

MMP PRINCIPAL CONTRACT STANDARD TERMS AND CONDITIONS

These are the standard terms and conditions of McMillan and Pereira Construction t/a MMP Construction (hereinafter referred to as “*the Contractor*” or “*MMP*”).

These standard terms and conditions apply to any and all agreements for construction entered into with MMP, where the agreement constitutes a principal contract between MMP and an employer, and MMP assumes the role of contractor.

MMP’s standard terms and conditions are the Fédération Internationale des Ingénieurs-Conseils (FIDIC) Conditions of Contract, Short Form of Contract, First Edition, 1999 (Green Book) (hereinafter called “*the General Conditions*”) as amended, supplemented and amplified below (these amendments, supplements and amplifications are hereinafter called “*the Particular Conditions*”).

Whenever there is a conflict the provisions of the Particular Conditions prevail over those in the General Conditions.

PARTICULAR CONDITIONS

Clause	Amendment
1	General Provisions
1.1 Definitions	<p>Insert the following new paragraphs at the end of this Sub-Clause:</p> <p>1.1.22 “Section” means a part of the Works specified in the Appendix as a Section.</p> <p>1.1.23 “Reasonable and Prudent Contractor” means the Contractor acting in good faith to perform its contractual obligations under this Contract and, in so doing exercising that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from an experienced contractor, engaged in the same or a similar type of undertaking, in the same or similar circumstances and conditions.</p> <p>1.1.24 “working day” means a working day (being any day except Saturdays, Sundays, official public holidays and the legislated December builder’s break in South Africa).</p>
1.2 Interpretation	<p>Insert the following new paragraphs at the end of this Sub-Clause:</p> <p>“References to a statutory provision include any subordinate legislation (including regulations) made from time to time under that provision and references to a statutory provision include that provision as from time to time modified or re-enacted</p>

Clause**Amendment**

as far as such modification or re-enactment applies, or is capable of applying, to the Contract.

In the event that the day for payment of any amount due by the Employer in terms of the Contract should fall on a Saturday, Sunday or official public holiday in the Country, the relevant day for payment shall be the next ordinary business day in the Country.

Save to the extent expressly provided for, all references to dates and times are to dates and times in the Country.

Save to the extent expressly otherwise stated in the Contract, no provision of the Contract constitutes a stipulation for the benefit of any person who is not a Party.

The use of the word "including" followed by a specific example/s shall not be construed as limiting the meaning of the general wording preceding it and the eiusdem generis rule shall not be applied in the interpretation of such general wording or such specific example/s.

References to "the Contract" shall be construed as a reference to the Contract as amended, varied, restated, novated or substituted by the Parties in accordance with the Contract from time to time.

The Contract contains the entire agreement between the Parties in regard to the subject matter thereof. No matter, whether in writing, oral communication or implied, not expressly included or recorded in the Contract shall have any meaning or effect in the Contract.

Save to the extent expressly otherwise provided for in the Contract no waiver or relaxation of any of the provisions or terms of the Contract (or any agreement or other document issued or executed pursuant to or in terms of the Contract) shall operate as an estoppel against a party in respect of any of its rights in terms of the Contract. No failure by a party to enforce any provision of the Contract shall constitute a waiver of such provisions or affect in any way such party's rights to require the performance of such provision at any time in the future, nor shall a waiver of a subsequent breach nullify the effectiveness of the provision itself."

**1.4
Law**

Delete the words "stated in the Appendix" and replace them with "the laws of the Republic of South Africa".

**1.5
Communication**

Insert the following new paragraphs at the end of this Sub-Clause:

"These communications shall be:

- a) in writing and delivered by hand (against receipt), sent by email or courier.
- b) delivered, sent or transmitted to the address for the recipient's communications as stated in the Appendix.

Clause

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Instructions are to be recorded in the daily diary / site instruction book as more fully described in Sub-Clause 10.1."

