up to date, taking into account Contractor's actual progress in the performance of the Work, and shall be revised, if necessary, and submitted to _____ for review and approval every thirty (30) days. The revised schedule and narrative shall be sufficient to meet the requirements for the completion of the work in accordance

SC-1 (Continued)

with the dates set forth in this Contract. The approved schedule and narrative in effect at any given time during the performance of the Work shall constitute the Contract Schedule for purposes of this Contract.

If at any time during the performance of the Work, Contractor's actual progress is, in _____ judgement, inadequate to meet the requirements of the Contract Schedule, _____ may so notify Contractor who shall thereupon take such steps as may be necessary to improve its progress. If within a reasonable period, as determined by _____, Contractor does not improve its performance to meet the currently approved Contract Schedule, _____ may require additional measures such as an increase in Contractor's work force, an increase in the number of shifts, overtime operations, additional days of work per week and an increase in the amount of Construction Plant; all without additional cost to _____.

Neither such notice by _____ nor the _____ failure to issue such notice shall relieve Contractor of its obligation to achieve the quality of work and rate of progress required by this Contract.

The failure of Contractor to comply with such instructions of _____ may be grounds for determination by _____ that Contractor is not prosecuting the performance of the Work with such diligence as will assure completion within the times specified. Upon such determination, _____ may terminate Contractor's right to proceed with the performance of the Work, or any separable part thereof, in accordance with the applicable provisions of this Contract.

SC-2 PROGRESS REPORTS

During the performance of the work, Contractor shall submit periodic progress reports in duplicate to _____ on the actual progress achieved. Such reports shall be furnished no less frequently than monthly, in a form and manner to be designated by _____ and shall include the following:

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No. _____

SC-2 (Continued)

- (a) a copy of the Contract Schedule outlining in detail progress to date and expected completion dates for the various major items of Work;
- (b) a description of any anticipated variance from the Contract Schedule, together with an assessment of the impact of such variance and a statement of the proposed corrective action;
- (c) a list of the equipment used at the Work Site during the reporting period and any equipment idle during the reporting period;
- (d) a statement of the total number of men actually engaged at the Work Site during the reporting period, with such total stated separately as to office, supervisory and manual personnel;
- (e) a Work Site manpower and equipment forecast, by month to the date of completion of the Work, stating the total number of men, and separately stating such total as to office, supervisory and manual personnel;
- (f) a material receiving report listing material received at the Work Site and material due but not received during the reporting period; and

(g) _____

(h) _____

CONTRACT

SC-3 COMMENCEMENT AND COMPLETION

Contractor shall commence performance of the Work upon the date specified in the formal Notice to Proceed issued to Contractor hereunder and shall furnish sufficient forces, facilities and Construction Plant, and shall work such hours, including extra shifts and overtime operations, so as to prosecute the Work to completion in accordance with the following Major Contract Dates:

(Major Contract Dates for this Contract shall be listed in terms of number of weeks after the commencement date specified in the formal Notice to Proceed and shall include at least the following dates, plus other intermediate dates as appropriate:)

Mobilization at Work Site _____ weeks after the commencement date specified in the Notice to Proceed

Commence construction at Work Site _____ weeks after the commencement date specified in the Notice to Proceed

Complete Work at Work Site, including clean-up _____ weeks after the commencement date specified in the Notice to Proceed

SC-4 FURNISHED UTILITIES AND FACILITIES

Utilities: The utilities listed below will be furnished by _____ without cost to Contractor; provided that all such utilities will be furnished only at outlets existing at the Work Site; and Contractor shall, at its expense, extend such

CONTRACT

SC-4 (Continued)

utilities from such existing outlets to the points of use and at completion of the Work shall remove all materials and equipment used for such extensions. Contractor shall also regulate its usage of such utilities to avoid overuse in accordance with the instructions of the

(List of _____ furnished
utilities; if none, state "NONE".)

Facilities: The facilities listed below will be furnished by

Such facilities may be used by Contractor without charge; provided that any such use will be subject to the prior written approval of _____; and provided further that Contractor shall be responsible, at its expense, for maintenance and repair of such facilities to the extent specified in such written approval of _____

(List of _____ furnished
utilities; if none, state "NONE".)

Except to the extent provided above, Contractor shall, at its expense, furnish and maintain all utilities and facilities required for the performance of the Work.

SC-5 FURNISHED MATERIALS AND
EQUIPMENT

_____ will furnish to Contractor at _____ warehouse or storage area on the Work Site the items listed below to be used in the performance of the Work. Such items will be furnished without cost to Contractor; provided that Contractor shall, at its expense, accept delivery thereof, load, unload, transport to points of use and care for such items until final disposition thereof. At the time of acceptance of any such items from _____, Contractor shall sign a receipt therefor. The signing of such receipt without reservation therein

CONTRACT

No. _____

SC-5 (Continued)

shall preclude any subsequent claim by Contractor that any such items were received from _____ in a damaged condition or with shortages. If at any time after acceptance of any such item from _____ such item is damaged, lost, stolen or destroyed, the item shall be repaired or replaced at the expense of Contractor. Items required to be replaced may, at the option of _____ be replaced by _____ at Contractor's expense. Upon completion of the Permanent Works and before Final Acceptance, Contractor shall return, at its expense, all surplus and unused items to _____ warehouse.

The materials and equipment to be furnished by _____ shall be the following:

(List of _____ furnished materials and equipment; if none, state, "NONE".)

To the extent the above-listed materials and equipment are incorporated by Contractor into the Permanent Works, such materials and equipment shall not be considered to be furnished by Contractor for purposes of the provisions contained in the General Condition hereof entitled "Warranty". However, upon Contractor's acceptance of the materials and equipment from _____ Contractor shall be fully responsible for such items in accordance with the General Condition hereof entitled "Responsibility for the Works".

SC-6 _____ FURNISHED PERMITS

Notwithstanding the provisions of the General Condition hereof entitled "Permits", _____ will, without cost to Contractor, furnish the permits listed below. Contractor shall, in accordance with the General Condition hereof entitled "Permits",

CONTRACT

No. _____

SC-6 (Continued)

obtain all other permits required for the performance of the Work.

All such permits furnished by _____ will be available

for examination at _____ office on the Work Site during

regular business hours.

(List of _____ furnished
permits; if none, state "NONE".)

SC-7 CONTRACTOR FURNISHED FACILITIES FOR _____

Contractor shall furnish, at its expense, office space, furnishings,
clerical and secretarial assistance, and communication services
required by _____ and its representatives at

Contractor's off-site offices and at the Work Site. Such facilities
and services shall conform to the following specifications and shall
be suitable for the designated maximum number of _____ personnel
who may use such premises.

Off-Site Facilities:

(Description of off-site facilities and
services to be provided for personnel of
_____, and designation of
maximum number of such personnel. If none,
state "NONE".)

Work Site Facilities:

(Description of Work Site facilities and
services to be provided for personnel of
_____, and designation of
maximum number of such personnel. If none,
state "NONE".)

