

**SKRIPSI**

**KESETARAAN DALAM KONTRAK  
KONSTRUKSI**



Oleh :

**ROSA RISTAWATI**

**NIM. 039814759**

**FAKULTAS HUKUM UNIVERSITAS AIRLANGGA  
SURABAYA**

**2001**

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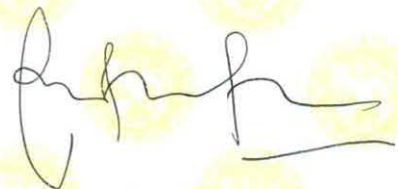
Diajukan untuk Melengkapi Tugas dan Memenuhi Syarat-syarat  
Untuk Mencapai Gelar Sarjana Hukum

**DOSEN PEMBIMBING**



**A. YUDHA HERNOKO, S.H., M.H.**  
NIP. 131878393

**PENYUSUN**



**ROSA RISTAWATI**  
NIM. 039814759

**FAKULTAS HUKUM UNIVERSITAS AIRLANGGA  
SURABAYA  
2001**

Skripsi ini telah dipertahankan dihadapan Tim Penguji  
pada tanggal 7 November 2001

TIM PENGUJI :

Ketua : Hj. Moerdiati Subagyo, S.H., M.S.



Anggota : 1. A. Yudha Hernoko, S.H., M.H.



2. Lisman Iskandar, S.H., M.S.



3. Bambang Soegeng A.S., S.H., M.H.



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Penyusun,

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# BAB I

## PENDAHULUAN

### **1. Permasalahan : Latar Belakang dan Perumusan Masalah**

Dewasa ini, Indonesia sedang dilanda krisis ekonomi yang berkepanjangan, dan berdampak ke segala sektor. Walaupun demikian, Indonesia sebagai negara berkembang tidak henti-hentinya menggalakkan pembangunan baik di pusat maupun di daerah. Hal tersebut tidak luput dari suatu industri konstruksi yang secara langsung memegang peranan penting dimana melibatkan banyak pihak baik pihak lokal maupun pihak asing. Keterlibatan pihak asing dalam suatu industri konstruksi merupakan hal yang umum terjadi, hal ini sangat erat kaitannya dengan faktor teknologi dan faktor finansial.

Sejalan dengan perekonomian Indonesia yang sudah mulai tumbuh, industri jasa konstruksi telah pula mulai menggeliat untuk bangkit kembali menjadi penggerak perekonomian nasional. Bersamaan kebangkitan ini industri jasa konstruksi Indonesia telah mencapai tahapan baru dengan telah berlakunya Undang-Undang RI No.18/1999 tentang Jasa Konstruksi, Lembaran Negara RI Tahun 1999 No.54, Tambahan Lembaran Negara No.3833 (selanjutnya disebut UU Jasa Konstruksi) beserta peraturan pelaksanaannya PP No.28/2000 Lembaran Negara RI Tahun 2000 No.63, Tambahan Lembaran Negara No.3955 (selanjutnya disebut PP Usaha dan Peran Masyarakat Jasa Konstruksi), serta PP No.29/2000 tentang Penyelenggaraan Jasa Konstruksi, Lembaran Negara RI Tahun 2000



No.64, Tambahan Lembaran Negara RI No. 3956 (selanjutnya disebut PP Penyelenggaraan Jasa Konstruksi), PP No.30/2000 tentang Penyelenggaraan Pembinaan Jasa Konstruksi, Lembaran Negara RI Tahun 2000 No.65 (selanjutnya disebut PP Penyelenggaraan Pembinaan Jasa Konstruksi), sejak 7 Mei 2000. Tahapan ini telah diwarnai pula dengan berlakunya Undang-Undang No.30/2000 Tentang Otonomi Daerah, Lembaran Negara RI Tahun 1999 No. 60, Tambahan Lembaran Negara No.3839 (selanjutnya disebut UU Otonomi Daerah) dan Undang-Undang No.25/1999 Tentang Perimbangan Keuangan Antara Pemerintah Pusat dan Daerah, Lembaran Negara Tahun 1999 No.72, Tambahan Lembaran Negara No.3848 (selanjutnya disebut UU Perimbangan Keuangan Antara Pemerintah Pusat Dan Daerah), sehingga benar-benar industri jasa konstruksi nasional telah menuju paradigma baru yaitu menjadi industri yang mandiri dan profesional.

Untuk menghadapi perubahan tersebut perlu adanya persiapan diri dari para pelaku industri jasa konstruksi dalam hal mengantisipasi perubahan-perubahan yang terjadi khususnya ditinjau dari aspek hukum dan manajemen konstruksi. Dalam rangka menyongsong kebangkitan kembali dunia konstruksi sejak keterpurukan yang telah dialami oleh negara Indonesia pada pertengahan tahun 1997 yang lalu, kiranya perlu untuk mempersiapkan diri agar dunia jasa konstruksi di Indonesia bukan saja bangkit dari keterpurukan namun sekaligus memperbaiki ketimpangan-ketimpangan yang dialami oleh dunia jasa konstruksi beberapa tahun lalu.

Ketimpangan yang dimaksud antara lain adalah kekurangsadaran kita mengenai hukum konstruksi serta keadilan dan kesetaraan dalam kontrak-kontrak konstruksi antara pengguna jasa (*owner*) dan penyedia jasa (kontraktor). Sudah seringkali kita mendengar suatu ungkapan yang kurang enak yang mengatakan bahwa kontraktor menjadi warga negara “kelas dua” dalam melaksanakan pekerjaan-pekerjaan konstruksi. Hal ini terjadi karena ketidakadilan dan ketidaksetaraan didalam kontrak-kontrak konstruksi.

Para kontraktor belumlah menjadi mitra yang setara dengan *owner*. Sehingga azas “*fair<sup>1</sup> and equal<sup>2</sup> contract*” hanya merupakan impian yang jauh dari kenyataan. Sebagai akibat dari hal-hal tersebut dalam kurun waktu 1998 hingga saat ini terjadilah pelbagai sengketa dalam industri jasa konstruksi yang dialami terutama oleh kontraktor didalam menuntut hak-haknya yang sebagian besar disebabkan oleh ketidakadilan atau kerancuan mengenai isi kontrak.

Sengketa tersebut pada akhirnya terpaksa harus diselesaikan melalui suatu alternatif penyelesaian sengketa baik melalui peradilan maupun melalui lembaga arbitrase. Keawaman dan kekurangsadaran terhadap hukum mengenai pentingnya kontrak konstruksi yang baik dan ideal menambah kerumitan didalam menyelesaikan masalah tersebut. Disamping hal-hal tersebut diatas muncul pula

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<sup>1</sup> Fair menurut Black's Law Dictionary adalah “Having the qualities of impartiality and honesty; free from prejudice, favoritism, and self-interest, just; equitable; even-handed; equal, as between conflicting interest, a gathering of buyers and sellers for purposes of exhibiting and sale of goods; usually accompanied by amusements, contest, entertainment, and the like.”

<sup>2</sup> Equal menurut Black's Law Dictionary adalah “a like; uniform; on the same plane or level with respect to efficiency, worth, value, amount, or rights.”

masalah-masalah lain yang berkaitan dengan industri jasa konstruksi, seperti masalah-masalah claim, resiko, yang kesemuanya erat kaitannya dengan masalah jaminan, asuransi, serta masalah manajemen konstruksi yang juga merupakan masalah-masalah kontraktual lain dimana apabila tidak ditemukan suatu solusi yang baik maka akan berujung pada penyelesaian melalui jalur hukum.

Kontrak konstruksi memegang peranan penting karena akan membawa dampak besar yang meluas kesegala lingkup pekerjaan konstruksi, apabila kontrak konstruksi tidak memberi keadilan dan kesetaraan untuk para pihaknya maka akan dapat berakibat misalnya, mangkraknya bangunan-bangunan, tertundanya proyek-proyek properti, infrastrukural yang pada akhirnya disamping akan menyisakan sejumlah masalah finansial diantara para pihak yang terkait juga dapat menimbulkan masalah hukum yang harus terselesaikan. Oleh sebab itu perlu adanya suatu antisipasi dini agar suatu sengketa kontraktual yang mengakibatkan kerugian dikedua belah pihak tidak terjadi.

Berdasarkan uraian diatas , timbul masalah-masalah sebagai berikut :

1. Bagaimanakah kontrak konstruksi yang adil dan setara ?
2. Bagaimanakah upaya untuk meminimalisasi dan menyelesaikan sengketa konstruksi ?

## **2. Penjelasan Judul**

Judul penulisan hukum ini adalah "**KESETARAAN DALAM KONTRAK KONSTRUKSI**", sedangkan maksudnya dapat diuraikan sebagai

berikut; Kontrak Konstruksi adalah keseluruhan dokumen yang mengatur hubungan hukum antara owner dan kontraktor dalam penyelenggaraan pekerjaan konstruksi, hal ini sebagaimana yang diatur dalam UU Jasa Konstruksi. Sedangkan kesetaraan dalam Kamus Umum Bahasa Indonesia dimaksudkan sebagai kedudukan yang sama tingkatnya, kedudukan yang sebanding, seimbang dan sejajar sama tingginya.<sup>3</sup>

Sehingga maksud dari “**KESETARAAN DALAM KONTRAK KONSTRUKSI**” adalah keseluruhan dokumen yang mengatur hubungan hukum antara owner dan kontraktor dalam penyelenggaraan pekerjaan konstruksi dengan mendudukan para pihaknya sama tingkatnya, sebanding, seimbang, dan sejajar sama tingginya dalam kedudukan dan tanggung jawabnya.

### **3. Alasan Pemilihan Judul**

Pemilihan judul dari penulisan hukum ini karena gambaran akan kontrak konstruksi yang ideal dimana hubungan para pihaknya setara dan sejajar masih sebatas suatu harapan saja. Pada dasarnya suatu kontrak konstruksi yang ideal akan memuat klausula-klausula yang didalamnya mencerminkan kedudukan para pihak yang setara dan sejajar dengan hak dan kewajiban yang seimbang. Kondisi kontrak konstruksi sampai saat ini, masih banyak menimbulkan konflik diantara para pihak. Hal ini disebabkan oleh ketidaksetaraan diantara para pihak itu sendiri.

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<sup>3</sup>W.J.S. Poerwodarminta, Kamus Umum Bahasa Indonesia, diolah oleh Pusat Pembinaan dan Pengembangan Bahasa Indonesia Departemen Pendidikan dan Kebudayaan PN. Balai Pustaka, Jakarta 1976, Cet. V 1976

Untuk itu perlu adanya suatu pemikiran dalam menyusun kontrak konstruksi ke arah kesetaraan dan keadilan.

Sehingga peranan kontrak konstruksi dalam suatu industri konstruksi sebagai pedoman yang memuat kewajiban dan hak masing-masing pihak dapat terlaksana. Disamping itu kontrak konstruksi juga diharapkan memberi perlindungan masing-masing pihak sebagai acuan apabila terjadi suatu sengketa dengan memberikan suatu solusi yang seimbang diantara para pihak. Untuk itu perlu adanya klausula-klausula yang memberikan perlindungan diantara para pihaknya, keberadaan UU Jasa Konstruksi beserta peraturan pelaksanaannya dapat dipakai sebagai bahan acuan untuk suatu kontrak konstruksi yang ideal dengan kesetaraan dan kesejajaran para pihaknya.

#### **4. Tujuan Penulisan**

Penulisan ini ditujukan untuk memberikan suatu wacana tentang kesetaraan para pihak dalam suatu kontrak konstruksi mengingat keberadaan kontrak konstruksi adalah sebagai kunci pokok bagi suatu industri konstruksi yang akhirnya memberikan dampak keberhasilan maupun kegagalan dari suatu industri konstruksi itu sendiri. Adapun tujuan penulisan ini terdiri dari :

- a. Tujuan akademis untuk memenuhi dan melengkapi syarat-syarat yang ditentukan dalam kurikulum Fakultas Hukum Universitas Airlangga Surabaya untuk mencapai gelar Sarjana Hukum.

- b. Tujuan praktis adalah memperluas wawasan dan memperdalam pengetahuan serta memberikan pola pemikiran preventif tentang kontrak konstruksi berkaitan dengan upaya preventif dan represif untuk dapat mengantisipasi suatu resiko terjadinya konflik yang bermuara pada ketidakadilan dan ketidaksetaraan para pihak yang terkait. Sehingga diharapkan dapat menjadi titik terang dalam solusi yang terbaik yang saling menguntungkan.

## **5. Metodologi**

### **5.1 Pendekatan Masalah.**

Penjelasan terhadap masalah yang menjadi pokok bahasan dalam penulisan ini, adalah menggunakan pendekatan metode normatif. Maksud dari pendekatan tersebut yaitu dalam membahas permasalahan saya melakukannya dengan melihat, mengkaji peraturan perundang-undangan hukum perdata dalam hal ini BW sebagai peraturan umum dan peraturan perundang-undangan tentang jasa konstruksi pada khususnya, peraturan hukum lain yang berkaitan dengan permasalahan ini, dan melihat permasalahan yang timbul dalam rangka kontrak konstruksi dan permasalahan-permasalahan yang timbul didalamnya yang pada akhirnya dilakukan analisa terhadapnya.

## **5.2. Sumber Bahan Hukum.**

Penulisan ini menggunakan metode deskriptif-analitis sehingga sumber data yang digunakan :

1. Sumber bahan hukum primer, yaitu peraturan perundang-undangan yang berkaitan dengan jasa konstruksi.
2. Sumber bahan hukum sekunder berupa literatur-literatur, koran, bacaan-bacaan lain, dan wawancara dengan pihak-pihak yang berkepentingan dengan masalah tersebut.

## **5.3. Proses Pengumpulan Bahan Hukum.**

Prosedur pengumpulan data yang saya lakukan adalah melalui studi kepustakaan dan studi lapangan. Data kepustakaan diperoleh dari peraturan perundang-undangan, literatur-literatur, surat kabar, majalah, seminar-seminar, internet, dan bahan lainnya yang ada hubungannya dengan pokok masalah dalam penulisan ini. Data lapangan diperoleh dengan melakukan wawancara dengan instansi-instansi yang mempunyai keterkaitan dengan permasalahan ini, diantaranya dengan Asosiasi Kontraktor Indonesia (AKI), kontraktor-kontraktor dan instansi lain yang berkaitan dengan pekerjaan kontraktor. Dari bahan yang terkumpul tersebut diadakan pengolahan untuk memisahkan kedalam bab-bab atau sub bab yang sesuai dengan bidang pembahasan masing-masing sehingga dapat memberikan jawaban atas masalah yang ada.

#### **5.4. Analisa.**

Penulisan hukum ini, menggunakan metode deduktif yaitu metode yang menganalisa peraturan perundang-undangan sebagai suatu hal yang umum kemudian ditarik kesimpulan yang bersifat khusus, selanjutnya dibahas, disusun, diuraikan, ditafsirkan, dan dikaji permasalahan sehingga memperoleh suatu kesimpulan sebagai upaya pemecahan masalah.

#### **6. Pertanggung jawaban Sistematika Penulisan**

Sistematika penulisan, bab satu adalah pendahuluan dimana diuraikan secara garis besar tentang latar belakang permasalahan yang akan dibahas didalam penulisan ini, masalah yang timbul atau mungkin timbul dalam metodologi dan lain-lain sehingga dapat dijadikan dasar bagi pembahasan dan pemahaman yang lebih mendalam didalam bab berikutnya.