**2.3
Employer's
Instructions**

Insert the following new paragraphs at the end of this Sub-Clause:

"All instructions issued to the Contractor are to be written in the daily diary / site instruction book and confirmation of such instruction is to be received from the Contractor's Representative."

**2.5
Free Issue**

Add the following new Sub-Clause:

"The Employer shall provide the items listed in the Appendix as free-issue to enable the Contractor to execute the Works ("Free-Issue") to enable the Contractor to execute and complete the Works in accordance with its programme."

**2.6
Security**

Add the following new Sub-Clause:

"If so stipulated in the Appendix, the Employer shall provide to the Contractor prior to the Commencement Date a payment guarantee in a form acceptable to the Contractor for the amount stated in the Appendix.

The payment guarantee shall be valid for the duration of the Contract. If no payment guarantee is stipulated in the Appendix, the provisions of 2.7 [Escrow] shall apply."

**2.7
Escrow**

Insert the following Sub-Clause:

"If it is so stipulated in the Appendix, instead of making payment to the Contractor of an advance payment, or the provision by the Employer of a payment guarantee, the Parties agree to amounts to be paid under this Contract as follows:

The Employer and Contractor shall enter into an escrow and security agreement ("Escrow Agreement") whereby:

- a) an accountant who shall be party to such Escrow Agreement will set up an escrow account with the bank named in the Appendix, in the name of the Contractor ("Escrow Account");
- b) prior to the Commencement Date and subsequently at the same date as the submission of the Contractor's statement in terms of Sub-Clause 11.2 the Contractor shall send to the Employer a cash-flow projection of Works to be executed in the subsequent month, together with an invoice for such amount;

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- c) the Employer shall make payment, within 7 days of such invoice, into the Escrow Account, to be paid to the Contractor in accordance with the Escrow Agreement.

A failure by the Employer to make payment into the Escrow Account as aforesaid shall entitle the Contractor to forthwith suspend the execution of the Works, which suspension shall be an Employer's Liability for the purposes of the Contract.

Each monthly invoice issued by the Contractor in advance is created against the current cash flow projection plus the delta found in the current month's actual statement."

**4.1
General Obligations**

Delete this Sub-Clause and replace it with the following:

"The Contractor shall carry out the Works properly and in accordance with the Contract and as a Reasonable and Prudent Contractor. The Contractor shall provide all supervision, Materials, Plant and Contractor's Equipment which may be required, subject to Sub-Clause 2.5 and the following:

Materials and Plant required for the Works shall be paid for in advance by the Employer, pursuant to Clause 11.3. The Employer shall be responsible for all delivery costs, import taxes, or any other costs to deliver the Materials to the Site. Materials and Plant shall become the property of the Employer upon payment in respect thereof."

4.3 Subcontracting

Amend this Sub-Clause to read as follows:

The Contractor may subcontract any portion or the whole of the Works without the consent of the Employer.

**4.4
Performance
Security**

Delete the contents of this Sub-Clause.

**5.1
Contractor's Design**

Delete the contents of this Sub-Clause and replace it with the following:

"The Contractor will not carry out any design, and accepts no liability whatsoever for incorrect drawings design/architectural faults."

**5.2
Responsibility for
Design**

Delete the contents of this Sub-Clause.

**6.1
Employer's Liability**

Amend (h) to read as follows:

"any operation of the forces of nature affecting the Site and/or the Works, it being specifically agreed that delays to the Works due to rain or any other type of