Contractor shall be responsible for the care and maintenance of such
facilities and shall provide all required utilities, except utilities
furnished by _____ pursuant to the Special Condition
hereof entitled " _____
Furnished Utilities and Facilities".

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No. _____

SC-8 SPARE PARTS

Contractor shall obtain from its vendors and subcontractors, at the time of obtaining offers for the supply of equipment, the price and listing of the recommended spare parts necessary to ensure one (1) continuous year of normal operation of the equipment after the expiration of the warranty period provided in the General Condition hereof entitled "Warranty". On the basis of such information, Contractor shall compile for each unit of equipment a list of recommended spare parts, which shall include part numbers, type, size, specification and vendor's reference. The list for each unit of equipment as completed shall be submitted to together with copies of the information obtained from vendors and subcontractors.

will return to Contractor a copy of such list indicating the items which are required hereunder. Contractor shall thereupon purchase, inspect and expedite such items and shall ensure that they are delivered to the Work Site before Final Acceptance.

shall pay to Contractor the net delivered cost to Contractor of such spare parts upon presentation of the vendor's invoice; however, no additional compensation shall be paid to Contractor for its services in connection with such procurement.

During performance of the Work, Contractor shall not use any spare parts obtained under the foregoing provisions without approval of

SC-9 INSURANCE REQUIREMENTS (First Alternative:

for use in Contracts involving the construction of support facilities at and elsewhere in

Unless otherwise provided in this Contract, Contractor shall, at its sole expense, take out and maintain in effect at all times during the performance of the Work insurance coverages with limits not less

CONTRACT

No. _____

SC-9 (Continued)

than those set forth below with insurers and under forms of policies satisfactory to Contractor shall deliver to no later than ten (10) days after the commencement date specified in the Notice to Proceed issued to Contractor hereunder but in any event prior to commencing Work at the Work Site, Certificates of Insurance, identified on their face as to Project Name and the Contract Number to which applicable, as evidence that policies providing such coverage and limits of insurance are in full force and effect. Such Certificates shall provide that the insurance carrier shall furnish with written notice thirty (30) days prior to the effective date of any material change or cancellation. and any designated authorized representative shall be named as additional insureds under coverages (b), (c) and (d) below, and such insurance shall provide for an insurer's waiver of subrogation in favor of all insured parties.

<u>Coverage</u>	<u>Minimum Amounts and Limits</u>
(a) Workmen's Compensation	Statutory requirements at location of work.
(b) Employer's Liability	As required by law, but not less than per occurrence.
(c) Comprehensive General Liability	
(1) Bodily Injury	per person
(2) Property Damage	per occurrence
(d) Comprehensive Automobile Liability (Owned, hired and non-owned)	
(1) Bodily Injury	per occurrence
(2) Property Damage	per occurrence

CONTRACT

No. _____

SC-9 (Continued)

The requirements contained herein as to types, limits approval of insurance coverage to be maintained by Contractor are not intended to, and shall not in any manner, limit or qualify the liabilities and obligations assumed by Contractor under this Contract. All insurance carried by Contractor under the terms hereof shall be primary to and not contributing with any insurance carried by Contractor. Additionally, Contractor shall require any subcontractor to supply insurance equal to that stipulated herein against the various risks and exposures arising out of the implementation of the subcontract.

(Second Alternative: for use in Contracts involving Work at)

A. Contractor Furnished Insurance

Unless otherwise expressly provided in this Contract, Contractor shall, at its sole expense, take out and maintain in effect at all times during the performance of the Work insurance coverage with limits not less than those set forth below. Contractor shall deliver to

no later than ten (10) days after the commencement date specified in the Notice to Proceed issued to Contractor hereunder but in any event prior to commencing Work at the Work Site, Certificates of Insurance, identified on their face as to Project Name and the Contract Number to which applicable, as evidence that policies providing such coverage and limits of insurance are in full force and effect. Such certificates shall provide that the insurance carrier shall furnish Contractor with written notice thirty (30) days prior to the effective date of any material change or cancellation. Such insurance shall name Contractor and any designated authorized representative as additional insureds and shall provide for an insurer's waiver of subrogation in favor of all insured parties. Additionally, Contractor shall require any subcontractor to supply insurance equal to that stipulated herein against the various risks and exposures arising out of the implementation of the subcontract.

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No. _____

SC-9 (Continued)

1. Adequate Workmen's Compensation Insurance or social insurance applicable to industrial illness or injury as may hereafter be required by law for employees (expatriate employees to be covered as required by the law of their country of origin). Employer's Liability Insurance covering all employees with a limit of not less than
2. Automobile Liability Insurance with limits as required by law, but not less than each occurrence for bodily injury and for property damage.
3. Watercraft/Aviation Liability Insurance insuring owned or hired watercraft or aircraft with limits equal to the value of the hull, but not less than each occurrence.
4. "All Risk" Hull Insurance insuring owned or hired watercraft or aircraft with a limit equal to the value of the hull.
5. Such other insurance as shall be mutually agreed upon by the parties.

The insurance policies covered by this Special Condition shall be maintained with insurance carriers approved by _____ shall be reviewed by _____, and shall be subject to the approval of _____ within ninety (90) days from the respective dates of such policies. All insurance carried by Contractor, under the terms hereof, shall be primary to and not contributing with any insurance carried by the _____

B. Furnished Insurance

Without in any way measuring or limiting Contractor's obligations under this Contract, _____ will take out, carry and maintain the following insurance coverages with Contractor and its subcontractors named as additional insureds:

1. "All Risk" Course of Construction Insurance with a limit sufficient to cover the maximum foreseeable loss and subject to a deductible of _____ or its U.S. dollar equivalent each occurrence, which deductible will be at Contractor's expense. The policy covers physical loss or damage

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No. _____

SC-9 (Continued)

to all material or equipment which is to become a part of the Permanent Works while located at the Work Site or at approved areas immediately adjacent thereto. The policy will provide for an insurer's waiver of subrogation in favor of each insured party.

2. Comprehensive Third Party Liability Insurance covering Contractor and its subcontractors in the course of their performance of the Work under this Contract in _____ with a limit of _____ or its U.S. dollar equivalent each occurrence, subject to a deductible for property damage of _____ or its U.S. dollar equivalent each occurrence which deductible will be at Contractor's expense. The policy excludes coverage arising out of the ownership, operation or use of motor vehicles, aircraft and watercraft. The policy will contain a cross liability or severability of interest clause and will not contain any exclusions for the perils of explosion, collapse of buildings or structures, or damage to property underground, commonly referred to as the "XCU" hazards.
3. "All risk" Transit Insurance insuring all material and equipment shipped by sea or air and which are to become a part of the Permanent Works from the time such material and equipment arrive at port of exit ready for loading until the material and equipment arrive at their designated destination in _____. The policy will contain a deductible of _____ or its U.S. dollar equivalent which deductible will be at Contractor's expense. The policy will provide for an insurer's waiver of subrogation in favor of each insured party.

