

## **PART 2**

### **MMP SUBCONTRACT STANDARD TERMS AND CONDITIONS**

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

These terms and conditions apply to any and all agreements for construction entered into with MMP, where the agreement constitutes a subcontract between MMP and a Subcontractor, and MMP assumes the role of Subcontractor.

MMP's subcontract 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*").

The Subcontractor shall endeavour to comply with the provisions of the Main Contract (incorporating the General Conditions), requiring compliance on the part of the Subcontractor insofar as they relate and apply to the Subcontract. In the event of any inconsistency the express provisions of this Subcontract shall take precedence.

The Contractor shall provide the Subcontractor with a copy of the Main Contract (incorporating the General Conditions), except confidential information and the detailed prices of the Subcontractor.

For the purposes of this Subcontract, in the General Conditions reference to "*Contract*" shall mean "*Subcontract*", reference to "*Employer*" shall mean "*Contractor*", reference to "*Contractor*" shall mean "*Subcontractor*" and reference to "*Works*" shall mean "*Subcontract Works*".

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

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

1.1.22 "Section" means a part of the Subcontract Works specified in the Appendix as a Section.

1.1.23 "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).

1.1.24 "Main Contract" means the contract between the Employer and the Contractor for the completion of the Works.

1.1.25 "Works" means the works to be completed under the Main Contract and as fully described in the Appendix.

1.1.26 "Subcontract Works" means the works to be completed under the Subcontract and as fully described in the Appendix.

##### 1.2

##### Interpretation

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

"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 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 Contractor 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.

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Save to the extent expressly otherwise stated in the Contract, no provision of the Subcontract 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 Subcontract as amended, varied, restated, novated or substituted by the Parties in accordance with the Subcontract from time to time.

The Subcontract 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 Subcontract shall have any meaning or effect in the Contract.

Save to the extent expressly otherwise provided for in the Subcontract no waiver or relaxation of any of the provisions or terms of the Subcontract (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 Subcontract 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.

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

Clause	Amendment
<b>2.3 Contractor's Instructions</b>	<p>Insert the following new paragraphs at the end of this Sub-Clause:</p> <p>"All instructions issued to the Subcontractor are to be written in the daily diary / site instruction book / MMP Site Instruction Transmittal and confirmation of such instruction is to be received from the Subcontractor's Representative."</p>
<b>2.5 Free Issue</b>	<p>Add the following new Sub-Clause:</p> <p>"The Contractor shall provide the items listed in the Appendix as free-issue to enable the Subcontractor to execute the Subcontract Works ("Free-Issue") to enable the Subcontractor to execute and complete the Subcontract Works in accordance with its programme."</p>
<b>2.6 Security</b>	<p>Add the following new Sub-Clause:</p> <p>"If so stipulated in the Appendix, the Contractor shall provide to the Subcontractor prior to the Commencement Date a payment guarantee in a form acceptable to the Subcontractor for the amount stated in the Appendix.</p> <p>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.</p> <p>"</p>
<b>2.7 Escrow</b>	<p>Insert the following Sub-Clause:</p> <p>"If it is so stipulated in the Appendix, instead of making payment to the Subcontractor of an advance payment, or the provision by the Contractor of a payment guarantee, the Parties agree to amounts to be paid under this Subcontract as follows:</p> <p>The Contractor and Subcontractor shall enter into an escrow and security agreement ("Escrow Agreement") whereby:</p> <ol style="list-style-type: none"><li>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 Subcontractor ("Escrow Account");</li><li>prior to the Commencement Date and subsequently at the same date as the submission of the Subcontractor's statement in terms of Sub-Clause 11.2 the Subcontractor shall send to the Contractor a cash-flow projection</li></ol>

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of Works to be executed in the subsequent month, together with an invoice for such amount;

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

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

Each monthly invoice issued by the Subcontractor 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 Subcontractor shall carry out the Subcontract Works properly and in accordance with the Subcontract and as a Reasonable and Prudent Subcontractor. The Subcontractor shall provide all supervision, Materials, Plant and Subcontractor's Equipment which may be required, subject to Sub-Clause 2.5 and the following:

Materials and Plant required for the Subcontract Works shall be paid for in advance by the Contractor, pursuant to Clause 11.3. The Contractor 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 Contractor upon payment in respect thereof."