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	<p>inclement weather, whether foreseeable or not, including the consequences thereof are an Employer's Liability."</p> <p>Amend sub-paragraph (k) by the addition of the following to the end of the sub-paragraph:</p> <p>"k) (including any delay, impediment or prevention caused by the Employer, including but not limited to the failure to provide the Free Issue),"</p> <p>Add (q) "loss or damage to the existing structure and its contents".</p> <p>Add (r) "failure by the Employer to take out or maintain insurances in excess of the Contractor's insurance obligations".</p>
7.2 Programme	The Contractor shall submit a programme in a form acceptable to the Contractor to the Employer within 14 days of the Employer's request. Should no such request be made by the Employer, the initial programme will be based on the Time for Completion specified in the Appendix.
7.3 Extension of Time	Delete the words "Subject to Sub-Clause 10.3" from this Sub-Clause.
7.4 Late Completion	Delete the contents of this Sub-Clause and replace it with "Delay damages are not applicable".
9.1 Remedying Defects	<p>Delete the first sentence of this Sub-Clause and replace it with the following:</p> <p>"The Employer may, at any time prior to the Contractor demobilizing from the Site, notify the Contractor of any defects or outstanding work."</p>
10.1 Right to Vary	<p>Delete the contents of this Sub-Clause and replace it with the following:</p> <p>"The Employer may instruct Variations by writing them in the daily diary or site instruction book and obtaining confirmation of receipt from the Contractor's Representative."</p>
10.2 Valuation of Variations	<p>Delete Sub-Clause 10.2(e) and replace it with the following:</p> <p>"Where the valuation of the Works is Cost reimbursable plus mark-up, at such Cost plus mark-up."</p>
10.3 Early Warning	Delete the second paragraph of this Sub-Clause.
10.4 Right to Claim	Add the following to the end of this Sub-Clause:

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“Notwithstanding the Contractor’s entitlement to Cost it is agreed that:

- a. The Contractor has made an allowance of 2 weeks for establishment. If the establishment takes longer than 2 weeks as a result of an Employer’s Liability, the Contractor shall be paid the amount stipulated in the Appendix per calendar day.
- b. Preliminary and General will be calculated by taking the time related P&G amount in the bill of quantities, dividing it by the number of working days between the commencement date and the time for completion to obtain a day rate. That day rate shall be the Cost for the purposes of the claim, unless already specified as a day rate in the Bill of Quantities.
- c. Standing time will be Cost plus 10%.
- d. In the event of a cost reimbursable payment option, in respect of all other Cost entitlements not specified in a. b and c.. above, markup on Cost shall be 10%”

10.5 Variation and Claim Procedure

Delete the words “within 28 of the instruction or of the event giving rise to the claim”.

10.6 Reprice the Works

Add the following new Sub-Clause:

“Should the quoted scope of works be varied by more than 10% of the quoted volume or price, the Contractor shall have the right at its sole discretion to adjust the rates in the Bill of Quantities (if applicable) in its sole discretion.”

11.2 Monthly Statements

Delete Sub-Clause 11.2 and substitute it as follows:

“Statements and Invoicing

The Contractor shall be entitled to be paid as follows:

- (a) The advance payment (if applicable) as set out in the Clause 11.2A; and
- (b) Monthly in respect of the value of the Works executed

subject to any additions or deductions that may be due (including, if applicable, repayment of the advance payment).

The Contractor shall submit a monthly statement (on or about the 20th of each month) to the Employer showing the amounts to which he considers himself entitled, together with an invoice reflecting such amount.

11.2A Advance Payment

This Sub-Clause shall apply if there is an amount in the Appendix for an advance payment.

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The Employer shall make an advance payment, as an interest-free loan for mobilization, design (if applicable) and/or procurement of materials. The value of the advance payment is specified in the Appendix.

The Contractor shall apply for this advance payment in its first monthly statement pursuant to Sub-Clause 11.2.

The Contractor shall repay the advance payment as specified in the Appendix.

Any amounts outstanding to the Employer in respect of the advance payment shall be deducted from the final payment.

**11.3
Payments**

Delete Sub-Clause 11.3 and insert the following new Sub-Clause 11.3:

"The Contractor shall submit an invoice to the Employer for the Advance Payment (if applicable) as soon as possible after signature of the Agreement.