Contractor shall be furnished with satisfactory evidence that the foregoing insurance is in effect. Such insurance policies will be endorsed to require the insurance carriers to furnish Contractor with written notice thirty (30) days prior to the effective date of any material change or cancellation of insurance.

_____ reserves the right at any time to require Contractor to obtain on its own behalf any or all of the coverages set forth in 1, 2, or 3 above with the premiums for such insurance to be reimbursed to Contractor by _____

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ADDITIONS TO ATTACHMENT "B"

Additional Special Conditions may be appended where appropriate.
Such Conditions may include, but not be limited to, the following:

- SC-10 MECHANICAL COMPLETION, PRE-COMMISSIONING, START-UP AND INITIAL OPERATION
- SC-11 QUALITY CONTROL AND TEST PROGRAM
- SC-12 PERFORMANCE TESTS AND PERFORMANCE GUARANTEES
- SC-13 LIMITATION OF CONTRACTOR'S LIABILITY
- SC-14 EXCLUSION OF CONSEQUENTIAL DAMAGES
- SC-15 TRAINING PROGRAM
- SC-16 PROJECT PROCEDURE MANUAL
- SC-17 PARENT COMPANY GUARANTEE
- SC-18 CONTRACTOR'S JOINT AND SEVERAL LIABILITY
- SC-19 DESIGNATION OF AMOUNT OF PERFORMANCE SECURITY
- SC-20 INTERFACE RESPONSIBILITIES FOR CONSTRUCTION PROVIDED BY
- SC-21 ADDITIONAL DRAWINGS AND SPECIFICATIONS TO BE FURNISHED BY
- SC-22 ADDITIONAL EXPRESS WARRANTIES
- SC-23 EXPLOSIVES
- SC-24 POSTERS AND SIGNS
- SC-25 CONFLICTS OF INTEREST
- SC-26 MODIFICATIONS OF GENERAL CONDITIONS

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ANNEX B

Checklist for Licensing Agreements

LICENSING PROVISIONS IN TURNKEY AGREEMENTS

DESIGNATION OF PARTIES

The opening clause in the licensing agreement identifies the parties to the agreement as Licensor and Licensee. It also generally recites the principal locations of the parties and the state or country of incorporation.

"WHEREAS" CLAUSE

This opening clause may be used by the Licensor to negate the concept of "mandatory" or "involuntary" package licensing, which occurs when the Licensor requires the Licensee to accept a license under the complete package being offered or receive no license at all. "Mandatory" or "involuntary" licensing is a violation of the U.S. antitrust laws. The Licensor can get the same result with a carefully worded "whereas" clause: "Whereas Licensee desires to secure a nonexclusive license under all of the patents and patent applications listed in the annexed schedule attached to this license agreement. . ." Later the Licensee will have difficulty in asserting that his acceptance of a license in the full package of patent rights offered was not an exercise of his free will.

If a package license is offered and Licensee seeks a provision in the license to terminate as to any patent in the package,

- If this clause is not granted, is there a coerced package?
- If one or more patents are dropped in accordance with the clause, how will royalties be pro-rated?

Developing countries should strongly condemn this whole concept of package licensing since through it the Licensee is forced to acquire rights to items it does not desire in order to purchase those which are of interest.

DEFINITIONS

- What is the "licensed product"?
 - A product which incorporates, is covered by, or is made in whole or in part by the use of any of the inventions covered by any of the licensed patents, or any of the data or information constituting part of the licensed know-how.
 - Is the definition broad enough to permit the development of improvements in the product?
 - If the definition is too broad, a coerced package licensing problem may result.
- What is the "licensed patent"?
 - All patents and any patents issuing from patent

applications listed in the annexed schedule, as well as any patents which cover inventions that are within the scope of, and constitute improvements on, any of the patents referred to in the annexed schedule, which patents are owned or controlled by Licensor.

- What about future patents?
 - In which country/countries will improvements be patented?
 - Who will prosecute the applications?
- What is "licensed know-how"?
 - All the data and information which are or have been furnished by the Licensor to the Licensee under the agreement.
 - Is the training of Licensee's workers in plant/laboratory of Licensor included?
- What is an "improvement"?
 - Patentable or commercial improvements
 - What if the improvement is developed by the Licensee?
 - Who is responsible for patenting the improvements?
- What are "Net Sales"?
 - When does sale occur?
 - When is it billed?
 - Can parts be sold?
 - Will credit be given for returns, freight, taxes?

- Are any related corporations involved?
 - Subsidiaries?
 - Parents?
 - Affiliates?
- Are any trademarks excluded?
- What is the "Field of use"?
 - Licensor grants exclusive licenses to many different Licensees with each license being limited to a specific field of use
 - In U.S., it is illegal and possible antitrust violation, to use an exclusive field of use licensing plan to divide markets between companies which would otherwise be competitors

IDENTIFICATION OF LICENSED SUBJECT MATTER

- Which issued patents are included under the license?
 - U.S.?
 - Foreign?
 - Whole or part?
- Which pending patents are included under the license?
 - U.S.?
 - Foreign?
 - Whole or part?
- Which trade secrets and other confidential information?
 - Are these secrets known to others than Licensors?

- Is Licensee bound by confidentiality and obligation of secrecy?
- Which improvements are included under the license?
 - What is their scope?
 - How are these improvements defined?
 - Are future improvements included?
 - Is know-how included?
 - Are patented improvements included?
- Are trademarks/Service Marks/Trade Names included?

GRANT CLAUSE

This provision sets forth in broad terms the basic rights which are being granted under the license.

- Is the license exclusive or nonexclusive?
- In what territory or area may the license be exercised?
- Has the Licensor reserved any rights?
- Is the license to manufacture or to sell or both?
- Has a right to sublease been given?
- Has Licensor retained a right to review and approve sublicensees? (may be against U.S. antitrust)
- How will income from sublicensing be divided?
 - Equally between Licensor and Licensee?
 - 3/4 to Licensor; 1/4 to Licensee?
 - Usually a matter for negotiation

WARRANTIES

- Does Licensor warrant that he has good title to the licensed patents?
- Does Licensor warrant that the documents containing the know-how accurately reflect the best judgment of the Licensor?
- Does Licensor warrant that he possesses the right to grant the licensed rights?
- Does Licensor warrant to the utility of the subject matter?
- Does Licensor warrant to the non-infringement of third party proprietary rights?
 - U.S. and/or foreign patents?
 - Trade secrets?
 - Trademarks?
- Is Licensor responsible of license operations or injury or explosion or fire (where Licensor designs and supervises the operations)?

DELIVERY OF KNOW-HOW

TECHNICAL ASSISTANCE

It may be very important for the Licensee/Purchaser to have detailed, specific, personal assistance from the Licensor so that he can successfully operate the highly complex technology which he has purchased.

