



Contractual Guidelines for WASTE-TO- ENERGY

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FOREWORD

This document is the first contractual guidelines published by ESWET, with the participation of other stakeholders involved in the Waste-to-Energy sector.

These Contractual Guidelines provide non-binding recommendations to Parties involved in the building, maintenance, refurbishment and operation of Waste-to-Energy plants. Their overall goal is to help the drafting of well-designed contracts that address the complexity of Waste-to-Energy projects, ensure fair relations between the contracting parties and, ultimately, the success of the projects.

These Contractual Guidelines are non-exhaustive and modifications might be required in some jurisdictions, or to adapt the recommendations to the specific features of the project. Parties are, in any event, free to derogate from these Guidelines.

CONTENT

1. DEFINITIONS.....	7
2. EMISSIONS REGULATION.....	9
3. LIQUIDATED DAMAGES	9
Applicability	9
Calculation and limits	10
4. LIABILITY.....	11
Limitations of liability	11
5. INDEMNITIES.....	11
6. INTELLECTUAL PROPERTY RIGHTS	12
Application.....	12
Reverse engineering.....	13
7. DEFECT LIABILITY PERIOD.....	13
8. PAYMENT TERMS	13
9. SECURITIES PROVIDED BY THE CONTRACTOR	14
10. AVAILABILITY GUARANTEE	14
11. PERFORMANCE TESTING & CONTRACT ACCEPTANCE TESTING.....	15
Performance testing.....	15
Acceptance testing	15
Authority of the Technical advisor / independent certifier	16
12. VARIATIONS TO THE CONTRACT	16
13. TERMINATION OF THE CONTRACT	17
Termination by the Client.....	17
Termination by the Contractor	17
14. RESCISSION.....	18
Reasons for rescission	18
Consequences for rescission	18
15. SUSPENSION OF WORK	18
Suspension by the Client	18
Suspension by the Contractor	19
16. SPARE PARTS	19
17. OBLIGATION OF THE CLIENT.....	19
Fulfilment of the payment obligations.....	19

Access to the site.....	19
Coordination.....	20
Provision of necessary information and documents	20
Necessary consents for the project.....	20
Consumables & utilities.....	20
Provision of waste & disposal of residues.....	21
Insurances	21
18. PROJECT TIME SCHEDULE.....	21
19. DESIGN BASIS	21
20. CONTRACTOR’S NAMED PERSONNEL.....	21
21. SUBCONTRACTORS.....	22
22. TRANSFER OF RISKS.....	22
23. RELIEF CLAUSES	22
Force majeure	23
“WHO pandemics or epidemics” relief clause	24
Change in law	25
24. DISPUTE RESOLUTION	26
Activation of the dispute resolution clause:	26
Choice of the dispute resolution procedure	26

1. DEFINITIONS

'Abandon' means, unless otherwise relieved by an express provision of the Contract, including a suspension of the Works permitted under this Contract or at Law, a failure by a Party to carry out whole of or substantially the whole of the works willfully and wrongfully for 30 consecutive days or a longer period permitted in accordance with the Contract, for a reason attributable to such Party

"Applicable law" means laws and any other instruments or subordinate legislation having the force of law [add jurisdiction]. It includes any applicable international or national standards, guidance, statute, ordinance, decree, regulation, or by-law or any rule, circular, directive or any licenses, consent, permit, authorization, concession or other approval issued by any authority which has appropriate jurisdiction.

'Consumables' means for instance power, water, fuel oil, lime, sodium bicarbonate, ammonia (or ammonium hydroxide or urea), powdered activated carbon, other reagents, town's water and boiler chemicals.

"Contract" means the Contract agreement, the Client's requirements, and further documents (if any) which are listed in the Contract agreement.

"Contract price" means the agreed amount states in the Contract agreement for the design, execution and completion of the Works and the remedying of any defects and include adjustments (if any) in accordance with the Contract.