Dalam bab dua diuraikan mengenai jawaban atas masalah yang pertama, dimana akan diuraikan terlebih dahulu mengenai aspek-aspek kontrak konstruksi, maksud, tujuan, dan fungsi kontrak konstruksi type-type konstruksi, kontrak konstruksi yang ideal, hambatan-hambatan kontrak konstruksi, kedudukan para pihak dan hubungan kontraktualnya, dan hal-hal yang terkait dengan permasalahan kontraktual kontrak konstruksi.

Dalam bab tiga diuraikan tentang analisa penyelesaian permasalahan kontraktual dalam kontrak konstruksi, menyangkut upaya hukum preventif maupun represif. Disamping itu juga dibahas mengenai masalah upaya yang harus



dilakukan oleh para pihak dalam mengantisipasi resiko ketidaklaksanaan suatu kontrak konstruksi dan pemutusan kontrak konstruksi.

Dalam bab empat akan diuraikan mengenai kesimpulan dari keseluruhan permasalahan dalam bab II dan bab III. Bab IV tersebut juga berisikan saran-saran agar dapat dijadikan sebagai masukan di bidang Jasa Konstruksi.

## BAB II

### KONTRAK KONSTRUKSI YANG ADIL DAN SETARA

#### 2.1. Kontrak Konstruksi Secara Umum

Dalam suatu industri konstruksi, hal yang sebenarnya paling menonjol adalah masalah kontrak konstruksi, ini erat kaitannya dengan berhasil atau tidaknya suatu industri konstruksi. Untuk menyusun suatu kontrak konstruksi tersebut, kiranya perlu dipersiapkan langkah-langkah dalam bidang perangkat lunak agar kesenjangan yang selama ini sering terjadi dapat diperbaiki pada masa yang akan datang. Diantara kesenjangan yang perlu diperbaiki tersebut adalah memperbaiki kondisi kontrak konstruksi agar benar-benar adil dan setara antara pihak *owner* sebagai pengguna jasa/pemberi tugas<sup>4</sup> dan kontraktor sebagai penyedia jasa<sup>5</sup>.

Sebelum pembahasan lebih lanjut akan diuraikan mengenai hal-hal yang berkaitan dengan kontrak konstruksi.

##### 2.1.1. Aspek-aspek dalam kontrak konstruksi.

Sebuah kontrak konstruksi umumnya berisikan aspek-aspek yang mengatur bidang tertentu, aspek-aspek yang termuat dalam kontrak konstruksi tersebut, meliputi:

---

<sup>4</sup> Pada umumnya owner diistilahkan dengan *buyer, client, promotor, employer, aanbestede, bouwheer*, yang memborongkan, pemberi tugas prinsipal, pemimpin proyek, dsb.

<sup>5</sup> Pada umumnya kontraktor disebut juga dengan *aanamar, developer, rekanan*, penyedia jasa, dsb.

- Aspek teknis; didalamnya meliputi :
  - a. Lingkup Pekerjaan (*scope of work*)
  - b. Dasar-dasar pelaksanaan dimana memuat tentang :
    - Syarat-syarat Umum (*General Condition of Contract*)
    - Syarat-syarat khusus (*Special Condition of Contract*)
    - Spesifikasi teknis (*Technical Specifications*)
    - Gambar-gambar kontrak (*Contract Drawing*).
  - c. Waktu pelaksanaan (*Construction Period*)
  - d. Metode pelaksanaan (*Construction Method*)
  - e. Jadwal pelaksanaan (*Time Schedule*)
  - f. Masa jaminan atas cacat (*Defect Liability-Period*).
- Aspek Administrasi; didalamnya meliputi :
  - a. Keterangan mengenai para pihak termasuk didalamnya adalah identitas
  - b. Laporan mengenai para pihak
  - c. Korespondensi
  - d. Hubungan kerja sama antara *owner* dan kontraktor.
- Aspek sosial ekonomi; meliputi:
  - a. Keharusan penggunaan tenaga kerja tertentu
  - b. Ketentuan penggunaan material/ peralatan dalam negeri
  - c. Dampak lingkungan
- Aspek hukum, yang meliputi:
  - a. Penghentian sementara pekerjaan (*suspension of works*)
  - b. Ganti rugi keterlambatan/ denda (*liquidity damage/penalty*)
  - c. Pemutusan kontrak (*contract termination*)
  - d. Penyelesaian perselisihan (*settlement of dispute*)
  - e. Keadaan memaksa (*force majeure*)
  - f. Hukum yang berlaku (*governing law*)
  - g. Bahasa kontrak (*contract language*)
  - h. Domisili.
- Aspek keuangan dan perbankan, meliputi :
  - a. Nilai kontrak (*contract amount*)
  - b. Cara pembayaran (*method of payment*)
  - c. Jaminan-jaminan (*guaranty/bonds*)
    - Jaminan uang muka (*advance payment bond*)
    - Jaminan pelaksanaan (*performance bond*)
    - Jaminan pembayaran (*payment guaranty*)
    - Jaminan pemeliharaan (*maintenance guaranty*)
    - Asuransi (CAR)<sup>6</sup>

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<sup>6</sup> Kuliah Umum "Construction Law and Construction Claim", Universitas Parahyangan, Bandung, 19 September 2000

Aspek-aspek tersebut yang kemudian dijemakan dalam klausula-klausula kontrak.

### 2.1.2. Tujuan dan fungsi kontrak konstruksi

Proses perkembangan dari suatu proyek konstruksi tersebut terdiri dari empat tahapan yaitu tahap pertama adalah *recognaisance study* atau studi pengenalan, pengumpulan dan penunjukan data-data pendahuluan tentang tujuan dan kegunaan proyek. Tahap kedua adalah *feability study* atau studi penelaahan untuk memeriksa biaya dan scope fasilitas dibandingkan dengan keuntungan ekonomis atau sosial yang akan dicapai. Tahap ketiga adalah perencanaan yang definitif, dalam tahap tersebut dilakukan pekerjaan design sampai selesainya dokumen untuk tender dan kontrak. Tahap keempat adalah *actual construction* pelaksanaan nyata fisik di lapangan tempat atau site dari suatu proyek.<sup>7</sup> Tahapan-tahapan dalam konstruksi tersebut menampakkan bahwa suatu proyek harus dipersiapkan semaksimal mungkin. Suatu proyek konstruksi tidak akan dapat berjalan tanpa adanya persiapan yang baik. Dalam tahapan persiapan selain faktor finansial, tahap yang tidak kalah pentingnya adalah tahap perumusan kontrak, tahap tersebut ada pada tahap ketiga yaitu tahap perencanaan yang definitif. Kontrak konstruksi sebagai media yang mendasari terwujudnya proyek yang akan dikerjakan. Proyek adalah obyek dari sebuah kontrak konstruksi dimana

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<sup>7</sup> M.Napitupulu, *Prosedur Kontrak Industri Konstruksi (Pemborongan)*, Cet.1, Badan Penerbit Pekerjaan Umum, Jakarta Selatan, 1975, h.3

keberadaan kontrak sebagai media untuk keberadaan proyek itu sendiri, sedang pengertian proyek dalam kamus arsitektur dan konstruksi proyek, proyek diartikan:

- a. *A construction undertaking, composed of one or more building and the site improvements, planned and executed in a fixed time period.*
- b. *A planned, large apartement building or housing complex, usually built at minimum cost with government fund for low-income families; also called a housing project.*
- c. *The total construction designed by the architect, of which the work performed under the contract documents may be the whole or a part.*<sup>8</sup>

Dengan mengacu pada perumusan diatas maka suatu proyek konstruksi bukanlah produk yang dapat selesai dengan begitu saja, didalamnya tercakup suatu hal yang sangat luas. Untuk terwujudnya suatu proyek konstruksi, diperlukan pengaturan-pengaturan yang bersifat menyeluruh mengingat pihak-pihak yang terlibat dalam suatu proyek adalah sangat kompleks dengan permasalahan-permasalahan yang rumit pula.

Suatu proyek pada umumnya mempunyai tujuan yang khusus yaitu berupa, produk akhir, jumlah biaya, sasaran jadwal serta kriteria mutu. Sehingga kegiatan proyek konstruksi tersebut harus ditentukan batasan-batasan misalnya, besar biaya (anggaran) yang dialokasikan dan jadwal serta mutu yang harus dipenuhi. Ketiga hal tersebut merupakan juga tiga kendala (*triple constraint*)<sup>9</sup>, dalam keberadaan proyek konstruksi, artinya tiga hal tersebut dapat mempengaruhi

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<sup>8</sup> Cyril.M.Harris, *Dictionary of Architecture and Construction*, second edition.

<sup>9</sup> Imam Soeharto, *Manajemen Proyek*, Cet.1, Erlangga, Jakarta, 1995, h.1.2.

keberhasilan suatu proyek konstruksi, sebab apabila ketiga hal itu tidak terencana secara baik akan mengakibatkan realisasi proyek terhambat.

Bagi sebuah proyek konstruksi, gambaran resiko tinggi telah tampak sejak dari awal pengembangan, hal ini karena sebagian besar munculnya proyek dimulai oleh suatu gagasan atau ide yang masih dalam bentuk konseptual. Dalam proses pengembangan proyek dari ide dasar sampai dengan keputusan untuk mengadakan investasi atau implementasi banyak digunakan asumsi-asumsi dan perkiraan-perkiraan. Hal ini disebabkan oleh tidak adanya cukup informasi dan data yang tersedia. Fenomena-fenomena yuridis juga didapati pada suatu kegiatan proyek konstruksi. Hal ini akan memungkinkan ditemukannya penyimpangan-penyimpangan. Suatu kegiatan proyek konstruksi juga sangat multikompleks yang melibatkan banyak peserta dari luar maupun dari dalam organisasi. Hal ini berarti bahwa hubungan kontraktual yang ada menjadi sangat luas. Multi kompleksnya pihak-pihak yang terkait tersebut ditambah dengan sasaran dan motivasi yang berbeda-beda diantara para pihak pada waktu yang bersamaan akan mengakibatkan pelaksanaan kegiatan konstruksi yang tidak terarah. Sehingga dalam hal kompleksitas, fenomena tersebut perlu dirumuskan kedalam suatu dokumen yang memuat kesepakatan dalam bentuk kontrak konstruksi.

Selanjutnya pula diuraikan mengenai kegunaan kontrak konstruksi dimana disebutkan bahwa :

*The inclusion of recognised condition of contract into the contract document is considered essential, firstly to protect each party's interest in a project, by identifying specific risks of hazards, recognising statutory and*

*contactual responsibilities particularly with regard to health and safety; and secondly, to promote and achieve a more professional contract performance. A number of documents exist to provide a satisfactory contract e.g. ice condition of contract (ice, 1983, 1991) sub contractors should be subject to similar conditions<sup>10</sup>.*

Pada dasarnya secara umum kontrak konstruksi mempunyai kegunaan dalam hal perlindungan kepada para pihak yang menandatangani, karena didalamnya berisikan tentang pertanggung jawaban, termasuk hak dan kewajiban masing-masing pihak, termasuk lingkup kerja konstruksi. Kontrak konstruksi tersebut merupakan perwujudan dari kepercayaan owner kepada kontraktor yang dalam hal ini diberikan kepercayaan dan tanggung jawab untuk merancang dan merencanakan termasuk meneliti, menaksir biaya, dan menganalisa ekonomi proyek.

Dalam hal pelaksanaan konstruksi sebenarnya ada dua cara yang dapat ditempuh, yaitu; dengan cara mengerjakan sendiri (*eigen beher, force account, direct labour*) dan dengan cara memborongkan atau mengontrakkan kepada pihak lain yang usahanya bergerak khusus dalam pelaksanaan dan pembangunan fisik proyek industri konstruksi yaitu pemborong atau kontraktor. Apabila cara yang ditempuh adalah cara yang kedua, maka secara otomatis antara owner dan kontraktor terikat kontrak konstruksi. Kontrak tersebut secara tradisional didasari pada faktor-faktor :

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<sup>10</sup> Thomas Telford, Site investigation in construction 4, Guidelines for safe investigation by drilling of landfills and contaminated land, first published, London, 1993, p.4.

- a. Umumnya *owner* bukanlah ahli dalam hal teknik konstruksi dan bila ahli belum tentu berfungsi sebagai pelaksana/ kontraktor.
- b. Cara kontrak dapat lebih menjamin terwujudnya pekerjaan yang baik dengan biaya dan waktu pelaksanaan yang wajar, karena kontraktor sebagai pengusaha dalam bidangnya akan lebih trampil, mahir, dan ampuh.
- c. Secara tidak langsung *owner* dapat mengetahui biaya taksiran harga selesai proyeknya yaitu sebesar harga borongan yang diterima oleh kontraktor.

Untuk mencapai hasil yang baik maka integritas dan kompetensi yang tinggi harus dimiliki tiap-tiap pihak yang terlibat didalamnya, sedangkan pengaturan hubungan antara pihak-pihak tersebut haruslah mencerminkan tanggung jawab, dukungan masing-masing pihak, serta bersifat bahwa kesulitan-kesulitan yang tidak terlihat dan resiko-resiko selama tahap-tahap kegiatan akan dapat diatasi tanpa membahayakan perjanjian-perjanjian yang sudah dibuat serta tujuan akhir yang hendak dicapai. Secara garis besar maka tujuan dari pada kontrak konstruksi tersebut adalah:

- a. agar proyek tersebut secara komersial berhasil
- b. mencegah, mengurangi, menyelesaikan perselisihan
- c. mengurangi klaim, karena dalam tiap industri konstruksi yang sangat rumit dan kompleks sangat dimungkinkan terjadi suatu klaim<sup>11</sup>.

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<sup>11</sup> Kuliah Umum "Construction law and Construction claims", 19 September 2000, Fakultas Teknik Sipil, Universitas Katolik Parahyangan, Bandung.



Diharapkan dengan adanya kontrak konstruksi dapat memberikan keuntungan-keuntungan dikedua belah pihak, kontrak konstruksi tersebut harus menjangkau hal-hal yang dikehendaki oleh masing-masing pihak, agar tidak menimbulkan suatu diskriminasi, dan apabila satu pihak diuntungkan maka pihak yang lain tidak dirugikan, sehingga disatu sisi ditujukan untuk mencakup kepentingan-kepentingan para pihak tapi disisi lain menyeimbangkan kepentingan tersebut.

Sedangkan fungsi dari kontrak konstruksi adalah :

- a. Secara umum mengelola transaksi komersial
- b. Menggerakkan proyek, menangani penagihan/pembayaran, perubahan pekerjaan, klaim-klaim dan perselisihan
- c. Mengawasi agar tujuan komersial tercapai.

Menurut M.Napitupulu dalam bukunya “Prosedur Kontrak Industri “ menyebutkan bahwa kontrak konstruksi mempunyai tiga fungsi penting yaitu :

1. Sebagai keterangan terhadap pekerjaan yang akan diborongkan, sifatnya sedemikian sehingga penawaran dapat dimasukkan oleh para kontraktor, jadi sekaligus berfungsi sebagai dokumen tender
2. Dokumen-dokumen tersebut menjadi pegangan/ petunjuk dan pedoman atau buku undang-undang selama periode pelaksanaan konstruksi
3. Sebagai dokumen kontrak yang dapat dipakai untuk bukti-bukti kebenaran dalam kasus proses oerselisihan atau arbitrase atau bahkan dalam proses yang terpaksa lewat seluruh hukum di pengadilan<sup>12</sup>.

Berdasarkan fungsi kontrak yang telah diuraikan tersebut, maka pada umumnya kontrak konstruksi dapat berfungsi secara teknis maupun juga secara non teknis.

