

Consortium Model Contract with Guidelines for the Construction of a Submarine Cable System

***DISCLAIMER:** The attached model contract for the construction of a fiber-optic submarine cable is a typical starting point for contract negotiations between Contractors and a consortium of purchasers considering the implementation of a submarine fiber-optic cable system, but it is not legal advice. Parties choosing to use the model contract must make their own independent assessment, in consultation with their usual legal advisers, both as to its suitability for use in any particular transaction and as to the meaning, validity or enforceability of any particular clause under the chosen governing law. SubOptic expressly disclaims all liability arising out of any party's use of this model contract for any purpose.*

INTRODUCTION: *The construction of a submarine cable system is a complex and sophisticated engineering feat. No two cable projects are the same, and each project will have specific challenges and issues that will need to be carefully considered and may require individually negotiated contract terms. This will especially be so if new technology or new network structures or applications are involved. A first model contract (the “2010 Model Contract”) had been published by SubOptic during the 2010 SubOptic Conference in Yokohama and is available for download on the SubOptic website. It corresponds to a simple case between one Contractor and one purchaser. The attached model contract is a second version corresponding to the frequent case where a group of Purchasers forms a consortium, and the proposed contractual terms reflect the starting point of such a consortium, typically when the consortium send an Invitation to Tender to Contractors. Just as for the first model, this model is intended not as a finished contract but as a set of typical standard contract terms for use as part of an Invitation to Tender and therefore as a suitable starting point for discussions and negotiations, helping to deliver clarity and speed to this critical project phase. The use of square brackets denotes that the enclosed text is merely suggested and is likely to be the subject of deal-specific negotiation. The model contract has been drafted on the assumption that English law is the governing law. If the model contract were used as a template for a contract to be governed by the law of a jurisdiction whose legal system is not based on the English common law, very considerable changes in the drafting might be required to reflect the requirements of the chosen law. See the commentary on subclause 35.1. The italicized commentary included in the model contract is intended to explain the structure and approach of the model contract, providing the reader with the perspective of both the purchaser and the Contractor. The commentary addresses areas that are likely to be the subject of negotiation and offers suggested alternative wording that the parties may wish to consider using. The commentary should, of course, be deleted whenever the model contract is used as a template.*

STRUCTURE OF THE MODEL CONTRACT: *The model contract consists of a set of basic contract terms and several detailed schedules and other attachments, such as a price schedule, a billing schedule, a plan of work, a technical specification and a system description (see clause 2). Some potential purchasers and Contractors may be more familiar with other terms (e.g. Provisional Schedule versus Price Schedule), but whatever these are called, all supply contracts for submarine cable projects require documents such as these to set out to a very high level of detail the complete lists of quantities of equipment to be supplied and full component price lists (Price Schedule), detailed schedules for when activities or supplies may be billed and must be paid for (Billing Schedule), a detailed day-by-day timeframe for all the activities involved in all aspects of construction (Plan of Work), the key engineering document that describes what the purchaser expects of the cable system and what the Contractor is committing to provide (Technical Specification), and the technical description of the system components to be provided by the Contractor (System Description). Reference is made to these schedules in the model contract, but the nature and content of these highly specialized engineering documents is outside the scope of both the model contract and the accompanying commentary. Prospective purchasers will require specialist submarine cable engineering and project management advice to develop or review the content of such schedules.*

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This agreement ("the Contract") is made and entered into on the [DATE],

BETWEEN:

the parties listed in Schedule A, ("the Purchasers").

AND

[insert name of CONTRACTOR], a company organised and existing under the laws of [COUNTRY], having its principal office at [ADDRESS] (hereinafter called «[ACRONYM]»).

(if more than one Contractor, insert "on a joint and several basis") «the Contractor» on the other part.

Both the Purchasers and the Contractor are collectively referred to as "the Parties" and individually as "the Party" and shall include their successors and permitted assigns.

The Parties have agreed as follows:

***Commentary:** The model contract has been drafted on the assumption that the parties are a consortium of purchasers on one hand, and one or more Contractors on the other hand. In such a case, the parties need to address the issue of whether their respective liabilities should be joint and several or separate and distinct. The respective obligations of each participating Contractor must be spelt out, unless the Contractors are to have joint and several liability. Typically, the consortium of purchasers would be a consortium of carriers having formed an unincorporated joint venture to arrange the construction of the system. In that case each of the partners may agree to underwrite a percentage of the construction cost and take the same percentage share of the capacity in the completed system. The required underlying agreements between a consortium of purchasers are outside the scope of this commentary, but where there are multiple purchasers it will be necessary to specify the financial responsibilities of each purchaser to the Contractor and to document any billing processes, as one purchaser may act as a central billing party or the purchasers may wish to receive proportionate invoices. If one or more of the purchasers have obligations to supply infrastructure, such as terminal stations, these responsibilities also should be clearly set out. The parties will need to form their own views on any credit or performance risks and address these in the contract through mechanisms such as performance bonds, payment guarantees, and letters of credit.*

DEFINITIONS

In these General Terms and Conditions and in all other documents forming part of the Contract the following definitions shall apply:

“Acceptance”	means written acknowledgement by the Purchasers that the Work, or part of it, has been completed in accordance with the Contract. “Accept” and “Accepted” in the context of “Acceptance” shall be construed accordingly.
“Acceptance Validation”	means formal assurance, including testing, by the Contractor that the Work satisfies the criteria for Acceptance in accordance with the Contract to enable the Purchasers to determine whether or not to accept the Work or any part thereof. “Acceptance Testing”, “Acceptance Tests” shall in this context be construed accordingly.
“Affiliate”	means, in relation to any Person, a Person controlling, controlled by, or under common control with, such Person. For purposes of this definition, “control” of a Person means direct or indirect ownership of more than xx% of the voting securities of such Person, whether by operation of law, by contract or otherwise.
“Billing Milestone”	means the pre-determined points for billing to be authorised subject to specific criteria being met. The Billing Milestones and their corresponding criteria are listed in the Billing Schedule.
“Billing Schedule”	means the billing schedule attached as Part 3 of this Contract
“Cable Route Estimate”	means the cable route estimate included in the Technical Specification.
“Cable System”	<i>[insert name]</i>
“Commercial Service”	means the Purchasers grant of a Certificate of Commercial Service in accordance with the Contract.
“Completion Date”	means the date defined in Subclause 5.1 of the Contract
“Confidential Information”	has the meaning set forth in sub-clause 26.2 of Clause 26 (Safeguarding of information and technology)
“Contract”	means the agreement concluded between the Purchasers and the Contractor incorporating these general terms and conditions, and all appendices, annexes and/or schedules thereto, as well as subsequent amendments which may be agreed to in writing between the Purchasers and the Contractor.
“Contractor (s)”	means the Party (or Parties) with whom the Purchasers enter into the Contract, as defined in the Recital.
“Contractor Permits”	has the meaning set forth in Sub-Clause 27.1 (Responsibility for obtaining permits and for custom clearance and other formalities)
“Contract Price”	means the price payable to the Contractor by the Purchasers under the Contract as defined in Sub-clause 13.1 of these terms and conditions.

“Central Billing Party” (CBP)	means the body authorised to receive and pay invoices on behalf of the Purchasers, as defined in Sub-clause 15.3.2.
“Deficiency List”	has the meaning set forth in Sub-clause 17.2.3 of this Contract
“Dry Plant”	means all of the Equipment supplied by the Contractor in the cable landing stations, points of presence, network operating center and other relevant locations as defined in the Contract
“Equipment”	means all equipment, components and spares, as more particularly described in the Price Schedule, manufactured or procured by Contractor for incorporation in the System.
“Final Acceptance”	means written acknowledgement by the Purchasers that the Final Acceptance tests of the system have been completed satisfactorily in accordance with Sub-clause 17.4 of the Contract. In this context “Certificate of Final Acceptance” shall be construed accordingly.
“Force Majeure”	means unexpected and unavoidable causes beyond the reasonable control of the Parties and without their fault or negligence, including but not limited to acts of GOD, or acts of or failure to act of any governmental authority, acts of terrorism, war or warlike operations, insurrections or riots, fires, floods, epidemics, quarantine restrictions, freight embargoes and unusually severe weather. Any failure on the part of the Contractor’s Sub-contractors and the Contractor’s to perform their obligations shall not be considered an event of Force Majeure. Lack of funds by the Contractor shall not be considered an event of Force Majeure. Lack of funds or financial failure by the Sub-contractors or their Contractors shall not be considered an event of Force Majeure.
“Information”	means information whether written or oral, including but not limited to documentation, specifications, reports, data, notes, drawings, models, patterns, samples, software, computer outputs, designs, circuit diagrams, inventions whether patentable or not and know-how.
“Intellectual Property Rights”	means any patent, registered design, copyright, design right, semiconductor topography right, know-how, or any similar right exercisable in any part of the world and shall include any applications for the registration of any patent or registered designs or similar registrable rights in any part of the world.
“LIBOR”	means the rate per annum (rounded upwards, if necessary, to the nearest hundredth of one percent) appearing on the Reuters “British Bankers Association Interest Settlement Rates” page as the London inter-bank offered rate for deposits in US Dollars for a term of 30 days at approximately 11:00 A.M. (London time) on the due date for the relevant payment.
“OTN”	means the OTN Switching Equipment and terrestrial transmission equipment located in the Terminal Station and points of presence which provides interconnection to adjacent line segments.
“Party(ies)”	means either the Purchasers and/or the Contractor, as appropriate.
“Performance Bond”	has the meaning set forth in Clause 6 (Performance and Warranty Bonds)

“Permits”	means Purchaser Permits and Contractor Permits, collectively.
“Person”	means any natural person or legal entity.
“Provisional Acceptance”	means the Purchasers grant a Certificate of Provisional Acceptance in accordance with Sub-Clause 17.2.1 of the Contract.
“Provisional Acceptance Date”	has the meaning set forth in Sub-Clause 17.2.1
“Provisional Acceptance Test Results”	has the meaning set forth in Sub-Clause 17.2
“Provisional Acceptance Tests”	has the meaning set forth in Sub-Clause 17.2
“Purchasers”	means, in alphabetical order, the entities that have executed this Contract as the Purchasers as listed in Schedule A (List of Purchasers) .
“Purchaser Permits”	has the meaning set forth in Sub-Clauses 27.2 (Responsibility for obtaining permits and for custom clearance and other formalities)
“Quality Assurance”	means all those planned and systematic actions necessary to provide adequate confidence that a product or service will satisfy the requirements of the Contract.
“Release Certificate”	means a written statement by the Contractor that the Equipment, Segment or the System being submitted to the Purchasers for Acceptance validation has been fully tested in accordance with the Contract requirements and conforms to Contract. In this context the term “Release” shall be construed accordingly.
“Rules”	has the meaning set forth in Clause 43 (Governing Law and Settlement of Disputes)
“Segment”	means: <ul style="list-style-type: none">i) A part of the Cable System between two or more terminal stations nominated by the Purchasers up to and including all the specific terminal equipment for conditioning the signal to line and all the submerged plant and nominated as (please refer to Schedule B: Technical Specifications): Segment S1 <i>[add description]</i> Segment S2 <i>[add description]</i> [.....]. and excluding the Synchronous Digital Hierarchy (“SDH”) terminal equipment.ii) All of the SDH Interconnection Equipment being supplied as part of the System nominated as “SIE Segment” or alternatively all of the OTN Equipment being supplied as part of the System oriii) Only for Provisional Acceptance purposes (or as otherwise specified in Schedule B), Segment means a segment from i) above with the addition of the corresponding part of ii) above necessary for such Segment to be able of being entered into service with complete capability to carry traffic.
“SIE”	means SDH Interconnection Equipment
“Site”	means:

- i) All land and buildings allocated by the Purchasers to the Contractor for the purposes of the Contract;
- ii) All places, including the seabed and foreshore, where the System is installed or to be installed;
- iii) Any cable-ship or other ship used in connection with the Contract.

“Software” shall mean all the computer programmes including but not limited to object code whether in machine readable, optically readable or any other format to be supplied by the Contractor including all licenses whether in writing, in firmware, or in any form necessary for commissioning, operating and maintaining the System and which includes documentation, support tools which are not commercially available.

“Sub-contractor” means any person, partnership or corporation with whom the Contractor places a contract or an order for the supply of any equipment, item, service or for any work, associated with this Contract. In this context the term “sub-contract” shall be construed accordingly.

“Submersible Equipment” means that portion of the Equipment consisting of submersible fiber optic cable and other equipment between, and including, beach joints.

“Survey” has the meaning set forth in Clause 12.3

“System” means the whole of the Cable System provided between and including the System Interfaces at each of the terminal stations at the following locations (same configuration as used for the definition of "Segment"): *[insert locations]*
The detailed configuration of the System is contained in **Schedule B: System Configuration**.

“System Acceptance” means the Purchasers issue a Certificate of Provisional Acceptance for the System.

“System Acceptance Date” means such date as the Purchasers issue a notice that they propose to issue a Certificate of Provisional Acceptance for the entire System in accordance with the Contract and this includes a thirty (30) day period for the Purchasers to complete evaluation of the full test results.

“System Design Life” means twenty-five (25) years from the System Acceptance Date.

“System Interface” means the input and output that shall be at the Digital/Optical Distribution Frame (including the Distribution Frame itself).

“Technical Specification” means the specified design and performance requirements for the entire System as set out in **Part 2** of this Contract

“Terminal Station” means a cable landing station or other facility in which the System or a segment of the System terminates.

“Terrestrial Equipment” means all Equipment other than Submersible Equipment.

“Upgrade” means the addition or replacement of transmission equipment (e.g.SLTE, SIE, or OTN equipment) after System Acceptance by the Contractor or other third party

“Warranty Bond”	has the meaning set forth in Clause 6 (Performance and Warranty Bonds)
“Warranty Period”	has the meaning set forth in Sub-clause 18.1 of clause 18 (Warranty)
“Warranty Repair”	has the meaning set forth in Sub-clause 18.2 of clause 18 (Warranty)
“Work“	means all tasks the Contract requires to be undertaken by the Contractor for the Purchasers

Commentary: The only real discrepancy with the definition of terms (Index of Defined Terms) in the 2010 Model Contract is the definition of Final Acceptance. This is highlighted in the commentary of Clause 17 (Acceptance).

CLAUSE 1 SUBJECT OF THE CONTRACT

1.1 This Contract is for the provision and long term technical support of the System (as fully described in **Part 2: Technical Specifications**), or part thereof (called a “Segment”) in accordance with the requirements of this Contract.

1.2 Where the Contract is for the provision and long term technical support of one or more Segments, but not the entire System, then:

- i) The Contractor acknowledges that it is of fundamental importance to the Purchasers that each Segment is fully compatible with the other Segments of the System so that the System functions as a coherent whole in accordance with the Technical Specifications;
- ii) The Contractor therefore shall ensure that the Segment or Segments to which this Contract relates is compatible with the other Segments which comprise the System.
- iii) The Contractor acknowledges that it may need to pass confidential information and other technical information to the contractors working on the other Segments of the System for the purpose of this Clause.