'Defect' means any defect in the Works, which is caused by the Contractor's failure to comply with its obligations under the Contract and any consequent physical damage to the Works, provided that such matter shall not be a Defect to the extent that it is caused by:

- (a) normal wear and tear;
- (b) a failure by the Client or any third party not engaged by the Contractor to operate and maintain the Plant in accordance with the Operating and Maintenance Manuals and/or with industry practice;
- (c) a failure by the Client to comply with any of its obligations under the Contract;
- (d) Force Majeure;
- (e) abuse, misuse, neglect, unauthorized repair/ alternation/ adjustment / removal by the Client or any third party not engaged by the Contractor;

(f) any equipment which have not been repaired or altered in accordance with the Contractor's recommended procedure by the Client or others not engaged by the Contractor;

(g) any equipment which have not been used in accordance with the Contractor's recommended procedure by the Client or any third party not engaged by the Contractor;

(h) any design, specifications, data, equipment, materials, or other supplies which were designed, supplied or specified by or on behalf of the Client; and/or

(i) any Materials, or parts of them, which are normally consumed in operation or which have a normal life shorter than the defects liability period/wear parts

“Exceptional Event” means any event, attributable to the Contractor, which results in the interruption or a considerable reduction of treatment of waste and/or export of electricity for a prolonged period but does not impact the long-term availability of the Plant.

“Latent defect” means a defect which exists at the time of acceptance but cannot be discovered by a reasonable or customary inspection.

“Party” means the Client or the Contractor, as the context requires.

“Site” means the places where the Works are to be executed and to which related materials are delivered, and any other places as may be specified in the Contract as forming part of the Site.

“Spare Parts” refers to the parts to be required for the operation and maintenance of the equipment supplied by the Contractor according to the Contract and does not include wearing parts.

“Wearing Parts” means those parts of the equipment which are subject to normal deterioration with time and/or shall be replaced under the preventive maintenance.

“Works” means the services to be performed under the Contract (for instance: design, manufacture, supply, construction, maintenance, or refurbishment of the plant or parts of it).

2. EMISSIONS REGULATION

The performances of monitoring techniques available on the market often do not meet the requirements of standards on monitoring made compulsory by the EU Industrial Emissions Directive in respect of the maximum levels of uncertainty¹. When relevant to the Works, it is advised that the Parties acknowledge this issue in the Contract, taking into account the current performances of the measuring equipment (AMS or CEMS and SRMs).

When permit conditions implement the Waste Incineration (WI) BREF published in 2019, the Contract shall include a dedicated clause to clarify between the parties the interpretation and implementation of all relevant parts transposed from the WI BREF and , in order to prevent possible uncertainties² with regards to related contractual requirements.

BREF and BAT shall not be referenced. Instead, relevant requirements shall be incorporated into the Contract specifically.

3. LIQUIDATED DAMAGES

Applicability

Liquidated damages shall be the sole and exclusive remedy for non-achievement of guaranteed performance or milestones, except for termination rights and rescission.

The Contract shall set a framework for proof of performance values and measurement procedures including consideration of tolerances. The Contractor shall not be held responsible for any loss of profit, loss of use, or loss of production, but for selected performance figures which are substantial for operation.

Transfer of risks relative to the structure shall be clearly defined. The transfer to the Contractor of typical owner's or developer's liabilities, such as underground risk and existing constructions, building and operation permit, shall be reasonably restricted.

¹ As highlighted by the a INERIS study: http://www.eswet.eu/wp-content/uploads/2020/12/INERIS-Study_Final_Website.pdf

² See the Explanatory & guidance document on Waste Incineration BREF and BAT documents: <http://www.eswet.eu/documents/explanatory-and-guidance-waste-incineration-bref-bat-conclusions/>

Milestone(s) subject to delay liquidated damages shall be limited in number and reflect an actual damage suffered by the Client. The Contract shall specify circumstances for which the Contractor shall be relieved from liquidated damages, e.g.:

- (i) when the Contractor is instructed to suspend the work;
- (ii) delay caused by public authorities provided that the Contractor diligently followed relevant legal procedures;
- (iii) variation in the Contract;
- (iv) force majeure event; etc.