- Must the Licensor render technical assistance to the Licensee?
- What areas does such assistance cover?
- In what does the assistance consist?
 - Detailed?
 - Specific?
 - Personal?
- What will the initial assistance be?
 - Is there training of Licensee's personnel for a specified period in the methods of operation and/or manufacture used by Licensor in one of Licensor's own plants?
 - Will Licensor provide a specified number of his own technical personnel for a specified period of time to help Licensee start up the operation of process or manufacturing plant?
- Does the agreement provide for follow-up assistance by Licensor to Licensee?
 - Will Licensee have to pay a stipulated amount for this follow-up assistance?

DELIVERY OF KNOW-HOW

DETAILS OF TECHNICAL SERVICE AND ASSISTANCE

- In which language will manuals be written?
- Will blueprints be in the metric system?
- Will a translator be available at meeting and at start-up?
- Is future know-how included?
 - Is future know-how limited to that know-how which goes into commercial use?

DELIVERY OF KNOW-HOW

INITIAL DATA AND INFORMATION

Generally, the agreement provides for an initial transfer of a substantial body of know-how for which the Licensor may charge a special fee.

- Are there any specifications and operating manuals for machinery and equipment?
- Are there any equipment designs and facility requirements?
- Are there any engineering drawings and technical information, and data relating to machinery, equipment, factory designs, facility requirements?
- Are there any alloy compositions?
- Are there any raw material specifications?

- Is there any technical information and data relative to the handling, preparation, and mixing of raw materials?
- Is there any technical information and data relating to the forming, stripping, curing, machining, testing, and handling of licensed products?

DELIVERY OF KNOW-HOW

IMPROVEMENT DATA AND INFORMATION

This provision may be vital to the Licensee to insure that he will receive the benefits of all improvements in the technology which are made by the Licensor during the life of the agreement.

- Will there be continuing transfer of data and information in regard to the changes and improvements which Licensor adopts in its designs of machinery and equipment?
- Will there be continuing transfer of data and information in regard to the changes and improvements which Licensor adopts in its methods of manufacture and production of licensed products?

DELIVERY OF KNOW-HOW

VISIT BY LICENSOR'S STAFF TO LICENSEE'S PLANT

It may be critical for the Licensee/Purchaser to be able to call upon various personnel on Licensor's staff to assist in correcting some minor problem, the solution to which may be particularly difficult and time consuming for the Licensee to ascertain on his own. This kind of visit together with the initial visit are sometimes called "show-how": the Licensor is physically showing and demonstrating to the Licensee techniques which are needed for the successful use of the technology.

DELIVERY OF KNOW-HOW

VISITS BY AND TRAINING OF LICENSEE'S STAFF

It may be essential for the Licensee to insist on the protection of this type of clause in the license agreement.

- Does the Licensee have the right to send personnel and members of his staff to the Licensor's plant for on the job training?

DELIVERY OF KNOW-HOW

RESPONSIBILITIES FOR SALARIES AND EXPENSES

- Is Licensor or Licensee responsible for the salaries and expenses of the technical personnel furnished by Licensor to Licensee?
- Will Licensor provide a specified number of technical personnel for a specified period of time at his own expense during an initial period?
- Will Licensor provide technical personnel after this initial period if Licensee agrees to provide salaries and expenses?
- Will Licensor insist that Licensee pay one and one-half ($1\frac{1}{2}$) times the salary of Licensor's personnel in any follow-up assistance?

ROYALTIES

FACTORS IN CALCULATING ROYALTY RATE IN A STRAIGHT LICENSE

- What is being offered?
 - What is the strength of the patent protection?
 - What is the scope of the patent protection?
 - Are trademarks, know-how, or other values also being offered?
 - How experienced and helpful is Licensor?
- What expenses are necessary to reach full production?
 - Research and development
 - Building a plant and starting up production
 - Training a sales or service force
- What exclusivity or lead time is being offered and in what markets?
 - Full exclusivity, semi-exclusivity, non-exclusive?
 - One country or several or world-wide?
 - How long may the exclusivity actually last?
- What is the competition?
 - Competitive products, processes, technology?
 - Royalties paid by competitors?
 - How long before competitor can catch up with the new technology?
- What is the market and how will it grow?
 - At home?
 - Abroad?
 - How much promotion, advertising, and service of customers will be required?

- Has a royalty rate become common to the industry?
- Will Licensee pay running royalties only or a lump sum or both?
- Does Licensee have a fully paid up option?
- Are there any factors external to the license? (e.g. Licensee wishes to do business with Licensor again in the future)
- Do option payments apply against future royalty payments?

MEASUREMENT OF ROYALTIES

- What is the royalty base? (The item which is used as the base against which the royalty rate is applied to determine the total royalty due.)
 - Has Licensor imposed a mandatory royalty base on the Licensee?
 - Does that royalty base exceed the scope of the licensed technology? (= antitrust violation)
 - Has Licensee voluntarily and willingly agreed to pay royalties which have been determined against a royalty base which exceed the scope of the licensed technology? (= no antitrust violation)
- Will Licensee pay royalties in one lump sum at the beginning of the license agreement?

- Will Licensee pay running royalties?
 - Will these running royalties be computed on a straight money basis?
 - Will these running royalties be computed on a percentage?
 - Is the royalty rate a percentage of the net sales price of the licensed product?
 - Exactly what amounts of money are included in the "net sales price"?
 - Taxes?
 - Credits for returned products?
 - Quantity discounts?
 - Freight allowances?
 - Cash discounts?
 - Agents' commissions?
- Will a graduated royalty scale be used?
 - Is a running royalty measured against the sale of licensed products?
 - Do the quantity of licensed products sold and the amount of royalty paid reach high figures?
 - Is the royalty rate reduced after a stipulated volume of licensed products has been sold until another stipulated sales level is reached when the royalty is once again reduced?
 - Does Licensee's use of the licensed technology reach a high volume?
 - Does Licensor wish to provide an

incentive to Licensee to increase its
volume sales of the technology?

- Does the Licensor charge different royalty rates to different Licensee?
 - Does some justification underlie this distinction?
 - Are the different royalties an arbitrary and unsupported judgment on the part of Licensor?
 - Has Licensor imposed discriminatory royalties upon one Licensee with respect to another, where the effect is adverse to the high-paying Licensee's being able to compete? (American antitrust)
- Has a valuation scale been assigned to the patents and know-how?
- Must the Licensee of an exclusive license pay a minimum royalty per year regardless of the amount of use of the technology?
- Is there a provision protecting Licensor/Licensee against the devaluation or revaluation of currency?
- Is there a clause in the agreement explicating how royalties can be exported in the face of currency controls?
- How will taxes on the royalties be handled?
 - Is there a tax treaty between the countries of Licensor and Licensee?
 - Will Licensee be responsible for collecting the taxes on the royalties in his country and furnishing paid tax receipts to the Licensor?

