



**DATED 5<sup>th</sup> November 2008**

**KOSOVO ENERGY CORPORATION**

**-and-**

**TURBO CARE KOSOVO LLC**

---

***DRAFT***

**SUPPLY AND DELIVERY  
OF A USED TRANSFORMER FOR KOSOVA 'A' POWER PLANT**

---

**This Contract Agreement** is made on [ ] November 2008, between:

- (1) **Kosovo Energy Corporation J.S.C** a company duly incorporated under the laws of Kosovo with registered number 70325399 whose registered office is at No. 36 Mother Theresa Street, Pristina, 10000, Kosovo (“**the Contracting Authority**”),
- (2) **Turbo Care Kosovo LLC**, a company duly incorporated under the laws of Kosovo with registered number 70458474 whose registered office is at Ulpiana C7 H5 2 Prishtina, 10000, Kosovo (the “**Contractor**”)

(each a “**Party**” and together “**the Parties**”)

**WHEREAS:**

- (A) The Contracting Authority requires the supply and delivery of a used transformer 240 MVA; 15,75Kv/220Kv (“**the Transformer**”) to the transformer pad (under the bus bars) at Unit A4 of Kosova ‘A’ Power Plant, Obiliq, Kosovo (“**the Site**”).
- (B) Pursuant to a decision of the Procurement Reviewing Body dated 24<sup>th</sup> June 2008 the Contracting Authority has conducted direct negotiations with the Contractor’s representatives in connection with the proposed works.
- (C) Following the commercial and technical negotiations between the Parties, and taking into account the offers submitted by the Contractor dated 28<sup>th</sup> July and 10<sup>th</sup> October 2008, and the signed Heads of Terms dated 3<sup>rd</sup> November 2008, the Parties have agreed that the Contractor shall supply and deliver the Transformer, and provide supervision services to the Contracting Authority in connection with the installation and commissioning of the said Transformer.

NOW, THEREFORE, in consideration of the mutual benefits to be derived and the representations and warranties, conditions and promises herein contained, and intending to be legally bound, the Parties hereby agree, as follows:

**1. SUBJECT MATTER OF THE CONTRACT**

- 1.1 The subject of the Contract shall be the supply and delivery of the Transformer, together with the provision of services, as particularised in the Technical Specifications (Annex 2) and Special Conditions attached to this Contract (“**the Works**”).
- 1.2 The Time for Completion of this Contract is outlined in the Special Conditions, save that the Parties mutually recognise and confirm that time is of the essence for the performance of this Contract.

## 2. CONTRACT DOCUMENTS

2.1 The following documents (“**the Contract Documents**”) shall be deemed to form and be read and construed as an integral part of this Contract:

- (a) This Contract Agreement.
- (b) The Special Conditions of the Contract (Annex 1).
- (c) The Technical Specifications (Annex 2).
- (d) The Heads of Terms (Annex 3).
- (e) General Conditions of Contract (Annex 4).
- (f) The Contractor’s tender (Annex 5).

Any Addenda and memoranda have the order of precedence of the document they are modifying.

2.2 The Contract Documents are complementary of one another. In the event, however, of any inconsistency, ambiguity or contradiction among them, they shall prevail in the order listed above.

2.3 In this Contract Agreement, words and expressions shall have the same meanings as are respectively assigned to them in the Special and General Conditions of Contract and they shall be deemed to form and be read and construed as part of this Contract Agreement.

## 3. CONTRACT PRICE

3.1 The Contracting Authority hereby agrees to pay the Contractor in consideration of the execution of the Works the contract price of **€3,726,550.85** Euros (in words three million seven hundred and twenty six thousand five hundred and fifty euros and eighty five cents) (the “**Contract Price**”).

3.2 The Contract Price includes 15% Kosovo VAT and Customs duties payable within Kosovo and any other taxes, customs or import duties, levies or fees payable, whether inside or outside Kosovo. The Contractor will invoice all payments with Kosovo VAT and Customs duties listed separately and the Contracting Authority is responsible for paying all invoices including the aforesaid VAT and Customs duties to the Contractor.

3.3 The Contracting Authority will adjust the Contract Price upon receiving written verification that there has been an increase or decrease of Kosovo taxes and custom duties between the date of the Contract and the completion of the Contract. Provided that this provision shall not apply to any extension period of the Contract caused by the Contractor’s delay.

- 3.4 The Contract Price also includes the reasonable travel costs of two representatives from the Contracting Authority to attend the testing of the Transformer in Poland and witness the commencement of the transportation to the Site. In this respect, Contractor shall provide reasonable assistance with securing visas for the KEK representatives.
- 3.5 Legal title in the Transformer shall pass to the Contracting Authority upon the date of its Commissioning at the Site. Prior to that date, all risks and liabilities related to the Transformer shall be borne by the Contractor.

#### **4. WARRANTIES**

- 4.1 The Works must, in all respects satisfy the Technical Specifications laid down in the Technical Specifications and the Contractor's tender dossier (see Annex 2). Further, and in addition to the obligations outlined in the Special and General Conditions of Contract, the Contractor warrants that the Transformer purchased under the terms of this Contract Agreement is in good working order and fit for its purpose. This warranty shall remain valid for 365 days from the date of the Taking Over Notice (as defined in the Special Conditions of Contract).
- 4.2 As part of the Works, the Contractor must perform all standard technical tests required to ensure that the Transformer is in good working order and fit for its purpose, which shall include a 'gas test' to estimate the quantity of released gas and its chemical composition. The results of the aforementioned technical tests must indicate that the Transformer is either:
- (a) In good working order and fit for its purpose; or
  - (b) that any reported faults can be remedied within the Time for Completion. Under this sub-paragraph, it is implicit that after completion of any repairs, the Transformer must undergo re-testing to ensure that it is in good working order and fit for its purpose.
- 4.3 Failure to satisfy the conditions outlined under paragraph 4.2 (a) or (b) above will result in termination of the Contract and return of the Advance Payment to the Contracting Authority.

#### **5. ENTRY INTO FORCE**

- 5.1 This Contract comes into effect on the date that the last of the Parties executes this document, save that the Contracting Authority shall have no obligations and shall not be required to make any payment under or in respect of this Contract until it has received an original signed counterpart of the Contract (including all attachments) and the requisite Advance Payment Guarantee and the Performance Bank Guarantee from the Contractor. The Contractor undertakes to present the aforementioned

documents to the Contracting Authority within 7 working days of the entry into force of this Contract.

**IN WITNESS WHEREOF** this Contract has been executed on the date set out at the commencement of this Contract.

**For the Contractor**

Name:

Position:

Signature:

Date:

**For the Contracting Authority**

Name: Mr. Njazi Thaçi

Position: Procurement Officer

Signature:

Date:

Duly endorsed by Mr. Arben Gjukaj

---

Acting Managing Director of the Contracting Authority

## **SPECIAL TERMS OF THE CONTRACT - ANNEX 1**

These Special Terms should be read in conjunction with the General Terms and Condition, as outlined in Annex 3. In particular, references to ‘Clauses’ or ‘Sub-Clauses’ in this document are references to that Clause or Sub-Clause in the General Terms and Conditions. Further, references to the ‘Employer’ shall mean the Contracting Authority.

**The Contract**                      *Sub-Clause 1.1.1*

"Contract" means the Contract Agreement and the other documents listed in the Contract Document.

**Employer**                              *Sub-Clause 1.1.4*

Means Kosovo Energy Corporation J.S.C a company duly incorporated under the laws of Kosovo with registered number 70325399 whose registered office is at No. 36 Mother Theresa Street, Pristina, 10000, Kosovo

**Contractor**                              *Sub-Clause 1.1.5*

Means Turbo Care Kosovo LLC, a company duly incorporated under the laws of Kosovo with registered number 70458474 whose registered office is at Ulpiana C7 H5 2 Prishtina 10000, Kosovo.

**Dates, Times and Periods**                      *Sub-Clause 1.1.7*

"Commencement Date" means the date of entry into force of the Contract Agreement.

**Time for Completion**                      *Sub-Clause 1.1.9*

The time for completion of the Works shall be no later than 8<sup>th</sup> January 2008. In this respect, completion shall occur when the Contractor delivers and places the Transformer on the Site.