Commentary: This clause is a succinct statement of the Contractor’s obligations, but it refers to the Technical Specifications which contain a full statement of the requirements for the system to be delivered. The parties may refine the definition of “Work” in the index of defined terms as desired. In the model contract the Contractor has overall responsibility for the design of the system. The parties may include a brief description of the project in this clause, but the Technical Specifications provide a detailed description of the Contractor’s scope of work and the system architecture, including the identification of new technology or systems applications, the standards to which the Contractor should adhere, such as start-of-life or end-of-life performance criteria, or any unique feature about the scope of work being undertaken, including any specific network requirements. The contract typically does not address items to be supplied by the purchaser except to the extent relevant to the Contractor’s performance of its obligations. For example, if the purchaser is to arrange for the construction of the terminal station, the contract should specify relevant details of the terminal station and state by when it must be ready.

This clause corresponds to Clause 1.1”Scope of Work” of the 2010 Model Contract.

CLAUSE 2 APPLICABLE DOCUMENTS

This Contract comprises several documents, which are all integral parts hereof and are mutually explanatory. In case of ambiguity, inconsistency, discrepancy or conflict among any of them, they have the following (descending) order of priority:

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Part 1: General Terms and Conditions of Contract.

Part 2: Technical Specification.

Part 3: Price Schedule.

Part 4: Billing Schedule.

Part 4.5: Option exercise schedule (if necessary)

Part 5: Plan of Work.

Part 6: System Description.

Part 7: Questions & Answers

Commentary: This clause corresponds to Clause 18.9 “Entire Agreement” of the 2010 Model Contract.

CLAUSE 3 RESPONSIBILITY OF THE CONTRACTOR

- 3.1 Contractor shall be fully responsible to supply the System/ Segment (s) and to implement the appropriate warranties in accordance with all the terms and conditions contained in the Contract, including any integration (including SIE or OTN) necessary for the compatibility of the overall System as defined in Clause 1 (Subject of the Contract).
- 3.2 Contractor shall warrant that the Work shall comply with the requirements of this Contract and shall meet the Purchasers' overall performance requirements in accordance with the Contract notwithstanding that **Part 2 (Technical Specification)**, may not fully define every detail of such requirements.
- 3.3 Contractor shall be deemed to have reviewed the Work as a whole and in detail and to have fully satisfied itself of the feasibility and practicability thereof.
- 3.4 Contractor shall provide the System/Segment(s) at the fixed price as set forth in the Sub-Clause **13.1** and detailed in **Part 3 (Price Schedule)**. The fixed price for the System/Segment(s) shall not be varied except as provided for in Clause **12** (Variations During Execution).
- 3.5 In addition to the requirements for the provision of technical information described in the Contract, Contractor shall, upon request, provide the Purchasers with such additional technical information in connection with the Contract as the Purchasers may reasonably require.
- 3.6 The Contractor warrants and confirms that the works, tasks, materials and equipment included in the Work are sufficient for the correct functioning of the System/Segment(s) in accordance with the Contract. If any necessary work, task, material or equipment is omitted in **Part 3 (Price Schedule)**, and consequently in Clause **13** (Contract Price) Contractor shall carry out such work or task or supply such material or equipment at its own cost without any claim being made against the Purchasers.
- 3.7 Contractor shall comply with **Part 5 (Plan of Work)**.
- 3.8 Contractor shall attend at its own expenses such meetings with the Purchaser's representatives at such times and in such locations as may be required by the Purchasers, to discuss the general progress, any other issues relating to any aspect of the Contract and any revision of **Part 5 (Plan of Work)** which may become necessary.
- 3.9 In case of any inconsistency and or discrepancy in the Work, in addition to the provisions of the above Sub Clauses, Contractor agrees that any correction shall be considered to the benefit of the Purchasers or, if cost arise for such correction, at the expense of Contractor.
- 3.10 **Contractor to verify information and documents.** The Contractor shall be deemed to have satisfied itself that it has obtained all necessary information with respect to the Work and the Contract including but not limited to the matters listed below:
- (a) Fees, pilotage and any dues payable to port authorities;
 - (b) Conditions affecting labour including work permits;
 - (c) Rules and regulations of governments and/or port authorities;
 - (d) Permits or approvals to lay the System or part thereof in the Territorial Waters, Exclusive Economic Zones or other claimed waters through which it passes, and the land route through which it passes;
 - (e) Permits related to the environmental impact of the cable laying and burial operations;
 - (f) Permits related to fishermen's areas and other economic activities that may be affected by the cable laying and operation.
 - (g) Rules and regulations covering landing point and cable landing station of local and national governments as well as those of the Landing Point Party.

The Contractor shall be deemed to have fully examined and independently verified the documents referred to Clause 2 (Applicable Documents) hereof and all drawings, specifications, schedules, terms and conditions of this Contract, regulations and other information in relation to the Contract and to have obtained and fully understood and satisfied itself as to all information which is relevant as to the risks whether political or otherwise, contingencies and other circumstances which could affect the Contract, and in particular the laying of the cable. The Purchasers, their servants and agents and all of them shall have no liability in Contract, tort or under any other cause of action with respect to any such information, risks, contingencies or other circumstances.

Commentary: Some parts of this clause corresponds to Clause 1.1 “Scope of the Contract” of the 2010 Model Contract. It defines key responsibilities of the Contractor and the relationship of these Terms and Conditions with the other key Parts of the Contract (Technical Specifications, Price Shedule, Plan of Work).

CLAUSE 4 TECHNICAL REQUIREMENTS

The Work shall comply with the requirements of Part 2: Technical Specifications but the Purchasers and the Contractor may mutually agree to make such alterations as may be considered necessary during the execution of the Contract and in accordance with Clause 12 (Variations During Execution).

Commentary: This clause corresponds to Clause 1.1 “Scope of the Contract” of the 2010 Model Contract.

CLAUSE 5 COMPLETION DATE

- 5.1 Contractor shall cause the requirements for issuance of a Provisional Acceptance Certificate to be met [___] months after the fulfilment of the Condition precedent to Contractor's obligations defined in Sub-Clause 4.1.2.
- 5.2 The Completion Date will be extended by an equitable number of days in case of suspension of the Contract, in accordance with Sub-Clause 11.3

Commentary: This clause corresponds to Clause 1.7 “Completion date” of the 2010 Model Contract. The completion date is linked to the fulfilment of a condition for the Contractor to start the work. Such condition is typically the payment by the Purchasers of the down payment defined in Sub-Clause 15.2. In addition to the case of suspension mentioned in Sub-Clause 5.2, the completion date may also be extended by mutual agreement in some cases of contract variations (See sub-clause 12.2 and 12.4) and in some cases of Force Majeure (sub-clause 20.2 and 20.3).

CLAUSE 6 PERFORMANCE AND WARRANTY BONDS

- 6.1 **Performance Bond.** To secure the performance of its obligations until the Provisional Acceptance, Contractor shall, within [___] days after Contract signature, cause a prime international bank, surety, insurance company or other financial institution acceptable to the Purchasers to issue an irrevocable and unconditional performance or surety bond or insurance policy substantially in the form of **Appendix 1 (Performance/Warranty Bond)** in the amount of [___]% of the Contract Price (the “**Performance Bond**”) in favour of Purchasers. The Performance Bond must be valid until the anticipated date of issuance of the Certificate of Provisional Acceptance or the Warranty Bond whichever occurs the latest. In the event that the Performance Bond is to expire before the effective Provisional Acceptance Date, the Contractor shall renew or extend the Performance Bond, within [___] days prior to its expiry, until the newly anticipated Provisional Acceptance Date.

6.2 Warranty Bond. To secure the performance of its warranty obligations from the Provisional Acceptance to the Final Acceptance, Contractor shall, within [] days prior to the issuance of Certificate of Provisional Acceptance, cause a prime international bank, surety, insurance company or other financial institution acceptable to the Purchasers to issue an irrevocable and unconditional performance or surety bond or insurance policy substantially in the form of **Appendix 1 (Performance/Warranty Bond)** in the amount of []% of the Contract Price (the “**Warranty Bond**”) in favor of Purchasers. The Warranty Bond must be valid until the anticipated date of issuance of the Certificate of Final Acceptance.. In the event that the Performance Bond is to expire before the effective date of issuance of the Certificate of Final Acceptance, the Contractor shall renew or extend the Warranty Bond, within [] days prior to its expiry, until the revised date of issuance of the Certificate of Final Acceptance.

Commentary: A performance bond equal to the down payment or to some percentage of the purchase price is a fairly standard purchaser request and should be issued by a financial institution that either is satisfactory to the purchaser or has a specified minimum credit rating, for example, investment grade. This clause could be revised to allow the Contractor to provide successive performance bonds, in each case before the expiration date of the first or any subsequent bond, as the case may be. Since the purchase price will reflect the cost to the Contractor of putting a performance bond in place, the purchaser may wish to consider, on the basis of “due-diligence” investigations as to the Contractor’s financial condition, whether to require a performance bond at all and, if so, in what amount.

A warranty bond is also a fairly standard purchaser request and should be delivered in the same way as the performance bond. It may be appropriate for the value of the bond to fall at the expiry of the warranty in respect of terrestrial equipment and expiry of the Contractor’s liability for ship costs. However, from the perspective of the Purchasers, it should be noted that the term “Warranty bond” may be misleading because it does not automatically expire with the end of the warranty period but with the issuance of the final acceptance certificate. A more appropriate term may be a “Final Acceptance bond”.

This clause corresponds to Clause 1.3 “Performance Bond” and Clause 9.9 “Warranty Bond” of the 2010 Model Contract.

CLAUSE 7 QUALITY ASSURANCE

- 7.1 The Contractor and its Sub-contractors shall permit the Purchasers or their designated representatives to carry out the following Quality Assurance activities:
- a) To audit the Contractor's and Sub-contractors quality assurance system and its application to the Work, including, without limitation, manufacture, development, and raw materials and components provision;
 - b) To inspect all parts of the Work to the extent reasonably practicable to ensure that their quality meets Part 2 (Technical Specification).
- 7.2 At any time during manufacture and installation, if any part of the Work does not, or will not, comply with the Contract; the Purchasers may reject the same. Upon rejection the Contractor shall forthwith, at its own expense, rectify the non-compliance in accordance with **Part 2 (Technical Specification), Part 6 (System Description) and Part 7 (Questions & Answers if applicable)** and no additional costs shall be made to the Purchasers in respect thereof. The Contractor shall bear the direct cost, including the Purchasers' participation, of additional Quality Assurance activities caused by major non-conformance of the Contractor.
- 7.3 No part of the System/Segment(s) shall be shipped until a Release Certificate has been issued by Contractor in accordance with **Part 2 (Technical Specification)** and accepted by the Purchasers.
- 7.4 Any certification given by or on behalf of the Purchasers in respect of any aspect of the Work carried out or proposed by the Contractor, or in respect of any part of the System/Segment(s) shall not relieve the Contractor of any responsibilities under the Contract relating to the performance of the System under Clause 3 (Responsibility of the Contractor) and the specific requirements set forth in **Part 2 (Technical Specification)**.

- 7.5 The Purchasers shall at all reasonable times have access to the Work, and the Contractor shall provide appropriate facilities for such access and for the purpose of inspection and testing. The Purchasers shall also have full access to all plants, offices and work sites of the Contractor and any of its sub-contractors, to enable the Purchasers to inspect the Work and monitor progress. The Contractor shall include in its sub-contractors such provisions as may be necessary to secure this right on behalf of the Purchasers. The Purchasers shall have the right to establish resident representative(s) at the Contractor's and Sub-contractor's plants and at all work sites, and the Contractor shall, if required, make suitable office space, facilities and shipboard accommodation available for such representative(s) at its own expense.

Commentary: The Contractor may wish to have unlimited access to the sites so that it can perform work at all times of day with a view to completing the project on time, but local rules may prevent access to some locations outside of ordinary business hours, which vary by country and location. To comply with such rules, the purchaser may wish to impose an obligation on the Contractor to give reasonable prior notice of each site visit, including anticipated dates and times and the names of the Contractor's personnel who will be performing the work.

The purchaser may wish to have unlimited access to the sites where the Contractor is performing the work for the purpose of auditing and inspecting the work. The purchaser may also wish to have similar access to the Contractor's own premises, but the Contractor's ability to grant such access may be limited. For example, the Contractor may be subject to limitations imposed by existing contracts with other purchasers or by governmental authorities, such as when the Contractor is an approved Contractor under military contracts. The requirements for the purchaser's access to the Contractor's sites for inspections that may be necessary to ensure adherence to the agreed quality plan are usually dealt with in some detail in the quality-assurance chapter of the technical specification.

If local law requires government officials to be on board the vessel during marine operations, the parties may wish to add language to address the issue of cabin accommodation for such officials.

This clause corresponds to Clause 5 "Access to sites; Inspections" of the 2010 Model Contract.

CLAUSE 8 DAMAGE TO THE SYSTEM BEFORE SYSTEM ACCEPTANCE

- 8.1 This Clause applies to all damage (which in this Clause includes destruction and loss) arising from any cause whatever, including Force Majeure.
- 8.2 The System shall stand at the risk of and be in the sole charge of the Contractor from the signature of the Contract up to the date of issuance of the Certificate of Provisional Acceptance. During this period, the Contractor shall, at reasonable possible speed, remedy to the Purchasers' satisfaction in accordance with the requirement of the Contract any damage occurring to the System. Notwithstanding such damage, the Contractor shall proceed with the execution and completion of the Work in accordance with the Contract, subject to any extension of time for completion agreed under Clause 20 (Delay in System Completion) hereof, and apart from the granting of extension of time to the Contractor, the Purchasers shall not be liable to the Contractor in damages or otherwise arising therefrom.
- 8.3 The cost of remedying such damage during this period shall be wholly borne by the Contractor and subject to Purchasers acceptance. Moreover, the execution and delivery of the System in accordance with this Contract and which may be subject to any extension of time for completion shall be in accordance with Clause 20 (Delay in System Completion).

Commentary: This clause has no equivalent in the 2010 Model Contract. The fundamental principle underlying this clause is that the System belongs to the Contractor until the Provisional Acceptance Certificate is issued.

CLAUSE 9 INJURY TO PERSONS AND DAMAGE TO PROPERTY

- 9.1 This Clause applies to all claims, losses, expenses and damages for:
- a) Injuries to or death of any persons; and
 - b) Damage to property, other than the System;
- which result directly from the activities of the Contractor, its Sub-contractors, or agents in the execution of the Contract.
- 9.2 The Contractor shall be liable for all claims, losses, expenses, and damages described in Sub-Clause 9.1 above, and shall indemnify and save the Purchasers harmless from all such claims, losses, expenses and damages.
- 9.3 The Purchasers shall:
- a) Provide written notice to the Contractor of all such claims and suits upon the Purchasers becoming aware thereof;
 - b) At their own discretion permit the Contractor to assume the sole defence of and to settle such claims or suits, and shall, upon the Contractor's request and at the Contractor's expense, furnish all information and reasonable assistance to assist the Contractor in the defence or settlement of the same.
- 9.4 .Contractor shall indemnify Purchaser against all losses and liabilities for environmental damage directly caused by Contractor, its Subcontractors or agents, in its performance of this Contract.