Prior to procurement of Materials, the Contractor shall provide the Employer with a quotation for acceptance. Upon acceptance, the Contractor shall submit an invoice to the Employer in respect thereof.

Within 7 days after the delivery of each statement, the Employer shall issue an payment certificate to the Contractor certifying the amount due to the Contractor for that monthly interval.

The Contractor shall submit a valid tax invoice for the value of the payment certificate and the Employer shall make payment of such invoice no later than 30 days after receipt of such invoice (unless otherwise specified in the Appendix). No payment shall be made by the Employer on invoices not meeting the requirements set out herein and the Employer shall not be liable for interest for such non-payment.

**11.6
Final Payment**

Delete the first sentence of this Sub-Clause and replace it with the following:

"Within 42 days of the latest of the expiry of the time for completion stated in the Appendix, or the remedying of notified defects or the completion of outstanding work, the Contractor shall submit a final account to the Employer together with any documentation reasonably required to enable the Employer to ascertain the final contract value.

Within 14 days after the submission of the final account the Employer shall issue a final payment certificate to the Contractor certifying the final amount due to the Contractor. The Contractor shall submit an invoice, in accordance with the requirements set out in Sub-Clause 11.3, for the value of the final payment certificate and the Employer shall make payment of such invoice no later than 30 days after receipt of such invoice.

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11.7 Currency	Delete the words “the currency stated in the Appendix” and replace them with the words “South African Rands”.
11.8 Delayed Payment	Delete the words “rate stated in the Appendix” and replace them with the words “prime lending rate of commercial banks of South Africa plus 2%”.
11.10 Contract Price Adjustment	If applicable the rates and prices shall be adjusted in accordance with the price adjustment formula in the contract price adjustment schedule annexed hereto.
12.2 Default by Employer	<p>In the first paragraph of this Sub-Clause add the words “or fails to timeously issue any payment certificate” after the words “ fails to pay”.</p> <p>In the second paragraph of this Sub-Clause, amend “28” to “14” and “21” to “14”.</p>
13.3 Limitation of Liability	<p>Add new Sub-Clause 13.3:</p> <p>“Neither Party shall be liable to the other Party for loss of use of any part (or all) of the Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under Sub-Clause 12.4 [<i>Payment on Termination</i>].</p> <p>The Contractor’s total aggregate liability to the Employer shall in no event exceed 50% of the value of the Works paid to the Contractor.</p> <p>This Sub-Clause shall not limit liability in any case of breach of law, fraud, deliberate default, wilful misconduct, gross negligence, taxes, intellectual property, environmental issues, anticorruption or reckless misconduct by the defaulting Party.</p>
14..1 Extent of Cover	<p>Delete the contents of this Sub-Clause and replace it the with the following:</p> <p>“The Contractor shall effect and maintain contractor’s all risk insurance to the value stipulated in the Appendix. The Employer shall, if it deems necessary, take out any additional insurances at its cost and shall be the Employer’s responsibility.”</p>
14.2 Arrangements	Delete the first sentence of this Sub-Clause.
15.1 Adjudication	<p>Delete the final sentence of this Sub-Clause and replace it with the following:</p> <p>“In the event of disagreement, the adjudicator shall be appointed by the Association of Arbitrators (Southern Africa).</p>
15.3 Arbitration	Delete the words “rules specified in the Appendix” from the first sentence and replace them with “latest edition of the Rules for the Conduct of Arbitrations published by the Association of Arbitrators (Southern Africa)”.

Clause**Amendment**

Delete the words “rules specified in the Appendix” from the second sentence.

Delete the words “the place specified in the Appendix” from the third sentence and replace them with “Durban”.

CONTRACT PRICE ADJUSTMENT SCHEDULE**Adjustments for Changes in Cost**

In this schedule, “table of adjustment data” means the completed table of adjustment data included in the Contractor’s Quotation. If there is no such table of adjustment data, this schedule shall not apply.