**Definition of “Country”**                      *Sub-Clause 1.1.12*

“Country” means Kosovo and no other region or area of the former Federal Republic of Yugoslavia.

|   |   |
|---|---|
| <b>“Site”</b>                           | <i>Sub-Clause 1.1.17</i><br><br>Means the transformer pad (under the bus bars) at Unit A4, Kosovo A Power Plant, Obiliq, Kosovo   |
| <b>“Works”</b>                          | <i>Sub-Clause 1.1.19</i><br><br>Means the supply and delivery of the Transformer by the Contractor, together with the provision of services, as particularised in the Technical Specifications (Annex 2).   |
| <b>General Conditions</b>               | <i>New Sub-Clause 1.1.20</i><br><br>Means the Federation Internationale Des Ingenieurs-Conseils (FIDIC) Short Form of Contract First Edition 1999 General Conditions.   |
| <b>Final Acceptance Certificate</b>     | <i>New Sub-Clause 1.1.21</i><br><br>Means the certificate given by the Employer’s Representative under Clause 8.3   |
| <b>Taking Over Notice</b>               | <i>New Sub-Clause 1.1.22</i><br><br>Means the notification by Contractor to the Employer that the Transformer has been Commissioned and is operating in accordance with its technical specifications. The Contractor shall bear all risks relating to the Transformer until the Taking Over Notice has been issued. The transfer of risk to the Contracting Authority shall take place upon issuance of the Take Over Notice. |
| <b>Installation of the Transformer</b>  | <i>New Sub-Clause 1.1.23</i><br><br>Means connecting the Transformer to the bus bars at the Site.   |
| <b>Commissioning of the Transformer</b> | <i>New Sub-Clause 1.1.24</i><br><br>Means energizing the Transformer under the load at the Site, together with the Employer issuing an acceptance certificate confirming successful operation of the Transformer.   |
| <b>Transformer</b>                      | <i>New Sub-Clause 1.1.25</i><br><br>Means a used transformer 240 MVA; 15,75Kv/220Kv (in compliance with the Technical Specifications) to be supplied, delivered, installed and  |

commissioned at the Contracting Authority's transformer pad (under the bus bars) at Unit A4 of Kosova 'A' Power Plant in Obiliq, Kosovo.

**Law of the Contract** *Sub-Clause 1.4*

The Agreement shall be governed by and interpreted in accordance with the Laws of England & Wales

**Communications** *Sub-Clause 1.5*

Written communications relating to this Contract between the Employer and/or the Project Manager on the one hand and the Contractor and/or the Contractor's Representative on the other may be sent by e-mail, post, fax or by hand. Provided that, formal notifications such as administrative orders, notifications of termination or breach or other notifications, which have an impact on the Contract Price, or additional cost claims, should be submitted by post or courier to the addresses outlined below (or such other address as a Party may designate in writing to the other Party). E-mail may be used as a supplementary notification method for such formal or other notifications only.

**For the Contracting Authority:**

Kosovo Energy Corporation J.S.C  
No. 36 Mother Theresa Street  
Pristina, 10000, Kosovo

For the attention of: The Chief Financial Officer (Mr. Salih Bytyqi)  
Tel: + 381 38 240 245 (ext. 294)  
Email: salih.bytyqi@kek-energy.com

**For the Contractor:**

Turbo Care Kosovo LLC  
Ulpiana C7 H5 2,  
Prishtina 10000, Kosovo  
Tel: +48 602 535 222  
Fax: +48 71 35 27 330  
Email: wieslaw.koprowski@turbocare.com.pl

For the attention of: Wiesław Koprowski

Unless otherwise agreed by the Parties in writing, communications shall be in English.

**Provision of Site** *Sub-Clause 2.1*

1. The Contractor shall have access to the Site at the following times,



subject to any restrictions reasonably imposed by the Employer, (with which the Contractor must comply):

- (a) 24 hours per day, 7 days per week, during the Time for Completion; and
  - (b) At such other times requested by the Contractor as the Employer's Representative considers are reasonably necessary to perform the Works.
2. The Contractor:
  - (a) must not interfere or hinder in any way at any time the operation of Power Plant Kosova 'A' except with the written consent of the Employer's Representative;
  - (b) shall leave the Site in a clean and orderly condition.
3. The Contractor acknowledges that:
  - (a) the Site is inherently dangerous and includes equipment, machinery, buildings and structures that may not be safe, structurally sound or properly maintained; and
  - (b) at the Site, safety procedures or standards may be inadequate, may not exist or may not be complied with.
4. The Contractor is not responsible for security at the Site but must take all reasonable precautions to protect its tools and the Plant.
5. With respect to transportation of the Transformer within Kosovo, the Parties acknowledge that in order to transport the Transformer to the Site, the Contractor or its duly authorised sub-contractor must utilise railway track from Obiliq to the Kosova A Power Plant, which is owned by the Employer. In this respect, the Employer agrees that by 1<sup>st</sup> December 2008, all necessary measures will have been taken to ensure that the aforementioned railway tracks are technically capable of transporting the Transformer to the Site. The Employer will also confirm the payload for the railway tracks owned by him.

**Licences etc.**

*Sub-Clause 2.2*

At the end of the Sub-Clause the following words to be added "only in the Country but not elsewhere".

**Authorised person**

*Sub-Clause 3.1*

Edmond Nulleshi, KEK Procurement  
Tel: +381 (0)38 240-245-243;  
Fax: +381 (0)38 222 604

Email: edmond.nulleshi@kek-energy.com

**Employer's  
Representative:**

*New Sub-Clause 3.2*

Employer's Representative/Project Manager: Hamdi Gashi  
Kosova A Power Plant  
Obiliq  
Tel: +377 44 503 875  
Email: <mailto:Hamdi.Gashi@kek-energy.com>

The Project Manager will have responsibility for supervision of the Works on a daily basis and will be the principal contact point for all technical matters relating to the implementation of the Contract.

**Contractor  
General Obligations**

*Sub-Clause 4.1*

The following additional provisions shall be added at the end of Clause 4.1:

1. The Contractor shall acquire all permits, approvals and/or licenses from all local or national government authorities or public service undertakings in the Country where the Site is located, which such authorities or undertakings require the Contractor to obtain in its name and that are necessary for the performance of the Contract. The Employer shall provide reasonable assistance to the Contractor in obtaining the requisite permits, approvals and/or licenses.
2. The Contractor shall comply with all laws in force in the Country where the Site is located.
3. In addition to the other obligations of the Contractor, the Contractor must ensure that the Works comply with the following standards: As referred to in the Technical Specifications.
4. The Contractor shall supply for the Transformer, operation and maintenance manuals, which will enable the Employer to operate, maintain, and adjust the Transformer. Such documentation shall be provided as and when the Transformer is delivered. The manuals shall be in Albanian and English. This documentation must be supplied in electronic form (PDF and TIF files on CD-ROM) and hard copy format.

**Contractor's  
representative**

*Sub-Clause 4.2*

Contractor's Representative: Kaloian Gotchev  
Turbo Care Kosovo LLC  
Ulpiana C7 H5 2,

Prishtina 10000, Kosovo  
Tel: +48 692 027 364; +377 (44) 110 484  
Fax: +381 (3856) 0122  
Email: Kaloian.Gotchev@turbocare.com.pl

**Performance security** *New Sub-Clause 4.4*

1. The Contractor must deliver a Performance Security Guarantee to the Contracting Authority according to the following terms:
  - a. **Amount:** not less than 10 % of the Contract Price to be committed within working 7 days of the Commencement Date until expiry of the Warranty period.
  - b. **Form:** in the form of the demand guarantee attached to this Contract Agreement as Schedule A and issued by an entity that: (1) is a bank; (2) has its principal place of business in the European Union; and (3) has an acceptable credit rating or its liquidity is acceptable to the Contracting Authority.
2. If the Final Acceptance Certificate is not issued by the date falling 60 days prior to the scheduled expiry date of the performance security:
  - a. the Contractor must notify the Employer; and
  - b. the Employer or the Employer's Representative may require the Contractor to extend the expiry date of the performance security until such time as the Final Acceptance Certificate is duly signed.
3. If the Contractor fails to provide evidence of the extended expiry date within 14 days of a request by the Employer or the Employer's Representative, the Employer may claim the entire amount of the performance security and hold that amount in cash in place of (and subject to the same terms as) the performance security until such time as evidence is provided to the Employer that the expiry date has been extended or until the Final Acceptance Certificate has been duly issued, whereupon such sum shall be returned to the Contractor within 5 working days.

**Contractor's design  
(if any)** *Sub-Clause 5.1*

1. The Contractor shall carry out design to the extent specified or implied in the Technical Specification.
2. It is the Contractor's responsibility to ensure that all drawings that it requires to perform the Works are available from the Employer or are prepared by the Contractor in sufficient time to avoid delay in completion of the Works. The Contractor should check all drawings and the Employer is not responsible for the accuracy or completeness of any drawings supplied by it.
3. The Contractor hereby grants the Employer, its successors, assignees and nominees an irrevocable royalty-free license to use for the business purposes of the Employer and any successor or affiliated companies, any designs created for the Works.

**Employer's  
Liabilities** *Sub-Clause 6.1*

Sub-Clause 6.1(n) is deleted and is replaced with the following provision:  
Any changes to the laws of the Country, provided that such changes significantly affect the Contractor's performance of its obligations under the Contract.

Sub-Clause 6.1(p) is deleted and is replaced with the following provision:  
Damage that is an unavoidable result of the Contractor's obligations to execute the Works and to remedy any defects. Provided that, damages incurred in the course of the Contractor's remedying defects that would have not been inflicted had there been no defect shall be at the Contractor's risk and shall not be a liability of the Employer.