The Contract shall also specify situations where, and under what conditions, the Contractor is entitled to an extension of the time of completion and/or adjustment of the Contract Price, for instance for the reasons mentioned above or other relevant situations.

Calculation and limits

Liquidated damages shall reflect real justifiable genuine pre-estimate of loss, be reasonable with regards to amount and calculation method.

a) performance LDs:

Double recovery shall be duly avoided, and benefits shall be accounted for, such as e.g. insurance over-recovery. Extrapolation of damage into future years shall be discounted and limited to a reasonable period e.g. 8 to 10 years but never longer and commensurate to the portion of the payback period of the plant. Liquidated damages shall be reasonably limited, for instance by setting a cap based on a contractually defined share of the Contract Price. Calculation method shall be transparent to all Parties to the Contract.

There should be no cross-default clause with the Operator.

b) delay LDs:

If the Contractor fails to complete the work within the time of completion, the Client shall be entitled to require the Contractor to pay delay liquidated damages for this default. However, the amount of due delay liquidated damage shall be contractually defined and shall be reasonably limited, for instance by setting a cap in the Contract. Calculation method shall be transparent to all Parties to the Contract.

4. LIABILITY

Limitations of liability

To the extent as may allow Applicable law, and excluding Liquidated Damages, infringement of intellectual property rights, defects in title of material transferred to client, liability for consequential or indirect damage (as well as heads of losses such as loss of profit and loss of contract) shall be excluded and the Contractor shall be held responsible only for faults directly attributable to the Contractor (e.g. in the context of a contract divided into lots).

The Contractor's total liability shall in general be a sum equal to the Contract Price (the "General Liability Cap") and, without prejudice to the foregoing limits of total liability, sub-limits may apply to liquidated damages.

Only damages which cannot be limited under the Applicable Law shall not be subject to limitation, e.g. liability for fraud, wilful default, death, personal injury.

To the extent permissible under Applicable Law, the Contractor's limitation of liability shall be maintained regardless whether the damages is due to any fault of the Contractor, its personnel, agents, or subcontractors.

Both Client and Contractor have a duty to mitigate losses in respect of claims against each other.

5. INDEMNITIES

The Contractor shall indemnify and hold harmless the Client from claims, costs and expenses in respect of:

- (i) illness, injury or death by reason of the design, execution or completion of the work unless it resulted from negligence, willful act or contractual breach by the Client;
- (ii) Damage to or loss of the Client's own property by reason of the design, execution or completion of the work and attributable to the Contractor's negligence, wilful act, or contractual breach.

The Client shall indemnify and hold harmless the Contractor from claims, costs and expenses in respect of:

- (i) illness, injury or death that resulted from negligence, willful act or contractual breach by the Client;
- (ii) Damage to or loss of the Contractor's own property that resulted from negligence, willful act or contractual breach by the Client.

6. INTELLECTUAL PROPERTY RIGHTS

General objective: The Contract shall include a clause covering ownership of intellectual property and reverse engineering.

Application

Background intellectual property that was created before the Contract shall belong to the party that has rights to such prior to the Contract effectiveness, while foreground intellectual property that was created by the Contractor for the purpose of the project should remain the Contractor's property. For the latter, the Contractor could grant the Client a license to use and maintain but not, for instance, to reverse engineer or deconstruct.

The Contractor shall indemnify and hold harmless the Client, against and from all claims in respect of infringement to intellectual property rights relating to the Works, to the extent that such infringement:

- (i) arises out of or in relation to the Contractor's design, manufacture, construction or execution of the Works; and
- (ii) is not attributable to any negligence, willful act or breach of the Contract by the Client, the Client's personnel or any of their agents.