Commentary: This clause corresponds to Clause 11.1 “Personal Injury, Death and Property Damage” and Clause 11.2 “Environmental Damage” of the 2010 Model Contract.

CLAUSE 10 INSURANCE

- 10.1 **Contractor's Obligations.** Contractor shall, during the performance of the Work, maintain insurance of such types and in such amounts as are required by applicable law or as is otherwise customarily maintained by turnkey suppliers of fiber optic submarine cable systems, including, at a minimum, the insurance described in **Schedule 7**, but Contractor may organize such levels of deductibles, excesses and self-insurance as it considers appropriate, within prudent industry standards. Upon Purchaser's request, Contractor shall furnish Purchaser with certificates, or other reasonable evidence, of insurance required to be maintained under this Sub-Clause 10.1. If Contractor fails to furnish such evidence of any such required insurance within a reasonable time after receiving Purchaser's request, Purchaser may obtain substitute insurance and charge Contractor for the cost of such substitute insurance. Should Contractor fail to make the payment within [] days of receipt of request for such payment, Purchasers may then deduct the amount of the requested payment from any monies that are, or may become due to Contractor, or recover the same as a debt due from Contractor. Contractor shall comply with all terms and conditions and guarantees contained in all policies affecting the foregoing insurance and shall ensure that its insurance brokers and/or insurers give to the Purchasers such information in relation thereto which may be relevant to such insurance as the Purchasers may reasonably request.
- 10.2 **Claims.** Each party shall promptly notify the other party and its insurer of any loss covered by any of the insurance to be maintained under this Contract, accompanied by full details of the circumstances giving rise to such loss, and shall assist the other party as may be necessary for the preparation and negotiation of related insurance claims.
- 10.3 Without limiting its obligations and responsibilities, the Contractor shall, prior to the commencement of any work, insure to cover its liabilities throughout the Contract at its own expense and in the joint name of the Purchasers and the Contractor as the insured and as a minimum shall purchase the following cover:

- (a) (i) The Work and any work in progress of every kind required for the execution, testing and completion of the Work including, but not limited to, the completed item to the full value of such Work and any work in progress executed from time to time.
- (ii) All appliances, instruments or things of whatsoever nature required in or pertaining to the execution, testing and completion of the Work, constructional plant, the materials and other things brought on to the Site by the Contractor to the full value of such constructional plant, materials and other things,
- against all losses or damages from whatever cause in respect of all risks including, but not limited to, marine cargo (Note 1), sea bed (Note 2) and war risks (Note 3) arising for which the Contractor is responsible under the terms of the Contract and in such manner that the Purchasers and the Contractor are covered during the period of construction of the Work,
- (b) Against any damage, loss or injury which may occur to any property (including that of the Purchasers) or to any person (including any employee of the Purchasers or agents) as a result of the execution of the Work or temporary work, and
- (c) Against damages or compensation payable under statute or at law in respect, or in consequence of any accident, or injury to any person in the employment of the Contractor or any Sub-contractor, and the Contractor shall indemnify and keep indemnified the Purchasers against all such damages, compensation, claims, demands, proceedings, costs, charges and expenses, whatsoever in respect thereof at its own expenses.

The total prices contained in **Part 3 (Price Schedule)** shall include any premium amounts paid or to be paid by the Contractor for the insurance coverage hereabove stated.

Note 1 Marine Cargo or equivalent coverage is required to protect against all risks of physical loss or damage to the cable, repeaters, branching units, terminal equipment and other equipment to be included in the System (other than War Risks) beginning with the date when each such equipment is ready for shipping and ending when the cable, repeaters and branching units are placed over-side the cable laying vessel and when the terminal equipment is delivered to the Terminal Stations.

Note 2 Sea Bed or equivalent coverage is required to protect against all risks of physical loss or damage to the equipment described in **10.1** (other than War Risks) from the time coverage under **10.1** ends until System Acceptance.

Note 3 War risks or equivalent coverage is required to protect against damage to, seizure by and/or destruction of the System by means of war, piracy, takings at sea and other warlike operations until the issuance of the Certificate of System Acceptance.

Commentary: The parties should seek advice from their own insurance departments or brokers as to the types and amounts of insurance to be obtained. For example, the purchaser will usually wish to be made an additional insured under some or all of the Contractor's policies. If the purchaser obtains insurance relevant to the performance of the contract, the Contractor may wish to be made an additional insured under some or all of the purchaser's policies.

This clause corresponds to Clause 13 "Insurance" of the 2010 Model Contract.

CLAUSE 11 SUSPENSION

- 11.1 Purchaser may, at any time, by notice to Contractor, direct Contractor to suspend performance of all or part of the Work for up to [] consecutive months for any single suspension, and up to [] months in the aggregate for all such suspensions.
- 11.2 If, as a result of such suspension of Work, the Contractor incurs additional costs, or suffers loss in the discharge of its responsibilities under the Contract, then the Contractor shall be allowed to recover an amount equal to the costs and/or losses from the Purchasers, provided that:
- a) Such costs or losses could not have been reasonably prevented by the Contractor,
 - b) The Contractor submits a detailed claim for such costs or losses, supported by sufficient evidence to enable it to be validated, and
 - c) The suspension was not caused by the default or negligence of the Contractor.
- 11.3 The Contractor shall be allowed an equitable extension in the time required for performance of any suspended work, or such longer or shorter period as may be mutually agreed, provided that the suspension was not caused by the default or negligence of the Contractor.
- 11.4 In case of suspension, the Contractor and the Purchasers will meet, examine and agree the best way forward to move ahead with the project.
- 11.5 If to prevent incurring costs, the Contractor has to take measures, such as vessel demobilization, that have a significant impact to the performance of the Contract, in particular its achievement of the Provisional Acceptance Date, then the Contractor shall provide the Purchasers with detailed analysis of the cost and delay impacts of all alternatives and agree with the Purchasers on the selected alternative.
- 11.6 To be clear, a notice of Force Majeure regardless of whether it was issued by the Contractor or the Purchasers shall not be considered as a suspension and will not entitle any of the Parties to claim for additional costs.

Commentary: This clause corresponds to part of Clause 14 “Suspension/Termination” of the 2010 Model Contract.

Generally, Purchasers will not agree to the Contractor having the right to suspend the contract, let alone the right to terminate for the lack of payment by one of the Purchasers.

The fundamental reason is that Purchasers do not want to sign a contract which includes joint and several liabilities for many reasons, practical as well as legal, in any respect. In case a Purchaser is late in payment, consortia require the Contractor to take action to recover the debt, including late interest charges, from the defaulting purchasers directly, without impact on other purchasers. This is expressed in sub-clause 15.1 (Responsibility of payment).

On the other hand, the Contractor will typically request reciprocity of the suspension right, so the matter may be subject to complex negotiations before contract award. The position of suppliers is well reflected in clause 14.4 (Suspension by supplier) of the 2010 model contract.

Between both positions, a limited suspension right in favour of the Contractor could be triggered beyond a minimum threshold of default payments, the amount of suspendable work being determined by the aggregate amount of undisputed unpaid invoices, and the choice of the suspendable work being made with the agreement of the purchasers.

In practical projects, if such suspension right is present in the contract, the Contractor will very rarely use it and he will rather spend a lot of time and effort to find a solution with the purchasers. Conversely, in the suspension right is not present in the contract, the consortium

of Purchasers have ways of convincing the defaulting Purchaser to remedy the situation through the Consortium and Maintenance Agreement signed between all Purchasers.

Apart from the right to suspend, the Contractor has other ways to alleviate the risk of not being paid, such as:

- requesting payment guarantees from the purchasers which the Contractor rates as financially vulnerable. Typical tools for payment guarantees are bank letters of credit;*
- taking a stake in the system, thus becoming a member of the consortium, the ultimate goal being to resell its stake to a new incoming party. This boils down to vendor financing.*

CLAUSE 12 VARIATIONS DURING EXECUTION

***Commentary:** Purchasers in a consortium generally, consider it useful to add a clause on contract variations to provide for a pre-agreed pricing mechanism for variations (e.g., same unit prices as in the provisioning schedule or, if there is no relevant unit price in the provisioning schedule, reasonable prices). They purchasers also generally wish to provide for the possibility of directing the Contractor to make certain changes to the work, such that the Contractor must carry out the purchaser's directions (cf. sub-clause 12.2) Contractors will usually want to limit such a clause to changes that are technically feasible, do not require an extension of time for performance or readjustment of the plan of work and would not increase or decrease the contract price by more than a certain percentage of the initial contract price.*

As a whole, this Clause 12 corresponds to Clause 1.5 "Contract subject to survey", Clause 1.6 "Changes to Plan of Work" (Page 4), Clause 3.1 "Configuration Options" and Clause 3.2 "Extension Options" of the 2010 Model Contract.

12.1 Contract Variations: Any variation of the Work shall be subject to the signature of an amendment to this Contract, also called a Contract Variation. The Purchasers and the Contractor may mutually agree on any Contract Variation.

12.2 Contract Variation requested by Purchasers: Notwithstanding the provisions of the above, the Purchasers may instruct the Contractor to vary the Work in the form of a project change notice, in the format attached in Appendix 4 (Model of Project Change), provided that such variations do not in total increase or diminish the Contract Price by more than xx per cent (xx%).

The effect of such variations on the Contract Price will be determined as follows:

- If the variations concern only quantities of equipment or services for which a unit price or rate is indicated in **Part 3 (Price Schedule)**, the unit price or rate as the case may be shall be applied to Clause **13** (Contract Price).
- If the subject of the variations is not covered by a unit price or rate in **Part 3 (Price Schedule)**, the Contractor shall satisfy the Purchasers that the proposed adjustment is fair and reasonable and shall provide such evidence as the Purchasers may reasonably require to this end.

Contractor and Purchasers shall agree on any modification of the Plan of Work (Part 5) required by such project Change,.

Contract and Purchasers shall sign a Contract Variation to formalise the modifications of the Price Schedule (Part 3) and/or the Plan of Work (Part 5)

12.3 Contract Subject to Survey and to Cable Lay

- 12.3.1 As described in the Technical Specifications (Part 2) of this Contract, Contractor shall conduct a detailed survey of the route on which the Cable Route Estimate is based (the "Survey") and, after completion of the Survey, shall deliver the results of the Survey ("Survey Report") to the Purchasers, including a route position list and a straight-line diagram, the expected variations of quantities of the wet-plant equipment, changes in installation methodology and burial requirements. After the Survey Report has been agreed by the Purchasers, it will form the basis for the remaining Work of the Contract.
- 12.3.2 When the laying operations have been completed, the Contractor shall submit the Cable Lay Report, including the detailed account of the variations of quantities of the wet-plant equipment (including cable type, cable length, repeaters, land-cable, joints, etc). Contract and Purchasers shall sign a Contract Variation to formalise the modifications of the Price Schedule (Part 3) required by such variations of quantities. For avoidance of doubt, marine operations services are subject to a fixed price and therefore are not subject to such quantity variations. The variation to the Price schedule are subject to the following rules:
- a) The unit prices shall be applied to the varied quantities of equipment
 - b) Any net increase beyond [__] per cent of the Contract Price as a whole shall be borne by the Contractor,
 - c) Any net decrease in price due to change in cable lengths and or cable types over the System as a whole shall be credited to the Purchasers.

Commentary: The process of defining the cable route involves several steps, which may include a desk-top study, a cable route study and a route survey. The technical specification usually describes this step in the Contractor's scope of work, in considerable detail. Sub-clause 12.3 is based on the assumption that the purchaser has already performed a desk-top study on the basis of which it has produced the cable route estimate to be included in the technical specification. If the cable route encompasses everything between the terminal stations, the route survey will necessarily include land-based and marine sections. On the completion of a marine survey it may be necessary to change cable types and lengths, and the ship days for installation. All these components and services should be itemized in the provisioning schedule, and the contract may provide a mechanism for agreeing and recording any changes. The purchaser may wish to state explicitly in this clause that any input from the purchaser at the review of the marine-survey report will not affect the Contractor's overall responsibility for the design of the system. The plan of work usually provides for an engineering period following the submission of the survey report and ending on the date by which the parties expect to agree on a contract variation to document any needed changes. New or more detailed information as to permitting requirements often come to light during the survey. The parties may, therefore, also wish to include the anticipated duration of the permitting process in the plan of work and revise it to take account of any such information. There are, however, a number of alternative approaches to cover the uncertainties inherent within a survey. This model is based upon the Contractor undertaking the Survey and agreeing to a maximum additional payment allowable because of route variation after completion of the lay. As an alternative a purchaser might prefer to have the survey performed under a separate contract before entering into the supply contract. This approach may eliminate some of the uncertainty inherent in a supply contract that is "subject to survey," but the parties will have to consider how to allocate the risk of nonconformity of the survey results to the actual seabed and other route conditions at the time of survey and the risk of changes in such conditions that may occur after the survey and before installation. Unless the Contractor is responsible for performing the survey, it will probably expect the purchaser to bear the risk of inaccuracies in the survey results. Surveying and the resultant need to change cable lengths and types and ship days for installation is a complex area with a

degree of risk involved, especially where a proposed cable route will be going through areas where limited existing survey information is available or where it is already known that the seabed conditions will be difficult. The final agreed approach will most likely therefore be subject to individual contract negotiation as essentially this whole area concerns the management of risk and defining where the cost penalties or cost benefits lie.

12.4 Changes to Plan of Work.

12.4.1 Contractor shall not make changes to the Plan of Work without Purchaser's prior written consent.

Notwithstanding the preceding sentence, Contractor may, at any time, by notice to Purchaser, make changes to the Plan of Work as long as such changes do not:

- extend the Completion Date;
- unnecessarily increase the risk of non-performance of Contractor's obligations;
- increase the Contract Price;
- increase Purchaser's costs or burdens under this Contract; or
- have a material adverse impact on Purchaser.

12.4.1 Purchasers may request by notice to Contractor a modification of the Plan of Work due to delays encountered in obtaining permits or in delivering beach manholes, at no cost and subject to a [] months notice before the relevant "Ready to Load" milestones of the contractual Plan of Work.

12.4.2 Purchaser may request by notice to Contractor a modification to the Plan of Work due to delays encountered in delivering the Terminal Stations, at no cost and subject to a [] months notice before the dispatching of the relevant station equipment.

12.4.3 In both Sub-Clause 12.4.1 or 12.4.2, the Contractor and Purchaser shall agree in writing on the new Plan of Work including an equitable extension of the Completion date.

12.5 Options. For any Option listed in the Option Exercise schedule, not later than the date listed in such Schedule, Purchaser shall notify Contractor whether it chooses such Option or not. If Contractor has not received the notice referred to in the preceding sentence within the time specified therein, then the Purchaser will be deemed to have irrevocably waived such Option, unless the Parties have agreed on an extension of time for the exercise of the Option. Contractor and Purchasers shall sign a Contract Variation to formalise the exercise of options.