ACCOUNTING AND REPORTING

- What records should Licensee keep?
 - How much detail?
 - Who should be allowed to inspect records?
- How often should royalties be reported?
 - Monthly?
 - Quarterly?
 - Yearly?
 - Any interest for late payment?
- If Licensee's government taxes royalty payments, who pays these taxes?
- Who has access to Licensee's books?
 - Licensor, with reasonable access?
 - Independent accountant only?
- Must Licensor maintain the confidentiality of this financial information?
 - For a fixed time?
 - During the term of the agreement?
 - After the termination of the agreement?

OTHER PAYMENTS IN LIEU OF ROYALTIES

- If a joint venture, stock taken as payment for technology
- Cross-licenses and joint licenses
- Technology trades where little or no royalty is involved
- Settling litigation or interference
- If licensing a subsidiary, later determination of value
- Advertising costs either shared by both or paid by only one party

MOST FAVORED LICENSEE

The Licensor agrees to notify Licensee of any other licenses granted under the licensed technology within the Licensee's territory. Licensor agrees that if Licensee feels that a license has been granted to another on terms more favorable than those under which license was granted to him, then he shall have the option to accept the more favorable agreement, including all of its terms and provisions, not just those which are favorable.

- Is the original agreement between Licensor and Licensee exclusive or non-exclusive?
- Does the original agreement contain a provision to convert from exclusivity?
- Was the obligation to grant other licenses imposed at law?
 - By Court order?
 - By settlement?
- What is the scope of the provisions in the second license which are applicable to original Licensee?
 - All terms of the agreement?
 - Royalty terms only?
- When are the most favored terms applicable?
 - Automatically?
 - At Licensee's option and at his written request?
 - Is Licensor obligated to advise without Licensee's inquiry?

- What information must Licensor provide?
 - Summary of second license?
 - Copy of second license?
 - Licensor's warranty of accuracy of information?
- Which considerations are involved in determining more favorable terms?
 - Percentage royalty v. lump sum payments
 - If Licensee takes a license with a specified percentage royalty, and the second licensee makes a lump sum payment, is the Licensee entitled to obtain a paid-up license for the lump sum minus the prior paid royalties?
 - Was any other consideration tendered, e.g. technical assistance?
 - What if second license has same royalty-rate but also grants information and services?
 - How is the dollar value of a cross-license agreement with second licensee estimated?
- If license provides for reduced royalties as the quantity of sales increases, is this inequitable to the small licensee and thus a basis for invoking most favored licensee rights?
- Who decides whether the rate or terms are more or less favorable in the second license?

- What are the results of Licensor's failure to enforce license rights against non-licensee?
 - Must Licensor notify Licensee of decision not to sue?
 - Is Licensee entitled to royalty-free continuance of license?
 - Is Licensee entitled to return of royalties?
 - Partial?
 - Full?
- Is Licensor forced to sue all licensees who do not comply with license payment of royalties even if only a small amount of money is involved?

LIMITATIONS ON DISCLOSURE OF KNOW-HOW

GENERAL PROVISIONS

- Does the Licensee agree not to disclose the licensed know-how to any third parties without the specific written consent of the Licensor?
- Will the Licensor specifically approve necessary disclosure to customers of the Licensee?
- Will the Licensor specifically approve necessary disclosure to sub-licensees of the Licensee?
- Does the Licensee have the right to disclose the know-how in the following instances:
 - If the Licensee can show that the know-how was known to him prior to entry into the license agreement?
 - If the Licensee can show that the know-how is in the public domain?
 - If the confidential know-how is disclosed to the Licensee by a third party who has the right to disclose it to him?
 - If after a period of years the Licensee will be free to disclose the confidential know-how on the basis that all know-how becomes obsolete with time, and that thus there is no economic reason for preserving the confidentiality of the know-how for unlimited or very long periods.

LIMITATION ON DISCLOSURE OF KNOW-HOW

LICENSEE'S OBLIGATION NOT TO CHALLENGE THE VALIDITY OF LICENSED PATENTS

The Licensor cannot, under U.S. antitrust law, secure an agreement from his Licensee not to challenge the validity of a licensed patent. To do so may invite a misuse of the patent or even an antitrust violation.

This type of clause has also been struck down in the Common Market and should be treated in like manner in the developing countries.

LIMITATIONS ON DISCLOSURES OF KNOW-HOW

LICENSEE'S PROMOTION OF DEMAND

The Licensor wants to insure that the Licensee use its best efforts and due diligence to promote a demand for the licensed product.

- If Licensee is exclusive, has Licensor required a minimum royalty payment?
- If Licensee is nonexclusive, has Licensor insisted on a "best efforts" clause in the agreement?

LIMITATIONS ON DISCLOSURE OF KNOW-HOW
IMPROVEMENTS MADE BY LICENSEE (GRANTBACKS)

The Licensor will wish to have access to any improvements generated by Licensee within the field of the licensed technology so that Licensor will not risk being shut out of his own technology. The Licensee naturally feels that it should have a right to its own technology and should be able to obtain worldwide patents thereon.

Various agreements are possible. Although Licensor can legitimately have a royalty-free license over the technology developed by its Licensee with the right to grant sub-licences, the safest form of a grantback provision for the Licensor is one which provides that if Licensee grants back technology to Licensor which Licensor wishes to have the right to use, Licensor will pay a reasonable royalty fee for its use. The Licensee might agree to voluntarily assign rights to the technology which it has developed to Licensor or to exploit such technology jointly with Licensor under terms to be negotiated. It may be to the Licensee's advantage to make a latter grantback agreement reciprocal with Licensor's promise to improve Licensee's physical plant, etc.

- Does Licensee agree to grant back to Licensor all improvements it generates?
 - Definition of "improvements"
 - Patentable or not?
 - In the field?
 - Partially in and partially out of field?

- Can Licensor sub-license these improvements?
- Is there a time limit? (example: first three years only)
- What if license is silent as to the compensation of inventors?

LIMITATIONS ON DISCLOSURE OF KNOW-HOW

MARKING OF LICENSED PRODUCTS

- Are Licensee and his sub-licensees required to mark all licensed products to show that they were manufactured under license from Licensor?

LIMITATIONS ON DISCLOSURE OF KNOW-HOW

SECURITY/CONFIDENTIALITY OF NON-PATENT TECHNOLOGY

- Does Licensee agree to keep secret and confidential and not to disclose any information received from the Licensor for a certain term of years except
 - Information previously known to Licensee
 - Information which is or becomes public
 - Information Licensee later receives from a third party with right to disclose that information
- Is the term of years specifically limited?
- Is Licensee required to use the information only for the licensed purpose?

LIMITATIONS ON THE USE OF KNOW-HOW

CUSTOMER ALLOCATION

- Is Licensee restricted to sell the patented product only to certain classes of customers?

LIMITATIONS ON THE USE OF KNOW-HOW

DURATION

The Licensor should place a limit to the duration of a restriction on a know-how license. This duration should be no longer than the amount of years it would take the Licensee working independently without the aid of the Licensor to develop the licensed technology. Generally this would be the amount of time it took the Licensor himself to develop the licensed technology.