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<sup>12</sup>Napitupulu, *op.cit.*, h. 14

Maksudnya adalah secara teknis yaitu mencakup hal-hal yang menjadi lingkup pekerjaan konstruksi secara riil dilapangan, sedangkan non teknis adalah mencakup hal-hal yang diluar itu termasuk dalam hal administrasi, kehendak para pihak, dan dalam hal terjadi persengketaan maka yang dijadikan acuan dasarnya adalah kontrak konstruksi tersebut.

### 2.1.3. Elemen-elemen dalam kontrak konstruksi.

Elemen-elemen dalam dokumen kontrak konstruksi yang merupakan satu kesatuan dokumen-dokumen meliputi<sup>13</sup> :

- a. Gambar-gambar kontrak (*contract drawing*);
- b. Spesifikasi (uraian/perincian teknis, *specification*);
- c. Daftar kuantitas pekerjaan (*bill of quantities*);
- d. Syarat-syarat umum kontrak (*general condition of contract*);
- e. Berita acara penjelasan (*letter of explanation, clarification, aanwijzing*);
- f. Penawaran atau tender (*tender-bidding proposals, offerte*);
- g. Perjanjian atau persetujuan kontrak konstruksi (*legal-formal agreement*).

Rosen dan Heineman dalam bukunya *Construction Specification Writing*, menyebutkan :

*The contract documents consist of following instruments;*

- i. *agreement, a written agreement between the owner and contractor setting forth the work to be performed, the time for completion and the contract sum*
- ii. *condition of the contract, these consist of the general conditions, supplementary conditions, and other conditions*
- iii. *drawing, the graphic presentation of work to be done*
- iv. *specifications, written, verbal description of work to be performed*
- v. *addenda, changes made before contract execution*
- vi. *modification, instructions, change orders, directives, and so on, written after execution of the contract*

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<sup>13</sup>Imam Soeharto, *op.cit.*, h.511

*Quite often the term construction documents is used as a synonym for contract documents*<sup>14</sup>.

Sedang menurut *Dario de Benedictis and Robert M. Mcleod*, dalam *Construction contract*<sup>15</sup>, disebutkan bahwa kontrak konstruksi terdiri dari beberapa elemen yaitu:

1. *Bid form, the proposal or bid form, the invitation for bids, and instructions to bidders*, meliputi proposal penawaran, dokumen tender;
2. *Agreement form*, meliputi identitas masing-masing pihak, tanggal, harga, kesepakatan kontraktor dalam hal pekerjaan sesuai dengan spesifikasi pekerjaan yang ditetapkan, tandatangan pihak-pihak yang membuat kontrak;
3. *General condition or standart specifications*, meliputi klausula khusus, hal-hal yang umum tentang proyek, klausula tentang berbagai subyek, definisi, perubahan, pembayaran, hubungan hukum, dan sebagainya;
4. *Special provisions or special condition also technical specifications*;
5. *Plans or drawing*;
6. *Addenda*.

Dalam PP Penyelenggaraan Jasa Konstruksi, dalam pasal 22 dokumen kontrak terdiri atas: Surat perjanjian, Dokumen lelang, Usulan/penawaran, Surat pernyataan dari *owner*, Surat pernyataan dari kontraktor, dan Berita acara.

#### **2.1.4. Type-type Kontrak Konstruksi.**

Kontrak dalam proyek engineering konstruksi lebih dikenal kontrak, Pengadaan dan Konstruksi (EPK), suatu dokumen yang memuat persetujuan bersama secara sukarela, yang mempunyai kekuatan hukum dimana pihak pertama berjanji untuk memberikan jasa dan menyediakan material untuk membangun

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<sup>14</sup> *Rosen and Heineme, construction specifications writing, priciples, and procedures, third edition, John willey and sons, New York, 1990, p.5.*

<sup>15</sup> *Dario de Benedictis and Robert M. Mcleod, Construction Contract, California.*

proyek bagi pihak kedua, sedangkan pihak kedua berjanji membayar sejumlah uang sebagai imbalan untuk jasa dan material yang telah digunakan.

Type-type kontrak konstruksi sangat banyak dan bervariasi, hal ini berkaitan dengan pesatnya perkembangan suatu jenis pembiayaan yang biasanya disebut pembiayaan proyek sehingga membawa konsekuensi-konsekuensi langsung terhadap perkembangan sektor hukum dibidang konstruksi, dewasa ini kontrak konstruksi tidak lagi hanya mempersoalkan negosiasi antara pihak *owner* dengan kontraktor saja melainkan juga secara intens pihak-pihak lainnya seperti asuransi, ahli manajemen, ahli pajak, dan sebagainya. Karena itu ada pertimbangan tertentu yang langsung mempengaruhi format dan materi suatu kontrak konstruksi.

Type-type kontrak konstruksi diantaranya adalah :

a. Kontrak Cost-plus.

Type kontrak tersebut dihasilkan dari penunjukan langsung yang dikenal sebagai kontrak hasil negosiasi. Dalam hal ini belum lengkap definisi lingkup kerja proyek, sehingga sifatnya reimbursable, oleh karena itu klausula-klausulanya tidak sepenuhnya berlaku dan harus sesuai dengan keperluan yang spesifik. Bentuk type kontrak konstruksi tersebut tidak standar, disusun sesuai keperluan, jadi klausula-klausulanya lebih fleksibel dan spesifikasinya dikembangkan selama proyek berlangsung. Owner harus menanggung segala resiko seluruhnya atas beban biaya proyek, termasuk hal-hal yang belum diketahui sewaktu penandatanganan kontrak, misalnya; eskalasi, perubahan nilai tukar mata uang, dan

sebagainya. Type kontrak konstruksi tersebut lebih cocok digunakan pada saat ada hubungan spesial antara owner dengan kontraktor.

Type kontrak konstruksi ini, disatu sisi bisa menguntungkan kontraktor dalam hal kontraktor tidak menanggung resiko bila terjadi kenaikan harga bangunan. Kontrak konstruksi tersebut mencakup hal-hal yang penting yaitu minimal tentang: lingkup proyek, jadwal penyelesaian proyek, batasan *reimbursable* dan *nonreimbursable*, program pemantauan dan pengendalian, tanggung jawab *owner* dan kontraktor, asuransi dan claim, terminasi kontrak. Kontrak *Cost-plus/cost reimbursement* tersebut terdiri dari :

- *Cost plus fixed fee*, merupakan kontrak harga tidak tetap ditambah upah tetap, *owner* membayar semua biaya proyek yang dikeluarkan kontraktor, ditambah *fee* yang jumlahnya tetap. Kontraktor akan memperoleh tambahan keuntungan bila pekerjaannya cepat selesai karena dapat membebaskan peralatan dan tenaga kerjanya untuk pekerjaan lain. Kontrak konstruksi tersebut lebih cocok untuk pekerjaan penelitian dan pengembangan atau pekerjaan lain yang definisi lingkup kerjanya masih dalam bentuk umum atau definisi belum lengkap.
- *Cost plus percentage*, kontraktor dibayar harga nyata biaya dasar, ditambah jumlah persentasi dari biaya dasar yang disetujui bersama pada awal permulaan kontrak sebagai *fee* untuk menutup biaya pengawasan, keuntungan. Kelemahan dari type kontrak tersebut adalah

kontraktor dapat menaikkan keuntungannya dengan cara memperlambat penyelesaian pekerjaan dan memperbanyak biaya dasar (*mark-up* terhadap *cost*). Jadi disini bila kontraktor mempercepat pekerjaannya maka dia tidak akan mendapat keuntungan. Sedangkan kelebihan dari kontrak tersebut adalah kontraktor akan mendapatkan penggantian biaya yang lebih besar disamping angka riil dari persentase tersebut juga lebih besar.

- Kontrak harga tidak tetap ditambah perangsang, *Incentive contract*, upah dapat berubah sesuai dengan prestasi kontraktor dimana pengeluaran ditanggung sepenuhnya oleh *owner*. Dalam hal ini disediakan *target fee* bonus untuk kontraktor yang dapat menyelesaikan proyek dengan *cost* yang lebih rendah dari *target cost*. Disatu sisi bisa merugikan kontraktor, karena jika *actual cost* lebih mahal dari *target cost*, maka kontraktor dapat dikenai sanksi, jadi bila ternyata pelaksanaan proyek lebih lama, maka akan ada penalti untuk kontraktor. Keuntungan dari type kontrak tersebut adalah bila kontraktor dapat menyelesaikan proyek dalam waktu yang relatif singkat dengan *actual cost* yang lebih rendah dari *target cost* maka perbedaan diantara keduanya dapat dibagi *fifty-fifty*. Pekerjaan yang cocok adalah pekerjaan konstruksi yang definisi lingkup kerjanya lebih lengkap.

- Kontrak *cost plus* yang berfluktuasi, *cost plus variable fee*, upah diberikan dengan perangsang yang berubah-ubah. Kontraktor dibayar atas harga nyata biaya dasar ditambah *fee*. Keuntungan yang bisa didapat oleh kontraktor adalah apabila pekerjaannya lebih cepat dan biaya nyata (*actual cost*)nya lebih murah maka, kontraktor akan dapat keuntungan yaitu dengan upah yang juga semakin tinggi. Bentuk tersebut adalah yang ideal, menguntungkan kedua belah pihak, terlebih bila dilihat dari sudut *owner* karena disatu sisi *owner* tetap akan membayar sesuai dengan *target cost* dan kontraktor berusaha untuk mempercepat pekerjaannya agar *fee* yang diperoleh lebih tinggi.
- Harga tidak tetap dengan resiko ditanggung bersama, dimana upah berubah-ubah sesuai prestasi kontraktor, jumlah upah akan naik sesuai dengan penghematan yang dihasilkan. Kontraktor akan mendapatkan hukuman denda bila *target cost* terlampaui. *Owner* membayar seluruh biaya pengeluaran proyek sampai maksimal atas sasaran yang disetujui bersama. Kontrak konstruksi tersebut biasanya untuk definisi lingkup pekerjaan lebih lengkap.
- *Guaranteed maximal cost*, harga tidak tetap dengan suatu batas maksimal. Hal ini untuk memberikan kepastian tentang *cost of project*. Kontraktor harus menjamin bahwa *cost of project* tersebut tidak melebihi nilai *maximal* dari seluruh *cost* yang akan dikeluarkan. Jadi disini *owner* membayar semua biaya yang dikeluarkan oleh kontraktor

untuk pelaksanaan proyek ditambah upah hanya sampai pada suatu batas maksimal. Keuntungan dari kontrak tersebut adalah bila actual cost dapat ditekan dibawah nilai maximal maka savingnya dapat dibagi antara kontraktor dengan owner. Sedangkan kerugiannya bila nilai actual cost melebihi nilai maximal, maka kontraktor akan dikenakan penalty sebab cost diatas batas maximal ditanggung oleh kontraktor.

b. Kontrak harga tetap (*lump-sum contract*).

Kontrak yang dihasilkan dengan cara penunjukan secara lelang. Merupakan suatu perikatan atau perjanjian dimana kontraktor setuju melaksanakan pekerjaan yang tertera pada dokumen lelang dengan pembayaran sejumlah uang yang tetap (*fixed*) tanpa berubah yaitu sebesar harga borongan. Kontraktor menanggung resiko atas segala sesuatu diluar syarat-syarat kontrak, misalnya kemungkinan kenaikan harga yang tidak terduga selama proyek berlangsung, kenaikan harga material, kenaikan gaji, keadaan cuaca yang tidak mendukung. Keuntungan dari kontrak tersebut adalah tidak perlu banyak pengukuran dan perhitungan detail dari kuantitas pelaksanaan pekerjaan jauh sebelum pekerjaan selesai, memberi kontraktor secara langsung dan jelas pekerjaan yang akan dibuat. Kontraktor bisa mengambil keuntungan sepenuhnya bila actual cost kurang dari harga yang tercantum dalam kontrak. Dipihak owner terlepas dari berapa cost yang harus dikeluarkan oleh kontraktor, owner bebas dari kerugian karena yang menanggung resiko adalah kontraktor.



Sedangkan kerugian dari kontrak tersebut adalah akan terjadi kesulitan-kesulitan bila owner ingin perubahan dari design atau jika pekerjaan itu berjalan dengan adanya hambatan/resiko yang sebelumnya tidak terlihat. Kontrak tersebut cocok untuk pekerjaan yang definisinya telah lengkap dicantumkan didalam dokumen lelang, atau pekerjaan-pekerjaan yang mempunyai resiko rendah/resiko dianggap dapat diperkirakan, dengan hasil yang tidak jauh menyimpang.

Didalam kontrak type tersebut mencakup komponen I, yaitu pokok-pokok persetujuan, yang merupakan materi inti dari dokumen kontrak dimana mencakup masalah komersial yaitu: pernyataan persetujuan para pihak untuk bekerjasama dalam bentuk kontrak, harga kontrak, tanggal mulai berlaku, jadwal penyelesaian pembangunan secara mekanikal, jaminan dan pertanggungan yang meliputi kinerja dan jadwal penyelesaian proyek serta mutu pekerjaan dan peralatan, pajak, asuransi, dan royalti, penghentian pekerjaan (terminasi, pengurangan dan penambahan pekerjaan, keadaan force majeure, pengaturan hak kepemilikan, persengketaan dan arbitrase.

Komponen II dalam kontrak tersebut berisi syarat-syarat umum termasuk penjelasan, petunjuk dan tata cara penyelenggaraan proyek. Termasuk juga wewenang dan tanggung jawab pihak-pihak yang bersangkutan, yang meliputi : *design*, pengadaan material dan jasa, konstruksi dan sub kontrak, perencanaan pengendalian biaya dan jadwal, pengendalian mutu, laporan kemajuan proyek, korespondensi dan sistem arsip, prosedur persetujuan keuangan dan pembayaran, penyelesaian dan penutupan proyek.

Komponen III merupakan syarat-syarat khusus, memuat tentang pengadaan material dan jasa yang ditanggung oleh owner, lingkup kerja khusus seperti pelatihan, fasilitas sementara, kondisi-kondisi lain yang diluar komponen II yang perlu diketahui oleh kontraktor. Sedang komponen IV yang merupakan uraian lingkup kerja, spesifikasi teknik dan gambar desain engineering, secara menyeluruh.

Ada 2 kelemahan yaitu aspek pemberian harga penawaran yang kurang realistik oleh kontraktor dalam memperhitungkan resiko pekerjaan tambah kurang (hal yang tidak pasti), selanjutnya adalah aspek ketidak fairan dari owner. Langkah-langkah yang dapat ditempuh untuk mengantisipasi kelemahan dari *type lump-sum* tersebut oleh kontraktor, adalah dengan membuat design dan perencanaan yang sedemikian detailnya sehingga tidak akan ada perubahan pada waktu realisasi fisik. Disamping itu perlu adanya penyediaan mekanisme penyesuaian harga kontrak (*adjustment/revision*) terhadap harga kontrak dalam situasi-situasi tertentu.

*Adjustment of price* adalah perubahan dalam *construction cost* karena adanya perubahan dalam konstruksi yang bersangkutan karena sebab-sebab tertentu. Jadi biasanya karena klausula variasi dari kontrak sehingga costnya juga berubah. Mekanisme adjustment, dapat dipakai bila terjadi hal-hal diantaranya jika ada variasi terhadap konstruksi yang bersangkutan; jika ternyata data yang disediakan ada yang tidak akurat; jika kontrak berhadapan dengan rintangan alamiah yang tidak diprediksi sebelumnya; dan jika terjadi perubahan policy,

kondisi atau regulasi yang berkonsekuensi terhadap perubahan konstruksi yang bersangkutan.