**Execution of the  
Works - Programme** *Sub-Clause 7.1*

The Contractor shall submit to the Employer a programme for the Works on or by the effective date of this Contract. Further, during the performance of Works on Site, the Contractor's Representative shall hold daily meetings with Employer's Representative and Project Manager to coordinate activities and discuss potential issues.

**Extension of Time**

*Sub-Clause 7.3*

The following provisions to be added at the end of Clause 7.3:

1. The Contractor shall only be entitled to an extension under this Clause 7.3 to the extent that the delay could not have been reduced or prevented by the taking of all reasonable precautionary and responsive measures by the Contractor and its subcontractors.
2. The Contractor will keep the Employer's Representative fully informed in relation to the delivery of the Transformer and the performance of the Works. With respect to arrangements for the transportation of the Transformer to the Site, the Contractor agrees to keep the Employer fully informed of the transportation schedule and the transit progress of the Transformer, to include providing written confirmation of the following events:
  - i. Commencement of the transportation from Poland;
  - ii. Prior to entry into the Republic of Serbia; and
  - iii. Upon leaving the Republic of Serbia.
3. If the Contractor (or its sub-contractor) is hindered, or delayed in the transportation of the Transformer through the Republic of Serbia, and such hindrance or delay is not only beyond its control and that of its sub-contractor, but will also result in a delay in the Time for Completion, the Contractor shall immediately notify the Employer of such event and the circumstances thereof in writing ("**the Delay Notification**"). Upon receipt of the Delay Notification, the Employer will calculate a grace period of 15 days from the Time for Completion; during which time liquidated damages (as provided under Sub-Clause 7.4) shall not be applied.

**Late Completion**

*Sub-Clause 7.4*

1. Late Completion: The Parties agree that Time Completion of the Works is critical and that time is of the essence under the terms of the Agreement. Subject to the Delay Notification outlined in Sub-Clause 7.3, the Parties agree that the amount of 0.65% of the Contract Price shall be payable by the Contractor to the Employer for each week of delay in completion of the Works up to an amount not to exceed 10% of the Contract Price.
2. Prolonged Delay: If the Employer has become entitled to the maximum amount for late completion of the Works, the Employer may by further notice to the Contractor either:

- a. require the Contractor to complete; or
- b. may himself complete at the Contractor's cost provided he does so in a reasonable manner; or
- c. terminate the Contract.

If the Employer terminates the Contract, he shall be entitled to recover from the Contractor any loss he has suffered up to the maximum of 120% of the Contract Price, except in the case of Gross Misconduct by the Contractor where the amount shall be 200% of the Contract Price or in the case of fraud of the Contractor where the amount shall be unlimited.

### **Taking over notice**

#### *Sub-Clause 8.2*

The first sentence of Sub-Clause 8.2 is replaced by the following:  
The Contractor shall notify the Employer in writing when the Transformer has been successfully Commissioned (the "Taking Over Notice").

#### *New Sub-Clause 8.3*

Final Acceptance Certificate: The Employer's Representative shall issue a Final Acceptance Certificate within 14 days, after the later of: (1) the expiry of the period stated in this Contract for notifying of defects (Warranty Period); and (2) if any notice has been given by or for the Employer as contemplated by Sub-Clause 9.1, the satisfactory remedying of notified defects and completion of all outstanding work to the satisfaction of the Employer's Representative

#### *New Sub-Clause 8.4*

Signing of notices and certificates: Each notice or certificate given under Clause 8 must be signed by the Employer's Representative in duplicate (one for Contractor and one for Employer).

### **Remedying Defects**

#### *Sub-Clause 9.1*

The provisions of Sub-Clause 9.1 are deleted and replaced by the following provisions:

- 1.1 Warranty Period (hereinafter referred to as the "Defects Liability Period": The Defects Liability Period shall be 365 days calculated from the date stated in the Taking Over Notice as provided in Sub-Clause 8.2. Where any part of the Works is taken over separately from the Works the Defects Liability Period for that part of the Works shall commence on the date it was taken over. With respect to the aforementioned Warranty obligations, if repairs of the Transformer during the Warranty period must be undertaken at the factory of the original manufacturer in Poland, the cost of transporting the Transformer from the Site to the factory, and return

transportation to the Site in Kosovo, will be borne by the Employer.

2. Making Good Defects: The Contractor shall, subject to paragraphs 8 and 9 below, be responsible for making good any defect in or damage to any part of the Works which may appear or occur during the Defects Liability Period and which arises from, either:
  - (a) the Contractor's Plant or any defective materials, workmanship or design, or
  - (b) any act or omission of the Contractor during the Defects Liability Period.

The Contractor shall make good the defect or damage as soon as practicable and at his own cost.

3. Notice of Defects: If any such defect appears or damage occurs, the Employer or the Employer's Representative shall forthwith notify the Contractor in writing thereof.
4. Extension of Defects Liability Period: The provisions of this Clause shall apply to all replacements or renewals carried out by the Contractor as if the replacements and renewals had been taken over on the date they were completed. The Defects Liability Period for the Works shall be extended by a period equal to the period during which the Works cannot be used by reason of a defect or damage. If only part of the Works is affected the Defects Liability Period shall be extended only for that part.
5. Failure to Remedy Defects: If the Contractor fails to remedy a defect or damage within a reasonable time, the Employer may fix a final time for remedying the defect or damage. If the Contractor fails to do so, the Employer may:
  - (a) Carry out the work himself or by others at the Contractor's risk and cost. The costs properly incurred by the Employer in remedying the defect or damage shall be deducted from the Contract Price, but the Contractor shall have no responsibility for such work, or
  - (b) Require the Contractor to grant the Employer a reasonable reduction in the Contract Price to be agreed; or
  - (c) If the defect or damage is such that the Employer has been deprived of substantially the whole of the benefit of the Works or a part thereof, he may terminate the Contract in respect of such parts of the Works as cannot be put to the intended use. The Employer shall be entitled to recover all sums paid in respect of such parts of the Works together with the cost of dismantling the same, clearing the Site and returning Plant to the Contractor or otherwise disposing of it in accordance with the Contractor's instructions. Provided that, this remedy shall not preclude the Employer's ability to claim against the Contractor for other losses suffered as a result of the defect or damage.
6. Removal of Defective Supplies: If the defect or damage is such that repairs cannot be expeditiously carried out on the Site, the

Contractor may with the consent of the Employer's Representative or the Employer remove from the Site for the purposes of repair any part of the Supplies which is defective or damaged.

7. Right of Access: Until the Final Acceptance Certificate has been issued, the Contractor shall have the right of access to all parts of the Site and to records of the working and performance of the Works. Such right of access shall be during the Employer's normal working hours and at the Contractor's risk and cost. Access shall also be granted to any duly authorised representative of the Contractor whose name has been communicated in writing to the Employer's Representative. Subject to the Employer's Representative's approval, the Contractor may also at its own risk and cost make any tests which it considers desirable.
8. Defects caused by Employer's Personnel: The Contractor shall not be liable for any defects caused by Employer's personnel or by the Employer's Representative.
9. Contractor to Search: The Contractor shall, if required by the Employer's Representative in writing, search for the cause of any defect, under the direction of the Employer's Representative. Unless the defect is one for which the Contractor is liable under this Clause, the cost of the work carried out by the Contractor in searching for the cause of the defect shall be added to the Contract Price.
10. Defects Liability Certificate: When the Defects Liability Period for the Works or any part thereof has expired and the Contractor has fulfilled all his obligations under the Contract for defects in the Works or that part, the Employer's Representative shall issue within 14 days to the Contractor a Defects Liability Certificate to that effect (together with the Final Acceptance Certificate).

**Variations and Claims**

*New Sub-Clause 10.5*

The Contractor shall submit to the Employer an itemised make up of the value of the Variations and claims within 4 working days of the instruction of or the event giving rise to the claim. The Employer shall check and if possible agree the value. In the absence of agreement, the Employer shall determine the value. In this respect, the Parties acknowledge that if the value of any additional works exceed 10% of the Contract Price the restrictions imposed by the Public Procurement Law of Kosovo will be applicable.

**Valuation of the Works**

*Sub-Clause 11.1*

A fixed price based on the Technical Specifications outlined at Annex 2.

Further, and subject to paragraph 3.3 in the Contract Agreement, there shall be no revision of prices during the implementation of this Contract. In particular, there will be no adjustment for rises or falls in the cost of labour, goods or other inputs to the Works.