The Client shall indemnify and hold the Contractor harmless against and from all claim alleging an infringement which:

- (i) results from the Contractor's compliance with the Client's requirements; or
- (ii) results of any Works being used by the Client:
 - (a) for a purpose other indicated by, to be reasonably inferred from, the Contract; or
 - (b) in conjunction with anything not supplied by the Contractor, unless the use was stated in the Contract.

Reverse engineering

Unless agreed by the Parties in writing for the purpose of the Works, and to the limited extent as may be specifically provided by applicable law:

- (i) the Client shall not reverse engineer or otherwise attempt to derive or obtain information about the functioning, manufacture or operation of the products supplied by the Contractor;
- (ii) the Contractor shall not reverse engineer or otherwise attempt to derive or obtain information about the functioning, manufacture or operation of the products owned by the Client.

7. DEFECT LIABILITY PERIOD

Defect liability shall cover only defects stipulated in the Contract and shall exclude any other warranty such as warranty for fitness of particular purpose or any other implied warranty at law.

The defect liability period shall not exceed a contractually defined period, e.g. 1 to 2 years, with a clearly defined start, with revolving or evergreen warranty being excluded. For rectified equipment – The defect liability period can be extended by up to maximum its original duration and shall in case be no longer in total than a contractually defined period after acceptance.

Latent defects (where applicable) that may arise during or after the Defect Liability Period shall be addressed in the Contract, but shall be clearly defined with a specified time limit.

However, the Contractor shall not be responsible for defects attributable to improper operation or maintenance by another Party (e.g: if the defect results from the other Party performing operations out of Operation & Maintenance Manual, using unauthorised spares, etc.).

8. PAYMENT TERMS

It is in the interest of all parties to achieve neutral payment conditions.

9. SECURITIES PROVIDED BY THE CONTRACTOR

Securities provided by the Contractor shall be provided only during a contractually defined period. Securities shall not exceed a contractually defined percentage during the construction period and the defect liability period. Securities provided by the Contractor shall be physically given back from the Client after the agreed period of time.

10. AVAILABILITY GUARANTEE

The definition of period of availability shall address any period of non-availability due to any reason the Contractor is not responsible for. It is in the interest of the Parties to precisely clarify the limit of the notions of availability and unavailability (for instance, with regards to cooling down period, start-up period, etc.). The clause shall also lay rules with regards to how to claim for unavailability and notification to the other Party.

In case of non-compliance with the availability guarantee, the sole remedy shall be reasonable liquidated damages. The definition of availability shall be such that Liquidated Damages for non-fulfillment reflect genuine pre-estimate of loss due to Contractor's fault during the availability test period, limited to a reasonable period e.g. 1 to 2 years. Liquidated damages shall be reasonably limited, for instance by setting a cap based on a contractually defined share of the Contract Price. Calculation method shall be transparent to all Parties to the Contract. Pre-estimate for liquidated damages for failure to pass Availability tests should not permit recovery for the same loss covered by the Performance liquidated damages/double-recovery.

The Contractor shall not be held responsible for the events that this guidance document excludes from the definition of "Defect" (see the list in *Chapter 1. Definition*).

Consequences of not meeting the availability guarantees shall distinguish between non-availability caused by the events that negatively impact long-term availability and non-availability caused by Exceptional Events.

The Availability Test (incl. application of damages relating to the availability) shall be suspended for the duration of the interruption caused by Exceptional Events.

11. PERFORMANCE TESTING & CONTRACT ACCEPTANCE TESTING

Performance testing

The Contract shall address the conditions, if the Works or part of the Works fail a performance test, for the Contractor to be entitled to either repeat the performance test or to pay liquidated damages.

If the Contractor does not receive contractually required feedback by the Client after a contractually defined period following the date of the test, e.g. 2 to 3 months, then the Works shall be deemed to have passed the test.

Acceptance testing

If contract acceptance testing is specified in the Contract, it shall:

- Include a clearly defined terminology;
- Clearly define the start of the acceptance testing (By way of example: *The Contractor shall be given a 14 days' notice of the date after which the acceptance testing will be carried out with, unless otherwise agreed, the acceptance testing being carried out within 14 days after this date, on the day(s) determined by the Client*).
- Provide a clear definition of the different acceptance sequences, as well as liabilities in each sequence.