If this schedule applies, the amounts payable to the Contractor shall be adjusted for rises or falls in the cost of labour, Plant and Materials and other inputs to the Works, by the addition or deduction of the amount determined by the formulae prescribed in this schedule. To the extent that full compensation for any rise or fall in Cost is not covered by the provisions of this schedule or other Clauses in the Contract, the amount stated in the Contractor’s Quotation shall be deemed to have included amounts to cover the contingency of other rises and falls in cost.

The adjustment to be applied to the amount otherwise payable to the Contractor, as valued in accordance with the appropriate Schedule and certified in payment certificates, shall be determined from formulae for each of the currencies in which the Contract price is payable. No adjustment is to be applied to work valued on the basis of Cost or current price. The formulae shall be of the following general type:

$$P_n = a + b \frac{L_n}{L_o} + c \frac{E_n}{E_o} + d \frac{M_n}{M_o} + \dots$$

Where:

“**P_n**” is the adjustment multiplier to be applied to the estimated contract value in the relevant of the work carried out in period “n”, this period being a month unless otherwise stated in the Contractor’s Quotation.

“**a**” is a fixed coefficient, stated in the relevant table of adjustment data, representing the non-adjustable portion in contractual payments.

“**b**”, “**c**”, “**d**”, ...are coefficients representing the estimated proportion of each cost element related to the execution of the Works, as stated in the relevant table of adjustments data; such tabulated cost elements may be indicative of resources such as labour, equipment and materials.

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“Ln”, “En”, “Mn”, ... are the current cost indices or reference prices for period “n”, expressed in the relevant currency of payment, each of which is applicable to the last day of the period (to which the particular payment certificate relates); and

“Lo”, “Eo”, “Mo”, ... are the base cost indices or reference prices, expressed in the relevant currency of payment, each of which is applicable to the relevant tabulated cost element on the Base Date (as set out in the Contractor's Quotation).

The cost indices or reference prices stated in the table of adjustment data shall be used. If their source is in doubt, it shall be determined by the Employer. For this purpose, reference shall be made to the values of the indices at stated dates (quoted in the fourth and fifth columns respectively of the table) for the purposes of clarification of the source; although these dates (and thus these values) may not correspond to the base cost indices.

Until such time as each current cost index is available, the Employer shall determine a provisional index for the issue of interim payment certificates. When a current cost index is available, the adjustment shall be recalculated accordingly.

If the Contractor fails to complete the works within the Time for Completion, adjustment of prices thereafter shall be made using either (i) each index or price applicable on the last day on the month prior to the expiry of the Time for Completion of the Works, or (ii) the current index or price: whichever is more favorable to the Employer.

The weight (coefficients) for each of the factor of cost stated in the table(s) of adjustment data shall only be adjusted if they have been rendered unreasonable, unbalanced or inapplicable, as a result of Variations.

Adjustments for Charges in Cost - Table(s) of adjustment data (11.10)

Coefficient; Scope of index	Country of origin; Currency of index	Source of index; Title/definition
a=0.10 Fixed	South Africa	N/a
b= 0.2 Labour	South Africa	“Labour Index” and shall be the price index for “Consumer Price Index” for the Kwazulu Natal Province, as published in the Statistical Release P0141, Table A, of Statistics South Africa.
c=0.1 Equipment	South Africa	“Equipment Index” and shall be the price index for “Plant and Equipment”, as published in the Statistical Release P0151.1, Table 4, of Statistics South Africa.
d=0.45 Material	South Africa	“Materials Index” and shall be the price index for the “Civil Engineering Material” product Roads, General (excl. Bitumen) as published in the Statistical Release P0151.1, Table 6, of Statistics South Africa.
e=0.1 Fuel	South Africa	“Fuel Index” and shall be the price index for “Coal and Petroleum Products”, for “Diesel”, as published in the Statistical Release P0142.1, Table 1, of Statistics South Africa.