**Payment terms**

*Sub-Clause 11.2 to 11.6*



The provisions of clauses 11.2 to 11.6 (inclusive) are deleted and replaced by the following provisions:

1. The Contract Price shall be paid by the Employer to the Contractor as follows:
  - (a) Advance payment: 30% of the Contract Price within 7 working days of the Commencement Date of the Contract against presentation of Contractor's invoice and provision of an Advance Payment Guarantee in the same amount and in the form outlined in Schedule 2 to this Contract. The Guarantee must be issued by a bank or a recognised financial institution that has a credit rating or liquidity acceptable to the Employer. The Guarantee will be returned from the Employer to the Contractor no earlier than the date of issue of the Take Over Notice
  - (b) 60% of the Contract Price to be paid 28 days after the date of placement of the Transformer at the Site.
  - (c) 10% of the Contract Price after Commissioning of the Transformer.
2. The Employer shall make payments payable to the Contractor within 45 days of submission of the original invoice. The invoice should contain: the contract number and title, place of execution of works; description of Works completed and the value of the accomplished Works. Payments will be made to a bank account number specified by the Contractor by notice from time to time. Invoices should be directed to: The Manager for Accounts Payable, KEK J.S.C at No.36 Mother Theresa Street, Pristina

**Currency of payment** *Sub-Clause 11.7*

Payments to be made in Euro.

**Delayed Payment** *Sub-Clause 11.8*

Late payment interest shall be 5% per annum.

**Default by Contractor** *Sub-Clause 12.1*

The following wording to be added at the end of clause 12.1:

Further, the Contractor shall deliver to the Employer the parts of the Works executed by the Contractor up to the date of termination

**Force Majeure** *Sub-Clause 13.2*

Sub-Clause 13.2 is deleted and is replaced by the following new clause 13.2:

1. If either Party is prevented, hindered or delayed from or in performing any of its obligations under the Contract by an event of Force Majeure, then it shall notify the other in writing of the occurrence of such event and the circumstances thereof within

fourteen (14) days after the occurrence of such event.

2. Subject to Clause 13.2 (3) below, “Force Majeure” shall mean any event beyond the reasonable control of the Employer or of the Contractor, as the case may be, and which is unavoidable notwithstanding the reasonable care of the party affected, and shall include, without limitation, the following:
  - (a) war, hostilities or warlike operations (whether a state of war be declared or not), invasion, act of foreign enemy and civil war;
  - (b) rebellion, revolution, insurrection, mutiny, usurpation of civil or military government, conspiracy, riot, civil commotion and terrorist acts;
  - (c) confiscation, nationalization, mobilization, commandeering or requisition by or under the order of any government or de jure or de facto authority or ruler or any other act or failure to act of any local state or national government authority;
  - (d) strike, sabotage, lockout, embargo, import restriction, port congestion, lack of usual means of public transportation and communication, industrial dispute, shipwreck, shortage or restriction of power supply, scrapping of major forgings or castings, epidemics, quarantine and plague;
  - (e) earthquake, landslide, volcanic activity, fire, flood or inundation, tidal wave, typhoon or cyclone, hurricane, storm, lightning, nuclear and pressure waves or other natural or physical disaster; and
  - (f) Shortage of labour, materials or utilities where caused by circumstances that are themselves Force Majeure.
3. The Parties agree that any variations in temperatures or climatic conditions at the Site shall not constitute an event of Force Majeure.
4. The party who has given notice of a Force Majeure event shall be excused from the performance or punctual performance of its obligations under the Contract for so long as the relevant event of Force Majeure continues and to the extent that such party’s performance is prevented, hindered or delayed. The Time for Delivery shall be extended accordingly.
5. The party or parties affected by the event of Force Majeure shall use reasonable efforts to mitigate the effect thereof upon its or their performance of the Contract and to fulfil its or their obligations under the Contract, but without prejudice to either Party’s right to terminate the Contract as per paragraph 9 below.
6. No delay or non-performance by either party hereto caused by the occurrence of any event of Force Majeure shall constitute a default

or breach of the Contract.

7. If the performance of the Contract is substantially prevented, hindered or delayed for a single period of more than four (4) months or an aggregate period of more than eight (8) months on account of one or more events of Force Majeure during the currency of the Contract, the parties will attempt to develop a mutually satisfactory solution, failing which either party may terminate the Contract by giving a notice to the other.
8. In the event of termination pursuant to paragraph (7) above, the Contractor shall:
  - (a) cease all further work and terminate all sub-contracts;
  - (b) remove all his personnel and equipment from the Site; and
  - (c) deliver to the Employer the parts produced up to the date of termination.
9. Notwithstanding paragraph 8 above, Force Majeure shall not apply to any obligation of the Employer to make payments that are due and owing to the Contractor.

**Insurance Arrangements**

Sub-Clause 14.2

The insurance requirements under the Contract are as follows:

| Type of cover   | Amount of cover  | Exclusions                                  |
|---|--|---|
| The Works, Materials, Plant and fees – installation all risks insurance (to include sub contractors as insured parties) | 110% of Contract Price (EUR 50,000 deductible limit) For damages for which the Contractor is responsible under the Contract, deductible shall be paid by the Contractor. | In accordance with international standards. |
| Contractor’s Equipment (not required to be in joint names)  | Full replacement value.  | In accordance with international standards. |
| Cargo insurance (not required to be in joint names)   | 110% of delivery value until delivery on Site  | In accordance with international standards. |

|  |   |   |
|--|---|---|
| Third party injury and death to persons and damage to property of the Employer or of third parties (to include sub contractors as insured parties) | EUR 1,000,000 for personal injury and EUR 1,000,000 for damage to property. | In accordance with international standards. |
| Workers compensation (not in joint names)  | EUR 150,000 for disability<br>EUR 5,000,000 for death                       | In accordance with international standards. |
| Automobile insurance for all vehicles used by contractor parties (not in joint names)  | EUR 1,000,000 for personal injury<br>EUR 1,000,000 for material damages     | In accordance with international standards. |

**Rules for Adjudication**

*Sub-Clause 15.1*

Shall not be applicable to this Contract Agreement.

**Arbitration Rules**

*Sub-Clause 15.3*

UNCITRAL Arbitration Rules.

Appointing authority shall be the President of FIDIC or the President's nominee.

Place of Arbitration: Vienna, Austria

The number of arbitrators for any arbitration proceedings shall be three and the language to be used in the arbitral proceedings shall be English.

**Representations**

*New Clause 16*

1. The Employer and the Contractor each represents and warrants to the other Party that, as at the date of this Contract:
  - a. it has full corporate power and authority to enter into and to exercise its rights and perform its obligations under the Contract;
  - b. the obligations expressed to be assumed by it under the Contract are legal and valid obligations binding on it; and
  - c. the Contract is executed by a duly authorised representative of that Party; and
  - d. once duly executed, the Contract will constitute legal, valid and binding obligations

**Entire agreement**

*New Clause 17*

The Contract embodies the entire agreement between the parties with respect to the subject matter of this Contract and supersedes any prior negotiation, arrangement, understanding or agreement with respect to the subject matter or any term of the Contract. No communication between the

Contractor and Employer (before or after the effective date of the Contract) shall affect the interpretation of the Contract.

**Ethics**

*New Clause 18*

1. The Contractor represents that he has not made and agrees that he shall not make in the performance of this Contract, any payments, loans or gifts, or promises, authorisations or offers of payments, loans or gifts, of money or anything of value, directly or indirectly, to or for the benefit of (i) any official or employee of any government or any agency, department or instrumentality of any government, or (ii) any political party or party official, or (iii) any employee, or consultant of the Employer for the purpose of influencing such person to use his or her official position to assist the Contractor in obtaining or retaining business for or with, or directing business to, any person or firm or otherwise securing any improper advantage.
2. A failure of the Contractor, judged through the decision of an arbitral tribunal pursuant to clause 15.3, to comply with any of the representations and obligations set forth in the preceding paragraph shall result in the forfeiture by Contractor of any payments, fees, commissions, or other compensation to which he would otherwise be entitled under this Contract, and the Contractor shall refund to the Employer any such fees previously paid, in which case the Contractor shall terminate further execution of the work.

**Confidential Information**

*New Clause 19*

1. The Employer and the Contractor shall keep confidential and shall not, without the written consent of the other party hereto, or unless required by law, divulge to any third party any documents, data or other information furnished directly or indirectly by the other party hereto in connection with the Contract. Whether such information has been furnished prior to, during or following termination of the Contract.
2. Notwithstanding the above, the Contractor may furnish to its Subcontractor(s) such documents, data and other information it receives from the Employer to the extent required for the Subcontractor(s) to perform its works under the Contract, in which event the Contractor shall obtain from such Subcontractor(s) an undertaking of confidentiality.

**Customs, Import Duties and Taxes**

*New Clause 20*

1. The Employer shall provide reasonable assistance to the Contractor on request with administrative formalities in relation to the exit from and entry to Kosovo of any Plant or machinery, subject to the Contractor providing all the requisite delivery documentation at least 1 week in advance, including ship lists, detailed description, place of origin and value/evidence of value and details of carrier. Provided that, the Contractor shall, at all times, remain responsible for compliance with those formalities.
2. The Contract Price includes:
  - (d) All customs duties, customs clearance charges or value added tax or any other charges related to customs clearance

whether levied inside or outside Kosovo on the goods and services supplied under this Contract are included in the Contract Price; and

- (e) Any other taxes, to include income tax or corporation tax levied within or outside Kosovo.
3. The Employer will adjust the Contract Price by the relevant amount if written evidence is presented that there has been an increase or decrease in taxes, custom duties or import duties payable in Kosovo between the date of the Contract and the completion of the Works. Provided that this provision shall not apply to any extension period of the Works caused by the Contractor's delay.