Testing and acceptance sequences shall be realistic and consistent with the programme.

Contract acceptance testing may include a reliability test ("*trial run*") where the plant is operated during a contractually defined period, e.g. 2 to 4 weeks, at nominal capacity to probe that the performances measured during the acceptance sequences will be maintain during operation time.

The results of the tests shall be compiled and assessed by both Parties. Appropriate account shall be taken of the effect of prior use of the Works by the Client.

If according to the testing, the plant or the item of the plant resulting from the Works performed by the Contractor is found to be defective or not in line with the Contract, the Client may not accept the plant or the item by giving the Contractor notice with reasons. The Contractor shall then correct the defect within a reasonable time so that the tested

item complies with the Contract. The compensation should be commensurate to the damage caused and the Contractor shall be entitled to prove performance via an appropriate retest.

Authority of the Technical advisor / independent certifier

The role and authority of the technical advisor/independent certifier hired by the Client shall be clearly identified in the Contract.

The Contractor shall not be held responsible for delays caused by the technical advisor or resulting, for instance, from a lack of coordination between the Client and the technical advisor/independent certifier.

The technical advisor/independent shall be qualified and impartial.

12. VARIATIONS TO THE CONTRACT

General objective: The Contract shall allow for reasonable changes in the Contract under fair conditions with regards to adjustment of price, timetable, delivery process, etc.

The terms and conditions of the Contract may be changed by mutual agreement of the Parties. The contract shall include a list of compensation/variation events. Such modification shall be effective upon the signing by both Parties of an addendum /amendment to the Contract encompassing those variations.

If the terms and conditions of the Contract are modified such that the variations cause an increase in the cost of, or the time required for, the Works, the Parties may agree in writing to a fair adjustment in pricing, delivery schedule, or both. The Parties may define in advance parameters in the Contract to help assess the proper nature and level of adjustment for the variations requested.

Any request for any variation to the Contract shall be in writing and shall include, at least, the following items:

- (i) a description of the scope of the terms and conditions to be changed, and
- (ii) the proposed adjustment for the variation requested.

As of the date of reception of a written request for a change to the Contract, the other Party shall request an adjustment for the variations to the Contract within a contractually defined period, e.g 2 to 4 weeks.

Contract to consider reasonable scenario where Contractor can object to the variations.

13. TERMINATION OF THE CONTRACT

General objective: The Contract shall include a mechanism for termination of the Contract under fair conditions, and should differentiate between the different reasons for termination.

Termination by the Client

(a) Termination for convenience by the Client:

The Contract shall state the Contractor's right to the payment by the Client of all incurred and committed costs, fair compensation for the cancellation of orders in progress, Contractors' costs associated with termination and direct losses, as well as loss of profit margin as defined, or a proportion of the outstanding Contract price.

(b) Termination due to Contractor's default:

The Contract shall state the Contractor's right to a correction period for the default after formal notice and before termination, and shall state the Contractor's right to payment for Works completed before termination. The termination shall be limited to specific material or substantial breaches, and shall not be used for minor defaults from the Contractor. Termination shall be a last-resort remedy for the Client.

Termination by the Contractor

(a) Termination due to Client's default:

The Contract shall state the Contractor's right to terminate the Contract in case of default by the Client, including but not limited to in case of non-payment of undisputed invoices by the Client after a contractually defined maximum period without payment, e.g. 4 to 8 weeks.

14. RESCISSION

Rescission is an extreme remedy that should be avoided. However, if a rescission right is stated in the Contract, then the following shall be the minimal provisions to ensure a fair contractual relationship:

Reasons for rescission

The Contract may state the Client's right to rescind the Contract for clearly defined and fair reasons that definitively prevent the Client from operating the plant, such as if the plant fails to fulfil requirements of the permit due to emissions to air and noise and this failure cannot be corrected by any reasonable endeavors.