LIMITATIONS ON THE USE OF KNOW-HOW

FIELD OF USE

- Is Licensee granted the right to make, use or sell the patented product only for a specific purpose?
- Is the limitation reasonable and necessary for the protection of the Licensor?
- Is the limitation of too broad a scope?
- Is the limitation of too long a duration?

LIMITATIONS ON THE USE OF KNOW-HOW

LOCATION OF SALES

- Must Licensee agree to sell from only one location?

LIMITATIONS ON THE USE OF KNOW-HOW

PRICE RESTRICTIONS

Under U.S. antitrust law it is per se illegal for Licensor to fix a price at which Licensee may sell products made under the licensed technology. Therefore, price restrictions on a know-how license should be avoided if a U.S. corporation is a license partner.

- Has Licensor set the price at which Licensee sells the patented product?
- Has Licensor set the price at which a non-licensed retailer sells the patented product (resale price maintenance)? (against U.S. antitrust)

LIMITATIONS ON THE USE OF KNOW-HOW

PRODUCTION OR QUANTITY LIMITATIONS

In the U.S., limitations on either production or quantity are of questionable legality. Therefore, such limitations should be avoided in international agreements where a U.S. corporation is a license partner.

Furthermore, when the urgent needs of developing countries are considered, any production or quantity limitations on the output of the Licensee should be strongly resisted. This statement assumes that the country had screened the project previously and determined that it had met the developmental priorities of the country.

LIMITATIONS ON THE USE OF KNOW-HOW

RESTRICTIONS AGAINST OBTAINING ADDITIONAL RELATED KNOW-HOW FROM OTHERS

Because it is illegal in the U.S. for a licensor to restrict in any way the freedom of a licensee to deal with others, this restriction should be avoided in any agreement where a U.S. company is a partner.

LIMITATIONS ON THE USE OF KNOW-HOW

RESTRICTIONS ON RESALE OF LICENSED PRODUCTS

Under U.S. law, the Licensor cannot legally place any restrictions at all on the resale of licensed products. American legal theory holds that once the first sale has been made by either the Licensor or Licensee, he is deemed to have handed over all title, possession, controls, dominion, and authority of the licensed product. Patent law calls this the principle of "exhaustion by first sale". The exclusive right of the patent is exhausted when the patent owner or Licensee has made the first sale; his reward comes from the proceeds of the first sale.

LIMITATIONS ON THE USE OF KNOW-HOW

RESTRICTIONS ON PURCHASES FROM OTHERS (TIE-INS, TIE-OUTS)

A supplier might agree that he will sell purchaser a product or process but only on the condition that the purchaser agrees either to buy another product or process from the supplier or not to buy that (second) product or process from anyone else. The former affirmative tying arrangement is known as a "tie-in", the latter negative tying arrangement is known as a "tie-out". These types of arrangements are contrary to U.S. antitrust law, because they tend to suppress competition in the free market for the tied product. As such, they are clearly against the best interest of Purchaser/Licensee.

However, the Supplier/Licenser often is a good source of raw materials or intermediates for the Licensee. If his offer is the most economic or otherwise most efficient, he should have the opportunity to sell these goods to Purchaser/Licensee. But in no way must the Purchaser/Licensee's right to purchase unpatented products or processes be aborted.

The Licenser is not free to prohibit his Licensee from purchasing components and spare parts from third parties under U.S. antitrust law unless he can show that the third party supplier could not meet the specifications required for the components and spare parts to work properly in Licenser's equipment. Generally, the Licensee will wish to purchase the spare and component parts from Licenser unless they are priced unreasonably high.

- Does Licensee of a patented process/product agree to buy the requirements for an unpatented product from Licensor?
- Does the Licensor of a patented process/product refuse to grant a license unless the Licensee buys an unpatented product from the Licensor?
- Does the Licensee of a patented process agree not to use an unpatented product purchased from a competitor of the Licensor?

LIMITATIONS ON THE USE OF KNOW-HOW

RESTRICTIONS EXCEEDING THE SCOPE OF THE LICENSED PROPERTY RIGHTS

- Has Licensor attempted to restrict Licensee's freedom of action after the expiration of the patent?
- Has Licensor attempted to limit Licensee's freedom of action in relation to other matters falling outside the protected coverage of the patent?
- Has Licensor demanded an obligation of confidential treatment after a trade secret has entered the public domain without the fault or negligence of Licensee?

Limitations such as these have no legitimate part in any licensing agreement.

LIMITATIONS ON THE USE OF KNOW-HOW

TERRITORIAL RESTRICTIONS

- Is Licensee restricted only to a certain geographical area from which to manufacture, sell or use the licensed product or process?
- Did Licensor forbid foreign Licensee from importing patented goods into the U.S.?
- Are territorial restrictions placed upon the purchaser of a patented item either by Licensor or Licensee?
(U.S. antitrust violation)

These clauses restricting territory may be of varying degrees:

- Is the clause "air tight"? Does it absolutely foreclose Licensee from selling Licensor's product outside of a specific geographic area?
- Is the clause a "primary jurisdiction" or "area of responsibility" clause? Does it require Licensee to expend most of his efforts in the territory allotted to him but also permits him a certain level of performance to sell products in territories adjacent to his primary jurisdiction under certain circumstances?
- Is the clause a "profit-pass-over" clause? Must Licensee who sells licensed product in another licensee's territory give a percentage of his profit to the other licensee?

LIMITATIONS ON THE USE OF KNOW-HOW

LIMITATIONS AGAINST LICENSOR

• Licensees also have devolved some licensing restrictions on
the Licensor.

- Has Licensor agreed not to deal with unpatented competing goods?
- Has Licensor agreed not to grant other licenses without the consent of Licensee?
- Has Licensor agreed not to trade the patented goods in the Licensee's territory?

MISCELLANEOUS PROVISIONS

ADMISSION OF VALIDITY OF PATENTS

The Licensor wants this clause to be included in the agreement for two reasons. Without it, the Licensee can contest the validity of the patent at any time (Lear v. Adkins). Further, if a third party law suit limits the patent scope or validity, the Licensee benefits.

PROSECUTION OF PATENT APPLICATIONS

- Is the Licensor responsible for the prosecution of patent applications within the field of the licensed technology?
- Is the Licensee responsible for prosecuting those applications?

MAINTENANCE OF PATENTS

- Is the Licensor responsible for payment of the maintenance fees for insuring the continued viability of the patents?
- Is the Licensee responsible for those fees?

PATENT INVALIDITY

- What will be the consequences if a patent fails to issue or is held invalid?
 - To the Licensor?
 - To the Licensee?
- If one or more of the patents either fails to issue or is held invalid, will the royalties due the Licensor be reduced?

IMPROVEMENTS MADE BY LICENSOR

This "flow-through" or "flow-forward" clause insures that future patents and future know-how generated by the Licensor will be enjoyed by the Licensee.