**4.3 Subcontracting**

Amend this Sub-Clause to read as follows:

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

**4.4  
Performance  
Security**

Delete the contents of this Sub-Clause.

**5.1**

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

Clause	Amendment
<b>Subcontractor's Design</b>	"The Subcontractor will not carry out any design, and accepts no liability whatsoever for incorrect drawings design/architectural faults."
<b>5.2 Responsibility for Design</b>	Delete the contents of this Sub-Clause.
<b>6.1 Contractor's Liability</b>	<p>Amend (h) to read as follows:</p> <p>"any operation of the forces of nature affecting the Site and/or the Subcontract Works, it being specifically agreed that delays to the Subcontract Works due to rain or any other type of inclement weather, whether foreseeable or not, including the consequences thereof are an Contractor'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 Contractor, 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 Contractor to take out or maintain insurances in excess of the Subcontractor's insurance obligations".</p>
<b>7.2 Programme</b>	The Subcontractor shall submit a programme in a form acceptable to the Subcontractor to the Contractor within 14 days of the Contractor's request. Should no such request be made by the Contractor, the initial programme will be based on the Time for Completion specified in the Appendix.
<b>7.3 Extension of Time</b>	Delete the words "Subject to Sub-Clause 10.3" from this Sub-Clause.
<b>7.4 Late Completion</b>	Delete the contents of this Sub-Clause and replace it with "Delay damages are not applicable".
<b>9.1 Remedying Defects</b>	<p>Delete the first sentence of this Sub-Clause and replace it with the following:</p> <p>"The Contractor may, at any time prior to the Subcontractor demobilizing from the Site, notify the Subcontractor of any defects or outstanding work."</p>

Clause	Amendment
<b>10.1 Right to Vary</b>	<p>Delete the contents of this Sub-Clause and replace it with the following:</p> <p>“The Contractor may instruct Variations by writing them in the daily diary or site instruction book or MMP Transmittal System and obtaining confirmation of receipt from the Subcontractor’s Representative.”</p>
<b>10.2 Valuation of Variations</b>	<p>Delete Sub-Clause 10.2(e) and replace it with the following:</p> <p>“Where the valuation of the Subcontract Works is Cost reimbursable plus mark-up, at such Cost plus mark-up.”</p>
<b>10.3 Early Warning</b>	Delete the second paragraph of this Sub-Clause.
<b>10.4 Right to Claim</b>	<p>Add the following to the end of this Sub-Clause:</p> <p>“Notwithstanding the Subcontractor’s entitlement to Cost it is agreed that:</p> <ul style="list-style-type: none"> <li>a. The Subcontractor has made an allowance of 2 weeks for establishment. If the establishment takes longer than 2 weeks as a result of an Contractor’s Liability, the Subcontractor shall be paid the amount stipulated in the Appendix per calendar day.</li> <li>b. Preliminary and General will be calculated by taking the time related P&amp;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.</li> <li>c. Standing time will be Cost plus 10%.</li> <li>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%”</li> </ul>
<b>10.5 Variation and Claim Procedure</b>	Delete the words “within 28 of the instruction or of the event giving rise to the claim”.
<b>10.6 Reprice the Subcontract Works</b>	<p>Add the following new Sub-Clause:</p> <p>“Should the quoted scope of Subcontract Works be varied by more than 10% of the quoted volume or price, the Subcontractor shall have the right at its sole discretion to adjust the rates in the Bill of Quantities (if applicable) in its sole discretion.”</p>
<b>11.2</b>	Delete Sub-Clause 11.2 and substitute it as follows:



**Clause**

**Amendment**

**Monthly Statements**

**“Statements and Invoicing**

The Subcontractor 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 Subcontract Works executed

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

The Subcontractor shall submit a monthly statement (on or about the 20<sup>th</sup> of each month) to the Contractor 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.