*Revision of cost*, diakibatkan dari perubahan-perubahan lain yang mempengaruhi cost dari suatu kontrak sedangkan konstruksinya sendiri tidak berubah. Biasanya perubahan cost karena adanya perubahan policy pemerintah dibidang ekonomi, seperti karena adanya devaluasi mata uang, inflasi, perubahan dibidang policy pajak, tarif, sehingga jelas perlu revisi tertentu terhadap kontrak yang bersangkutan. Apabila revisi harga tersebut dilakukan dengan alasan perubahan nilai mata uang (karena inflasi atau devaluasi) maka dalam kontrak dapat dibuat klausula dengan metode :

- *Currency clause*, misalnya, bila harga konstruksi menggunakan mata uang rupiah, tetapi digunakan mata uang USA Dollar untuk referensi yang akan digunakan sebagai acuan jika akan dilakukan revisi harga kontrak karena invlasi, devaluasi rupiah dan sebagainya.
- *Unit of account clause*, didasarkan pada index rata-rata dari beberapa mata uang, misalnya bersandar pada units of account yang ditetapkan oleh The International Monetary Fund berupa Spesial Drawing Right (SDR) atau dapat juga direfer kepada The European Currency Unit (ECU).

Type kontrak lump-sum tersebut terdiri dari :

- Harga tetap dengan eskalasi, harga kontrak disesuaikan, naik atau turun yang didasarkan atas suatu index eskalasi yang disetujui bersama. Keuntungan

untuk kontraktor adalah adanya sistem eskalasi tersebut dapat dipakai untuk melindungi kontraktor dari kenaikan harga karena inflasi sehingga membuat ketenangan bekerja, terutama untuk kontrak jangka panjang (multi year).

- Harga tetap dengan perangsang, kontraktor akan mendapat tambahan harga yang telah disetujui formulanya sebagai perangsang bila kontraktor dapat menyelesaikan proyek lebih awal dari rencana. Bila pada waktu lelang belum cukup keterangan yang diperlukan untuk mencapai persetujuan antara owner dengan kontraktor
- Harga tetap dengan satuan harga perunit (unit price), didasarkan pada harga satuan perunitnya, misalkan permeter kubik aspal, perkubik tanah. Kelebihan dari kontrak unit price antara lain adalah; menghasilkan pembayaran kepada kontraktor sesuai dengan kuantitas/banyaknya pekerjaan yang dikerjakan oleh kontraktor tersebut; dipihak lain kontrak tersebut tetap membatasi harga yang harus dibayar (harga satuan atau unit price pada waktu penawaran adalah pasti dan tetap atau tidak berubah).

Type kontrak lump-sum merupakan type kontrak yang paling cocok diterapkan dengan harga satuan (DKP), owner dan kontraktor tidak terbebani oleh suatu resiko yang fatal dan hal tersebut mengundang harga yang bersifat kompetisi dari para kontraktor.

Disamping itu juga memberi kesempatan bagi owner dan kontraktor untuk menjalankan fungsi dan tanggung jawabnya secara baik, dalam hal terjadi perubahan kuantitas pekerjaan yang dikerjakan sehingga hal tersebut akan membuat actual cost terkontrol. Sebagai type kontrak yang paling bagus dan sesuai untuk pekerjaan teknik sipil.

c. Kontrak harga tidak tetap menjadi tetap.

Dimana pada awal proyek dipakai kontrak harga tidak tetap, setelah didefinisikan lingkup kerja menjadi jelas dan lengkap, bentuk kontrak diubah menjadi kontrak harga tetap. Dalam hal ini owner ingin agar pekerjaan segera dimulai, tetapi pada awalnya definisi belum lengkap, misalnya ingin merebut pasar yang sedang tersedia dengan produk hasil proyek.

d. Kontrak tradisional.

Type kontrak yang merupakan kontrak konstruksi yang konvensional, yang tidak melibatkan banyak pihak, umumnya ada pihak owner dan kontraktor (plus supplier). Dalam kontrak type tersebut, pembayaran dilakukan melalui sistem pembayaran secara lump-sum (harga tetap), pergantian biaya dan fee (pengupahan), pembayaran harga per unit. Biasanya untuk pekerjaan konstruksi pembangunan-pembangunan gedung-gedung/proyek secara tradisional dan sederhana yang tidak melibatkan banyak para pihak. Untuk pekerjaan-pekerjaan konstruksi lebih banyak dikerjakan oleh pihak kontraktor atau pihak owner sendiri.

e. Kontrak Turnkey.

Type kontrak Turnkey ini sangat populer di Asia tetapi kurang populer di Eropa. Dalam kontrak tersebut menempatkan pihak kontraktor untuk melakukan segala hal dalam pelaksanaan pekerjaan, mulai dari permulaan mendesign proyek sampai dengan penyerahan proyek yang bersangkutan setelah proyek tersebut jadi (*ready for use*), bahkan juga untuk masalah-masalah furnishing. Dalam beberapa proyek, tugas kontraktor juga termasuk pencarian lahan (pembebasan tanah). Pekerjaan tersebut dibebankan pada single kontraktor, jadi tanggung jawab tersebut hanya pada single kontraktor. Kelemahan dari kontrak turnkey adalah pada keterbatasan dari pihak owner untuk ikut terlibat dalam mengawasi efisiensi penggunaan dana, waktu, kualitas, estetika, dan detail-detail lain dari konstruksi yang bersangkutan.

f. Kontrak *Design and Build*.

Dalam type kontrak ini, pihak kontraktor bertanggung jawab sesuai dengan kontrak konstruksi dan juga untuk melakukan pekerjaan-pekerjaan (sebagian atau seluruhnya) yang berhubungan dengan design. Sehingga tidak dikenal adanya pihak design team. Ciri-ciri dari kontrak design and build adalah :

- Harga kontrak;
- Syarat-syarat yang ditetapkan oleh owner negosiasi-negosiasi;
- Kecilnya peranan para profesional.

Kelebihan kontrak design and build meliputi tanggung jawab hukum dari pihak kontraktor mencakup keseluruhan kegiatan dalam pembangunan proyek yang

bersangkutan. Hal ini memberi keuntungan bagi pihak owner, dimana owner tidak lagi menyandarkan diri pada pendapat pihak luar dan tidak lagi membedakan antara design fault dengan workmanship fault. Hubungan dan komunikasi pihak kontraktor bersifat langsung sehingga semakin lancar dan dapat menghemat biaya dan waktu. Komunikasi pihak owner dengan kontraktor bersifat langsung dan intens sehingga pelaksanaan proyek berjalan lebih cepat dan lebih ekonomis.

Kelemahan dari kontrak dengan type tersebut adalah adanya *Minimum Design Effort*, dimana pihak kontraktor bertanggung jawab untuk mendesign suatu proyek sehingga menyebabkan usaha untuk mendesign biasanya tidak dilakukan secara maximum. Bisa jadi kontraktor kurang pengalaman dalam mendesign dan unsur design belum tentu ditempatkan oleh pihak kontraktor sebagai hal yang diprioritaskan. Dengan adanya kelemahan-kelemahan tersebut maka dapat memungkinkan timbulnya suatu resiko-resiko yaitu :

- Waktu; bagi kontraktor, apabila ada keterlambatan penyelesaian proyek maka sepenuhnya adalah tanggung jawab kontraktor;
- Kualitas; dengan menggunakan type tersebut dapat dimungkinkan produk konstruksi berkualitas rendah;
- Penyelesaian pekerjaan; dalam type ini lebih banyak diberikan kesempatan kepada kontraktor untuk memutuskan kontrak.
- Wanprestasi oleh kontraktor; karena adanya single liability oleh kontraktor, maka kontraktor sendiri yang harus bertanggung jawab;

- Harga kontrak dan biaya; dalam hal ini kontraktor bertanggung jawab terhadap harga dan biaya dalam sistem kontrak tersebut.

g. Kontrak *Build Operate Transfer* (BOT).

Kontrak dengan type ini, menempatkan pihak kontraktor menyerahkan bangunan yang sudah dibangunnya setelah masa transfer, sementara sebelum proyek tersebut diserahkan, ada masa tenggang waktu bagi pihak kontraktor untuk mengoperasikan proyek dan memungut hasil sebagai imbalan dari jasa membangun proyek yang bersangkutan. Dalam bidang pembangunan jalan tol, type BOT tersebut terdiri dari perjanjian-perjanjian ; perjanjian pokok , yaitu yang mengatur pokok-pokok antara pihak kontraktor utama dengan pihak owner yang dalam hal ini adalah pemerintah, perjanjian usaha patungan antar investor, perjanjian konsensi dari pemerintah kepada investor asing, project management servis agreement, yang merupakan perjanjian untuk mengawasi pelaksanaan konstruksi, material and equipment supply agreement, joint operation agreement, sub contractor agreement/ sub supplier agreement, management/ technical assistance agreement, maintenance agreement. Sedangkan dalam proyek-proyek pertamina dokumen-dokumennya meliputi ; engineering, procurement and construction agreement, yang mengatur masalah pembangunan dan pembiayaannya, title assignment agreement, yang mengatur tentang pengalihan proyek dari pelaksanaan kepada pihak owner, assignment revenue agreement, yang mengatur peralihan revenue proyek sebagai cara membayar utang, dimana



utang tersebut dipakai untuk membangun proyek yang bersangkutan, operation agreement, mengatur pelaksanaan operasi proyek.

h. Kontrak *Build Operate Own* (BOO).

Setelah selesai proyek maka kepemilikan proyek yang bersangkutan beralih kepada pihak kontraktor, sementara dalam masa operasi pihak kontraktor wajib membayar sewa kepada owner, Owner hanya menerima imbalan sewa dalam masa operasi sebagai satu-satunya imbalan atas penyerahan proyek yang bersangkutan dan kemudian kepemilikannya diserahkan oleh kontraktor, akan tetapi hal ini jarang dilakukan.

i. Kontrak *Build Own Operate Transfer* (BOOT).

Type kontrak ini merupakan paduan antara type BOT dengan type BOO, dimana kontraktor mempunyai masa tertentu setelah selesainya proyek untuk mengoperasikan sambil memungut hasil/revenue sebagai imbalan dari jasanya dalam membangun proyek yang bersangkutan, kedudukan kontraktor dalam masa operasi tidak hanya sebagai operator saja, melainkan sudah merupakan pemilik dari proyek yang bersangkutan. Disini kedudukan kontraktor lebih kuat dari kedudukan kontraktor dalam type BOT karena pada saat itu, kontraktor sudah merupakan owner dari proyek. Hal ini penting artinya bagi kontraktor, misalnya dalam hal pencarian dana dari pihak ketiga, proyek tersebut sudah langsung dapat menjadi jaminan hutangnya dan kedudukan krediturnya menjadi semakin kuat.

j. Kontrak *Build Own Transfer*.

Type kontrak tersebut mirip dengan BOOT, dimana penekanannya pada unsur kepemilikan dari pihak kontraktor sebelum proyek yang bersangkutan diserahkan pada owner. Kontraktor memiliki proyek yang bersangkutan selama belum diserahkan kepada owner sehingga kontraktor bebas untuk menggunakan proyek termasuk menjadikannya sebagai jaminan hutangnya atau menyerahkan proyek yang bersangkutan untuk dioperasikan oleh pihak ketiga atau mengalihkan sama sekali proyek tersebut kepada pihak ketiga selama masa proyek tersebut belum ditransfer kembali kepada pihak owner. Yang mengoperasikan proyek bisa juga pihak owner seperti dalam type Build Lease Transfer (BLT).

k. Kontrak *Build and Transfer* (BT).

Kedudukan kontraktor hanya membangun proyek, setelah selesai maka proyek diserahkan kepada owner tanpa kontraktor berhak untuk mengelola ataupun memungut hasil atau revenue dari proyek tersebut. Imbalan owner diberikan kepada kontraktor atas dasar kesepakatan, bisa dengan Cost-plus fee atau secara lump-sum. Type kontrak ini hampir sama dengan type design and build dan type kontrak konvensional.

l. Kontrak *Build Transfer Operate* (BTO).

Type tersebut merupakan variant dari type BOT dimana proyek langsung diserahkan pada pihak owner, sehingga segala resiko yang timbul setelah penyerahan tersebut menjadi tanggung jawab dari owner. Kontraktor setelah serah terima, diberi kesempatan untuk mengoperasikan proyek tersebut termasuk

memungut hasil atau revenue dari proyek tersebut dalam jangka waktu tertentu, yang merupakan imbalan dari pelaksanaan pembangunan. Beda dengan BOT, dalam BOT serah terima proyek baru dilakukan setelah berakhirnya hak operasi dari kontraktor selama masa operasi.

m. Kontrak *Build Lease Transfer* (BLT).

Type tersebut merupakan perkembangan dari type BOT (*Build Operate Transfer*) dimana kontraktor menyerahtherimakan proyek tersebut kepada owner setelah berakhirnya masa hak operasi dari kontraktor, akan tetapi selama masa operasi kontraktor tidak mengoperasikan sendiri proyek tersebut, tetapi justru diserahkan (secara sewa) hak operasi tersebut kepada owner sendiri sehingga selama beroperasi, kontraktor akan menerima bayaran sewa proyek, yang akan menjadi imbalan bagi jasanya dalam membangun

n. Kontrak *Joint Operation* (JO).

Type ini disebut juga Kontrak Konstruksi Kerja Sama Operasi (KSO). Dalam kontrak tersebut, owner adalah pemerintah, sehingga yang terlibat dalam hal ini adalah BUMN binaan departemen dimana proyek tersebut ada. Owner dan kontraktor, melakukan pengoperasian proyek secara bersama-sama dengan membago hasil. Fungsi kontraktor disini adalah sebagai pemodal, pemodal dan kontraktor, atau hanya sebagai kontraktor saja. Spesifikasi dari kontrak ini adalah antara owner dengan kontraktor menanam *equity* sehingga dibentuk *joint venture company*.

o. Kontrak *production sharing*.

Type kontrak ini disebut juga kontrak bagi produksi, dimana pihak swasta (owner) diharuskan untuk menyeteror ke negara sejumlah persentase tertentu dari hasil bersih yang diperoleh. Untuk itu diperlukan persetujuan dari Presiden RI dengan kewajiban pemerintah untuk melaporkan seluruh kontrak *production sharing* kepada DPR. Adapun garis besar isi dari kontrak menurut type ini adalah; *Scope and definition; term; exclusion areas; work program and expenditures; rights and obligations of the parties; recovery of operating costs and handing of production; valuation of crude oil; payment and currency; equipment; consultation and arbitration; employment and training of Indonesians personnel; termination; book and accounts and audits; other provisions; effectiveness.*

p. Kontrak karya.

Type ini disebut *contract of work*, dimana pihak swasta yang akan bertindak dengan pihak owner (pemerintah) untuk membuat kontrak secara *joint venture* dengan swasta ataupun tidak. Dalam type ini, diperlukan persetujuan presiden dan juga DPR. Kontrak tersebut merupakan kontrak baku yang dikeluarkan oleh pemerintah, tetapi masih ada peluang untuk negosiasi sesuai dengan situasi dan kondisi, sehingga kontrak tersebut selalu mengalami regenerasi (updated generasi ke generasi) agar sesuai perkembangan.