**Identity of Contractor**

*New Clause 21*

If the Contractor is comprised of more than one entity, those entities shall be jointly and severally liable to the Employer in all respects in connection with the Contract.

**Ownership of Tools**

*New Clause 22*

Any tools provided by the Contractor for the purpose of this Contract on a temporary import basis to Kosovo A Power Station shall remain the property of the Contractor and are to be returned to Contractor's workshop at the end of the Works.

**Environment, Health and Safety**

*New Clause 23*

The Contractor will conduct the Works with due regard to the environment and public and occupational health and safety and in accordance with environmental regulations and standards in effect from time to time in Kosovo. The Contractor will indemnify the Employer for any damage incurred by the Employer on the basis of the Contractor's breach of its obligations under the this paragraph.

**Amendment and Waiver and Assignment**

*New Clause 24*

- 1. Any amendment to or waiver by the Employer or the Contractor of any of the terms or conditions of, or consent given by any Party under, the Contract shall be in writing, signed by both Parties.
- 2. The Contractor may not assign any of it rights or obligations in this **Contract** without the prior written consent of the Employer.

**Counterparts**

*New Clause 25*

The Contract may be signed in one or more counterparts, which shall together constitute one document.

## Schedule 1

### Example Form of Performance Security

#### DEMAND GUARANTEE

Re: **Contract for supply and delivery of a used transformer 240 MVA; 15,75Kv/220Kv (the ‘Contract’)**

Name of Beneficiary: Korporata Energjetike e Kosoves Sh.a (whom the Contract defines as the Employer)  
Address of Beneficiary: 36, Nena Tereze Str., 38000 Pristina, Kosovo

We have been informed that **Turbo Care Kosovo LLC** (hereinafter called the ‘Principal’) is your contractor under the Contract that requires it to obtain a performance security.

At the request of the Principal, we [*name of bank*] hereby irrevocably undertake to pay you, the Beneficiary/Employer, any sum or sums not exceeding in total the amount of **Insert amount in figures and words** (the ‘guaranteed amount’) upon receipt by us of your demand in writing and your written statement:

- (a) stating that the Principal is in breach of its obligation(s) under the Contract, and
- (b) providing details in respect of such breach without the bank examining the merits of the breach or assessing the quantity and/or quality of the details provided by you.

Any demand for payment must contain the signatures of the Beneficiary’s Authorised Persons which must be authenticated by a solicitor or attorney admitted to practice in a European Union country, the United States, Canada, Australia or Hong Kong. The authenticated demand and statement must be received by us at this office on or before the expected expiry period for notification of defects set out in the Contract (the ‘expiry date’), when this guarantee shall expire and shall be returned to us.

In this document, a **Beneficiary’s Authorised Persons** shall mean the Employer’s Chief Financial Officer and the Managing Director.

This guarantee shall be governed by the laws of England and Wales and shall be subject to the Uniform Rules for Demand Guarantees, published as number 458 by the International Chamber of Commerce, except as stated above.

[*Date & Signature*]

## Schedule 2

### Example Form of Advance Payment Guarantee

Re: **Contract for supply and delivery of a used transformer 240 MVA; 15,75Kv/220Kv (the ‘Contract’)**

Name of Beneficiary: Kosovo Energy Corporation (whom the Contract defines as the Contracting Authority)

Address of Beneficiary: No. 36, Mother Theresa Street 10000 Pristina, Kosovo

We have been informed that **Turbo Care Kosovo LLC** (hereinafter called the Principal) is the contractor under such Contract, which requires him to obtain a financial security.

At the request of the Principal, we **[insert name of bank]** hereby irrevocably undertake to pay you, the Beneficiary, any sum or sums not exceeding in total the amount of **[insert amount in figures and words]** (the guaranteed amount) upon receipt by us of your demand in writing and your written statement stating:

(a) that the Principal has failed to repay the pre-financing in accordance with the conditions of the Contract, and

(b) the amount, which the Principal has failed to repay.

This guarantee shall become effective upon receipt of the pre-financing by the Principal. Such guaranteed amount shall be reduced by the amounts of the pre-financing repaid.

Any demand for payment must contain the signature of the Beneficiary’s Chief Financial Officer, which must be authenticated by a solicitor or attorney admitted to practice in a European Union country, the United States, Canada, Australia or Hong Kong or a Public Notary. We must receive the authenticated demand and statement at this office on or before **[insert expiry period]** (the ‘expiry date’), when this guarantee shall expire and shall be returned to us.

This Guarantee shall be governed by the laws of England & Wales and shall be subject to the Uniform Rules for Demand Guarantees, published as number 458 by the International Chamber of Commerce, except as stated above.

**[Date & Signature]**



## ANNEX 2

### **TECHNICAL SPECIFICATION FOR THE USED TRANSFORMER 240 MVA; 15,75KV/220KV for PP KOSOVA A.**

- 1.1 The Contract to be executed by the Parties shall incorporate the description and technical specifications of goods and services offered by TurboCare in its offer dated 10<sup>th</sup> October 2008, which shall include:
- (a) Modifications to the Transformer to ensure compliance with the technical requirements outlined in Contracting Authority's tender dossier, to include:
    - (i) Connection windings;
    - (ii) Windings changed from Yd11 to Yd5;
    - (iii) Connection voltage to the generator should be 15.75 kV; and
    - (iv) Any other modifications required for connection of the Transformer to the generator's bus bars.
  - (b) Deployment of a qualified engineer to the Site, to assess the mounting requirements for the Transformer. This assessment shall also include production of a list of parts required to connect the Transformer to the bus bars and a determination as to whether any reconfiguration of the Site is required.
  - (c) The reasonable travel costs of two representatives from the Contracting Authority to attend the testing of the Transformer in Poland and witness the commencement of the transportation to the Site. In this respect, Contractor shall provide reasonable assistance with securing visas for the KEK representatives.
  - (d) Performance of all standard technical tests required to ensure that the Transformer is in good working order and fit for its purpose, which shall include a 'gas test' to estimate the quantity of released gas and its chemical composition.
  - (e) Obtaining all necessary technical approval certificates, which shall subsequently be provided to KEK.
  - (f) Supply and delivery of the Transformer to KEK, which shall include:
    - (i) All transportation of the Transformer within Poland;
    - (ii) Transportation of the Transformer from Poland to the Site (which will include transportation within the Power Plant and placing the Transformer on the Site); and
    - (iii) Insurance of the Transformer during the transportation mentioned under sub-clauses 1.1 (f) (i) and (ii) above.

- (g) Providing supervision with the Installation and Commissioning of the Transformer at the Site, however the actual Installation and Commissioning shall be performed by KEK. In this respect, ‘Installation’ of the Transformer shall be defined as connecting the Transformer to the bus bars at the Site, while ‘Commissioning’ of the Transformer shall be defined as energizing the Transformer under the load at the Site, together with issuing an acceptance certificate by KEK confirming successful operation of the Transformer. In this respect, it is agreed that Installation and Commissioning shall be performed by KEK within a period of 10 days with supervision of TurboCare.
  - (h) The Parties also agree that:
    - (i) KEK will perform unit test of electrical protection of transformer at the Site.
    - (ii) TurboCare will provide supervision with connecting the Transformer to the electrical network; and
    - (iii) TurboCare also agrees to participate in the body or committee responsible for issuing a permit for use of the Transformer in the electrical network. Provided that, KEK alone shall be responsible for any sign-off/approval.
- 1.2 With respect to the provision of an engineer under sub-clause 1.1(b) above, the Parties agree that the engineer shall be deployed to the Site as soon as possible after signing of this document, and no later than the end of October 2008. The engineer shall also provide his/her findings or determinations in writing to KEK within 7 days of completing his/her investigations.
2. The results of the technical tests performed under sub-clause 1.1(d) above must indicate that the Transformer is either: (a) good working order and fit for its purpose; or (b) that any reported faults can be remedied within the original time schedule for placing the Transformer at the Site (i.e. by 8<sup>th</sup> January 2009). Under this sub-clause 2.4(b), it is implicit that after completion of any repairs, the Transformer must undergo re-testing to ensure that it is in good working order and fit for its purpose.
3. Failure to satisfy the conditions outlined under Clause 2 (a) or (b) above will result in termination of the Contract and return of the advance payment to KEK.
4. With respect to the findings of the engineer under sub-clause 1.1(b) above and any alterations or parts required for installation at the Site, KEK shall have the option of either (i) procuring the parts or undertaking the work itself; or (ii) requesting that TurboCare provide a price for undertaking these additional works. The cost of any additional works shall be added to the Contract Price.