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

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

Any amounts outstanding to the Contractor 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 Subcontractor shall submit an invoice to the Contractor for the Advance Payment (if applicable) as soon as possible after signature of the Agreement.

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



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

The Subcontractor shall submit a valid tax invoice for the value of the payment certificate and the Contractor 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 Contractor on invoices not meeting the requirements set out herein and the Contractor 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 Subcontractor shall submit a final account to the Contractor together with any documentation reasonably required to enable the Contractor to ascertain the final Subcontract value.

Within 14 days after the submission of the final account the Contractor shall issue a final payment certificate to the Subcontractor certifying the final amount due to the Subcontractor. The Subcontractor 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 Contractor shall make payment of such invoice no later than 30 days after receipt of such invoice.

**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 Subcontract  
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  
Contractor**

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”.

In the second paragraph of this Sub-Clause, amend “28” to “14” and “21” to “14”.

Clause	Amendment
<b>12.3A Termination of Main Contract</b>	<p>Insert the following new Sub-Clause 12.3A:</p> <p>“In the event that the Main Contract is terminated for any reason whatsoever before the Subcontractor has discharged its obligations under the Subcontract, then the Contractor shall promptly by notice to the Subcontractor forthwith terminate the Subcontract.</p> <p>In the event that the Main Contract is terminated for a reason other than a default by the Subcontractor under the Subcontract, the Subcontractor shall be entitled to Payment on Termination in terms of Sub-Clause 12.4 which payment will include amounts contemplated under Sub-Clause 12.4(d).”</p>
<b>13.3 Limitation of Liability</b>	<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 Subcontract 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 Subcontract, other than under Sub-Clause 12.4 [<i>Payment on Termination</i>].</p> <p>The Subcontractor’s total aggregate liability to the Contractor shall in no event exceed 50% of the value of the Subcontract Works paid to the Subcontractor.</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>
<b>14..1 Extent of Cover</b>	<p>Delete the contents of this Sub-Clause and replace it the with the following:</p> <p>“The Subcontractor shall effect and maintain Subcontractor’s all risk insurance to the value stipulated in the Appendix. The Contractor shall, if it deems necessary, take out any additional insurances at its cost and shall be the Contractor’s responsibility.”</p>
<b>14.2 Arrangements</b>	<p>Delete the first sentence of this Sub-Clause.</p>
<b>15.1 Adjudication</b>	<p>Delete the final sentence of this Sub-Clause and replace it with the following:</p>

**Clause**

**Amendment**

**15.3  
Arbitration**

“In the event of dispute or difference, the adjudicator shall be appointed by the Association of Arbitrators (Southern Africa).

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)”.

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”.

**15.4 Joinder of  
dispute**

Insert the new Sub-Clause 15.4:

“If any dispute or difference, arises under or in connection with this Subcontract, and the same or a similar dispute arises between the Contractor and the Employer under the Main Contract, the Subcontractor agrees that the Contractor may request that the disputes be joined and determined together under the dispute resolution provisions contemplated in the Main Contract.

The Contractor shall notify the Subcontractor in writing of any intention to join disputes at the earliest opportunity, and the Subcontractor shall be entitled to make submissions in such proceedings under the Main Contract.

The Subcontractor agrees to comply with any decision, determination, or award made in such proceedings, to the extent that the same is relevant to such disputes under this Subcontract.”

**SUBCONTRACT 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 Subcontractor’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 Subcontractor 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

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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 Subcontractor'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 Subcontractor, 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 subcontract 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<sub>n</sub>**" is the adjustment multiplier to be applied to the estimated subcontract value in the relevant of the work carried out in period "n", this period being a month unless otherwise stated in the Subcontractor'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.

"**L<sub>n</sub>**", "**E<sub>n</sub>**", "**M<sub>n</sub>**", ... 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 relevant tabulated cost element on the last day of the period (to which the particular payment certificate relates); and

"**L<sub>o</sub>**", "**E<sub>o</sub>**", "**M<sub>o</sub>**", ... 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 Subcontractor'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 Contractor. 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 Contractor 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 Subcontractor 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 of 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 Contractor.

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.