Consequences for rescission

Rescission may entail the following consequences:

- (i) Repayments of the part of the Contract Price already received until the date of termination and dismantling of the Works already constructed on site so far;
- (ii) liability up to a contractually defined percentage of the Contract Price proportionate to the overall liquidated damages cap.

15. SUSPENSION OF WORK

The Contract shall clarify in what circumstances either party can apply its suspension right.

Suspension by the Client

If the Contract states the Client's right to suspension for convenience, the Contract shall also clearly define conditions to exercise this right to suspension.

The Client shall reimburse the costs linked to the suspension (e.g. remobilisation costs).

If the suspension exceeds a contractually defined period, e.g. 3 to 6 months, then termination shall be possible.

Suspension by the Contractor

The Contract shall state the Contractor's right to suspension for failure of payment by the Client after a defined prolonged period and until the Client pays due invoices. The Contract shall clearly define conditions to exercise this right to suspension.

16. SPARE PARTS

To the extent permissible under Applicable Law, the Contractor may provide the availability of the defined spare parts for a minimum defined number of years from completion of Works, e.g. 5 to 10 years.

17. OBLIGATION OF THE CLIENT

General objective: The Client shall acknowledge that the Contractor's performance of the Works requires reasonable cooperation and the obligation of the Client shall be clearly defined.

Fulfilment of the payment obligations

The Contract Price shall be paid in installments in accordance with the payment schedule for the Works as stated in the Contract, provided that each such payment shall be due only if the relevant milestone has been achieved or the Works have been performed.

The Parties shall agree on a clear invoicing schedule.

Access to the site

The Client shall give the Contractor unrestricted access to, and possession of, all parts of the site required to perform the Works within a contractually defined period. Access and possession may not be exclusive to the Contractor.

If no such period is defined, the Client shall give the Contractor access, and possession of, all parts of the site required to perform the Works with effect from the commencement date of the Works.

Access and possession shall not be interrupted or restricted, unless necessary reasons to interrupt or restrict access and possession are specifically defined in the Contract (e.g: reasonable safety restrictions) or to the limited extent as may be specifically provided by applicable law.

Coordination

The Contract shall state that it is the Client's responsibility to secure the different Contractors required to be co-operating on the site (for instance, EPC, O&M, waste suppliers, power off taker), including interface with the power grid and connection to the utilities.

Provision of necessary information and documents

The Client shall agree to cooperate and perform its duty in a timely manner, including the provision of any information, data, or document that the Contractor reasonably requests from the Client and that is necessary for the Contractor to properly perform its obligations. Such information, data or document shall be provided by the Client in the form and by the dates mutually agreed upon. Such information, data, or document shall be kept confidential in accordance with the rules defines by the Contract and Applicable law.

Necessary consents for the project

The Parties shall agree to take the necessary steps and use their reasonable endeavors to obtain, or assist each other to obtain, third-parties' consents and authorizations required to perform the Works.

Rely Upon Information shall include planning permission, environmental permit and site boundaries.

Consumables & utilities

If provided for by the Contract, the conditions regarding the provision of consumables and utilities (for instance, back-feed power) shall be clearly defined.

Provision of waste & disposal of residues

The provision of waste in accordance with the specifications and volume, as well as disposal of residues, shall be secured by the Client.

Insurances

If so agreed in the Contract, the Client needs to provide the agreed insurances and certificates of the same in due time.

18. PROJECT TIME SCHEDULE

The level of details regarding the time schedule shall be agreed between parties prior to Contract Execution.

Only PDF files reflecting the programme shall be provided highlighting the critical path.

19. DESIGN BASIS

If the Client's requirements include an outline design, the Contract shall clearly define which of the Client's outline design is a suggestion or a requirement, and which, if any, shall not be changed. In order to clarify the rights of each Party, the Contract shall clarify which documents require approval (e.g: general arrangement), comments (e.g. piping and instrumentation diagram) or information (e.g. drawing of a grate). It is advised that the Contract clearly determines what basic information shall be guaranteed by the Client.