**GENERAL CONDITIONS OF THE CONTRACT - ANNEX 4**

1. General Provisions

Where reference is made to 'Appendix' in these terms, this should be understood as a reference to the Special Terms of the Contract (Attachment 1)

|            |                                 |        |  |
|------------|---------------------------------|--------|--|
| <b>1.1</b> |                                 |        | In the Contract as defined below the words and expressions defined shall have the following meanings assigned to them except where the context requires otherwise:   |
|            | <b>Definitions</b>              |        |  |
|            | <b>The Contract</b>             | 1.1.1  | <b>"Contract"</b> means the Agreement and the other documents listed in the Appendix.  |
|            |                                 | 1.1.2  | <b>"Specification"</b> means the document as listed in the Appendix, including Employer's requirements in respect of design to be carried out by the Contractor, if any, and any Variation to such document. |
|            |                                 | 1.1.3  | <b>"Drawings"</b> means the Employer's drawings of the Works as listed in the Appendix, and any Variation to such drawings.  |
|            | <b>Persons</b>                  | 1.1.4  | <b>"Employer"</b> means the person named in the Agreement and the legal successors in title to this person, but not (except with the consent of the Contractor) any assignee.                                |
|            |                                 | 1.1.5  | <b>"Contractor"</b> means the person named in the Agreement and the legal successors in title to this person, but not (except with the consent of the Employer) any assignee.                                |
|            |                                 | 1.1.6  | <b>"Party"</b> means either the Employer or the Contractor.  |
|            | <b>Dates, Times and Periods</b> | 1.1.7  | <b>"Commencement Date"</b> means the date 14 days after the date the Agreement comes into effect or any other date agreed between the Parties.   |
|            |                                 | 1.1.8  | <b>"day"</b> means a calendar day.   |
|            |                                 | 1.1.9  | <b>"Time for Completion"</b> means the time for completing the Works as stated in the Appendix (or as extended under Sub-Clause 7.3), calculated from the Commencement Date.                                 |
|            | <b>Money and Payments</b>       | 1.1.10 | <b>"Cost"</b> means all expenditure properly incurred (or to be incurred) by the Contractor, whether on or off the Site, including overheads and similar charges, but does not include profit.               |
|            | <b>Other Definitions</b>        | 1.1.11 | <b>"Contractor's Equipment"</b> means all apparatus, machinery, vehicles, facilities and other things required for the execution of the Works but does not include Materials or Plant.                       |
|            |                                 | 1.1.12 | <b>"Country"</b> means the country in which the Site is located.   |
|            |                                 | 1.1.13 | <b>"Employer's Liabilities"</b> means those matters listed in Sub-Clause 6.1.  |

- 1.1.14 **"Force Majeure"** means an exceptional event or circumstance: which is beyond a Party's control; which such Party could not reasonably have provided against before entering into the Contract; which, having arisen, such Party could not reasonably have avoided or overcome; and, which is not substantially attributable to the other Party.
- 1.1.15 **"Materials"** means things of all kinds (other than Plant) intended to form or forming part of the permanent work.
- 1.1.16 **"Plant"** means the machinery and apparatus intended to form or forming part of the permanent work.
- 1.1.17 **"Site"** means the places provided by the Employer where the Works are to be executed, and any other places specified in the Contract as forming part of the Site.
- 1.1.18 **"Variation"** means a change to the Specification and /or Drawings (if any) which is instructed by the Employer under Sub-Clause 10.1.
- 1.1.19 **"Works"** means all the work and design (if any) to be performed by the Contractor including temporary work and any Variation

## 1.2

### **Interpretation**

Words importing persons or parties shall include firms and organisations. Words importing singular or one gender shall include plural or the other gender where the context requires.

## 1.3

### **Priority of Documents**

The documents forming the Contract are to be taken as mutually explanatory of one another. If an ambiguity or discrepancy is found in the documents, the Employer shall issue any necessary instructions to the Contractor, and the priority of the documents shall be in accordance with the order as listed in the Appendix.

## 1.4

### **Law**

The law of the Contract is stated in the Appendix.

## 1.5

### **Communications**

Wherever provision is made for the giving or issue of any notice, instruction, or other communication by any person, unless otherwise specified such communication shall be written in the language stated in the Appendix and shall not be unreasonably withheld or delayed.

## 1.6

### **Statutory Obligations**

The Contractor shall comply with the laws of the countries where activities are performed. The Contractor shall give all notices and pay all fees and other charges in respect of the Works.

## **2. The Employer**

### 2.1

#### **Provision of Site**

The Employer shall provide the Site and right of access thereto at times stated in the Appendix.

- 2.2**  
**Permits and Licences** The Employer shall, if requested by the Contractor, assist him in applying for permits, licences or approvals which are required for the Works.
- 2.3**  
**Employer's Instructions** The Contractor shall comply with all instructions given by the Employer in respect of the Works including the suspension of all or part of the Works.
- 2.4**  
**Approvals** No approval or consent or absence of comment by the Employer or the Employer's representative shall affect the Contractor's obligations.

### **3. Employer's Representatives**

- 3.1**  
**Authorised Person** One of the Employer's personnel shall have authority to act for him. This authorised person shall be as stated in the Appendix, or as otherwise notified by the Employer to the Contractor.
- Employer's Representative** The Employer may also appoint a firm or individual to carry out certain duties. The appointee may be named in the Appendix, or notified by the Employer to the Contractor from time to time. The Employer shall notify the Contractor of the delegated duties and authority of this Employer's representative.

### **4. The Contractor**

- 4.1**  
**General Obligations** The Contractor shall carry out the Works properly and in accordance with the Contract. The Contractor shall provide all supervision, labour, Materials, Plant and Contractor's Equipment which may be required. All Materials and Plant on Site shall be deemed to be the property of the Employer.
- 4.2**  
**Contractor's Representative** The Contractor shall submit to the Employer for consent the name and particulars of the person authorised to receive instructions on behalf of the Contractor.
- 4.3**  
**Subcontracting** The Contractor shall not subcontract the whole of the Works. The Contractor shall not subcontract any part of the Works without the consent of the Employer.
- 4.4**  
**Performance Security** If stated in the Appendix, the Contractor shall deliver to the Employer within 14 days of the Commencement Date a performance security in a form and from a third party approved by the Employer.

## 5. Design by Contractor

### 5.1

#### **Contractor's Design**

The Contractor shall carry out design to the extent specified, as referred to in the Appendix. The Contractor shall promptly submit to the Employer all designs prepared by him. Within 14 days of receipt the Employer shall notify any comments or, if the design submitted is not in accordance with the Contract, shall reject it stating the reasons. The Contractor shall not construct any element of the permanent work designed by him within 14 days after the design has been submitted to the Employer or where the design for that element has been rejected. Design that has been rejected shall be promptly amended and resubmitted. The Contractor shall resubmit all designs commented on taking these comments into account as necessary.

### 5.2

#### **Responsibility for Design**

The Contractor shall remain responsible for his tendered design and the design under this Clause, both of which shall be fit for the intended purposes defined in the Contract and he shall also remain responsible for any infringement of any patent or copyright in respect of the same. The Employer shall be responsible for the Specification and Drawings.

## 6. Employer's Liabilities

### 6.1

#### **Employer's Liabilities**

In this Contract, Employer's Liabilities mean:

- a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, within the Country,
- b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,
- c) riot, commotion or disorder by persons other than the Contractor's personnel and other employees, affecting the Site and/or the Works,
- d) ionizing radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such an assembly, except to the extent to which the Contractor may be responsible for the use of any radio-active material,
- e) pressure waves caused by aircraft or other aerial devices

- travelling at sonic or supersonic speeds,
- f) use or occupation by the Employer of any part of the Works, except as may be specified in the Contract,
  - g) design of any part of the Works by the Employer's personnel or by others for whom the Employer is responsible, and
  - h) any operation of the forces of nature affecting the Site and/or the Works, which was unforeseeable or against which an experienced contractor could not reasonably have been expected to take precautions.
  - i) Force Majeure,
  - j) a suspension under Sub-Clause 2.3 unless it is attributable to the Contractor's failure,
  - k) any failure of the Employer,
  - l) physical obstructions or physical conditions other than climatic conditions, encountered on the Site during the performance of the Works, which obstructions or conditions were not reasonably foreseeable by an experienced contractor and which the Contractor immediately notified to the Employer,
  - m) any delay or disruption caused by any Variation,
  - n) any change to the law of the Contract after the date of the Contractor's offer as stated in the Agreement,
  - o) losses arising out of the Employer's right to have the permanent work executed on, over, under, in or through any land, and to occupy this land for the permanent work, and
  - p) damage which is an unavoidable result of the Contractor's obligations to execute the Works and to remedy any defects.

## **7. Time for Completion**

### **7.1**

#### **Execution of the Works**

The Contractor shall commence the Works on the Commencement Date and shall proceed expeditiously and without delay and shall complete the Works within the Time for Completion.