Hubungan antara kontraktor dengan owner (pemerintah) mirip dengan kontrak *production sharing* yaitu sama-sama melakukan pekerjaan untuk pemerintah dengan membagi hasil yang diperoleh. Kontraktor bisa menunjuk

subkontraktor-subkontraktor dimana sebagai kontraktor tunggal maka dipercaya untuk menggali bahan-bahan tambang selain minyak dan gas bumi. Kontraktor harus melakukan pembayaran-pembayaran tertentu kepada pihak pemerintah.

q. Kontrak *package deal*.

Kedudukan para pihak muncul dari owner minta kepada kontraktor untuk membangun suatu proyek tertentu, owner hanya memilih salah satu model dari katalog ataupun dari suatu proyek yang sudah pernah ada. Disini, owner menyediakan tempat untuk dibangun dan memberikannya ke kontraktor user requirements. Disamping itu dapat dipakai seorang arsitek independen untuk memberikan advis berkenaan dengan type bangunan tersebut atau untuk mengawasi pembangunan tersebut.

r. Kontrak *tradisional procurement*.

Dalam kontrak ini ada pihak yang berkedudukan sebagai design team sehingga pekerjaan design sudah tidak lagi dikerjakan oleh kontraktor. Disamping itu juga ada pihak contract administrator yang bertanggungjawab untuk melakukan supervisi terhadap pelaksanaan pekerjaan dan bertindak atas nama pihak owner. Kedudukan para pihak dalam type ini adalah pihak maincontractor bertanggung jawab kepada pihak owner. Sedangkan pihak subcontractor bertanggung jawab ke maincontractor dimana ada hubungan kontraktual diantaranya. Owner dapat menunjuk langsung pihak subcontractor melalui Nominated subcontractor sehingga antara owner dan nominated subcontractor ada dokumen *collateral warranties* sehingga keduanya ada ikatan kontraktual secara langsung.

s. Kontrak Management.

Kontraktor disewa atas dasar pembayaran fee. Main contractor menyerahkan keahlian manajemen yang diperlukan dalam pembangunan, agar kontraktor dapat ditempatkan dalam kapasitas profesional sehingga kontraktor dapat menyediakan management skill dan practical building ability. Kontraktor juga dibebankan tanggung jawab untuk mengawasi pekerjaan dilapangan dan berkewajiban untuk memberikan masukan-masukan penting yang berhubungan dengan aspek-aspek praktis dari proses konstruksi ketika proyek didesign.

t. Kontrak *Management Construction*.

Type kontrak ini berbeda dengan type *management contract*, dalam type construction management pihak owner berhubungan kontraktual langsung dengan semua specialist dan *trade contractors*. Owner menunjuk construction management yang kemudian akan ditunjuk design team. Perbedaan dengan type management contract selain pada pasal-pasal dalam kontraknya juga terletak pada penerapan prinsip-prinsip manajemennya. Pihak-pihak yang terlibat adalah pihak-pihak yang mempunyai profesionalisme tinggi. Type kontrak tersebut mempunyai beberapa kelemahan dari berbagai macam segi, untuk mengatasinya maka dilakukan hal-hal:

1. untuk mengatasi resiko waktu, maka pihak owner harus memilih seorang construction manager yang mempunyai profesionalisme tinggi.
2. untuk mengatasi resiko kualitas, maka owner harus menunjuk arsitek dan kontraktor dalam hal ini mempunyai kewajiban agar proyek berjalan sesuai

dengan kontrak, dan juga perlu adanya suatu inspeksi dan pemantauan dari pihak owner.

3. untuk mengatasi default atau wan prestasi dari para pihak, kontraktor diberi kesempatan untuk memasukkan design responsibility kedalam trade contract.
4. untuk mengawasi resiko completion, dalam type ini, owner tidak diberi wewenang untuk menetapkan kontrak secara sepihak sehingga harus dilakukan dengan membagi-bagi kontrak kepada beberapa paket.

u. Kontrak *Project Management*.

Owner menunjuk profesional konsultan yang akan menunjuk design consultant dan kemudian akan mengangkat pihak kontraktor. Type kontrak ini sangat sesuai dengan proyek-proyek building dan engineering.

v. *Management Fee Contract*.

Dalam type kontrak tersebut kontraktor setuju untuk mengerjakan proyek dan owner akan membayar fee plus biaya-biaya yang telah dikeluarkan kontraktor. Type kontrak tersebut sama dengan type Cost-plus contract, dimana terdapat target cost sehingga apabila kontraktor dapat mencapai target tertentu maka dia akan mendapat tambahan fee.

w. Kontrak *Fast Tracking*.

Dalam kontrak ini tahapan konstruksi dilakukan dengan cara terpisah jadi, untuk tiap-tiap tahapan konstruksi dituangkan kedalam kontrak yang berbeda-beda. Kelebihan dari kontrak type ini adalah dapat menghemat waktu pelaksanaan

konstruksi dari awal sampai penyerahan secara menyeluruh. Sedangkan kelemahannya adalah dalam type ini banyak dipertaruhkan efisiensi dari segi biaya dan kualitas.

x. Kontrak *Measured Term dan Type Measurement Contract*.

Dalam type kontrak measured term, pembayaran dilakukan setelah proses konstruksi tersebut selesai dengan menggunakan nilai yang sebelumnya telah disetujui. Sedangkan dalam type kontrak measurement, pihak kontraktor dibayar untuk pekerjaan yang dilakukan dengan mengukur pekerjaan yang telah dilakukan. Pengukuran tersebut pada akhirnya dikalikan dengan nilai yang telah disepakati.

y. Kontrak Serial Tender.

Dalam type tersebut, ditentukan jika ada proyek yang serupa dikemudian hari maka pihak kontraktor yang memenangkan tender sebelumnya berhak tanpa melalui tender baru untuk menyelesaikan proyek konstruksi. Didalamnya juga ada penyesuaian-penyesuaian misalnya mengenai harga. Akan tetapi type kontrak ini juga tidak mengikat apabila ternyata pada pekerjaan konstruksi yang pertama, kontraktor telah gagal melaksanakan pekerjaannya atau dari owner merasa tidak puas dengan pekerjaan kontraktor tersebut.

z. Kontrak *Bulk Purchase Agreement*.

Dalam type kontrak tersebut, ditentukan pembelian bahan bangunan yang standar oleh supplier tertentu. Owner telah mempunyai hubungan dengan pihak supplier. Type kontrak tersebut lebih cocok untuk proyek konstruksi industri yang banyak menggunakan komponen yang sudah standar.



Untuk masing-masing karakteristik konstruksi mempunyai type kontrak yang berlainan. Jadi belum tentu suatu type kontrak konstruksi cocok untuk suatu proses konstruksi. Dalam penerapannya harus dilihat karakteristik dari pekerjaan konstruksi yang bersangkutan. Karena apabila suatu type kontrak konstruksi diterapkan tidak sesuai dengan karakteristik suatu proses konstruksi, maka kendalanya akan terjadi ditengah proses konstruksi tersebut, sehingga proses konstruksi tidak akan berjalan sesuai dengan kontrak yang disepakati, disamping itu juga motivasi masing-masing pihak tidak dapat terpenuhi.

Dalam praktek menurut Ir. Djoko Purwanto<sup>16</sup>, type kontrak yang sering digunakan adalah type kontrak unit price dan lump-sum. Kedua type ini diterapkan tergantung dari kemauan owner. Biasanya hal ini dikaitkan dengan resiko terhadap faktor dana yang telah ditetapkan sebelumnya. Owner memilih type lumpsum, karena mereka menghendaki agar tidak terjadi pembengkakan cost. Sebab pada type ini, apa yang terjadi sebenarnya sepanjang bukan pekerjaan baru, hal itu menjadi tanggung jawab kontraktor. Sehingga resiko yang terberat ada ditangan kontraktor.

Namun apabila owner memakai tipe unit price, anggaran biaya harus fleksibel sesuai dengan realisasi yang sebenarnya. Karena dalam type kontrak tersebut, biaya pekerjaan dapat naik-turun. Owner akan membayar sesuai dengan volume pekerjaan yang sebenarnya. Dan apabila pekerjaan baru yang harus

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<sup>16</sup> Urip Yustomo/Ratih/Rakhidin, "Tender Swasta Umumnya Tertutup", Majalah Konstruksi, Oktober 1993, h.34.

diselesaikan oleh kontraktor tersebut sesuai dengan permintaan owner, maka biaya menjadi tanggung jawab owner.

#### **2.1.5. Praktek Kontrak Konstruksi Sampai Saat Ini.**

Pada umumnya posisi owner jauh lebih dominan dari kontraktor. Kontraktor hampir selalu harus menerima konsep kontrak yang dibuat oleh owner. Dalam hal ini tidak adanya peraturan perundang-undangan yang baku yang mengatur hak-hak dan kewajiban para pelaku industri konstruksi mengakibatkan azas kebebasan berkontrak menjadi satu-satunya acuan yang sangat merugikan kontraktor. Kelangkaan proyek disatu sisi dan banyaknya calon kontraktor dilain sisi mengakibatkan posisi tawar kontraktor menjadi sangat rendah. Faktor-faktor KKN seperti “tender diatur”, “arisan”, “mark up”, “pekerjaan fiktif” dan sebagainya ikut menyumbang kontrak konstruksi menjadi tidak wajar. Kekhawatiran/ancaman tidak mendapatkan pekerjaan yang ditenderkan atau pekerjaan-pekerjaan mendatang, menyebabkan kontraktor terpaksa menerima saja kontrak yang dibuat oleh owner. Kontraktor seringkali mau saja menerima pekerjaan walaupun kesediaan dana dari owner diragukan, tidak mencukupi atau sama sekali belum tersedia. Kontraktor seringkali bersedia menerima pekerjaan yang perencanaannya belum matang.

Secara umum ada kategori-kategori khusus dalam kontrak konstruksi, pertama adalah untuk proyek swasta yang dalam kontrak konstruksi dapat diterima oleh asas kebebasan berkontrak sesuai Buku III BW, tetapi dalam prakteknya

kontraktor tidak memiliki posisi yang seimbang atau posisi yang kuat dengan owner. Walaupun tuntutan-tuntutan yang sah akan diterima, kontraktor yang dianggap tidak layak atau curang akan diblack list atau dicoret oleh owner melalui jaringan profesionalnya. Kategori kedua adalah proyek pemerintah dengan dana bantuan luar negeri yang biasanya mengikutkan kontraktor asing dengan sistem tender Internasional. Kategori ketiga yaitu proyek pemerintah dengan dana lokal, pemerintah sebagai ownernya. Tetapi pada umumnya kontrak lokal tidak memberikan perlindungan hukum dalam hal permodalan dan sangat tergantung pada owner. Akibatnya, kontraktor lokal berada pada posisi yang lemah apabila berhadapan dengan owner. Pada kategori tersebut permasalahan dapat timbul yaitu tidak terlihat adanya fair and equal dalam perumusan kontrak konstruksi. Hal ini karena anggapan bahwa sifat bisnis konstruksi adalah buyer market dan bukan seller market sehingga yang serba menentukan dalam hal ini adalah owner sebagai pihak pembeli. Jadi kontraktor sebagai penjual jasa selalu ditempatkan pada posisi tidak seimbang dengan kontraktor. Sebenarnya, hal ini dapat menjadi sumber utama adanya korupsi dan kolusi.

Dalam hal terjadi suatu kesalahan atau wan prestasi oleh salah satu pihak belum ada suatu sanksi profesional, disamping itu juga sulit untuk menentukan siapa yang bertanggung jawab atas kesalahan yang terjadi. Dari hal-hal tersebut tampak bahwa kontrak konstruksi sampai saat ini belum menunjukkan kesetaraan dan keadilan bagi para pihak. Untuk mengatasi hal tersebut sebenarnya perlu keberadaan dari UU Jasa Konstruksi yang didalamnya telah tercermin suatu

kontrak konstruksi yang adil dan setara. Sehingga dapat mengeliminir diskriminasi dan ketergantungan yang berlebihan dimana owner berusaha untuk menciptakan suasana tertib kepada kontraktor yang dampaknya justru menimbulkan ketidaksetaraan dan diskriminasi.

Adanya kontrak konstruksi yang merupakan ketentuan-ketentuan sepihak dari owner, kiranya perlu dengan segera dibenahi melalui format yang sesuai dengan pengaturan dalam UU Jasa Konstruksi yang walaupun tidak luput dari ketidak sempurnaan tetapi telah memberikan solusi selangkah lebih maju dalam menciptakan suatu kontrak yang adil dan setara. Hal yang mendasar yang perlu diperhatikan adalah bahwa apabila faktor fair and equal mulai dapat diterapkan dalam kontrak konstruksi, setidaknya para praktisi konstruksi telah mulai belajar dan memberikan kesadaran untuk menghargai hak-hak orang lain di negara hukum ini.

Sehingga secara umum, dalam kontrak konstruksi sampai saat ini, masih menjadi kewenangan owner untuk menentukan isi dan ketentuan-ketentuan kontrak, tidak adanya fair and equal dalam perumusan kontrak maka banyak dijumpai permasalahan yang dapat menghambat implementasi kontrak konstruksi disamping juga dapat merugikan para pihak. Disini tercermin bahwa kontraktor yang menginginkan mendapat pekerjaan dari owner. Sehingga kontraktor harus mau mematuhi ketentuan yang dibuat oleh owner. Walaupun secara teori tiap-tiap pihak diberikan hak untuk menuangkan ide dan aspirasinya sesuai dengan asas kebebasan berkontrak dan asas persamaan hak namun dalam praktek kontraktor

tidak mendapatkan kesempatan untuk ikut menentukan klausula yang akan tertuang dalam kontrak konstruksi karena kontrak konstruksi umumnya telah dibakukan menurut kepentingan owner dengan pertimbangan dari pihak owner sendiri tanpa keikutsertaan kontraktor.

Pada kondisi ini biasanya asal tidak terlalu merugikan, kontraktor akan tetap menyetujui perjanjian untuk mendapat pekerjaan dari owner demi kelangsungan perusahaannya dan keeksistensian dari profesionalisme kontraktor tersebut dengan harapan bahwa perusahaannya akan tercantum dalam daftar rekanan kerja yang baik dan berharap akan dapat mengerjakan proyek-proyek owner berikutnya. Dari sini dapat terlihat bahwa sebenarnya terdapat suatu ketergantungan dari kontraktor terhadap owner yaitu adanya harapan suatu saat dapat memperoleh proyek-proyek berikutnya, walaupun kontraktor mengorbankan posisinya dalam kontrak konstruksi.