- Is the Licensor obligated to communicate all future patents and know-how to the Licensee?
- Does the Licensee have the right to use these improvements under the terms of the agreement?
- Does the Licensee have the right to use these improvements under any other specified terms?

GOVERNMENT APPROVAL

- Must there be any necessary government approvals of license?

PERFORMANCE GUARANTEES

The Licensee will generally insist upon a performance guarantee by the Licensor in international agreements licensing rights to use commercial processes. The Licensor might guarantee that when the licensed technology is used in the manner prescribed, a certain performance level will be achieved. The Licensor will usually limit his liability to not more than the total royalties paid by the Licensee.

BANKRUPTCY

- Can Licensee terminate the license in the event of Licensor's bankruptcy?
- Can Licensor terminate the license in the event of Licensee's bankruptcy?
- What if there is only a reorganization or some other action short of full bankruptcy?

TRADEMARK LICENSING

- Definitions
 - Trademark
 - Manner of display of trademark
 - Generic words
 - Field of use
 - Territory of use
 - Registration status
 - Registered user status
- Which controls are to be used and which cautions are to be exercised to maintain the validity of the trademark?
- Who maintains the trademark registration?
- What happens to the trademark upon termination?
- Licensee shall not use a confusingly similar trademark.

DISCLAIMERS

- Do both parties wish to disclaim that either party shall have any recourse against the other for any loss, liability, damage or cost which may be suffered or incurred by practicing any of the rights or licenses granted by this agreement?
- Do both parties wish to disclaim any liability arising from any lawsuit brought against one of the parties by reason of its exercise of rights under the agreement?
- Do both parties wish to disclaim any representation with respect to the validity or scope of any of the licensed patents?

THIRD PARTY INFRINGEMENT OF THE LICENSED PATENTS

- What is Licensor's obligation to sue third-party infringer?
 - Is the license exclusive or non-exclusive?
- Does Licensee have option to sue third-party infringer?
 - Is the license exclusive or non-exclusive?
 - Will Licensor provide assistance?
 - What if Licensor takes no action?
- Should Licensor and Licensee sue jointly, how will expenses and responsibilities be allocated?
- In any case, how will the expenses of the suit be allocated?
- How will the damages recovered be allocated?
- Which party has the right to compromise the action?
- Should the obligated party fail to institute action, in what way will the agreement status change?
 - Will royalties be withheld?
 - Will the agreement be terminated?
 - Will the agreement be exclusively modified?
- Who determines what constitutes an infringement warranting suit?
 - Licensor alone
 - Licensee alone
 - Licensor and Licensee jointly
 - Impartial third party
- What is the scope of the permissible/required litigation?
 - All subject matter licensed
 - Specific part only

- Certain infringing acts only
- Multiple infringers
- Certain infringer only
- Who instructs the lawyers in the suit?
- Who pays the lawyers in the suit?
- If the suit is unsuccessful, must Licensee continue to pay royalties?
- Must Licensee fulfill notice requirement to Licensor?
- Is infringement limited to competitive products where there is potential harm to the Licensee?
- What infringement is sufficiently substantial to trigger the obligation of Licensor to bring suit?

RIGHT OF FIRST REFUSAL

Licensor and Licensee may wish to provide that if Licensor shall decide to sell the business which is making use of the licensed technology, the Licensee shall be granted the right of first refusal to purchase the property and assets of that business.

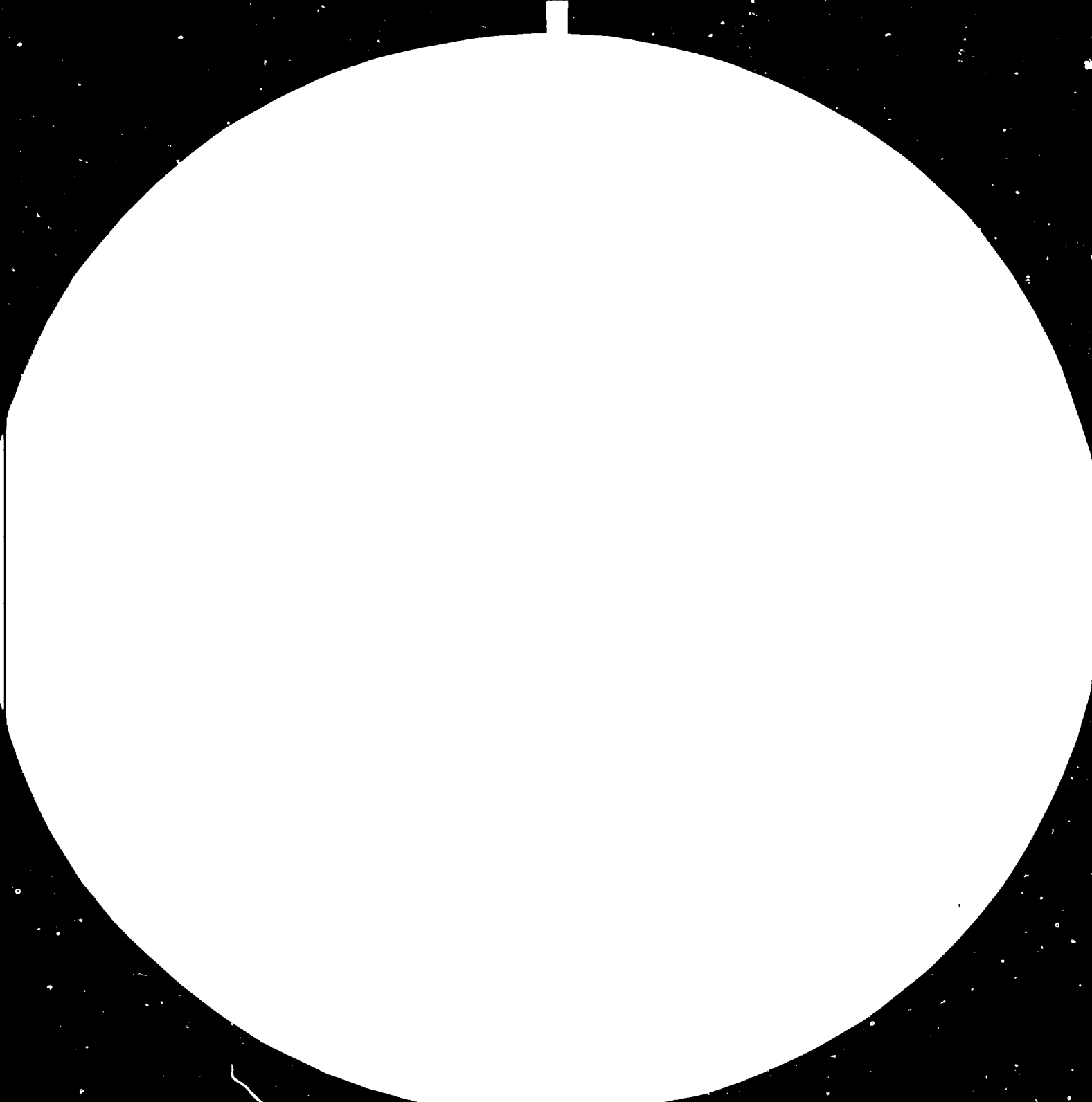
QUALITY CONTROL

Licensor may impose certain quality controls upon Licensee in order to protect the reputation of the licensed goods.