Commentary: Unlike the 2010 model, Sub-Clause 12.5 does not make a distinction between configuration and extension options.

CLAUSE 13 CONTRACT PRICE

13.1 Contract Price

The Contract Price payable by the Purchasers to the Contractor for the full and proper performance of the Work is **[USD] [Amount] (DDU)**.

The breakdown of the Contract Price is given in **Part 3 (Price Schedule)** and is fixed and shall not be varied except as provided in Clause 12 (Variations During Execution).

13.2 Taxes, Levies and Duties

13.2.1 The Contract Price shall include all taxes, duties, levies and fees that may be imposed or levied in connection with the Work, whether in the country of the Contractor, the Purchasers' countries, or any other country. Taxes incurred by the Contractor in the countries of the Purchasers in respect of his personnel and Sub-contractors including but not limited to business income tax, income tax, pay-roll tax and other taxes, contributions and levies that may be levied on the Contractor or the personnel, local agent or site office of the Contractor

13.2.2 shall be borne by the Contractor except customs duties, import taxes, VAT/GST or similar taxes, relating to the Contract items.

13.2.3 The Purchasers shall be responsible for the payment of appropriate customs duties, import taxes, VAT/GST or similar taxes, relating to the Contract items to the authorities in their countries. However, if the Contractor is required to pay such it will be reimbursed by the Purchasers in the Contract currency (in case of payment of such taxes in other currency, by applying the conversion rate used upon importation or original tax payment):

- a) Within sixty (60) days after the receipt of the invoices by the CBP supported by appropriate documentation; this invoicing will take place once upon or after the issuance of the Certificate of Provisional Acceptance; or
- b) When required by the applicable laws in the Purchasers' countries.

The Contractor shall, if required, provide the tax and billing documentation to allow the Purchasers to be compliant with the international and local tax laws and regulations.

13.2.4 The Contractor shall use its best endeavours to have all supplies made exempt from all taxes, custom duties or other applicable levies, fees, charges and duties related to the importation or installation in the Purchasers' countries.

13.2.5 Notwithstanding the above, should the Purchasers become aware of any areas of exemption from the above referenced taxes, duties, levies or charges, then the Purchasers shall identify these areas to the Contractor.

13.3 Change of law

Change of any law except those affecting the customs duties, import taxes, VAT/GST or similar taxes, relating to the Contract items shall not affect Clause 13 (Contract Price). In any case, the Contractor shall not claim ignorance of the laws and regulations of each Purchaser's country concerning this provision.

13.4 Withholding tax

The Contractor shall be responsible for any tax that might be incurred by the Contractor in the Purchasers' countries as a result of incomes or revenue obtained by the Contractor arising from and/or in connection with the present Contract. If withholding taxes are payable in the Purchasers' countries, the Purchasers shall withhold such sums from the Contractor taking into account the bilateral fiscal agreement between Purchasers' and Contractor's countries to avoid double taxation and pay to the relevant authorities in accordance with the applicable laws.

Within 30 days of the payment of the withholding tax from the Purchasers to the relevant authorities, the Purchasers shall issue the evidence or certificate of the payment of such withholding tax to the Contractor.

Commentary: The parties should seek advice from their own tax advisers, taking into account the jurisdiction or jurisdictions where the purchaser and Contractor are based and the jurisdiction or jurisdictions where the system is to be manufactured and installed.

This clause corresponds to Clause 1.4 "Contract Price; Invoicing and Payment" (Page 2) and Clause 7 "Taxes" of the 2010 Model Contract.

CLAUSE 14 ASSIGNMENT AND SUB-CONTRACTED WORK

14.1 **By Contractor.** Contractor may not assign its rights under this Contract without Purchasers prior written consent. Contractor may subcontract the Work to any of the Persons listed in **Appendix 3** but remains liable to Purchaser for all such subcontracted Work. Except as provided in the preceding sentence, Contractor shall not subcontract or delegate its duties under this Contract without Purchaser's prior written consent, which must not be unreasonably withheld or delayed.

14.2 **By Purchasers.** Any Purchaser may assign its rights under this Contract.

14.3 Successors and Assigns. This Contract is binding upon and inures to the benefit of the parties' respective successors and assigns.

Commentary: This clause corresponds to Clause 16 "Assignment and delegation" of the 2010 Model Contract. Contractor may require reciprocity in the right to assign, however the contractor/purchaser relationship is inherently non symmetrical and reciprocity may not be appropriate. However, in case a Purchaser has agreed at contract signature to provide a bank guarantee, but later during the execution of the project decides to make use of its assignment right, Contractor may want to oppose such assignment if no alternative bank guarantee is provided by the assignee.

CLAUSE 15 TERMS OF PAYMENT

15.1 Responsibility for Payment

The financial liability of each of the Purchasers for payments to the Contractor for the Work to be performed in accordance with the Contract shall be limited to their respective portion of the total Contract price as detailed in **Schedule C: Liability of Purchasers** (in percentage).

No individual Purchaser will be liable to the Contractor in any way whatsoever for payments defined as the responsibility of another Purchaser.

In the event that one or more of the Purchasers defaults in making payments to the Contractor in respect of this Contract, the Contractor shall only make efforts to recover the portion of such default payment from the defaulting Party(ies) , and shall not for that reason interrupt performing the Work as scheduled in the Contract.

Commentary: This provision is specific to consortium cable projects in which the Purchasers make it a matter of principle that their liability be several and not joint. Consortia want to protect themselves from financial liability in case one of their members defaults and to minimise the overall impact to the system. On the other hand Contractors will be limited in their response, if they cannot for instance suspend the work or take some other form of defensive action. For a Contractor to take on such a risk, depending upon who are the members of the purchasing consortium may have some cost penalty to all purchasers. But in practice, consortium that have to handle such problems make their best efforts for the CBP to continue timely payments to the Contractor.

15.2 Invoicing and Payment.

Contractor shall bill Purchasers through the Central Billing Party (CBP) for instalments of the Contract Price in accordance with Part 4 (Billing Schedule), not earlier than the date set out in such Billing Schedule, not more than once every [] months and the billing date shall be the []-th day of the month. Purchaser shall pay the down payment within [] days after the date of signature of this Contract and, except as otherwise provided in this Contract, all other instalments within [] days after receiving the applicable invoice.

Invoices will be deemed accepted by Purchaser unless Purchaser notifies Contractor of any objection within [] days after receiving the applicable invoice. If any such objection relates to only part of an invoice, the undisputed portion of the invoice will be deemed accepted by Purchaser, and Purchaser shall pay such undisputed portion as and when due. If and to the extent that a disputed amount is agreed by Contractor and Purchasers to have been properly invoiced, it will be due [] days after Contractor's and Purchasers' agreement. If Purchasers fails to pay any amount when due under this Contract, then such amount will bear late-payment interest from the due date until the date of payment at a rate equal to LIBOR plus [] percentage points.

15.3 Billing and Payment Procedures

- 15.3.1 Invoices shall be submitted in an format agreed by Contractor and Purchasers.
- 15.3.2 The Contractor shall render all invoices together with supporting documents to the Central Billing Party (CBP). The address of the CBP is:
[Address to be inserted]
- 15.3.3 All payments to the Contractor shall be made by the CBP on behalf of the Purchasers.
- 15.3.4 All amounts due to the Contractor in respect of this Contract shall be paid in the name of **[Contractor's Name]** to the following Bank Account:
[To be inserted]

Commentary: Purchasers expect the billing schedule to provide for billing of installments upon the achievement of predetermined milestones in the performance of the work. With such billing milestones, purchasers wish to specify a calendar date for each milestone before which the Contractor may not issue its invoice even if it meets the billing-milestone criteria earlier than expected. The number of days within which an invoice must be paid is negotiated to conform to the parties' billing systems. This clause also provides for the purchaser to dispute part of or the entire invoice and for a rule for calculating late-payment-interest. In this model contract involving a consortium of purchasers, one of them typically acts as the central billing party, to which the Contractor submits all its invoices. Finally, purchasers expect that their liabilities are not joint but only several.

15.4 Guarantee against payment

- 15.4.1 The Contractor shall, at least [] days before each payment is due, deposit a Letter of Guarantee Against Payment for the amount of each such payment to be made by the Purchasers to the Contractor.
- 15.4.2 Such Letter of Guarantee Against Payment to be issued in accordance with the format given in Appendix 2 (Model of a Letter of Guarantee Against Payment) shall remain in force until the issuance of a Certificate of Provisional Acceptance or the settlement of all claims arising from termination of the Contract in accordance with its Terms and Conditions.
- 15.4.3 In the event of default by the Contractor in carrying out its responsibilities under the Contract, or of frustration of the Contract by law for any reason, the Purchasers will have the right to call in the amount represented by the Letter of Guarantee Against Payment in accordance with the terms of such Bond.
- 15.4.4 The invocation of the Letter of Guarantee Against Payments shall not limit the rights of the Purchasers to take such actions to enforce any remedies that are otherwise included in the Contract.
- 15.4.5 No payment shall be due from the Purchasers before the submission by the Contractor of such Letter of Guarantee Against Payments.

Commentary: Until the Provisional Acceptance Date, which is the date when the title passes to them, the Purchasers need a tool like the Guarantee against Payment to enable them to recover the money spent in the event there is a major problems in the execution of the project. However the Contractor is usually reluctant to accept such a financial burden with 100% of the Contract Price being subject to financial guarantees.

15.5 Deductions from Contractor's Monies

- 15.5.1 All direct losses, costs, charges and expenses which the Purchasers incur as a result of the Contract's failure to perform the Contract together with any sum or sums payable to the Purchasers as liquidated damages may be deducted from any moneys that are, or may become due to the Contractor, and if the moneys so due shall be less than the amount so deductible, the amount of the deficiency shall be a debt recoverable by the Purchasers
- 15.5.2 A certificate signed by the Purchasers stating the amount of the losses, costs, charges, expenses and damages referred to in the Sub-Clause 15.5.1 shall be verifiable evidence of such amounts.

Commentary: As a whole, clause 15 corresponds to part of Clause 1.4 "Contract Price; Invoicing and Payment" of the 2010 Model Contract.

CLAUSE 16 TRANSFER OF TITLE

- 16.1 **Title to Equipment.** Title to the Equipment (excluding Software) will pass to, and vest in, Purchaser on the date of signature of the Certificate of Provisional Acceptance. Upon transfer of title to Purchaser, the Equipment must be free from valid liens, security interests and/or other encumbrances.

The transfer of title shall not absolve or release the Contractor from its other obligations and liabilities under the Contract.

- 16.2 **License to Use System Software.** Effective upon passing of title to the Equipment, Contractor grants to Purchaser a nonexclusive, irrevocable, royalty-free license, in all countries where the System is deployed, to use the software embedded in or provided with the Equipment ("**Software**") solely for the operation and maintenance of the System, including the right to make a reasonable number of copies for back-up purposes. This license entitles Purchaser to use the Software only with the Equipment. Contractor shall provide the Software to Purchaser in machine-readable format only. Purchaser shall not decompile the Software or modify its source code or attempt to do so. Notwithstanding anything in this Contract to the contrary, Contractor does not warrant that the Software is error-free. For the duration of the Warranty Period Contractor shall, at its own expense, endeavour to correct any reproducible errors occurring in the Software by providing a workaround, patch or new release of the relevant Software. Contractor's obligations in the preceding sentence do not apply to any Software that has been modified other than as specifically authorized by Contractor in writing. Purchaser is not acquiring, and nothing herein is to be deemed to transfer to Purchaser, any right, title or interest in or to the Software other than the license granted in this Sub-Clause 16.2.

Contractor represents that it has obtained the right to grant to Purchasers the licence granted in this section from any third party owning intellectual property rights in any part of the Software.

Commentary: Purchasers typically expect that title passes to them at the date of provisional acceptance. This is common practise but the 2010 Model mentions an alternative date for transfer of title, the date of payment of all but the final instalment of the contract price. This does not however preclude the system's being placed into commercial service (see sub-clause 17.3).

This clause corresponds to Clause 8 "Title" of the 2010 Model Contract.

CLAUSE 17 ACCEPTANCE

Commentary: These sub-clauses deal with major steps in the acceptance process, which are key events in the plan of work and can be typically linked to billing milestones. There will however be a range of equipment and other acceptance tests and demonstrations, whose criteria and acceptance limits will flow down from the overall system design and specification. These will all need to be identified and included in the relevant technical specification with the pre-acceptance conditions and allowable deficiencies identified before testing for Provisional Acceptance can begin. The technical specifications should include detailed testing procedures and document deliverables, and the purchaser will typically want both the technical specification and the plan of work to allow for its own testing, in which case the methodology and timescales for this would normally be subject to contract negotiation because of timescale and responsibility implications and the agreed results incorporated into the technical specifications. With new technology it is unlikely that the test specifications will be fully defined at the time of signing of the contract. It may, therefore, be reasonable during contract negotiation to agree a schedule of tests and test periods, allowing the purchaser to review and agree the final test specifications as they become available. The methodology and timescales for this review would again normally be the subject of contract negotiation as it also has potentially timescale implications. The rationale for a set of Final Acceptance Tests linked to a final payment milestone at the end of the warranty period, is to try to minimise the risk to purchasers of the system failing to meet its specified system performance criteria during its entire design life. This is especially important as systems are unlikely to be carrying anywhere near their maximum capacity in early life and the potential exists that with new technology these capacities may be increased significantly during system life.

17.1 Acceptance Tests Programme

At least four (4) months before the planned date of the start of the acceptance testing of a Segment and/or the System respectively the Contractor shall submit to the Purchasers for approval a test programme and an Acceptance Handbook designed to prove that the System or part thereof will operate in accordance with the requirements of the Contract together with a list of equipment the Contractor intends to use for the conduct of the Segment and/or System Acceptance Tests, as detailed in **Part 2 (Technical Specification)**.

The provision of any item of Equipment required for Acceptance Testing in addition to that supplied by the Contractor for the satisfactory operation and maintenance of the System or part thereof shall be the responsibility of the Contractor.

17.2 **Factory Acceptance:** Before shipping any Equipment to its designated Site, Contractor shall: (i) test such Equipment in accordance with the Technical Specification ("**Factory Acceptance Tests**") to establish that such Equipment complies in all material respects with Contractor's standards and the Technical Specifications, (ii) confirm the equipment conforms to all local, national and Terminal Station party requirements (e.g. earthquake) and (iii) upon successful completion of the Factory Acceptance Tests, issue a certificate of factory acceptance of such Equipment having Purchasers approval and signature ("**Factory Acceptance Certificate**"). Contractor shall provide Purchaser with reasonable prior notice of the Factory Acceptance Tests. The Purchaser shall be entitled to observe the activities undertaken during this period.

Commentary: Decision to keep this step should be discussed in each contract.