#### **Programme**

Within the time stated in the Appendix, the Contractor shall submit to the Employer a programme for the Works in the form stated in the Appendix.

### **7.3**

#### **Extension of Time**

Subject to Sub-Clause 10.3, the Contractor shall be entitled to an extension to the Time for Completion if he is or will be delayed by any of the Employer's Liabilities.

On receipt of an application from the Contractor, the Employer shall consider all supporting details provided by the Contractor and shall extend the Time for Completion as appropriate.

**7.4**

**Late Completion**

If the Contractor fails to complete the Works within the Time for Completion, the Contractor's only liability to the Employer for such failure shall be to pay the amount stated in the Appendix for each day for which he fails to complete the Works.

## **8. Taking-Over**

**8.1**

**Completion**

The Contractor may notify the Employer when he considers that the Works are complete.

**8.2**

**Taking-Over Notice**

The Employer shall notify the Contractor when he considers that the Contractor has completed the Works stating the date accordingly. Alternatively, the Employer may notify the Contractor that the Works, although not fully complete, are ready for taking over, stating the date accordingly.

The Employer shall take over the Works upon the issue of this notice. The Contractor shall promptly complete any outstanding work and, subject to Clause 9, clear the Site.

## **9. Remedying Defects**

**9.1**

**Remedying Defects**

The Employer may at any time prior to the expiry of the period stated in the Appendix, notify the Contractor of any defects or outstanding work. The Contractor shall remedy at no cost to the Employer any defects due to the Contractor's design, Materials, Plant or workmanship not being in accordance with the Contract.

The cost of remedying defects attributable to any other cause shall be valued as a Variation. Failure to remedy any defects or complete outstanding work within a reasonable time of the Employer's notice shall entitle the Employer to carry out all necessary work at the Contractor's cost.

**9.2**

**Uncovering and Testing**

The Employer may give instruction as to the uncovering and/or testing of any work. Unless as a result of any uncovering and/or testing it is established that the Contractor's design, Materials, Plant or workmanship are not in accordance with the Contract, the Contractor shall be paid for such uncovering and/or testing as a Variation in accordance with Sub-Clause 10.2.

## **10. Variations and Claims**



- 10.1  
Right to Vary** The Employer may instruct Variations.
- 10.2  
Valuation of  
Variations** Variations shall be valued as follows:
- a) at a lump sum price agreed between the Parties, or
  - b) where appropriate, at rates in the Contract, or
  - c) in the absence of appropriate rates, the rates in the Contract shall be used as the basis for valuation, or failing which
  - d) at appropriate new rates, as may be agreed or which the Employer considers appropriate, or
  - e) if the Employer so instructs, at daywork rates set out in the Appendix for which the Contractor shall keep records of hours of labour and Contractor's Equipment, and of Materials used.
- 10.3  
Early Warning** A Party shall notify the other as soon as he is aware of any circumstance which may delay or disrupt the Works, or which may give rise to a claim for additional payment. The Contractor shall take all reasonable steps to minimise these effects.
- The Contractor's entitlement to extension to the Time for Completion or additional payment shall be limited to the time and payment which would have been due if he had given prompt notice and had taken all reasonable steps.
- 10.4  
Right to Claim** If the Contractor incurs Cost as a result of any of the Employer's Liabilities, the Contractor shall be entitled to the amount of such Cost. If as a result of any of the Employer's Liabilities, it is necessary to change the Works, this shall be dealt with as a Variation.
- 10.5  
Variation and Claim  
Procedure** The Contractor shall submit to the Employer an itemised make-up of the value of Variations and claims within 28 days of the instruction or of the event-giving rise to the claim. The Employer shall check and if possible agree the value. In the absence of agreement, the Employer shall determine the value.

## **11. Contract Price and Payment**

- 11.1  
Valuation of the Works** The Works shall be valued as provided for in the Appendix, subject to Clause 10
- 11.2  
Monthly Statements** The Contractor shall be entitled to be paid at monthly intervals:

- a) the value of the Works executed,
- b) the percentage stated in the Appendix of the value of Materials and Plant delivered to the Site at a reasonable time, subject to any additions or deductions which may be due.

The Contractor shall submit each month to the Employer a statement showing the amounts to which he considers himself entitled.

**11.3**

**Interim Payments**

Within 28 days of delivery of each statement, the Employer shall pay to the Contractor the amount shown in the Contractor's statement less retention at the rate stated in the Appendix, and less any amount for which the Employer has specified his reasons for disagreement. The Employer shall not be bound by any sum previously considered by him to be due to the Contractor.

The Employer may withhold interim payments until he receives the performance security under Sub-Clause 4.4 (if any).

**11.4**

**Payment of First Half of Retention**

One half of the retention shall be paid by the Employer to the Contractor within 14 days after issuing the notice under Sub-Clause 8.2.

**11.5**

**Payment of Second Half of Retention**

The remainder of the retention shall be paid by the Employer to the Contractor within 14 days after either the expiry of the period stated in the Appendix, or the remedying of notified defects or the completion of outstanding work, all as referred to in Sub-Clause 9.1, whichever is the later.

**11.6**

**Final Payment**

Within 42 days of the latest of the events listed in Sub-Clause 11.5 above, 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 28 days after the submission of this final account, the Employer shall pay to the Contractor any amount due. If the Employer disagrees with any part of the Contractor's final account, he shall specify his reasons for disagreement when making payment.

**11.7**

**Currency**

Payment shall be in the currency stated in the Appendix.

**11.8**

**Delayed Payment**

The Contractor shall be entitled to interest at the rate stated in the Appendix for each day the Employer fails to pay beyond the prescribed payment period.

## **12. Default**

## 12.1

### **Default by Contractor**

If the Contractor abandons the Works, refuses or fails to comply with a valid instruction of the Employer or fails to proceed expeditiously and without delay, or is, despite a written complaint, in breach of the Contract, the Employer may give notice referring to this Sub-Clause and stating the default.

If the Contractor has not taken all practicable steps to remedy the default within 14 days after the Contractor's receipt of the Employer's notice, the Employer may by a second notice given within a further 21 days, terminate the Contract. The Contractor shall then demobilise from the Site leaving behind Materials and Plant and any Contractor's Equipment which the Employer instructs in the second notice is to be used until the completion of the Works.

## 12.3

### **Default by Employer**

If the Employer fails to pay in accordance with the Contract, or is, despite a written complaint, in breach of the Contract, the Contractor may give notice referring to this Sub-Clause and stating the default. If the default is not remedied within 7 days after the Employer's receipt of this notice, the Contractor may suspend the execution of all or parts of the Works.

If the default is not remedied within 28 days after the Employer's receipt of the Contractor's notice, the Contractor may by a second notice given within a further 21 days, terminate the Contract. The Contractor shall then demobilise from the Site.

## 12.4

### **Insolvency**

If a Party is declared insolvent under any applicable law, the other Party may by notice terminate the Contract immediately. The Contractor shall then demobilise from the Site leaving behind, in the case of the Contractor's insolvency, any Contractor's Equipment which the Employer instructs in the notice is to be used until the completion of the Works.

## 12.5

### **Payment Termination**

**upon**

After termination, the Contractor shall be entitled to payment of the unpaid balance of the value of the Works executed and of the Materials and Plant reasonably delivered to the Site, adjusted by the following:

- a) any sums to which the Contractor is entitled under Sub-Clause 10.4,
- b) any sums to which the Employer is entitled,
- c) if the Employer has terminated under Sub-Clause 12.1 or 12.3, the Employer shall be entitled to a sum equivalent to 20% of the value of those parts of the Works not executed at the date of the termination,
- d) if the Contractor has terminated under Sub-Clause 12.2 or 12.3, the Contractor shall be entitled to the Cost of his suspension and demobilisation together with a sum equivalent to 10% of the value of those parts of the Works not executed at the date of termination.

The net balance due shall be paid or repaid within 28 days of the notice of termination.

### **13. Risks and Responsibility**

**13.1 Contractor's Care of the Works** The Contractor shall take full responsibility for the care of the Works from the Commencement Date until the date of the Employer's notice under Sub-Clause 8.2. Responsibility shall then pass to the Employer. If any loss or damage happens to the Works during the above period, the Contractor shall rectify such loss or damage so that the Works conform with the Contract.

Unless the loss or damage happens as a result of an Employer's Liability, the Contractor shall indemnify the Employer, the Employer's contractors, agents and employees against all loss or damage happening to the Works and against all claims or expense arising out of the Works caused by a breach of the Contract, by negligence or by other default of the Contractor, his agents or employees.

**13.2 Force Majeure** If a Party is or will be prevented from performing any of its obligations by Force Majeure, the Party affected shall notify the other Party immediately. If necessary, the Contractor shall suspend the execution of the Works and, to the extent agreed with the Employer, demobilise the Contractor's Equipment.

If the event continues for a period of 84 days, either Party may then give notice of termination which shall take effect 28 days after the giving of the notice.