- Does Licensee agree to maintain high standards of quality on all licensed goods commensurate with the acknowledged reputable business reputation of Licensor?
- Has Licensor already inspected the goods to be produced and marked with his trademark?
- Does Licensee agree to forward samples of all licensed goods once a month to Licensor for inspection?
- Shall Licensee operate his business in accordance with the standards and requirements of quality, production and cleanliness necessary to produce licensed goods of same quality as those Licensor has examined?
- Shall Licensee allow representatives of Licensor on Licensee's premises at any time to inspect premises and test licensed goods?
- If the quality of the licensed goods falls below acceptable standards, must Licensor notify Licensee in writing?
- Shall Licensee have sixty days to cure this deficiency?
- Does Licensor have the right to terminate if the deficiency is not cured?



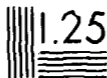
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Resolution Test Chart
1.0 1.1 1.25 1.4 1.6 1.8 2.0 2.2 2.5 2.8

LICENSEE'S INFRINGEMENT OF THIRD PARTY PATENTS

- Does Licensor grant an indemnity to Licensee against any infringement of the patents of others?

- Does the Licensor hold the Licensee harmless from
 - Direct infringement?
 - Contributory infringement?
 - Actively inducing infringement?

- Does this clause apply to all patents, U.S. patents only, foreign patents only, specific patents only?

- Shall the license be extended in the settlement of litigation or contemplated litigation?

- Shall the Licensor reimburse the Licensee for costs and damages, should Licensee defend?

- Shall Licensor defend directly?

- What if the infringement is de minimis because of the small volume?

- Who determines whether or not the product/process actually infringes?

- What if the infringement is in a market segment not even served by Licensee?

- What occurs if as a result of settlement of litigation the original exclusive license now must become non-exclusive or semi-exclusive?

- What happens if the suit results in the Licensee having to shut down or to pay a large royalty to a third party?

ASSIGNABILITY

- Does Licensor provide that the rights granted to the Licensee under the agreement are personal to the Licensee and may not be assigned or transferred without the written consent of the Licensor?
- Does Licensor state that any attempted assignment without the written consent of Licensor shall be void and shall automatically terminate all rights of the Licensee under the agreement?
- What is the actual legal result if Licensee assigns even though the license provides for nonassignability?

The Licensor may wish to limit the assignability of the license. It is to the Licensee's benefit to watch out for this clause and to guard against it.

ARBITRATION

All the considerations listed above should be reviewed.

- Can questions of patent validity, infringement, and antitrust be submitted to arbitration?

SPECIAL PROVISIONS IN LICENSING AGREEMENTS

- Have "major innovations" been excluded from improvements to be relayed by Licensor to Licensee?
- Has Licensor agreed to buy back equipment on first refusal basis?
- Has Licensor agreed to buy a portion of the licensed production at a fixed price?
- Has Licensee agreed not to license in the same "field" from others during the term of this license?
- Has Licensor agreed to negotiate for revisions to cure inequities should they arise? (Golden Rule clause)
- If Licensor is a U.S. citizen, has it required that Licensee will not violate U.S. Export Control laws?

TERMINATION

- Has a fixed term been set for the agreement?
 - Life of patent?
 - Life of last to issue patent?
 - Other specified period?
 - Specified period plus renewal or extension?
- Does a right to cancel the agreement exist?
 - At any time?
 - Only after a stated period?
 - Is specific notice required?
 - Can Licensor cancel unilaterally?
 - Can Licensee cancel unilaterally?
 - Can the agreement be cancelled by mutual consent?
 - Is there a provision for arbitration of disputes before termination?
 - Is there a penalty for terminating?
- Does Licensor have the right to terminate for cause?
 - Because of Licensee's general default or material breach?
 - Because of Licensee's bankruptcy or insolvency?
 - Because of Licensee's failure to pay royalties, in full and/or timely?
 - Because of Licensee's non-payment of minimum royalties?
 - Because of Licensee's failure to make all required reports in full and/or timely?

- Because of Licensee's failure to exploit licensed subject matter?
- Because of Licensee's failure to perform any specific obligation recited as cause for termination?
- Implied because of Licensee's attack on enforceability of licensed subject matter?
 - Is there an implied termination clause when challenging validity under Lear?
 - Can validity be challenged after termination?
- Does Licensee have the right to terminate for cause?
 - Because of Licensor's general default or material breach?
 - Because of Licensor's bankruptcy or insolvency if the licensed subject matter might be prejudiced?
 - Because of Licensor's failure to enforce licensed subject matter against third parties?
 - In the event that the licensed subject matter is invalidated
 - By Court order
 - By Licensor's direct or implied concession
- Does Licensee have the option to terminate or to change exclusive provisions to non-exclusive if a certain market penetration is not achieved?
- Is there a provision for termination without fault?
 - Because of war?
 - Because of strikes?
 - Because of an Act of God?
 - Because of impossibility of performance?

- Death or disability of indispensable party
or employee
- Mere suspension of rights and obligations for
an indefinite or a fixed period

- What will be the effective date of termination?
 - Must written notice be given?
 - Will the effective date be contingent upon the
mailing or the receipt of that notice?
 - To whom must the notice be given?
 - Must the notice be served?
 - Is the effective date of termination conditioned
upon failure to rectify?

- What are the Licensor's rights following termination?
 - Will Licensor receive all accrued royalties?
 - Will Licensor expect Licensee to discontinue all
use of licensed subject matter?
 - Will Licensor accept or reject sub-licenses?
 - Will Licensor receive back all confidential infor-
mation in tangible form?
 - Will Licensor expect Licensee to honor obligations
of secrecy?
 - Will Licensor review Licensee's books?
 - Will Licensor purchase Licensee's stock on hand?
 - Will Licensor receive all post-termination royalties
incurred?

- What are Licensee's rights following termination?
 - Will he dispose of licensed products on hand or work in progress?
 - Will he insist that the sub-licenses continue?
 - Will he obtain a release for future obligations?
- When are royalties no longer due?
 - Date Licensee stops paying?
 - Date of effective repudiation?
 - Date patent is determined to be invalid?
 - Can this date be set in the agreement?
 - Will Licensee pay royalties on sales made after termination of licensed products that were manufactured prior to termination?
 - Does Licensee have an obligation to pay royalties on acts occurring after expiration of the licensing agreement? This is illegal according to U.S. antitrust law.
- Where an exclusive agreement is terminated, can Licensor grant non-exclusive licenses to utilize the same know-how?
- What happens to know-how upon the termination of the agreement?