17.3 Provisional Acceptance: Contractor shall perform provisional acceptance tests in accordance with the Technical Specification ("**Provisional Acceptance Tests**"), including Segment tests, System tests, and where applicable network tests (if SIE, OTN, or Backhaul/POP is deployed) and an out-of-service confidence trial. Contractor shall provide Purchaser with reasonable prior notice of the Provisional Acceptance Tests. The Purchaser shall be entitled to observe the activities undertaken during this period. At the end of the Provisional Acceptance Tests, Contractor shall provide Purchaser the results of the Provisional Acceptance Tests ("**Provisional Acceptance Test Results**")

Commentary: List of tests can be modified depending on what is included in the technical specifications

17.3.1 If the Provisional Acceptance Test Results establish that the System complies in all material respects with the Technical Specification, the Purchasers shall issue a certificate of provisional acceptance of the System ("**Provisional Acceptance Certificate**").specifying the date of Provisional Acceptance (the "**Provisional Acceptance Date**"). Such notice shall be issued within [] days after receipt of the Provisional Acceptance Test Results. If Purchaser fails to give such notice within such []-day period, it is deemed to have provisionally accepted the System and to have issued the Provisional Acceptance Certificate as of the Provisional Acceptance Test Results receipt.

17.3.2 Notwithstanding Sub-Clause 17.3.1,if Purchaser wishes to reject the Provisional Acceptance Test Results, it shall so notify Contractor within [] days after its receipt of those documents, explaining the reasons for such rejection. If Purchaser fails to give such notice of rejection within such []-day period, it is deemed to have provisionally accepted the System and to have a issued the Provisional Acceptance Certificate as of the Provisional Acceptance Test Results receipt.

17.3.3 In case of deficiencies that do not materially affect the normal operation and maintenance of the System, the Provisional Acceptance Certificate must list all such deficiencies ("**Deficiency List**"). Contractor shall agree with Purchasers their expected clearance dates, remedy the deficiencies listed in the Deficiency List, in accordance with a timetable annexed to the Certificate of Provisional Acceptance, so as to ensure full conformance with the requirements of the Contract. So long as any such items are outstanding, Contractor shall continue to carry the risk in respect of those items.

17.3.4 As from the Provisional Acceptance Date, and in accordance with Clause 16:

- Responsibility for maintenance of the System (except as mentioned in Clause 17.3.3 above) will pass to Purchaser; and
- Risk of loss of, and damage to, the System (except as mentioned in Sub-Clause 17.3.3 above) will pass to Purchaser.

17.4 Commercial Acceptance

If the System does not meet the requirements for issuance of a Provisional Acceptance Certificate but the System or a part thereof is acceptable for Purchaser's commercial use, then, subject to Contractor's prior written approval, Purchaser may issue a certificate of commercial acceptance of the System or such part, as the case may be ("**Commercial Acceptance Certificate**"). The Commercial Acceptance Certificate must set forth the date when the System or such part, as the case may be, was accepted for commercial use ("**Commercial Acceptance Date**").

The Commercial Acceptance Certificate shall have annexed to it an agreed list of all outstanding items and deficiencies to be made good by the Contractor and the timetable for the remedy of such outstanding items and deficiencies.

When the deficiencies referred to above have been remedied, the Purchasers, at their sole discretion, may require a repeat of part or all of the Acceptance Tests and if the results are considered satisfactory then the Purchasers will issue a Certificate of Provisional Acceptance.

On the Commercial Acceptance Date: (i) Purchaser may place the System or such part, as the case may be, in service; (ii) maintenance of the System or such part, as the case may be

shall pass to Purchaser (iii) Contractor shall continue to carry the risk of loss of, and damage to, the System or such part, as the case may be;

Issuance of a Commercial Acceptance Certificate will not limit Contractor's obligations under sections 17.3.1, 17.3.2 or 17.3.3, in particular, any deterioration resulting in a deviation from Technical Specification requirements occurring between the Commercial Acceptance Date and the Provisional Acceptance Date shall be corrected at the expense of the Contractor.

Commentary: As part of any discussion concerning the proposed issuance of a commercial acceptance certificate, the parties may wish to negotiate the percentage of the provisional-acceptance billing milestone to be billed at commercial acceptance to take account of the extent of the deficiencies noted. This should be discussed on a case by case basis, but cannot be captured in the contract.

17.5 Final Acceptance: At the end of and no later than sixty (60) days after the expiration of the five (5) year warranty period and after the satisfactory completion of the Final Acceptance tests of the System, defined in **Part 2 (Technical Specification)**, and provided that the Contractor has fulfilled his commitments under the Contract, the Purchasers shall issue a Certificate of Final Acceptance ("**Final Acceptance Certificate**").

17.5.1 The issuance of the Final Acceptance Certificate shall not be unreasonably withheld or delayed, but in the event that a pattern of failure or pattern of degradation develops that is likely to cause the System to fail to meet the requirements of the Contract or such other performance levels agreed upon by Purchaser over the twenty five (25) year design life of the System, Or, any board component or unit failure rate observed during the Warranty Period exceeding the contractual committed values or contradicting the reliability models provided in the Contract. Therefore, Final Acceptance may be withheld until it can be demonstrated to the satisfaction of the Purchasers in accordance with the requirements of the Contract that such failures should not continue. In such event, the validity of the Warranty Bond provided for under Clause 6 shall be extended until the Final Acceptance Certificate is issued.

17.5.2 The Certificate of Final Acceptance will not apply to those parts which may have been replaced during the Warranty Period or to those parts having been the subject of an extension of warranty according to the provisions of Sub-Clause **18.5** hereof.

17.5.3 At the discretion of Purchasers, the Final Acceptance tests programme may consist of a repetition of a part or the whole of the tests of the Provisional/System Acceptance test programme.

17.5.4 The Purchasers reserve the right to dispense with the Final Acceptance tests.

17.6 Costs of Acceptance

All expenses incurred by Contractor (including testing apparatus and technical staff) in the execution of the Acceptance procedures defined in **Part 2 (Technical Specification)** shall be borne by Contractor.

Commentary: A major difference between the 2010 model contract and this one is related to the definition of "Final Acceptance" Contractors see it as the closure of the deficiencies of the provisional acceptance, while the purchasers see it as an independent acceptance milestone with a full system assessment at end of the warranty period, to check that the system is still likely to work as expected during its System Design Life. This clause corresponds to Clause 6 "Acceptance" of the 2010 Model Contract.

CLAUSE 18 WARRANTY

- 18.1 **Scope and Duration.** Contractor warrants that the System, including its spares, will be free from material defects in design, materials and workmanship and will perform in accordance with the requirements of the Technical Specification under normal use and service for a period of [] years, beginning on the Provisional Acceptance Date ("**Warranty Period**")

During the warranty period, Contractor warrants that the System, including its spares, shall conform fully, over the [] years System Design Life, to the requirements of the Contract or such other performance levels agreed upon as acceptable by the Purchasers and that no pattern of failure or pattern of degradation shall have developed that is likely to cause the System to fail to meet the requirements of Part 2 (Technical Specification), over the System Design Life.

Commentary: This clause reflects the traditional approach, according to which the warranty period begins on the date of provisional acceptance, which is when the purchaser ordinarily places the system in service. Purchasers also wish to address the possibility of patterns of failure, in particular those related to the submersible equipment. New and untried technologies often present the risk of systemic failure. The technical specification will usually try to address such risks with failure-in-time (FIT) rates. One approach could be to treat failures outside of the FIT rates as indicative of a pattern of failure. This is a complex topic as current systems may only reach their full capacity potential, later in their designed system lifespan. The duration of any warranty period is a commercial matter to be agreed by the parties on a case-by-case basis. The traditional 25 years duration for the System Design Life could also be a matter of discussion with the advances of technology.

- 18.2 **Cost of Warranty Repairs.** During the relevant Warranty Period, Contractor shall bear the cost of all repairs or replacements required to correct any defect or non-performance covered by the Warranty ("**Warranty Repairs**"). This cost shall include, but shall not be limited to, the cost of any vessels and/or any costs arising from burial or reburial, the components, equipment or materials requiring replacement, the cost of any additional equipment necessary to effect the repair, the cost of making the repair, the cost of labour and engineering assistance or development required to make the repair, the cost of Purchasers' expenses (if any), reasonably justified and incurred by the Purchasers in testing or examining any part of the System with the making good, replacing or repairing any part of the System and all associated costs such as but not limited to shipping and customs and services that may be required to make the repair. .

Commentary: It is common practice that purchasers will enter into a marine maintenance contract. Repair times can be expected to be considerably longer if the system is not covered by a marine maintenance contract, since a vessel of opportunity would be required for each repair. If the system were not to be covered by a maintenance agreement, when costs can be well defined, this requirement will need to be agreed in detail during contract negotiation.

- 18.3 **Warranty Repairs by Contractor.** During the relevant Warranty Period, Contractor shall perform any repair required to restore the System to the requirements of the Contract or such other performance levels agreed upon by the Purchasers, if the System should fail to meet such requirements at any time during the Warranty Period or has developed a pattern of failure or pattern of degradation that is likely to cause the System to fail to meet such requirements. The repair or replacement of any faulty unit or equipment includes the delivery to the Purchasers of a descriptive report of the fault found and, when appropriate, of the repair carried out on such faulty unit or equipment

- 18.4 **Warranty Repairs by Purchaser.** During the relevant Warranty Period, if Purchasers are not satisfied with Contractor's proposal to make repairs, including at sea repairs which are covered by the Warranty, Purchasers may elect at their sole option to undertake a Warranty Repair. Then:

- 18.4.1 Contractor shall replace any of Purchaser's parts and equipment used to effect the Warranty Repair within [] months after Purchasers provide Contractor with a list of such parts and equipment at Contractor's own cost;
- 18.4.2 Purchaser shall return to Contractor any defective or nonperforming Equipment that Purchaser recovers during the Warranty Repair at Contractor's cost and request; and
- 18.4.3 Purchaser shall give Contractor advance notice of the Warranty Repair, and Contractor may have a representative present on board ship to observe at-sea Warranty Repairs.
- 18.4.4 Such repairs by the Purchasers shall not in any way diminish Contractor's obligations under the warranty period
- 18.5 **Extension of Warranty.** If Contractor makes a Warranty Repair, the Warranty applies to the repaired item or to the replacement item, as the case may be, for the longer of:
- 18.5.1 the remainder of the Warranty Period applicable to the original Equipment; or
- 18.5.2 [] year[s] after the date of the Warranty Repair.
- 18.6 **Pattern of failure:** If during the Warranty Period, defects are found on repeated occasions in any part or parts of the System or if a pattern of failure or pattern of degradation is likely to cause any part or parts to fail to meet the specified requirements over the System Design Life, such part or parts shall not be repaired but shall be replaced by new part(s) at the request of the Purchasers, including all the appropriate spares.
- 18.7 **Warranty Repair duration:** Contractor shall make every reasonable effort to minimise the period of time during which the System is out of service for repairing and testing. For failures or any situations which cause or risk causing an outage of the System, Contractor undertakes to initiate a corrective intervention immediately but in any case no later than two (2) days after receipt of a notice from the Purchasers. The maximum period for repair of the units (including shipping and customs clearance) shall be as defined in **Schedule B (Technical Specification)**, paragraph [.....].
- 18.8 **Software support during the Warranty Period.** During the Warranty Period, the Contractor shall fully disclose and supply and keep supplied in confidence to the Purchasers:
- (i) the latest version of all documentation and the Software which is necessary for the operation and maintenance of the Network as defined in the Contract, with relevant information about their release status, free of charge to the Purchasers;
- (ii) at the Purchasers' request, provide maintenance releases correcting faults identified by the Purchasers or Contractor free of charge to the Purchasers.

Commentary: This clause corresponds to Clause 9 "Warranty" of the 2010 Model Contract.

CLAUSE 19 LONG TERM SUPPORT

- 19.1 **Non-Warranty Repairs and Technical Support.** During the relevant Warranty Period, Contractor shall provide non-warranty repair service and technical support and supply spare parts, as may be necessary for the System's operation, maintenance or repair, all as more particularly described in the Technical Specification, at prices included in **Part 3 (Price Schedule)** duly revised through a formula in which [] per cent of the price will be fixed and [] per cent of the same will be re-adjustable according to price indices submitted by the Contractor. The readjustment will not exceed [] per cent per year, and in any case no higher than the prevailing market prices. In case this Contractual equipment is no longer available, Contractor shall be fully responsible for providing alternative equipment with equivalent or superior technical characteristics to those originally provided at the same Contractual or cheaper price. Any relevant training courses which may be necessary due to the alternative equipment provided would be at no extra cost for the Purchasers.

- 19.2 **Post-Warranty Repairs and Technical Support.** After the expiration of the relevant Warranty Period; and until the end of the System Design Life, Contractor shall provide repair service and technical support and supply spare parts, as may be necessary for the System's operation, maintenance or repair, all as more particularly described in the Technical Specification, at prices no higher than the prevailing market prices and agreed by the Parties. In case this Contractual equipment is no longer available, Contractor shall be fully responsible for providing alternative equipment with equivalent or superior technical characteristics to those originally provided at prices no higher than the prevailing market prices and agreed by the Parties. . Any relevant training courses which may be necessary due to the alternative equipment provided would be provided at no extra cost for the Purchasers.
- Contractor shall accept any faulty unit for repairs at cost to be mutually agreed within an annual maintenance Contract to cover the request for the lifetime repair and support after the Warranty Period.
- The cost of normal repair of any unit/sub-unit of equipment manufactured by the Contractor shall not exceed [] per cent of the FOB price of the unit/sub-unit.
- Turn around time for repair of faulty units shall not exceed the times given in Part 2 (Technical Specification), paragraph [.....].
- If the Contractor delays the return of the repaired equipment, then the Contractor shall be penalized [] per cent of the repair cost of the item per week or part of the week so delayed, with up to a cumulative maximum of [] weeks
- 19.3 **Long-term support of software.** After the Warranty Period, the Contractor shall fully disclose and supply and keep supplied to the Purchasers, at reasonable prices:
- (i) the latest version of all documentation and the Software which is necessary for the operation and maintenance of the Network as defined in the Contract, including upgrades and enhancements or new features, with relevant information about their release status.
 - (ii) The Contractor shall offer the Purchasers at market price a new release containing new or improved features or facilities, when applicable and available, for a period of [] years after Final Acceptance. The new release shall indicate what modifications are required on implementation to the Software and hardware used by the Purchasers.
- 19.4 **Phase-Out.** Notwithstanding Sub-Clause 19.2, Contractor shall notify Purchaser in writing [] months before Contractor intends to cease providing any repair service or technical support or manufacturing any spare parts to be discontinued. Purchaser may order all required spare parts from Contractor within such []-month period. Contractor has no obligation to provide such discontinued repair service or technical support or manufacture such discontinued spare parts after such []-month period, but it shall provide compatible parts with characteristics equivalent or superior to such discontinued parts, together with a repair service and technical support for these items, for the remainder of the period referred to in section 19.2

Commentary:

This clause corresponds to Clause 10 “Long-Term Support” of the 2010 Model Contract.