When the Client provides the site for the Works, the Client shall provide rely-upon information (including data relating to ground conditions).

20. CONTRACTOR'S NAMED PERSONNEL

The Contractor's key personnel shall be nominated at the signing off of the Contract. The Contractor shall be free of replacing his key personnel, provided the replacement demonstrates similar competence or experience.

21. SUBCONTRACTORS

The Contractor shall not subcontract the entire Works.

The Parties may agree on a predefined list of main subcontractors. Subcontractors on a predefined list that are changed by the Contractor for non-listed subcontractors shall require approval by the Client for key works. Below a certain contractually defined value, the selection of subcontractors shall be at the discretion of the Contractor.

The Contract shall not prevent a Party from using the services of any subcontractor and from determining the terms of the subcontracts, provided that each Party remains primarily liable to the other Party for the performance of their respective subcontractors.

22. TRANSFER OF RISKS

Unless otherwise agreed in the Contract, and to the extent as may be specifically provided by Applicable law:

- (i) In Contracts for erection, commissioning and acceptance, the transfer of risks to the Client shall occur at the stage of the acceptance and the start of the mechanical warranty.
- (ii) In delivery Contracts, transfer of risks to the Client shall be determined in accordance to Incoterms.

23. RELIEF CLAUSES

General objective: The Contract shall include a relief clause covering and carefully defining the scope of change in law, force majeure (including pandemics), “Act of God”, etc. Relief clauses should address the consequences with regards to extension of cost & extension of time.

Warning: If the Client requests that any relief event needs to be unforeseeable at the time of the signing of the Contract, then the Contractor should consider any clauses on relief events that would be foreseeable (e.g. Brexit or COVID).

Force majeure

(a) Definition of Force majeure:

“Force majeure” means an unforeseen event beyond the control of the affected Party; against which it would have been unreasonable for the affected Party to take precautions; which the affected Party cannot avoid even by using its best reasonable efforts; and which prevents the affected Party from complying with any of its obligations under the Contract.

Such events may include but are not limited to:

- (i) natural disasters or other events qualified as “acts of God” (such as, but not limited to, fires, explosions, earthquakes, drought, tidal waves and floods);
- (ii) acts of war, hostilities (whether war be declared or not), invasion, act of foreign enemies, mobilisation, requisition, or embargo;
- (iii) rebellion, revolution, insurrection, or military or usurped power, riots, or civil war;
- (iv) contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such assembly;
- (v) acts or threats of terrorism;
- (vi) epidemics or pandemics, categorised as such by national public authorities of the country where the Works are performed or the country where the Contractor manufactures its products, or by international public authorities (such as, but not limited to, the World Health Organisation).
- (vii) national strikes;

The Contract shall also include an exclusion list of events that shall not constitute Force majeure.

(b) Consequences of Force majeure:

Either Party shall be excused from performance and shall not be in default in respect of any obligation hereunder to the extent that the failure to perform such obligation is due to a Force majeure event.

If a Party wishes to claim protection in respect of an event of Force Majeure as defined in the Contract, it shall, within a contractually defined period following the date of commencement of such event of Force Majeure, notify the other Party of the nature and expected duration of the Event of Force Majeure and shall thereafter keep the other Party informed until such time as it is able to perform its obligations.

The Parties shall use their reasonable endeavors to:

- (i) overcome the effects of the event of Force Majeure;
- (ii) mitigate the effects of any delay occasioned by any event of Force Majeure; and
- (iii) ensure resumption of normal performance of the Contract as soon as reasonably practicable.

Provided that the Contractor has given notice to the Client and shown reasonable endeavors described above, then if the Contractor is prevented from performing its contractual obligations by a Force majeure event and has suffered delay and/or cost incurred by reason of such event, the Contractor shall be entitled to:

- (i) an extension of time if completion is or will be delayed;
- (ii) payment by the Client of costs incurred by reason of the Force majeure event.