Hal serupa juga diungkapkan bahwa memang dalam penentuan klausula kontrak terdapat suatu jarak antara owner dengan kontraktor. Posisi owner lebih kuat dari kontraktor. Sebenarnya sebelum adanya UU Jasa Konstruksi beserta Peraturan Pemerintah yang berkaitan dengan jasa konstruksi ini, keseimbangan para pihak dapat diwujudkan dengan adanya asas kebebasan berkontrak sesuai dengan pasal 1338 BW akan tetapi, karena penerapan asas tersebut tidak konsisten artinya hanya sebagian kecil saja maka menyebabkan tidak terwujudnya suatu kesetaraan dan keadilan, fungsi kontrak konstruksi yang melindungi para pihak

secara hukum menjadi tidak terwujud. Format kontrak konstruksi<sup>17</sup> secara baku sampai dengan saat ini :

- a. Standar atau model :
  - Pemerintah : Standar Departemen/Ditjen
  - Swasta Nasional : Beraneka ragam
  - Swasta asing : FIDEC/JCT/SIA.
- b. Perhitungan biaya; kerancuan antara fixed lump-sum price dengan unit price
- c. Cara pembayaran; Kerancuan antara sistem pra pendanaan penuh dan turn key (design build/ design construct)
- d. Jaminan-jaminan/ pertanggung :
  - jaminan pelaksanaan berkaitan dengan pembayaran bertahap
  - jaminan pembayaran berkaitan dengan turnkey/pra pendanaan penuh
  - jaminan tidak liquid berkaitan dengan personal guarantee/ corporate guarantee
- e. Pendanaan :
  - Pemerintah; umumnya jelas sumbernya (APBN/loan)
  - Swasta nasional; tidak ada jaminan/ sulit dilacak
  - Swasta asing; tidak ada jaminan/sulit dilacak
- f. Manajemen konstruksi
  - manajemen konstruksi tidak berfungsi optimal
  - penyedia jasa sering mencampuri fungsi manajemen konstruksi
- g. Kelalaian para pihak
  - dari pihak kontraktor dapat dikenai sanksi berat
  - dari pihak owner tidak ada saksi atau kurang memadai
- h. Kelambatan pelaksanaan
  - kelambatan karena kesalahan kontraktor kena sanksi
  - percepatan pelaksanaan tidak dapat ganjaran/ insentif
- i. Penyelesaian sengketa/ perselisihan
  - sering terjadi kerancuan antara arbitrase atau pengadilan
  - arbitrase dan pengadilan
  - arbitrase, bila salah satu pihak tidak puas ke pengadilan
  - pilihan arbitrase : BANI/ICC, Ad Hoc
- j. Masa pelaksanaan/ masa kontrak:

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<sup>17</sup>Standart Baku Kontrak Konstruksi pada Kontrak Kerja Paiton Energi.

- batasan
  - perhitungan jumlah hari
  - saat mulai
- k. Keadaan memaksa/ force majeure:
- batasan dan definisi
  - proses penanganan
  - konsekuensi hukum akibat force majeure
- l. Pemutusan kontrak/ penghentian sementara pekerjaan
- alasan pemutusan/ penghentian terlalu sumir
  - kontraktor berada dalam posisi sulit
- m. Kelengkapan dokumen kontrak
- dokumen tidak lengkap
  - isi bertentangan satu sama lain (inkonsistensi)
  - perencanaan kurang lengkap

Secara baku kontrak konstruksi yang sering digunakan oleh owner dan kontraktor sampai saat ini umumnya berisikan; Nama proyek; Nomer kontrak; Para pihak; Dasar pelaksanaan pekerjaan; Tanggung jawab dan kewajiban; Hasil pekerjaan; Jangka waktu pekerjaan; Harga proyek; Sanksi dan denda; Penyelesaian perselisihan; Pemutusan perjanjian; Tanda tangan para pihak. Disamping itu juga dilampirkan dokumen-dokumen lain yang mendukung yaitu : rencana kerja dan syarat-syaratnya, berkas penawaran, surat perintah kerja, gambar-gambar kerja. Hal ini terlihat bahwa kontrak konstruksi tersebut bentuknya baku, dimana telah ditentukan oleh salah satu pihak, dalam hal ini adalah owner. Suatu kontrak konstruksi dalam bentuk baku, secara umum banyak mempunyai kelemahan, hal ini berkaitan dengan tipologi proyek konstruksi yang berlainan dengan teknologi yang berbeda-beda dan keterlibatan banyak pihak yang tidak selalu permanen, ditambah pula bahwa suatu proyek konstruksi sangat rumit yang kesemuanya memerlukan penanganan sistem manajemen dan kontraktual yang pastinya

berbeda tergantung tipologi proyeknya, besar kecilnya suatu proyek, misalnya. Sehingga dapat dipastikan bahwa kontrak konstruksi tidaklah relevan bila dituangkan dalam bentuk yang baku.

#### **2.1.6. Gambaran idealnya suatu kontrak konstruksi.**

Kontrak konstruksi dimasa yang akan datang diharapkan memenuhi azas-azas yaitu kejujuran, keadilan, manfaat, keserasian, keseimbangan, kemandirian, keterbukaan, kemitraan, keamanan, keselamatan. Perlu juga diperhatikan masalah kesetaraan dan kesejajaran diantara para pihak, khususnya owner dan kontraktor.

Kontrak konstruksi yang baik harus memperhatikan jenis usaha konstruksi. Dimana jenis usaha konstruksi meliputi usaha perencana konstruksi, usaha pelaksana konstruksi, dan usaha pengawas konstruksi. Untuk masing-masing jenis usaha konstruksi tersebut haruslah mempunyai ijin usaha, Sertifikat Klasifikasi dan Kualifikasi. Dalam hal pengikatan pekerjaan konstruksi, terlebih dahulu harus benar-benar dilihat apakah owner mempunyai kemampuan membayar. Hal ini harus didukung dengan suatu dokumen pembayaran. Tentang masalah pembayaran ini pada saat sekarang masih ditemui hambatan-hambatan, dirasakan kesadaran owner untuk menganggap kontraktor sebagai mitra masih sangat kurang. Itu terlihat dari cara pembayaran mereka yang sering kali terlambat. Kadang kala ada suatu gejala nakal dari owner untuk menunda-nunda pembayaran. Disatu sisi kontraktor harus terus bekerja, apabila belum dibayar berarti kontraktor harus meminjam dari bank. Dari keadaan tersebut ada ketidakseimbangan dimana



kontraktor harus membayar bunga sementara owner mendapat bunga. Sehingga dalam format kontrak konstruksi yang dicita-citakan diharapkan dapat memberikan pengaturan yang tepat dalam sistem pembayaran.

Dalam hal kegagalan bangunan, owner maupun kontraktor bertanggung jawab atas kegagalan bangunan paling lama 10 tahun sejak pekerjaan konstruksi diserahkan terakhir kali. Bila terjadi kegagalan bangunan baik karena kesalahan perencana, pengawas atau pelaksana konstruksi maupun owner dan hal tersebut menimbulkan kerugian dipihak lain, maka dia wajib bertanggung jawab dan dikenakan ganti rugi.

Penyelesaian sengketa adalah hal yang perlu dicermati dalam kontrak konstruksi yang menjadi suatu harapan dimasa datang. Diharapkan dengan disepakatinya penyelesaian sengketa secara teapt dapat mengantisipasi adanya suatu sengketa konstruksi yang timbul. Format kontrak konstruksi yang ideal sesuai dengan UU Jasa Konstruksi yang mencerminkan suatu hubungan yang setara diantara para pihaknya seharusnya mencakup :

- a. Para pihak, yang memuat secara jelas identitas para pihak, didalam suatu kontrak yang pertama kali harus diperhatikan ialah kedudukan para pihak yang menandatangani kontrak tersebut. Apabila para pihaknya adalah suatu badan hukum, maka harus jelas kedudukan/ posisi dari orang yang mewakili badan hukum tersebut.
- b. Rumusan pekerjaan, yang memuat uraian yang jelas dan rinci tentang lingkup kerja, nilai pekerjaan, dan batasan waktu pelaksanaan.
- c. Masa pertanggungan dan atau pemeliharaan, yang memuat tentang jangka waktu pertanggungan jawab dan atau pemeliharaan yang menjadi tanggung jawab kontraktor.
- d. Tenaga ahli, yang memuat ketentuan tentang jumlah, klasifikasi dan kualifikasi tenaga ahli untuk melaksanakan pekerjaan konstruksi.

- e. Hak dan kewajiban yang memuat hak owner untuk memperoleh hasil pekerjaan konstruksi serta kewajiban untuk memenuhi ketentuan-ketentuan yang diperjanjikan serta hak kontraktor untuk memperoleh informasi dan imbalan jasa serta kewajibannya melaksanakan pekerjaan konstruksi
- f. Cara pembayaran yang memuat ketentuan tentang tanggung jawab dalam hal salah satu pihak tidak melaksanakan kewajibannya sebagaimana diperjanjikan.
- g. Wanprestasi yang memuat ketentuan tentang tanggung jawab dalam hal salah satu pihak tidak melaksanakan kewajibannya sebagaimana diperjanjikan.
- h. Penyelesaian perselisihan, yang memuat ketentuan tentang tata cara penyelesaian perselisihan akibat ketidaksepakatan, didalam kontrak harus ditetapkan cara apa yang dipakai untuk menyelesaikan perselisihan antara para pihak (settlement of dispute).
- i. Pemutusan kontrak konstruksi, yang memuat ketentuan tentang pemutusan kontrak konstruksi yang timbul akibat tidak dapat mengakhiri perjanjian.
- j. Keadaan memaksa (force majeure) yang memuat ketentuan tentang kejadian yang timbul diluar kemauan dan kemampuan para pihak, yang menimbulkan kerugian bagi salah satu pihak.
- k. Kegagalan bangunan, yang memuat ketentuan tentang kewajiban-kewajiban kontraktor dan atau owner atas kegagalan bangunan.
- l. Perlindungan pekerja, yang memuat ketentuan tentang kewajiban para pihak dalam pelaksanaan keselamatan dan kesehatan kerja serta jaminan sosial.
- m. Aspek lingkungan yang memuat kewajiban para pihak dalam pemenuhan ketentuan tentang lingkungan.

Selain itu juga diatur tentang kontrak konstruksi dimana:

- Kontrak konstruksi untuk pekerjaan perencanaan harus memuat ketentuan tentang hak atas kekayaan intelektual;
- Kontrak konstruksi dapat memuat kesepakatan para pihak tentang pemberian insentif;
- Kontrak konstruksi untuk kegiatan pelaksanaan dalam pekerjaan konstruksi, dapat memuat ketentuan tentang subpenyedia jasa serta

pemasok bahan dan atau komponen bangunan dan atau peralatan yang harus memenuhi standar yang berlaku;

- Kontrak konstruksi dibuat dalam bahasa Indonesia dan dalam hal kontrak konstruksi dengan pihak asing, maka dapat dibuat dalam bahasa Indonesia dan bahasa Inggris, dalam hal ini bahasa kontrak adalah sangat penting ditetapkan mengingat konsekuensi hukum yang serius yang akan ditimbulkan. Bahasa kontrak didalam suatu kontrak konstruksi hanya ada satu. Jadi kedua belah pihak hanya berpegang pada satu bahasa. Apabila ada terjemahan kedalam bahasa lain, terjemahan ini tidak mengikat, yang mengikat adalah bahasa kontrak yang disepakati. Selain itu bahasa kontrak tersebut didalam arti kata-kata atau kalimatnya haruslah jelas dan tidak dapat mempunyai pengertian lain selain dari apa yang tertulis. Perlu juga dihindarkan penggunaan kata-kata yang tidak jelas, yang memberikan pengertian rancu.

Disamping itu sebagai suatu perjanjian, hendaknya kontrak konstruksi berisikan tentang :

- Pengertian seluruh perjanjian; perjanjian itu sendiri (article of agreement) beserta seluruh kelengkapannya berupa rencana kerja dan syarat-syarat, spesifikasi teknis, gambar-gambar serta dokumen-dokumen lain yang merupakan satu kesatuan dan bagian yang tidak terpisahkan, perjanjian itu

sendiri merupakan dokumen yang paling tinggi kedudukannya, sedang yang lain merupakan kelengkapannya.

- Berlakunya kontrak; saat dimulainya suatu kontrak secara hukum sangat penting, karena hal ini menyangkut waktu pelaksanaan pekerjaan.
- Amandemen dan adendum; disebabkan karena pada waktu kontrak sudah ditandatangani muncul hal-hal yang perlu diatur yang sebenarnya belum diatur didalam kontrak atau perlu penambahan dan pengurangan hal-hal tertentu. Hal-hal yang perlu diubah dituangkan ke dalam suatu amandemen kontrak sedangkan hal-hal yang perlu ditambahkan dituangkan ke dalam adendum, yang perlu diketahui bahwa baik amandemen maupun adendum merupakan satu kesatuan dan bagian yang tidak terpisahkan dari kontrak dan disepakati secara tertulis oleh kedua belah pihak.
- Notice; Hal ini diperlukan untuk menjaga tertib administrasi agar tidak timbul birokrasi dalam surat menyurat.

UU Jasa Konstruksi beserta PP Penyelenggaraan Jasa Konstruksi merupakan suatu landasan hukum untuk mencapai suatu kontrak konstruksi yang adil dan setara. Dalam peraturan perundang-undangan tersebut, adanya azas keadilan, keserasian, keseimbangan, keterbukaan, kemitraan sebagaimana diatur dalam pasal 2 UU Jasa Konstruksi, merupakan suatu sarana dalam mewujudkan kontrak konstruksi yang adil dan setara untuk kedua belah pihak. Adapun tujuan

untuk mewujudkan kesetaraan para pihak, owner dan kontraktor itu sendiri yaitu, meningkatkan struktur usaha yang kokoh, andal, berdaya saing tinggi dan mencapai konstruksi yang berkualitas, disamping itu juga menjamin kesetaraan para pihak agar tidak terjadi ketidakseimbangan hak dan kewajiban.

Yang menjadi pokok dari kesetaraan para pihak dalam suatu kontrak konstruksi adalah adanya tanggung jawab bersama atas kegagalan bangunan, dimana kegagalan suatu bangunan dalam proses konstruksi menjadi tanggung jawab kedua belah pihak yaitu owner dan kontraktor. Dalam PP Penyelenggaraan Jasa Konstruksi, disebutkan adanya larangan persengkongkolan untuk mengatur dan menentukan pemenang serta larangan untuk menaikkan nilai pekerjaan. Antara owner dan kontraktor dilarang bersekongkol untuk mengatur pemenang dan menentukan pemenang, sehingga terjadi persaingan yang tidak sehat. Selain itu ada larangan persekongkol untuk menaikkan nilai pekerjaan (mark up) yang berakibat kerugian masyarakat dan atau negara. Owner harus membuktikan kemampuan untuk membayar disamping kontraktor juga harus menunjukkan keprofesionalitasannya.

Dalam perumusan kontrak konstruksi, kedua belah pihak menginginkan suatu keadaan yang saling menguntungkan. Keadaan demikian dapat terwujud bila dalam kontrak konstruksi sesuai dengan asas-asas dalam hukum, yaitu asas konsensualime, asas keseimbangan, asas kepercayaan, asas kekuatan mengikat, asas persamaan hak, asas moral, asas kepatuhan, asas kebiasaan, dan asas kepastian hukum.

Untuk mewujudkan kontrak yang setara dan adil dan untuk mencegah timbulnya perbedaan persepsi dalam suatu kontrak konstruksi serta untuk dapat lebih menjamin hak dan kewajiban para pihak, sebenarnya dapat diupayakan dengan jalan menempatkan posisi para pihak yang sejajar dan setara dalam proses pembuatan kontrak konstruksi dan pada waktu implementasi kontrak tersebut. Yaitu memberi peran yang sama untuk merumuskan klausula kontrak dan dalam hal implementasi kontrak tersebut. Keberadaan dari UU Jasa Konstruksi serta Peraturan Pemerintah yang berkaitan dengan jasa konstruksi seharusnya dapat dimanfaatkan keberadaannya ini untuk dapat memberi kesetaraan dan keadilan serta menempatkan posisi para pihak secara mantap dimana para pihak merasa hak dan kewajibannya terlindungi oleh sarana yuridis tersebut sehingga proyek konstruksi yang menjadi obyek dapat memberikan keuntungan bagi kedua belah pihak karena adanya suatu hubungan kontraktual yang sehat dan stabil.