CLAUSE 20 DELAY IN SYSTEM COMPLETION

- 20.1 Subject to the provisions in Clause 11 (Suspension), Clause 12 (Variations During Execution) and Sub-Clause 20.2, the Contractor shall complete the supply and installation of the System by the Completion Date.
- 20.2 If the execution of the Work shall, without the default or negligence on the part of the Contractor, be delayed by reason of any event of Force Majeure and subject to Sub-Clause 20.3 the Contractor may be granted such extension of time for completion as shall be mutually agreed with the Purchasers, without any financial claim from the Contractor to the Purchasers.
- 20.3 In connection with Sub-Clause 20.2 and provided that the Contractor proves that there is insufficient contingency time in **Part 5 (Plan of Work)** to cover any delay, any extension of time for completion will only be considered by the Purchasers if the Contractor notifies the Purchasers of the cause of delay within [] calendar days of commencement of the delay and provides to the Purchasers, either on completion of the Work or at an appropriate stage in the Work, satisfactory evidence of the effects of the delay.
- 20.4 If the System is not completed in accordance with Clause 5 (Completion Date) or by the end of the period of extension agreed upon under Clause 11 (Suspension), Clause 12 (Variations During Execution) or Sub-Clause 20.2, the Contractor shall pay to the Purchasers by way of liquidated damages and not as a penalty an amount not exceeding []% of the Contract System Price and calculated as follows:
[]% of the Contract Price, less the value of the Segment(s) for which a Certificate of Commercial Service has been granted, per calendar day from the Completion Date or from the end of any period of extension agreed upon under Clause 11 (Suspension), Clause 12 (Variations During Execution) or Sub-Clause 20.2 and during which period the Certificate of System Acceptance continues not to have been granted.
- 20.5 Liquidated damages applied in accordance with Sub-Clause 20.4 shall be paid by the Contractor within [] days from the date of notification by the Purchasers of the application of such damages.
- 20.6 Should the Contractor default in the payment of liquidated damages applied under the terms of this Clause, the Purchasers shall have the right to obtain compensation by making deductions from any payments due or to become due to the Contractor and/or by recovering such sums as a debt or by forfeiture in part or in whole by means of the Letter of Performance Guarantee.

Commentary: Liquidated damages are designed to compensate the purchaser for the loss it will suffer by reason of the Contractor's failure to complete the system on time. Under English law, contractual penalties are not enforceable, but liquidated damages are enforceable if they are a genuine pre-estimate of the purchaser's loss. Liquidated damages must, therefore, be calculated and negotiated by the parties. For this reason, the model contract does not include any recommendation as to the appropriate level of liquidated damages.

This clause corresponds to Clause 1.8 "Liquidated damages for Delay in Completion" of the 2010 Model Contract.

CLAUSE 21 UPGRADES AND NEW TECHNOLOGIES

21.1 **Upgrade Options.** Purchaser may, at any time from the date of this Contract until the [] anniversary of the Provisional Acceptance Date (the “**Upgrade Option Period**”), request one or more Upgrades, as more particularly described in the Technical Specification, and in accordance with the procedures and other terms set forth in the Upgrade Schedule. Purchaser shall provide access at the relevant Terminal Stations to enable Contractor to implement any Upgrades. Applicable prices shall be as set out in Part 3 (Price Schedule) but may be reduced so as not to be higher than the market prices.

21.2 The Contractor shall inform the Purchasers of all new technologies capable of enhancing the System Performance, and shall propose them at reasonable prices for implementation to the Purchasers.

On Purchasers request, the Contractor shall collaborate for future upgrades beyond the maximum design capacity of the Contract.

21.3 **Fast Upgrade:** Up to [] months after the Coming in to Force of the Contract, Contractor can be requested to install and fully test date additional wavelengths, in addition to the initial equipage, up to [] wavelengths in total per Digital Line Section (defined in **Part 2 (Technical Specification)**, paragraph [.....]). The following rules shall apply for these additional wavelengths:

- The Completion Date remains unchanged
- The applicable price for these additional wavelengths shall be included in **Part 2**
- []% of the prices of these additional wavelengths shall be paid through a Contract variation
- The remaining cost for each additional wavelength shall be paid by the Purchasers when it is requested to activate traffic on the wavelength
- In case all the additional wavelengths are not activated within five (5) years after the provisional acceptance, the Purchasers shall pay the remaining cost to the Contractor.

Commentary: In addition to seeking a warranty from the Contractor as to the future upgradeability of the system, a purchaser may desire an option, such as in this clause, to purchase upgrades from the Contractor on pre-agreed price and other terms for a certain period after the system is placed in service. The purchaser may also desire an option to provide for “fast” upgrades by purchasing additional terminal equipment that would be installed in connection with the construction of the system but not activated unless and until needed. The parties would then need to negotiate special billing and payment terms for “fast” upgrades.

This clause corresponds to Clause 3.3 “Upgrade Options” of the 2010 Model Contract.

CLAUSE 22 TERMINATION FOR DEFAULT, BANKRUPTCY OR WINDING UP

22.1 **Termination by Purchaser and Takeover of the Work.** In addition to all other remedies available to Purchaser, but subject to Sub-Clause 22.2, Purchaser may, at any time, by notice to Contractor, terminate this Contract and take over the Work if:

- (a) Contractor fails to make progress so as to significantly endanger the performance of the Contract or has committed a material breach of this Contract (other than delays in performance giving rise to liquidated damages under Sub-Clause 20, unless the maximum amount of liquidated damages has become payable), and has failed to remedy such breach within [] days after receipt of a notice from Purchaser specifying such breach and demanding that it be remedied;
- (b) Contractor has filed a voluntary petition under any bankruptcy, insolvency or other similar law seeking liquidation, reorganization or other relief, or has consented to the appointment of a trustee, receiver, custodian or other similar official for any substantial part of its property, or has made a general assignment for the benefit of creditors, or has

taken any corporate action to authorize any of the foregoing, or has failed, or become unable, to pay its debts as they become due; or

(c) An involuntary petition has been filed against Contractor under any bankruptcy, insolvency or other similar law seeking liquidation or reorganization of, or other relief against, Contractor or the appointment of a trustee, receiver, custodian or other similar official for any substantial part of its property, and such involuntary petition has not been dismissed or stayed within [__] days after the filing thereof, or an order for relief under any such law has been entered against Contractor.

(d) Contractor, being a company, shall pass a resolution for winding up, or the Court shall make an order that the company shall be wound up (in either case other than for the purposes of reconstruction), or if a receiver or manager on behalf of a creditor shall be appointed, or if circumstances shall arise which entitle the Court or a creditor to appoint a receiver or manager which entitle the Court to make a winding-up order.

22.2 **Purchasers' Rights and Obligations Upon Takeover of the Work.** If Purchaser takes over the Work pursuant to section 22.1., then Purchasers shall pay Contractor for all Work performed through the date of takeover and Purchaser may finish the Work with or without the assistance of other Persons selected by Purchasers. Contractor is liable for the reasonable cost of the Work actually incurred by Purchasers to the extent it exceeds the price for the uncompleted Work Contracted for, but Purchasers shall use all reasonable efforts to mitigate any such costs of completion.

22.3 . **Contractor's Obligations in case of termination by Purchaser:** If the Contract is terminated in accordance with Sub-Clause 22.1, Contractor shall, upon request from the Purchasers, protect and preserve property in its possession in which the Purchasers have an interest. Contractor shall not be relieved from any liability for damages or other remedies which may have been incurred by reason of any breach of the Contract. This shall include, but is not limited to, the invocation of the Performance Bond.

Commentary: This clause corresponds to part of Clause 14 "Termination/Suspension" of the 2010 Model Contract.

As for suspension (see commentary to clause 11 of this model contract), Purchasers will not agree to the Contractor having the right to terminate the contract, for any reason, including late payment by one or more purchasers. Purchasers do not want to sign a contract which includes joint and several liabilities for many reasons, practical as well as legal,, in any respect, and such a right given to the Contractor would tie them in a joint and several relationship.

On the other hand, Contractor sees the termination right as one of the means to obtain the payment of the unpaid bills. The position of Contractors is well reflected in clause 14.5 (Termination by supplier) of the 2010 model contract.

Between both positions, a limited termination right in favour of the Contractor could be triggered as a follow-up of the possible limited suspension mentioned in the commentary to clause 11 (suspension), if the aggregate value of payment defaults exceeds the value of the work remaining to complete the project.

In practical projects, if such termination right is present in the contract, the Contractor will not use it and he will instead spend a lot of time and effort to find a solution with the purchasers. Conversely, in the termination right is not present in the contract, the consortium of Purchasers have ways of convincing the defaulting Purchaser to remedy the situation through the Consortium and Maintenance Agreement signed between all Purchasers.

CLAUSE 23 TERMINATION BECAUSE OF FORCE MAJEURE

- 23.1 In the event that the Contractor is unable to execute the Contract for a period of more than [] calendar months because of an event of Force Majeure, the Contractor may apply to the Purchasers for termination of the Contract. If the Purchasers are in agreement with such application, then the Contract may be so terminated.
- 23.2 In the event that the Contractor is delayed or prevented from performing any of its obligations under the Contract by an event of Force Majeure, but not including events of Force Majeure that preclude the Purchasers from fulfilling their responsibilities under the Contract, and such cause shall continue to a delay or prevent continuance of the Work for a continuous period of [] calendar months or more, the Purchasers may terminate the Contract.
- 23.3 Upon termination as provided for in Sub-Clauses 23.1 and 23.2 above, the Purchasers may at their discretion require the Contractor to transfer to the Purchasers title in any equipment or materials held by the Contractor or its Sub-contractors for which payments have been made under the Contract.
- 23.4 In the event that payments already made to the Contractor under this Contract exceed the value of those items retained or obtained under the Sub-Clause above, then the Contractor shall repay such excess to the Purchasers within [] days from the date of notification and if not paid shall be a debt due to the Purchasers recoverable in a civil action.

Commentary: This clause corresponds to part of Clause 15 “Force Majeure” of the 2010 Model Contract.

CLAUSE 24 INTELLECTUAL PROPERTY - INDEMNITY

- 24.1 Contractor shall indemnify Purchaser against all losses and liabilities arising out of any infringement of any patent, or other form of intellectual property right, for any Equipment, including Hardware and Software, provided by Contractor, unless Purchasers use of the Equipment for purposes other than those described in this Contract or reasonably inferred from this Contract.
- 24.2 In the event of any infringement or alleged infringement or any claim being made or action brought against the Purchasers arising out of the matters referred to in this Clause:
- a) The Contractor shall, as soon as reasonably practicable, be notified and shall:
 - (i) At its own expense conduct all negotiations for the settlement of the same, and any litigation that may arise therefore;
 - (ii) Give to the Purchasers such reasonable security as shall from time to time be required by the Purchasers to cover the amount ascertained or agreed or estimated, as the case may be, of any compensation, damages, expenses and costs for which the Purchasers may be liable;
 - b) The Purchasers shall, at the request of the Contractor, afford all reasonable assistance for the purpose of contesting any such claim or action, and shall be repaid any expenses incurred in so doing. The Purchasers shall not make admission prejudicial to the Contractor's contesting such claim or action insofar as they are legally able to avoid making any such admission;
 - c) In the event that the Contractor fails to take over the conduct of the negotiations and litigation within [] days of being notified of any claim or action, or fails to provide the Purchasers with any security required by the Purchasers under this Sub-Clause, the Purchasers may conduct negotiations and litigation for the settlement of the same and shall be released from their obligations under Sub-Clause 24.2 (b) and reimbursed by the Contractor for all such expenses and payments.
- 24.3 If the System or any part thereof is held to constitute infringement and is subject to an order restraining its use or providing for its surrender or destruction, the Contractor shall at its own expense immediately either:

- a) Procure for the Purchasers the right to retain and continue to use the System;
or
- b) Modify the System so that it becomes non infringing.

Commentary: This clause corresponds to Clause 11.3 “Intellectual Property” of the 2010 Model Contract.

CLAUSE 25 TERMINATION FOR CONVENIENCE

- 25.1 The performance of Work under the Contract may be terminated by the Purchasers in whole, or from time to time, in part, whenever they shall so determine. The Purchasers shall deliver to the Contractor a written notice, the "Notice of Termination", specifying the extent to which performance of Work under the Contract is terminated and the date upon which such termination becomes effective.
- 25.2 On receipt of such a Notice of Termination, unless otherwise directed by the Purchasers in the notice, the Contractor shall:
- a) Stop Work under the Contract, on the date and to the extent specified in the Notice of Termination;
 - b) Place no further orders or contracts for materials, services, or facilities except as may be necessary for completion of any portion of the Work under the Contract which is not terminated;
 - c) Use reasonable efforts to terminate all orders and contracts to the extent that they relate to the performance of Work terminated by the Notice of Termination;
 - d) Assign to the Purchasers, in the manner, at the time and to the extent directed by the Purchasers after the agreement about the settlement has been reached, all of the Contractor's rights, title and interest under the orders and contracts so terminated;
 - e) Use reasonable efforts to settle all outstanding liabilities and all claims arising out of such termination of orders and contracts, with the Purchasers' approval or ratification to the extent they may require, which approval or ratification shall be final for all the purposes of this present Clause;
 - f) Transfer title and deliver to the Purchasers in the manner, at the time, and to the extent (if any) directed by them, after the agreement about the settlement has been reached:
 - i) The fabricated or un-fabricated parts, work in progress, completed work, supplies, and other material produced as part of, or acquired in connection with the performance of the Work terminated by the Notice of Termination, and
 - ii) The completed or partially completed plans, drawings, information and other property which, if the Contract had been completed, would have been required to be furnished to the Purchasers;
 - g) Use reasonable efforts to sell, in the manner, at the time, to the extent and at the price or prices directed or authorised by the Purchasers, any property of the types referred to above, provided, however, that the Contractor:
 - i) Shall not be required to extend credit to any buyer; and
 - ii) May acquire any such property under the conditions prescribed by and at a price approved by the Purchasers; and provided further that the proceeds of any such transfer or disposal shall be applied in reduction of any payments to be made by the Purchasers to the Contractor under this Contract or paid in such other manner as the Purchasers may direct;
 - h) Complete performance of such part of the Work as may not have been terminated by the Notice of Termination and
 - i) Take such action as may be necessary, or which the Purchasers may direct, for the protection and preservation of the property related to the Contract which is in the Contractor's possession and in which the Purchasers have or may acquire an interest.
- 25.3 After reception of a Notice of Termination the Contractor shall submit to the Purchasers a written termination claim. Such claim shall be submitted promptly, but in no event later than one year from the effective date of termination.
- 25.4 In the settlement of any such partial or total termination claim, the Purchasers' payment to the Contractor shall be limited to the following:

- a) The price for completed Work, based on Part 4 (Price Schedule);
- b) A fair and reasonable sum in respect of partially completed work prorated where practicable based on Part 4 (Price Schedule) hereto;
- c) The cost of supplies and materials reasonably and necessarily purchased in respect of the Contract, but not incorporated into completed or partially completed work;
- d) The cost of settling and paying claims arising out of the termination of the work under contracts and orders, as provided above, which are properly chargeable to the terminated portion of the Contract;
- e) The reasonable costs of settlement, including accounting, legal, clerical and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination and settlement of contracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposal of property allocable to the Contract.