After termination, the Contractor shall be entitled to payment of the unpaid balance of the value of the Works executed and of the Materials and Plant reasonably delivered to the Site, adjusted by the following:

- a) any sums to which the Contractor is entitled under Sub-Clause 10.4,
- b) the Cost of his suspension and demobilisation,
- c) any sums to which the Employer is entitled.

The net balance due shall be paid or repaid within 28 days of the notice of termination.

## 14. Insurance

### 14.1

#### Extent of Cover

The Contractor shall, prior to commencing the Works, effect and thereafter maintain

insurances in the joint names of the Parties:

- a) for loss and damage to the Works, Materials, Plant and the Contractor's Equipment,
- b) for liability of both Parties for loss, damage, death or injury to third parties or their property arising out of the Contractor's performance of the Contract, including the Contractor's liability for damage to the Employer's property other than the Works, and
- c) for liability of both Parties and of any Employer's representative for death or injury to the Contractor's personnel except to the extent that liability arises from the negligence of the Employer, any Employer's representative or their employees.

### 14.2

#### Arrangements

All insurances shall conform with any requirements detailed in the Appendix. The policies shall be issued by insurers and in terms approved by the Employer. The Contractor shall provide the Employer with evidence that any required policy is in force and that the premiums have been paid.

All payments received from insurers relating to loss or damage to the Works shall be held jointly by the Parties and used for the repair of the loss or damage or as compensation for loss or damage that is not to be repaired.

#### Failure to Insure

If the Contractor fails to effect or keep in force any of the insurances referred to in the previous Sub-Clauses, or fails to provide satisfactory evidence, policies or receipts, the Employer may, without prejudice to any other right or remedy, effect insurance for the cover relevant to such default and pay the premiums due and recover the same as a deduction from any other monies due to the Contractor.

## 15. Resolution of Disputes

### 15.1

#### Adjudication

Unless settled amicably, any dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any valuation or other decision of the Employer, shall be referred by either Party to adjudication in accordance with the attached Rules for Adjudication ("the Rules"). The adjudicator shall be any person agreed by the Parties. In the event of disagreement, the adjudicator shall be appointed in accordance with the Rules.

**15.2**

**Notice of  
Dissatisfaction**

If a Party is dissatisfied with the decision of the adjudicator or if no decision is given within the time set out in the Rules, the Party may give notice of dissatisfaction referring to this Sub-Clause within 28 days of receipt of the decision or the expiry of the time for the decision. If no notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the Parties. If notice of dissatisfaction is given within the specified time, the decision shall be binding on the Parties who shall give effect to it without delay unless and until the decision of the adjudicator is revised by an arbitrator.

**15.3**

**Arbitration**

A dispute which has been the subject of a notice of dissatisfaction shall be finally settled by a single arbitrator under the rules specified in the Appendix. In the absence of agreement, the arbitrator shall be designated by the appointing authority specified in the Appendix. Any hearing shall be held at the place specified in the Appendix and in the language referred to in Sub-Clause 1.5.

---

## **Rules for Adjudication**

### **referred to in Sub-Clause 15.1**

**General**

1 Any reference in the Conditions of Contract to the Rules for Adjudication shall be deemed to be a reference to these Rules.

2 Definitions in the Contract shall apply in these Rules.

**Appointment of  
Adjudicator**

3 The Parties shall jointly ensure the appointment of the Adjudicator. The Adjudicator shall be a suitably qualified person

4 If for any reason the appointment of the Adjudicator is not agreed at the latest within 14 days of the reference of a dispute in accordance with these Rules, then either Party may apply, with a copy of the application to the other Party, to any appointing authority named in the Contract or, if none, to the President of FIDIC or his nominee, to appoint an Adjudicator, and such appointment shall be final and conclusive.

5 The Adjudicator's appointment may be terminated by mutual agreement of the Parties. The Adjudicator's appointment shall expire when the Works have been completed or when any disputes referred to the Adjudicator shall have been withdrawn or decided, whichever is the later.

**Terms of Appointment**

- 6** The Adjudicator is to be, and is to remain throughout his appointment, impartial and independent of the Parties and shall immediately disclose in writing to the Parties anything of which he becomes aware which could affect his impartiality or independence.
- 7** The Adjudicator shall not give advice to the Parties or their representatives concerning the conduct of the project of which the Works form part other than in accordance with these Rules.
- 8** The Adjudicator shall not be called as a witness by the Parties to give evidence concerning any dispute in connection with, or arising out of, the Contract.
- 9** The Adjudicator shall treat the details of the Contract and all activities and hearings of the Adjudicator as confidential and shall not disclose the same without the prior written consent of the Parties. The Adjudicator shall not, without the consent of the Parties, assign or delegate any of his work under these Rules or engage legal or technical assistance.
- 10** The Adjudicator may resign by giving 28 days' notice to the Parties. In the event of resignation, death or incapacity, termination or a failure or refusal to perform the duties of Adjudicator under these Rules, the Parties shall agree upon a replacement Adjudicator within 14 days or Rule 4 shall apply.
- 11** The Adjudicator shall in no circumstances be liable for any claims for anything done or omitted in the discharge of the Adjudicator's duties unless the act or omission is shown to have been in bad faith.
- 12** If the Adjudicator shall knowingly breach any of the provisions of Rule 6 or act in bad faith, he shall not be entitled to any fees or expenses hereunder and shall reimburse each of the Parties for any fees and expenses properly paid to him if, as a consequence of such breach any proceedings or decisions of the Adjudicator are rendered void or ineffective.

**Payment**

- 13** The Adjudicator shall be paid the fees and expenses set out in the Adjudicator's Agreement.



- 14 The retainer fee, if applicable, shall be payment in full for:
  - (a) being available, on 28 days' notice, for all hearings and Site visits;
  - (b) all office overhead expenses such as secretarial services, photocopying and office supplies incurred in connection with his duties;
  - (c) all services performed hereunder except those performed during the days referred to in Rule 15.
- 15 The daily fee shall be payable for each working day preparing for or attending Site visits or hearings or preparing decisions including any associated travelling time.
- 16 The retainer and daily fees shall remain fixed for the period of tenure of the Adjudicator.
- 17 All payments to the Adjudicator shall be made by the Contractor who will be entitled to be reimbursed half by the Employer. The Contractor shall pay invoices addressed to him within 28 days of receipt. The Adjudicator's invoices for any monthly retainer shall be submitted quarterly in advance and invoices for daily fees and expenses shall be submitted following the conclusion of a Site visit or hearing. All invoices shall contain a brief description of the activities performed during the relevant period. The Adjudicator may suspend work if any invoice remains unpaid at the expiry of the period for payment, provided that 7 days prior notice has been given to both Parties.
- 18 If the Contractor fails to pay an invoice addressed to it, the Employer shall be entitled to pay the sum due to the Adjudicator and recover the sum paid from the Contractor.

**Procedure for Obtaining Adjudicator's Decision**

- 19 A dispute between the Parties may be referred in writing by either Party to the Adjudicator for his decision, with a copy to the other Party. If the Adjudicator has not been agreed or appointed, the dispute shall be referred in writing to the other Party, together with a proposal for the appointment of an Adjudicator. A reference shall identify the dispute and refer to these Rules.
- 20 The Adjudicator may decide to visit the Site. The Adjudicator may decide to conduct a hearing in which event he shall decide on the date, place and duration for the hearing. The Adjudicator may request that written statements from the Parties be presented to him prior to, at or after the hearing. The Parties shall promptly provide the Adjudicator with sufficient copies of any documentation and information relevant to the Contract that he may request

- 21** The Adjudicator shall act as an impartial expert, not as an arbitrator, and shall have full authority to conduct any hearing as he thinks fit, not being bound by any rules or procedures other than those set out herein. Without limiting the foregoing, the Adjudicator shall have power to:
- (a) decide upon the Adjudicator's own jurisdiction, and as to the scope of any dispute referred to him,
  - (b) make use of his own specialist knowledge, if any,
  - (c) adopt an inquisitorial procedure,
  - (d) decide upon the payment of interest in accordance with the Contract,
  - (e) open up, review and revise any opinion, instruction, determination, certificate or valuation, related to the dispute,
  - (f) refuse admission to hearings to any persons other than the Employer, the Contractor and their respective representatives, and to proceed in the absence of any Party who the Adjudicator is satisfied received notice of the hearing.
- 22** All communications between either of the Parties and the Adjudicator and all hearings shall be in the language of the Adjudicator's Agreement. All such communications shall be copied to the other Party.
- 23** No later than the fifty-sixth day after the day on which the Adjudicator received a reference or, if later, the day on which the Adjudicator's Agreement came into effect, the Adjudicator shall give written notice of his decision to the Parties. Such decision shall include reasons and state that it is given under these Rules.

"The fulfillment of the offer on TurboCare's part is subject to the proviso that this shall not be prevented by impediments on the grounds of national or international legal requirements, in particular export control provisions."