The Parties may define in advance parameters in the Contract to help assess the level of payment to the Contractor and/or of the extension of time.

“WHO pandemics or epidemics” relief clause

While an event can be unforeseen at first and may qualify as a Force majeure event, the COVID-19 crisis has shown that such event can have long-lasting impacts likely to disrupt the normal performance of the Contract. As such event lasts, the application of a Force majeure clause may become challenging when new related costs and delays arise, leading to contractual uncertainties between the Parties.

Learning from the impact of the COVID-19 crisis, the Contract shall include a relief clause addressing the consequences of a lasting event that could initially be considered as Force majeure. In particular, it should cover the effect of new variants/strains of an ongoing epidemic or pandemic provided it is affecting the Contractor's ability to perform the Work.

Accordingly, such clause shall grant protection similar as a Force majeure clause with regards, for instance, to excuse from performance, extension of time granted for a delay suffered, and payment of the cost incurred by reason of such event. It is in the interest of the Parties to carefully define conditions and parameters for the extension of time and/or payment of the cost incurred.

Similarly, if a Party wishes to claim protection under such clause, it should demonstrate that it has used its reasonable endeavors to overcome and mitigate the effect of the event, and to ensure resumption of normal performance of the Contract as soon as reasonably practicable.

Change in law

(a) Definition of Change in law:

“Change in law” means the coming into effect after a date specifically defined in the Contract (date of the Contract, bid submission date, or other date) of:

Applicable Law; or any applicable judgment of a relevant court of law which changes the interpretation of the Applicable Law which directly and adversely affects a Party’s performance under the Contract.

(b) Consequences of Change in law:

If a Change in law occurs, the affected Party shall:

- (i) Take all reasonable measures to anticipate and mitigate the adverse impact of a Change in law upon the Contract;
- (ii) Within a contractually defined reasonable period following the time when the Contractor becomes aware of the Change in law, notify the other Party of the clearly identified Change in law.

Warning: The Contract shall avoid any clause imposing an unreasonable time period during which the Contractor shall make its claim regarding the Change in law.

If the affected Party is prevented from performing its obligations under the Contract, but would be able to proceed if a variation were made to the Contract, then the affected Party shall submit a notice for a variation to the Contract (see guidelines’ chapter 11. *Change to the Contract*).

If the Change in law causes an increase in the cost of, or the time required for, the Works, the affected Party shall be entitled to a fair adjustment in pricing, delivery schedule, or both. The Parties may define in advance parameters in the Contract to define allocation of risk of Change in law, and to help assess the proper nature and level of adjustment depending on the nature and degree of change suffered by the affected Party.

In the event that the affected Party is prevented from performing its obligations under the Contract and this cannot be remedied by an adjustment or a variation to the Contract, or the other Party has refused to grant a variation to the Contract, then the affected Party may suspend performance of the work and - after a contractually defined period- may give notice of termination. Such termination shall not be deemed as termination due to the affected Party's default.

24. DISPUTE RESOLUTION

General objective: The Contract shall define applicable law and a clear dispute resolution procedure.

Activation of the dispute resolution clause:

The Contract shall include a dispute resolution procedure where amicable negotiation between the Parties is prioritised. Such clause shall be activated when one of the Parties sends an official written notice to the other Party, notifying them of a dispute related to the Contract.

The Parties shall attempt in good faith to resolve any dispute or claim through preliminary negotiations between a representative of each of the Parties with authority to settle the relevant dispute. After a contractually defined period, if the negotiations have not sufficed to resolve the dispute, then the remaining provisions of the dispute resolution procedure defined in the Contract shall apply.

Choice of the dispute resolution procedure

The dispute resolution procedure should be stated in the Contract after the Parties assessed the pros and cons of choosing either arbitration or court resolution, taking into account criteria such as the resulting length of procedure, related cost, or technical competence. In addition, the clause shall state Applicable law and jurisdiction.