- 25.5 In arriving at the amount due to the Contractor under this Clause, there shall be deducted all monies paid or due to be paid to the Contractor, any liabilities which the Contractor may have to the Purchasers and the agreed price for or the proceeds of sale of any materials, supplies or other things acquired by the Contractor or sold, pursuant to the provisions of this present Clause, and not otherwise recovered by or credited to the Purchasers.
- 25.6 If the termination is partial, before the settlement of the terminated portion of the Contract, the Contractor may submit to the Purchasers a written request for any equitable adjustment of the price or prices specified in the Contract relating to the portion of the Contract not terminated by the Notice of Termination prorated where practicable, based on Part 4 (Price Schedule) hereto and such equitable adjustments as may be agreed shall be made.
- 25.7 The Purchasers may, from time to time, under such terms and conditions as they may prescribe, approve partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of the Contract if in the opinion of the Purchasers the total of such payments is within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this Clause, such excess shall be payable by the Contractor to the Purchasers on demand or recovered by the Purchasers from the Letter of Performance Guarantee.
- 25.8 For a period of [] year after final settlement under the Contract, the Contractor shall preserve and make available to the Purchasers at all reasonable times at the Contractor's premises, but without charge to the Purchasers, all books, records and documents bearing on costs and expenses under the Contract relating to the work terminated under this Clause.

Commentary: This clause has no equivalent in the 2010 Model Contract.

CLAUSE 26 SAFEGUARDING OF INFORMATION AND TECHNOLOGY

- 26.1 The Confidential Information related to the Contract shall include the existence of the Contract, or the details of this Contract or any information regarding the performance of this Contract.
- 26.2 All information related to the Contract shall be deemed confidential ("**Confidential Information**") except if:
- Such information was previously known to the receiving Party free of any obligation to keep it confidential; or
 - Such information has come into the public domain other than by a breach of confidentiality by the receiving Party.
- 26.3 Neither party shall disclose the Confidential Information related to the Contract to any third party without the prior written consent of the other party, but either party may:
- (i) respond to customary press inquiries or otherwise making public or private statements in the normal course of business, so long as consistent with a mutually agreed press-release; and
 - (ii) disclose the existence or the details of this Contract and information regarding its performance of this Contract strictly as needed to obtain financing or to comply with applicable securities laws or to perform its obligations under this Contract; and
 - (iii) disclose such information as may be required to be disclosed pursuant to an order of the court or under any written law, or an order from any regulatory bodies.
- 26.4 This Clause 26 will survive expiration or termination of this Contract in its entirety.

Commentary: This clause corresponds to Clause 18.5 "Confidential Information" of the 2010 Model Contract.

CLAUSE 27 RESPONSIBILITY FOR OBTAINING PERMITS AND FOR CUSTOMS CLEARANCE AND OTHER FORMALITIES

- 27.1 **Contractor's Obligations:** Except as otherwise provided in section 27.2, Contractor shall, at its expense, be responsible for obtaining all permits, licenses, consents, authorizations and approvals necessary in connection with the implementation, landing, ownership and operation of the System (collectively "**Contractor Permits**"). Contractor shall endeavour to arrange for all Contractor Permits not issued in the name of Purchaser (other than those required for Contractor to perform the Survey and installation activities) to be freely assignable to Purchaser, and to be assigned to Purchaser at the time title to the System is transferred to Purchaser under this Contract. With respect to any interest in real property, Contractor shall, to the extent practicable, obtain title or leasehold directly in the name of Purchaser. During the execution of this Contract, Contractor shall prepare and deliver to Purchaser a list of Contractor Permits that to its knowledge are required to be obtained under current law in order to complete the Work, including projected dates of filing of applications and expected dates of issuance. Contractor shall update the list from time to time as it becomes aware of changes in such requirements.

Commentary: This clause reflects the traditional approach, according to which the Contractor gets the operational permits. The purchasers may also wish the Contractor to be responsible for other permits, typically called permits in principle. Clauses relating to the Contractor's permitting obligations are very likely to be the subject of extensive negotiation between the parties.

- 27.2 **Purchaser's Obligations:** Only when local laws and regulations so require, Purchaser shall be responsible for obtaining necessary permits and authorisations not directly related to Contractor's activities from the appropriate authorities ("**Purchaser Permits**"). Contractor shall provide all necessary documentation, charts, studies and assistance.

Commentary: Purchasers must get all permits other than operational permits, typically called permits in principle, if the local laws and regulations so require. Clauses relating to the purchaser's permitting obligations are very likely to be the subject of extensive negotiation between the parties.

- 27.2.2 **Shipping and Customs clearance:** Contractor or its logistics agent shall ship the Equipment to the designated Sites and carry out all formalities of importing the Equipment into the landing countries, pay all related taxes directly to the appropriate taxing authority, and apply for any exemptions from, or refunds of, such Taxes that are available under applicable law, all in the name and on behalf of Purchaser, which shall be the importer of record. Any involvement of the Purchasers in the importation and customs clearance of the materials and equipment to be imported shall not release Contractor from any Contractual liability. For that purpose, Contractor shall provide, so far as reasonably practicable, the relevant Purchasers [] weeks advance notice of all the freight and shipment arrangements, and the following documents, in the appropriate format, as required:
- a) Original bill of lading or air bill;
 - b) Copies of the invoice;
 - c) Copies of the packing list;
 - d) Certificate of origin, or Goods Circulation Certificate (T2L); and
 - e) Any other documentation as necessary.

Commentary: The process by which the Contractor is reimbursed for duties and taxes paid on behalf of the purchaser is generally subject to negotiation and captured in more detail in the Contract.

For the execution of this Contract, Contractor shall be liable for any damages which Purchaser may sustain should Contractor be unable to perform the Contract in accordance with the provisions hereof, even in the event that it is unable to ship the System or the grant of the export or other permit to ship the System is delayed or refused.

In the case of temporary importation all operations and related activities shall be the exclusive responsibility of Contractor. Contractor shall be responsible for the maintenance of the materials or equipment in question while they remain in the Purchasers' countries as well as for their re-exportation.

Commentary: This clause corresponds to Clause 2 "Permits" and Clause 4 "Custom Clearance" of the 2010 Model Contract.

CLAUSE 28 NOTICES

28.1 All notices pertaining to this Contract must be in writing and sent to the parties at the addresses shown on the signature page. A party may, at any time, upon [] days' prior written notice to the other party, change its address for notices. Notwithstanding the preceding sentence, and without prejudice to any other way of serving notice, any notice will be sufficiently given if sent by recorded delivery to the addressee's address for notices, or to its registered office or last known place of business, and will be deemed to be given, on the day it was received or on the tenth day after it was dispatched, whichever is earlier.

28.2 Address for Notices to the Contractor

Notices to the Contractor should be sent to the following:

[to be inserted at Contract Signature]

28.3 Addresses for notices to Purchasers

Notices to the Purchasers should be sent to the addresses listed in Schedule D: Purchasers' Addresses for Notices

Either Party shall give written notice to the other of any change to such nominated addresses

Commentary: This clause corresponds to Clause 18.14 "Notices" of the 2010 Model Contract.

CLAUSE 29 CLAUSE HEADINGS

Clause and Sub-Clause headings are for convenience of reference only and are not to be construed as affecting the construction or meaning of this Contract.

Commentary: This clause corresponds to Clause 18.11 "Headings" of the 2010 Model Contract.

CLAUSE 30 LIMITATION OF LIABILITY

30.1 Except as specifically provided for under the Contract, neither Party shall be liable to the other under the Contract for any consequential, incidental or indirect loss or damages or loss of profit.

30.2 The liability of the Contractor shall have no limit with regard to:

- b) Death or personal injury;
- c) Environmental damage resulting from the Contractor's work;
- d) Wilful failure of the Contractor to perform its Contractual obligations;
- e) The provisions under Clause 24 ("Intellectual Property-Indemnity").

30.3 Except for the provisions of Clause 30.2, the Contractor's aggregate liability hereunder shall be limited to 100% of the Contract Price.

Commentary: This clause corresponds to Clause 12 "Limitation of Liability" of the 2010 Model Contract.

CLAUSE 31 SEVERABILITY

If any provision of this Contract is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Contract will remain in force, and the parties shall endeavor to agree on a valid and enforceable substitute provision that as nearly as possible fulfills the intention of such invalid or unenforceable provision.

Commentary: This clause corresponds to Clause 18.17 "Severability" of the 2010 Model Contract.

CLAUSE 32 CONTRACTOR TO CONFORM TO REGULATIONS

- 32.1 The Contractor shall comply with the requirements of all laws in the countries and territories in which any part of the Work under this Contract is to be done and with all regulations and rules made under the same and with any lawful requirements there under and with the lawful requirements of public and other authorities within those countries, states, provinces and territories in any way affecting this Contract or applicable to any Work there under. In particular, the parties shall comply with all applicable anticorruption laws in connection with their performance of this Contract.
- 32.2 The Purchasers shall not be responsible for any acts, defaults, neglects or omissions of the Contractor that violate the laws, rules, or regulations of any jurisdiction in which the Work is carried out

Commentary: Apart from the reference to anticorruption laws this paragraph has no equivalent in the 2010 SubOptic model. However, in spite of this clause, the parties are legally required to comply with applicable laws even in the absence of any contractual undertaking to do so.

This clause corresponds to Clause 18.1 “Anticorruption” of the 2010 Model Contract.

CLAUSE 33 ENVIRONMENTAL PROTECTION

- 33.1 The Contractor shall comply (and shall ensure that all of its employees and Sub-Contractors comply) with all statutory and other regulations relating to the handling, transportation, storage and disposal of waste and special waste.
- 33.2 The Contractor, including its Sub-Contractors, shall appropriately manage the waste left as a result of its Work under the Contract. The Contractor, including its Sub-Contractor, must endeavour to reduce the amount of waste by recycling or re-use of waste. The Contractor will be responsible for obtaining, and paying any fees associated with acquiring any required licenses, permissions, authorizations or permits necessary for the handling, storage, disposal, or transportation of waste or special waste. The Contractor, in a timely manner, shall complete documentation in accordance with all laws, regulations, licenses, permissions, authorizations or permits with regards to waste or special waste.
- 33.3 The Contractor shall assess the handling or processing difficulty of the waste generated when a part or whole of the System is manufactured, transported and installed.
- 33.4 When the Contractor wastes some material under the Work, the Contractor shall abide by all regulations, laws and ISO14000 series recommendations.
- 33.5 The Contractor shall be liable for and indemnify and hold harmless the Purchasers from all claims, demands, actions, suits, proceedings, prosecutions, fines, penalties, damages or expenses related to environmental damages arising out of the Work.
- 33.6 The Purchasers shall have the right to carry out an environmental audit. The need for and scope of any follow up actions will be determined, by the Purchasers, following the audit. Areas likely to be covered under this audit include, but are not limited to:
- a) working knowledge of environmental legislation;
 - b) Contractor’s management processes and systems;
 - c) documented emergency/contingency plans;
 - d) training of staff and operatives;
 - e) licenses;
 - f) security of work site;
 - g) corrective action processes.

Commentary: This clause has no equivalent in the 2010 Model Contract.

CLAUSE 34 CORRUPT GIFTS AND PAYMENT OF COMMISSIONS

- 34.1 The parties shall comply with all applicable anticorruption laws in connection with their performance of this Contract.
- 34.2 The Contractor shall not offer or give or agree to give to any person employed by any of the Purchasers (or its affiliates) or to a Purchaser any gift, commission, rebate or consideration of any kind as an inducement or reward for doing, influencing or carrying out any act in relation to the obtaining or execution of this Contract or for showing any favour or disfavour to any person or persons in relation to such Contract.
- 34.3 In the performance of this Contract, the Contractor have not and will not pay, offer, promise to pay, or authorize the payment directly or indirectly of any monies or anything of value to any government official or employee or any political party or candidate for political office, for the purpose of influencing any act or decision of such official or of the government in connection with this Contract.
- 34.4 Breach of this Clause 34 may render the Contractor, its Sub-contractors and agents liable to punishment by law and any such breach shall be deemed material. The Contractor and agents shall accept audits by the Purchasers for clearance of any doubts. Likewise the Contractor shall be liable for and indemnify and hold harmless the Purchasers from all claims, demands, actions, suits, proceedings, prosecutions, fines, penalties, damages or expenses related to the breach of this Sub-Clause.

Commentary: This clause has no equivalent in the 2010 Model Contract.

CLAUSE 35 GOVERNING LAW AND SETTLEMENT OF DISPUTES

Commentary: When drafting a governing-law provision, parties need to consider both the choice of law and the scope of the clause. The 2010 model contract uses English law, which is a highly developed body of law in commercial and financial matters and one frequently chosen by parties to contracts for the construction of submarine cable systems. If the parties prefer some other law, they will need to make changes to the contract to reflect the requirements, concepts and terminology of the chosen law. The changes required will probably not be extensive as long as the chosen law is based on the English common law, but very considerable changes in the drafting might be required, if the parties choose the law of a jurisdiction whose legal system is not based on the English common law.

However, Purchasers will typically prefer a ‘neutral’ jurisdiction such as Switzerland.

- 35.1 All matters arising out of this Contract, including tort claims, are governed by [Swiss] law, except for any conflict-of-laws provision thereof that would cause the law of any other jurisdiction to govern such matters.
- 35.2 The Contractor and the Purchasers shall endeavour to settle any differences of opinion which may arise during the execution of the Contract in an amicable manner.
- 35.3 Any dispute, controversy or claim concerning the validity, interpretation or performance of this Contract will be finally settled by arbitration in the English language in [Geneva, Switzerland] and in accordance with the Rules of Arbitration of the International Chamber of Commerce then in force (the “Rules”), which are hereby incorporated herein by this reference.

Commentary: The parties should think carefully before deleting the suggested arbitration and relying on the courts for the final resolution of all disputes. There are many more treaties on the reciprocal enforcement of arbitration awards than treaties on the reciprocal enforcement of court decisions.

This clause corresponds to Clause 17 “Governing Law; Dispute Resolution” of the 2010 Model Contract.

CLAUSE 36 KEEPING OF RECORDS

For all items specified in Part 3 (Price Schedule) or in Contract Variations, Contractor shall maintain records of its billing of the Contract Price and all other amounts payable by Purchaser to Contractor under this Contract, and shall allow Purchaser to inspect such records on reasonable prior notice, for a period of five years after the Provisional Acceptance Date, but, with the exception of amounts billed on a cost-incurred basis, Contractor is not required to disclose its costs to Purchaser.