## **2.2. Hubungan dan Kedudukan Para Pihak Dalam Kontrak Konstruksi**

### **Yang Adil dan Setara**

#### **2.2.1. Hubungan kontraktual dan kedudukan para pihak.**

Para pihak yang terlibat dalam proses konstruksi terdiri dari banyak pihak hal ini berkaitan dengan faktor profesionalitas dan teknologi, mengingat dalam suatu proses konstruksi banyak hal yang sangat rumit, canggih dan memerlukan teknologi yang tinggi. Namun umumnya pihak dalam suatu kontrak konstruksi

adalah owner<sup>18</sup> dan kontraktor<sup>19</sup>. Sebelumnya, hubungan kontraktual antara owner dan kontraktor merupakan hubungan hukum antara majikan dengan bawahan, kontraktor sebagai bawahan sedangkan owner sebagai majikan<sup>20</sup>. Akan tetapi setelah reformasi bergulir, dengan keberadaan UU Jasa Konstruksi, maka diantara owner dengan kontraktor terdapat kesetaraan antara owner sebagai pengguna jasa dan kontraktor sebagai penyedia jasa. Istilah pemberi tugas yang bernuansa diskriminatif sudah tidak digunakan lagi. Owner sebagai pemilik proyek maupun kontraktor sebagai penyedia jasa dapat dikenai sanksi jika menyalahi ketentuan yang ada. Sehingga tidak ada lagi istilah warga negara kelas satu untuk owner dan warga negara kelas dua dan tiga untuk konsultan dan kontraktor.<sup>21</sup>

Kontraktor dalam implementasinya dapat terdiri dari dua jenis kontraktor yaitu main contractor dan subkontraktor. Main contractor merupakan pihak yang terlibat langsung dengan owner, dimana pihak main contractorlah yang menandatangani kontrak konstruksi. Pihak main kontraktor juga mempunyai tanggung jawab hukum yang lebih luas, tidak hanya pada periode konstruksi tetapi juga setelah periode konstruksi berlangsung. Pihak kontraktor yang

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<sup>18</sup> owner menurut Dictionary of architecture and construction adalah the architects's client and party to the owner architect agreement, and one who has the legal right or title to a piece of property.

<sup>19</sup> Contractor menurut Dictionary of architecture and construction adalah one who undertakes responsibility for the performance of construction work, including the provision of labour and materials, in accordance with plans and specifications and under a contract specifying cost and schedule for completion of the work; the person or organization responsible for performing the work, and identified as such in the owner-contractor agreement.

<sup>20</sup> Napitupulu, *op.cit.*, h.5.

<sup>21</sup> [www.indoconstruction.com.200008.51\\_opini.shtml](http://www.indoconstruction.com.200008.51_opini.shtml).

selanjutnya adalah pihak subkontraktor, yang umumnya ditunjuk langsung oleh owner yang juga disebutkan dalam (klausula kontrak). Selain pihak-pihak tersebut juga ada pihak arsitek sebagai konsultan yang kesemua dari pihak-pihak tersebut mempunyai kesetaraan kedudukan yang tidak dibeda-bedakan karena masing-masing mempunyai hak dan kewajiban menurut fungsinya sendiri.

Umumnya pada pelaksanaan proyek terjadi hubungan kontraktual sebagai berikut :

1. Owner dibantu konsultan perencana mempersiapkan dokumen lelang kemudian mengadakan pelelangan untuk menentukan kontraktor pelaksana yang bertugas melaksanakan pembangunan struktur fisik proyek. Sesuai dengan dokumen perencanaan dan perubahan-perubahan perencanaan. Selama pelaksanaan owner menyediakan dana yang diperlukan untuk pelaksanaan pembangunan.
2. Owner dengan perantara konsultan pengawas kemudian mengawasi pelaksanaan proyek agar sesuai dengan dokumen kontrak.
3. Konsultan pengawas yang berperan sebagai wakil owner berkewajiban mengawasi pelaksanaan proyek dan melaporkan jalannya pelaksanaan tersebut pada owner.
4. Kontraktor pelaksana mengerjakan pembangunan fisik konstruksi dibawah pengawasan konsultan pengawas.



5. Kontraktor pelaksana melaporkan jalannya pelaksanaan pekerjaan fisik konstruksi, rencana kerja dan masalah yang terjadi kepada konsultan pengawas.
6. Dalam melaksanakan pekerjaan konstruksi, kontraktor dapat melakukan kerja sama atau kontrak dengan sub kontraktor untuk melaksanakan sebagian dari pekerjaan namun terlebih dahulu harus mendapat persetujuan dari konsultan pengawas.

Jadi disini, owner, konsultan, kontraktor, dan subkontraktor adalah merupakan mitra kerja dan bukan penyelia<sup>22</sup>. Maksudnya adalah diantara para pihak yang terlibat, kesemuanya memiliki suatu peranan yang bersifat sejajar dan dituntun oleh semangat mitra kerja yang sederajat dalam rangka mencapai sasaran bersama.

Kedudukan owner yang dalam suatu proses konstruksi adalah sebagai promotor yang bersedia melaksanakan kegiatan-kegiatan proyek, membayar dan nantinya memiliki proyek yang dikerjakan, hendaknya harus memberikan kepercayaan tanggung jawab untuk merencanakan, merancang proyek yang dikehendaknya, secara profesionalitas. Karena pada saat owner memborongkan kepada kontraktor, pada saat itu pula ia memberikan kepercayaan dan demikian juga dengan kontraktor diharapkan mampu melaksanakan kepercayaan dengan keprofesionalitas yang dipunyainya.

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<sup>22</sup>Imam Soeharto, *op.cit.*, h.497.

Owner harus menyadari bahwa kontraktor adalah perusahaan yang mandiri, memperoleh pekerjaan atas dasar kontrak yang disepakati bersama. Dalam pelaksanaan teknis proyek, owner memberikan batasan dalam bentuk kriteria dan spesifikasi dan menyerahkan kepada kontraktor untuk menggunakan kecakapan, pengalaman dan metode yang menurut pendapatnya paling baik, guna mewujudkan sasaran proyek. Jadi jelas konteks ini, owner bukan bertindak sebagai penyelia yang dapat menjurus pada pengalihan sebagian tanggung jawab pelaksanaan teknis pekerjaan dari kontraktor kepada owner. Tanggung jawab owner adalah melakukan tindakan-tindakan untuk menyakinkan bahwa tugas dan tanggung jawab kontraktor dilaksanakan secara memuaskan sedangkan kontraktor memiliki tanggung jawab tunggal atas teknik penyelenggaraan proyek.

Dalam penjelasan UU Jasa Konstruksi hubungan kontraktual antara owner dan kontraktor yang sejajar dan setara harus diikuti dengan proses ditetapkannya hak dan kewajiban masing-masing pihak yang adil dan serasi dengan disertai sanksi. Secara konkret, hubungan yang sejajar dan setara dalam mencakapi suatu kesepakatan untuk proses konstruksi harus dilandasi dengan adanya prinsip persaingan sehat, dalam arti bahwa masing-masing pihak harus mengakui kedudukan yang sejajar antara owner dan kontraktor. Disamping itu juga perlu adanya penerapan asas-asas yang telah disebutkan diatas khususnya asas keterbukaan dimana harus ada komunikasi yang baik diantara para pihak disertai dengan transparansi segala hal yang berhubungan dengan proses konstruksi, asas kejujuran dan keadilan agar terwujud kesadaran masing-masing pihak akan

fungsinya dalam penyelenggaraan tertib jasa konstruksi serta bertanggung jawab memenuhi setiap kewajibannya dalam memperoleh haknya, asas keserasian agar terwujud interaksi yang harmonis diantara para pihak dalam setiap proses konstruksi, asas keseimbangan dimana hal ini sangat diperlukan untuk menjamin terwujudnya keseimbangan antara kemampuan kontraktor dan beban kerjanya, dan asas kemitraan yang melandasi hubungan kerja para pihak yang harmonis, terbuka, bersifat itmbal balik, dan sinergis.

### **2.2.2. Kehendak masing-masing pihak.**

Kehendak masing-masing pihak tercermin dari motivasi dan tujuan, hal ini sangat penting untuk saling dipahami dan dimengerti, agar dapat diketahui posisi dalam menempatkan diri dan bagaimana mengambil sikap masing-masing pihak yang satu terhadap pihak yang lain dalam rangka mencapai sasaran. Konsultan dan kontraktor disamping ingin menyelesaikan proyek dengan jadwal dan mutu sesuai dengan kontrak juga mendapat suatu keuntungan. Dalam hal keuntungan tersebut sering terjadi pertentangan kepentingan antara kontraktor dengan owner yang menginginkan penyelenggaraan proyek dilakukan secara ekonomis dan efisien.

Untuk mengantisipasi perbedaan kepentingan tersebut, kontraktor harus dapat menghadapinya melalui mekanisme kerjasama atau kontrak dan pemantauan eksekusinya, sehingga tidak memberikan dampak negatif terhadap sasaran lain. Motivasi terhadap masing-masing sasaran proyek konstruksi umumnya berbeda-beda, misalnya dalam hal jadwal penyelesaian, owner berkeinginan agar suatu

proyek konstruksi cepat selesai sehingga hasilnya dapat segera dipergunakan. Sementara disatu sisi pihak konsultan dan kontraktor berkeinginan agar proyek konstruksi cepat selesai seminimal mungkin sesuai dengan kontrak. Dari segi biaya proyek, pihak owner menginginkan harga terendah yang memenuhi persyaratan teknik, dimana harga minimal terendah tersebut tidak melewati anggaran. Sedangkan dari pihak konsultan dan kontraktor menginginkan mendapat keuntungan yang semaksimal mungkin dengan mengactualkan target cost yang serendah mungkin, tetapi juga tidak mempengaruhi mutu dari proyek konstruksi. Dalam hal mutu pekerjaan dan peralatan, owner memiliki tujuan agar peralatan dapat berfungsi sesuai dengan pekerjaan yang diharapkan, minimal sesuai dengan spesifikasinya, sama halnya dengan pihak konsultan dan kontraktor yang sama-sama menginginkan agar terpenuhi kriteria dan spesifikasi sesuai dengan yang tertuang dalam kontrak.

### **2.2.3. Keseimbangan Hak dan Kewajiban Para Pihak.**

Hal yang umum terjadi pada proses konstruksi owner mendominasi haknya sedang kewajiban yang harus dipenuhi oleh owner banyak diimplikasikan sebagai kompensasi dari kewajiban kontraktor, disini terjadi suatu ketidakseimbangan hak dan kewajiban antara owner dengan kontraktor. Owner mempunyai wewenang untuk menentukan kontraktor mana yang disertai tugas untuk melaksanakan pembangunan proyek tersebut. Sehingga hak owner dalam proses konstruksi sering disalah artikan bahwa owner lebih mempunyai hak yang harus didahulukan

karena owner sebagai pemilik dan penguasa dalam proses konstruksi, faktor tersebut yang pada akhirnya menjadikan kewajiban owner sebagai suatu hal yang tidak menonjol. Peranan owner dalam suatu proses konstruksi tersebut lebih tampak pada tahap konseptual, dimana owner adalah sebagai pemeran utama dalam mencari peluang usaha, pencetus gagasan, kemudian melihat kedalam organisasi, mengenai tersedianya perangkat dan keahlian untuk melakukan studi dan pengkajian dalam rangka melihat kelayakan gagasan tersebut menjadi suatu proyek.

Kontraktor, pada umumnya digambarkan sebagai pihak yang dominasi memiliki banyak kewajiban dengan sedikit hak, sebagai pihak yang akan melaksanakan tugas pekerjaan sesuai dengan rencana yang dibuat oleh pihak konsultan perencana, terdiri dari perorangan ataupun badan hukum yang bonafide dan punya pengalaman dan niat yang baik menurut penilaian yang diadakan oleh owner yang dalam pelelangan dinyatakan menang.

### **2.3. Hambatan-hambatan Dalam Kontrak Konstruksi .**

Hambatan-hambatan yang terjadi dalam implementasi suatu kontrak konstruksi, dapat disebabkan berbagai macam. Hal ini yang pada akhirnya menjadi kendala bagi terwujudnya suatu kontrak konstruksi yang ideal. Secara umum hal tersebut karena adanya legal and contractual problems, misalnya karena ketidaklengkapan kontrak, ketidakjelasan kontrak atau klausula didalamnya kurang spesifik sehingga menimbulkan kerancuan dan kurangnya suatu kontrak konstruksi

memberikan perlindungan hukum bagi kedua belah pihak. Sebenarnya, hambatan-hambatan tersebut dapat memperburuk keadaan hubungan kontraktual antara para pihak dan bahkan apabila tidak dilakukan pemecahan secara tepat dapat pula berujung pada pemutusan kontrak konstruksi yang pastinya menimbulkan kerugian dikedua belah pihak.

### **2.3.1.Keterlibatan owner .**

Keterlibatan owner yang terlalu jauh dapat menjadi faktor hambatan. Seperti telah dijelaskan diatas, bahwa dalam proses konstruksi, kontraktor diserahkan tanggung jawab implementasi fisik suatu proyek konstruksi. Dengan demikian, perlu diketahui adanya batasan-batasan sejauh mana keterlibatan owner, hubungannya dengan tugas-tugas memantau dan sampai taraf mana owner dapat mengendalikan kegiatan kontraktor. Hal ini apabila tidak dipahami secara tepat oleh owner, dapat menimbulkan tumpang tindih dan counter productive yang berdampak inefficiency. Owner juga diberikan kesempatan untuk terlibat dalam implementasi fisik proses konstruksi, tetapi dengan batasan-batasan tertentu. Jadi sekalipun owner telah menyerahkan wewenang dan tanggung jawab implementasi fisik proses konstruksi tersebut kepada kontraktor dalam bentuk kontrak, maka owner juga harus berperan aktif dalam rangka usaha agar proyek selesai sesuai dengan sasaran, sejauh dalam batas yang wajar. Yang menjadi masalah adalah sejauh mana dan dalam bentuk bagaimana peran itu harus dilakukan. Sebab selain seperti yang telah disampaikan, bahwa bila owner melangkah terlalu jauh, maka

pihak kontraktor yang telah diberi tugas dan tanggung jawab dapat merasa dicampuri wewenangnya, sehingga dapat mempengaruhi sikap dan motivasi dalam melakukan pekerjaannya, akan tetapi sebaliknya, bila owner terlalu sedikit dalam berperan maka hasilnya juga tidak akan efektif, hal ini berkaitan pula dengan motivasi kontraktor yang menginginkan keuntungan yang maksimal.

### **2.3.2. Konflik yang muncul pada saat implementasi proyek.**

Konflik yang timbul umumnya mengenai jadwal atau waktu, dimana sebelumnya telah diperjanjikan terlebih dahulu. Adanya perbedaan pendapat mengenai kurun waktu dan urutan pekerjaan dapat memicu suatu konflik. Disatu sisi owner yang awam memaksa proyek selesai secepat mungkin. Sedangkan disisi lain, kontraktor berdasarkan perhitungan, pengalaman dan secara teknisnya mempunyai persepsi sendiri tentang waktu dalam suatu proyek. Penetapan jadwal pelaksanaan yang terlalu singkat menyebabkan setiap kegiatan dilaksanakan secara tergesa-gesa.