Commentary: This clause corresponds to Clause 18.15 “Recordkeeping” of the 2010 Model Contract.

CLAUSE 37 ENTIRE AGREEMENT AND AMENDMENTS

- 37.1 This Contract is the entire agreement of the parties, and supersedes all prior oral or written understandings between the parties, with respect to the subject matter hereof, except that the nondisclosure agreement remains in force.
- 37.2 The Parties acknowledge and agree that:
- (i) They have not been induced to enter into this Contract by any representation, warranty or other assurance not expressly incorporated into it; and
 - (ii) In connection with this Contract, and except in the case of fraud, their only rights and remedies in relation to any representation, warranty or other

assurance shall be for breach of the terms of this Contract and all other rights and remedies are excluded.

38.3 **Written Amendments.** Except as expressly provided in Clauses 12 and 27, all amendments to this Contract must be written and signed by both parties. The following named individuals have express authority to sign amendments to this Contract on behalf of the party indicated:

for Purchaser: *[insert list of names]*;

for Contractor: *[insert list of names]*.

Commentary: This clause corresponds to Clause 18.9 “Entire Agreement” of the 2010 Model Contract.

CLAUSE 38 RELATIONSHIP BETWEEN THE PARTIES

34.1 The parties are entering into this Contract as independent contractors, and nothing herein is to be construed as creating any relationship of partnership, employment or agency between them.

34.2 The liability of the Purchasers shall not be joint but several.

Commentary: if more than one Contractor add the following Sub-Clause:

34.3 The liability of the Contractor shall be joint and several.

Commentary: This clause corresponds to Clause 18.16 “Relationship of the Parties” of the 2010 Model Contract.

CLAUSE 39 AGENTS AND REPRESENTATIVES OF THE PURCHASERS

The Purchasers may nominate such agents or representatives, as they may desire, to carry out any of their responsibilities or to exercise any of their rights under this Contract. The Purchasers shall notify the Contractor in writing of any such nominations.

Commentary: This clause has no equivalent in the 2010 Model Contract.

CLAUSE 40 SUCCESSORS BOUND

This Contract is binding upon and inures to the benefit of the parties' respective successors and assigns.

CLAUSE 41 COMING INTO FORCE OF THE CONTRACT

- 41.1.1 **Condition Precedent to Purchaser's Obligations.** Notwithstanding anything in this Contract to the contrary, Purchaser's obligations under this Contract are subject to Purchaser's receipt from Contractor of the Performance Bond as defined in Clause 13. Any delay in submitting the Performance Bond shall remain the Contractor's responsibility and shall not extend the completion date of the project.
- 41.1.2 **Condition Precedent to Contractor's Obligations.** Notwithstanding anything in this Contract to the contrary, Contractor's obligations under this Contract, other than delivery to the Purchaser of the Performance Bond, are subject to Contractor's receipt from Purchaser of the down payment referred to in Sub-Clause 15.2 and in the Billing Schedule
- 41.2 When both of the conditions referred in Sub-Clause 41.1.1 and 41.1.2 are satisfied, the Purchasers shall notify the Contractor and the Contract shall come into force at the receipt of such notice.
- 41.3 If the Contract has not come into force within [] days from the signature, the Parties will attempt to reach an agreement to extend the time limit.

Commentary: Parties often do not want their contractual obligations to become effective until the satisfaction of one or more conditions or the occurrence of one more events, typically the down payment by the purchasers or the delivery of the performance bond. To address this concern, some contracts state in the "coming-into-force" clause that the contract does not enter into force (i.e., does not become a binding contract) until all conditions are fulfilled. The disadvantage of that approach is that the status of the contract and the parties' rights and obligations is unclear between the date of signing and the coming-into force date. Before it comes into force, the contract, though signed, is not a contract at all, so the parties are left in a sort of legal limbo until the coming-into-force date. The model contract takes a different approach: upon signing, only Contractors have an obligation, it is to deliver a performance bond. The rest of their obligations become effective when the Purchasers have completed the down payment, while the Purchaser's obligations become effective when the Contractors have delivered the Performance Bond. From the Purchasers perspective the ability for the Contractor to withdraw from the contract, because of delays in paying the down payment may not be acceptable as in a consortium, a delay by one member may impact the whole project. Negotiations around this point may therefore be complex.

This clause corresponds to Clause 18.3 "Condition Precedent to Purchaser's Obligations" and 18.4 "Condition Precedent to Contractor's Obligations" of the 2010 Model Contract.

CLAUSE 42 PROPERTY OF PURCHASERS

- 42.1 Any property of the Purchasers issued in connection with the Contract, and anything supplied by the Purchasers whether for incorporation in the System or not, shall remain the property of the Purchasers and shall not be used other than in the execution of the Contract without the prior written consent of the Purchasers.
- 42.2 No such property or things shall be removed from the place where they are normally used or stored for the purposes of the Contract without the Purchasers consent.
- 42.3 The Contractor shall keep readily available records of all such property and things in order to enable the Purchasers to check from time to time the quantities in use, used, and available for use, against those delivered to the Contractor's charge.
- 42.4 Neither the Contractor nor any other Person shall have a lien on any such property or things for any sum due. The Contractor shall take all reasonable steps to ensure that the Purchasers title and the exclusion of lien are brought to the notice of all Persons dealing with such property and things.

- 42.5 All such property and things shall be deemed to be in good condition when received by or on behalf of the Contractor unless the Contractor notifies the Purchasers to the contrary within [] days of receipt.
- 42.6 All such property and things which are not for incorporation in the System shall be returned by the Contractor at the earliest possible time, but in any case within [] days of the granting of System Acceptance by the Purchasers. Between the time of delivery to the Contractor and of return to the Purchasers the Contractor shall be responsible for all damage except for normal wear and tear resulting from proper use in the execution of the Contract.

Commentary: This clause has no equivalent in the 2010 Model Contract.

CLAUSE 43 EXPORT CONTROL

The Parties acknowledge that any products, software, and technical information (including, but not limited to, services and training) provided by any Party under this Contract are or may be subject to applicable export laws and any use or transfer of such products, software and technical information must be authorized under those laws. The Parties agree that they will not use, distribute, transfer or transmit the products, software or technical information (even if incorporated into other products) except in compliance with such export laws. If requested by Purchasers, the Contractors agree to sign written assurances and other export-related documents as may be required to comply with export laws.

Commentary: This clause has no equivalent in the 2010 Model Contract.

CLAUSE 44 PUBLICITY / CONFIDENTIALITY

Neither party shall disclose the existence or the details of this Contract or any information regarding its performance of this Contract to any other Person without the prior written consent of the other party, but either party may (i) respond to customary press inquiries or otherwise making public or private statements in the normal course of business, so long as consistent with a mutually agreed press-release and (ii) disclose the existence or the details of this Contract and information regarding its performance of this Contract strictly as needed to obtain financing or to comply with applicable securities laws or to perform its obligations under this Contract. This Clause will survive expiration or termination of this Contract.

Commentary: This clause corresponds to part of Clause 18.5 “Confidential Information” of the 2010 Model Contract.

CLAUSE 45 NO WAIVER

No failure by either party to insist on strict compliance with any term of this Contract is to be construed as a waiver of such party’s rights. No failure of either party to exercise, or delay by either party in exercising, any right under this Contract is to be construed as a waiver of such right, nor does any express right or remedy under this Contract, or any single or partial exercise thereof, preclude further exercise of such right or remedy or any other right or remedy under this Contract or under applicable law, unless expressly provided otherwise.

Commentary: This clause corresponds to Clause 18.18 “Waiver” of the 2010 Model Contract.

CLAUSE 46 SYSTEM OWNERSHIP

Schedule D (Ownership of Parts of the System) details the status of ownership by the Purchasers of the relevant parts of the System. Apart from the Contract Price to be invoiced according to Schedule C as per Sub-Clause 15.1, the Contractor shall invoice the duties and taxes (if applicable) to the relevant Purchasers according to Schedule D.

Commentary: This clause is specific for the case of a consortium and has no equivalent in the 2010 Model Contract.

CLAUSE 47 SIGNATURE

If this Contract is signed in counterparts, all of them, taken together, constitute one and the same agreement. IN WITNESS WHEREOF the Parties have severally subscribed these presents or causes them to be subscribed in their names and on behalf of their respective officers thereunto duly authorised.

THE CONTRACTOR

for and on behalf of *[To be inserted at Contract signature]*.

By: _____

THE PURCHASERS

for and on behalf of *[To be inserted at Contract signature]*.

By: _____

Commentary: This clause corresponds to Clause 18.6 “Counterparts” and to the paragraph IN WITNESS WHEREOF of the 2010 Model Contract.

APPENDIX 1: MODEL OF A PERFORMANCE/WARRANTY BOND

Commentary: This appendix is referred to by Clause 6 (Performance and Warranty Bonds)

Gentlemen,

We refer to the Contract for a provision of the **[name of System]**. System which you signed with: . **[name of Contractor]** herein designated as the Contractor.

Under the terms of the above Contract, the Contractor must submit to **[name of CBP]**

of the. **[name of System]** System on behalf of the Purchasers a Performance (resp. Warranty) Bond of [] representing [] per cent of the Contract Price at Contract signature date, as a guarantee of correct execution of his Contractual obligations.

Consequently, as Guarantor, we **[name of Bank]**. whose head office is at . [] hereby declare that we unconditionally and irrevocably guarantee payment to **[name of CBP]** .on behalf of the Purchasers, for a maximum amount of [] . starting from [] .

Through the validity of this letter of guarantee you shall have the right, by delivery of a mere written notice addressed to us and without the necessity of any proof related to any non-compliance of the Contractor, to declare as forfeited in your favour, wholly or partly, the above cited guarantee and up to the extent of the amount above written, and where upon receipt of your said notice we shall have instantly to pay in cash the amount thus forfeited to:

the Bank account number(s) of the System **[bank account to be defined]**

This engagement will automatically become null and void at the earlier of: (a) the date of the issue of the Certificate of Provisional Acceptance(resp. Final Acceptance) or (b) **[expected date of Provisional or Final Acceptance]**. On expiry, this Letter of Guarantee must be returned to us so that it can be cancelled from our records.

Yours sincerely,

APPENDIX 2: MODEL OF A LETTER OF GUARANTEE AGAINST PAYMENT

Commentary: This appendix is referred to by Sub-Clause 15.4 (Guarantee Against Payment)

PAYMENT GUARANTEE FOR INVOICE N°

Gentlemen,

We refer to the Contract for a provision of the **[name of System]**. System which you signed with: **[name of Contractor]** herein designated as the Contractor.

In consideration of the above, as Guarantor, we, **[name of Bank]** whose head office is at [__] hereby declare that we unconditionally and irrevocably guarantee payment to **[name of CBP]** on behalf of the Purchasers, starting of [__] for a maximum amount of.[__] , which represents 100% of the the total invoice N°[__] dated [__]

Through the validity of this letter of guarantee you shall have the right, by delivery of a mere written notice addressed to us and without the necessity of any proof related to any non-compliance of the Contractor, to declare as forfeited in your favour, wholly or partly, the above cited guarantee and up to the extent of the amount above written, and where upon receipt of your said notice we shall have instantly to pay in cash the amount thus forfeited to:

the Bank account number(s) of the System **[bank account to be defined]**

This engagement will automatically become null and void at the earlier of: (a) the date of the issue of the Certificate of Provisional Acceptance or (b) **[expected date of Provisional Acceptance]**. On expiry, this Letter of Guarantee must be returned to us so that it can be cancelled from our records.

Yours sincerely,

APPENDIX 3: LIST OF CONTRACTORS AND SUB-CONTRACTORS

Commentary: This appendix is referred to by Clause 14 (Assignment and Subcontracted Work)

Items / Services	Contractors/Subcontractors	Place of Manufacture
A. Items to be Manufactured By Contractors/Sub-Contractors		
B. Services to be Provided By Contractors/Sub-Contractors		

[To be inserted at Contract signature]

APPENDIX 4: MODEL OF PROJECT CHANGE

Commentary: This appendix is referred to by Sub-Clause 12.2 (Contract Variation requested by Purchasers)

PROJECT CHANGE NOTICE NO. XX

- 1. DESCRIPTION OF PROJECT CHANGE
 - 1.1 DESCRIPTION OF ORIGINAL ITEM OF WORK
 - 1.2 DESCRIPTION OF PROJECT CHANGE
 - 1.3 PLAN OF WORK

2. PRICE DETAILS OF PROJECT CHANGE

3. EFFECT ON FINAL CONTRACT PRICE

- 3.1) Value of Original Item of Work (A): US\$ xxxxxx
- 3.2) Value of Project Change (B): US\$ xxxxxx
- 3.3) Net Value of Item of Work (A+B) US\$ xxxxxx

PRICE NATURE: Fixed Price Cost Incurred

4. EFFECT ON PLAN OF WORK

Does Project Change affect the SA Date? Yes No

5. EFFECT ON SYSTEM PERFORMANCE

6. SUPPORTING DOCUMENTATION

The following documentation shall support this PC Notice:

- detailed Technical documents
- scope of work
- detailed Price Schedule

SUBMITTED BY _____ DATE _____

CONTRACTOR'S AGREEMENT Yes No DATE _____

PG APPROVAL Yes No DATE _____

SCHEDULE A: LIST of PURCHASERS

Commentary: This schedule is referred to by the RECITAL of the Contract and it contains legal designation of each Purchaser

PURCHASER A, a company organised and existing under the laws of [country], registered in [place], under the number [___], having its principal place of business at [address] (herin called [shortname], which expression shall include its successors)

PURCHASER B, a company organised and existing under the laws of [country], registered in [place], under the number [___], having its principal place of business at [address] (herin called [shortname], which expression shall include its successors)

PURCHASER C, a company organised and existing under the laws of [country], registered in [place], under the number [___], having its principal place of business at [address] (herin called [shortname], which expression shall include its successors)

etc

SCHEDULE B: System Configuration / Technical Specifications

Commentary:

This schedule contains a detailed listing of the different sub-segments of the System.

SCHEDULE C: LIABILITY OF THE PURCHASERS (in percentage)

Commentary: This schedule is referred to by Sub-Clause 15.1 (Responsibility for payment) and list the percentage of liabilities of each Purchaser.

Purchasers	Liability (%)
Purchaser A	A %
Purchaser B	B%
Purchaser C	C%
TOTAL	100 %

SCHEDULE D: PURCHASERS' ADDRESSES FOR NOTICES

Commentary: This schedule is referred to by Sub-Clause 28.3 (Addresses for notices to Purchasers).

SCHEDULE E: OWNERSHIP OF RELEVANT PARTS OF THE SYSTEM

(as defined in Schedule B)

Commentary:

This schedule is referred to by Clause 49 (System Ownership).

It should contain a two column table listing the ownerships of different part of the system.

It used the sub-segment designations defined in Schedule B

SUB-SEGMENTS	PURCHASERS
sub-segment 1	Purchaser A
sub-segment 2	Purchaser B
sub-segment 2	Purchaser C
All other sub-segments no listed above	All Purchasers