Kendala pada masalah teknis meliputi masalah tenaga kerja/staf dimana penempatan (kurun waktu, kualitas, dan kuantitas) personil dalam proses konstruksi, berkaitan dengan personil internal (pihak-pihak didalam kontrak ) maupun eksternal (pihak diluar kontrak) kurang memahami isi dari kontrak konstruksi sehingga banyak menimbulkan masalah dalam implementasinya. Perbedaan dalam personalitas antara pelaku konstruksi dalam melihat segala sesuatunya, besar kemungkinan juga dapat menimbulkan konflik yang

menghambat implementasi kontrak konstruksi. Dalam hal ini perlu dikembangkan suasana yang menunjang, saling pengertian dan menjalin komunikasi yang baik antar pihak.

Konflik muncul disebabkan pula ketidaktepatan penggunaan peralatan atau penggunaan peralatan yang tidak layak operasi. Proses konstruksi yang melibatkan banyak pihak secara kompleksitas disertai banyaknya hubungan para pihak secara ekstern, memungkinkan timbulnya perbedaan pandangan antara peserta proyek perihal bobot pentingnya berbagai kegiatan. Nilai kontrak yang terlalu rendah menyebabkan kontraktor harus mengadakan penghematan dalam penggunaan material maupun upah. Perbedaan anggapan mengenai jumlah dan jadwal alokasi biaya bagi bermacam-macam paket kerja menimbulkan konflik antar pihak.

### **2.3.3. Wanprestasi para pihak.**

Dalam proses implementasi kontrak konstruksi, sangat dimungkinkan timbul wanprestasi yang dilakukan baik oleh kontraktor maupun owner. Owner melakukan wanprestasi adalah pada saat dia tidak mau membayar atau tidak menyediakan bahan material untuk proses konstruksi (apabila diperjanjikan demikian). Secara umum, wanprestasi owner dapat berupa owner tidak melakukan apa yang disanggupi akan dilaksanakannya, melaksanakan apa yang diperjanjikan tetapi tidak sebagaimana yang diperjanjikan, melaksanakan apa yang dijanjikan



tetapi terlambat, melakukan sesuatu yang menurut perjanjian tidak boleh dilakukannya.

Sedangkan dipihak kontraktor, wanprestasi dapat timbul karena alasan-lasan berikut, kontraktor tidak memenuhi prestasi sama sekali, artinya kontraktor yang bersangkutan tidak dapat memenuhi kewajibannya yang telah disanggupi untuk dipenuhi dalam suatu perjanjian atau tidak memenuhi kewajiban yang ditetapkan Undang-Undang dalam perikatan yang timbul karena Undang-Undang. Kontraktor memenuhi prestasi tetapi pelaksanaannya tidak baik, tidak semestinya. Disini kontraktor dalam melaksanakan prestasi tidak menurut aturan dan kualitas yang telah ditetapkan. Kontraktor memenuhi prestasi tetapi tidak tepat pada waktunya. Disini kontraktor dalam memenuhi kewajibannya terlambat dari waktu yang telah disepakati.

Terjadinya wanprestasi dapat menyebabkan pemutusan kontrak untuk sebagian yaitu bagian yang menjadi hak dan kewajiban dari kontraktor yang melaksanakan wanprestasi. Kontraktor dalam hal ini harus bertanggung jawab secara moral kepada owner karena adanya wan prestasi demikian juga dengan owner harus bertanggung jawab kepada kontraktor bila terjadi wanprestasi olehnya. Dalam praktek, tidak jarang terjadi salah satu pihak melakukan kesalahan, kesalahan yang dimaksud adalah yang berhubungan dengan kelalaian dalam memenuhi suatu prestasi atau kewajiban yang telah disanggupi atau melakukan kealpaan ingkar janji atau melanggar suatu kontrak konstruksi. Hal ini

merupakan salah satu hambatan yang dijumpai dalam implementasi satu kontrak konstruksi. Yang berkaitan dengan masalah wanprestasi adalah ketentuan tentang:

- Ganti rugi keterlambatan (*liquidated damage*), merupakan suatu jumlah uang yang harus dibayar/dipotong dari pembayaran kepada kontraktor karena keterlambatan penyelesaian suatu bagian pekerjaan yang mengakibatkan kerugian langsung kepada owner.
- Denda/sanksi/penalty, merupakan suatu jumlah uang yang harus dibayar/dipotong dari pembayaran kontraktor, karena suatu bagian/beberapa bagian pekerjaan tidak selesai sesuai jadwal, walaupun keterlambatan tersebut tidak menimbulkan kerugian pada owner. Sebaliknya dalam suatu kontrak konstruksi yang ideal, bukan saja kontraktor yang dapat didenda, tetapi juga owner apabila ia lalai memenuhi kewajibannya sesuai dengan kontrak, misalnya keterlambatan pembayaran, menghalangi kemajuan pekerjaan dan sebagainya.

#### **2.3.4. Keadaan memaksa.**

Keadaan memaksa atau *force majeure* adalah suatu keadaan atau suatu kejadian yang tidak dapat diduga terjadinya. Sehingga menghalangi seseorang untuk melaksanakan prestasinya sebelum ia lalai untuk apa dan keadaan mana tidak dapat dipersalahkan kepadanya. Dalam keadaan memaksa tersebut, terdapat dua sifat yaitu:

1. Keadaan memaksa yang bersifat mutlak atau absolut;
2. Keadaan memaksa yang bersifat relatif<sup>23</sup>

Keadaan memaksa yang bersifat mutlak terjadi apabila dalam suatu keadaan tertentu suatu prestasi tidak dapat dipenuhi oleh siapapun. Jadi disini terdapat keadaan sedemikian rupa sehingga dalam keadaan tersebut saetiap orang mutlak tidak dapat memnuhi satu perikatan. Sedangkan keadaan memaksa yang bersifat relatif terjadi karena dalam suatu keadaan tertentu pemenuhan suatu prestasi masih dimungkinkan. Hanya saja pelaksanaannya memerlukan pengorbanan yang besar dari salah satu pihak.

### **2.3.5. Klaim.**

Klaim adalah permintaan mengenai biaya, waktu, dan atau kompensasi penampilan atau sesuatu yang telah ditetapkan dari salah satu pihak terhadap pihak lain dalam suatu kontrak konstruksi. Klaim konstruksi sering disalah artikan sebagai tuntutan, sehingga mempunyai konotasi negatif. Dinegara barat, kalim adalah sesuatu yang wajar dalam dunia konstruksi. Memang benar bahwa adakalanya klaim diselesaikan lewat arbitrase atau pengadilan karena gagal diselesaikan secara musyawarah. Di Indonesia, kontraktor pada masa lalu segan melakukan klaim karena akan merusak reputasinya dimata owner sehingga tidak jarang kontraktor kehilangan peluang untuk memenangkan tender apabila sering

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<sup>23</sup> Qiram Syamsudin Maliala, Pokok-Pokok Hukum Perjanjian, Liberty, Yogyakarta, 1985,h.25,27.

mengajukan klaim. Meskipun didalam kontrak konstruksi terdapat pasal yang mengatur prosedur pemecahan masalah klaim melalui arbitrase atau lembaga hukum, namun hal tersebut jarang ditempuh, dan lebih disukai penyelesaian melalui negosiasi. Dengan adanya UU Jasa Konstruksi dan PP Penyelenggaraan Jasa Konstruksi maka diharapkan pengertian klaim yang sesungguhnya dapat mulai diterima, karena selama ini masalah klaim dilingkungan kontraktor merupakan masalah yang tabu.

Sebab-sebab timbulnya klaim secara umum adalah; material atau peralatan yang cacat. Hal ini dapat terjadi pada saat mengganti atau memperbaiki memerlukan waktu yang lama sehingga memperlambat waktu penyelesaian proyek. Hasil kerja dibawah standart, misalnya banyak pekerjaan yang tidak sesuai dalam kontrak konstruksi yang diperjanjikan, sehingga prlu diulang dan akan memperlambat pekerjaan lain. Keadaan lahan yang diluar perkiraan dan hasil tes yang kurang akurat. Hal ini sering dijumpai bahwa kondisi lahan ternyata diluar estimasi semula, sehingga pekerjaan harus dilakukan dengan usaha yang lebih berat. Melesetnya jadwal dan bertambahnya biaya karena hal-hal tersebut akan mendorong timbulnya klaim. Perubahan peraturan yang tidak diduga, sumber timbulnya klaim yang lain, dimana mempengaruhi atau menaikkan biaya proyek, misalnya peraturan pajak, peraturan ekspor-impor. Pasal-pasal kontrak yang kurang lengkap dan kurang jelas dalam hal menerangkan, merumuskan ataupun mendefinisikan sesuatu, atau sifatnya abstrak sehingga mudah menimbulkan

tafsiran yang berbeda-beda antara owner, kontraktor, konsultan, ataupun supplier, seringkali menjadi sumber adanya klaim.

Dari uraian diatas dapat dilihat sebab timbulnya klaim dibedakan menjadi dua yaitu :

- a. Dari pihak owner, dapat berupa pekerjaan yang cacat, kelalaian kontraktor dalam hal keterlambatan, pemutusan kontrak konstruksi.
- b. Dari pihak kontraktor, dapat berupa keterlambatan atas cacat informasi dalam hal gambar-gambar, kelambatan atas cacat bahan, perubahan gambar/spesifikasi, perubahan kondisi lapangan, larangan metode kerja tertentu, kontrak kurang jelas, dan pengaruh pekerjaan yang berdekatan.

Tetapi pada prakteknya di Indonesia klaim tersebut belum populer hal ini karena adanya faktor penyebab kontraktor tidak atau enggan menuntut owner karena memang dalam kontrak telah dinyatakan secara tegas bahwa pihak kontraktor tidak akan menuntut atau melakukan klaim terhadap owner, hal ini menyangkut kontrak konstruksi dalam bentuk baku. Disamping itu juga menyangkut masalah kondite atau profesionalisme kontraktor dimata owner, dimana kontraktor tidak ingin keeksistensiannya dalam dunia konstruksi tercemar.

Klaim dapat berasal dari pihak kontraktor terhadap owner berupa tambahan waktu pelaksanaan, tambahan kompensasi, tambahan konsesi pengurangan spesifikasi teknis atau bahan. Sedangkan dipihak owner terhadap kontraktor dapat berupa pengurangan nilai kontrak, percepatan waktu, dan kompensasi atas kelalaian.

### 2.3.6. Resiko.

Proyek konstruksi merupakan salah satu jenis proyek yang memiliki potensi resiko yang relatif tinggi, dibandingkan dengan proyek-proyek pada bidang pekerjaan non konstruksi, karena sifatnya yang unik, dinamik dan kompleks. Potensi resiko ini antara lain berupa resiko yang berhubungan dengan tahap feasibility proyek, tahap design, lokasi dan kondisi lapangan proyek, aspek teknis proyek, tindakan manusia sebagai pelaku dalam proyek konstruksi, tahapan setelah konstruksi.<sup>24</sup>

Potensi-potensi resiko proyek konstruksi semakin berkembang dalam beberapa dasawarsa terakhir yang dipicu oleh kondisi dalam industri konstruksi yang antara lain ditunjukkan oleh meningkatnya ukuran (volume dan nilai kontrak) dan kompleksitas proyek konstruksi (metode dan teknologi). Hal ini terlihat pada proyek-proyek skala besar di Indonesia seperti bangunan tinggi (high risk), dan penggunaan type kontrak "*blame it on the kontraktor*" dan "*no fair share*"<sup>25</sup> yang menjadi umum/ kebiasaan dalam industri konstruksi karena owner sebagai pihak yang memiliki kepentingan paling besar pada suatu proyek konstruksi merasa perlu untuk mengalihkan resiko sebanyak mungkin kepada pihak lain dalam hal ini kontraktor.

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<sup>24</sup> Nael.G.Bunni, "Construction Insurance," *Elsevier Applied Science Publishers*, New York, 1986.

<sup>25</sup> Harkuti Rahayu., "Pengembangan Model Cakupan Resiko untuk Asuransi CAR sebagai Alternatif Pengalihan Resiko Proyek Konstruksi", Makalah untuk diterbitkan dalam Jurnal Teknik Sipil, ITB.

Dampak tersebut pada industri konstruksi adalah peningkatan konflik dan perselisihan, penyelesaian perselisihan di pengadilan, keterlambatan penyelesaian pekerjaan, berkembangnya tuntutan (*claim*) dan perubahan-perubahan dalam durasi, ruang lingkup dan biaya pekerjaan. Kondisi-kondisi ini menempatkan kontraktor sebagai pihak yang memiliki posisi dan resiko tinggi. Dapat dibayangkan pada era globalisasi dimana diberlakukan AFTA, maka resiko yang harus dihadapi oleh kontraktor akan semakin besar dan kompleks. Tingkat persaingan akan semakin tinggi, tidak hanya dengan sesama kontraktor dalam negeri tetapi dengan kontraktor asing, tidak ada lagi proteksi terhadap kontraktor dalam negeri.

Disamping itu dengan berlakunya otonomi daerah yang pada dasarnya juga memicu pengembangan daerah akan membuka kesempatan yang luas pada masyarakat industri konstruksi Indonesia untuk dapat berperan lebih aktif dalam pembangunan daerah. Dalam konteks proyek konstruksi, resiko dapat dilihat sebagai suatu kondisi dimana dampak dari terjadinya suatu resiko dapat menyebabkan tidak tercapainya tujuan suatu proyek, seperti penyelesaian yang sesuai dengan komitmen terhadap waktu, biaya dan mutu. Secara umum resiko dapat di klasifikasikan menurut berbagai sudut pandang yang tergantung dari kebutuhan dalam penanganannya, antara lain :

- a. Resiko murni dan resiko spekulatif (*pure risk and speculatif risk*)<sup>26</sup>,

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<sup>26</sup> R. Flanagan and G. Norman, "*Risk Management and Insurance*", Mc Graw-Hill, Singapore, 1989.

- b. Resiko fundamental dan resiko khusus (*fundamental risk and particular risk*),<sup>27</sup>
- c. Resiko terhadap benda dan manusia<sup>28</sup>.

Untuk proyek konstruksi resiko dapat bersumber dari dua hal, pertama bersumber dari keputusan yang diambil dan lingkup proyek (internal), seperti yang berkaitan dengan masalah teknis, finansial, penjadwalan dan organisasi, kedua bersumber dari luar lingkup proyek (eksternal) yaitu alam dan lingkungan termasuk aspek hukum, sosial, ekonomi dan budaya dimana proyek diselenggarakan. Sehubungan dengan kedua sumber resiko tersebut, resiko proyek dapat diuraikan lebih lanjut<sup>29</sup>, dimana mencakup :

- a. Desain proyek (*defective atau faulty design, incomplete design dan design built ability*);
- b. Dokumen kontrak, persyaratan, gambar, spesifikasi, daftar volume pekerjaan, adendum, yang terdapat dalam dokumen kontrak dapat menjadi sumber resiko proyek konstruksi;
- c. Kondisi alam;
- d. Pelaksanaan pekerjaan konstruksi;
- e. Kondisi perekonomian yang tidak stabil;
- f. Situasi sosial politik.

Bagi kontraktor yang hanya melaksanakan pekerjaan saja kemudian terjadi kerusakan sebelum pekerjaan diserahkan, maka resiko ada pada kontraktor yaitu hanya bertanggung jawab terbatas pada kesalahan yang dibuatnya. Sekalipun tidak

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<sup>27</sup>Radiks Purba, "Memahami Asuransi di Indonesia", PT.Pustaka Binaman Pressindo, 1992, h.25.

<sup>28</sup>Agus Prawoto, "Hukum Asuransi dan Kesehatan Perusahaan Asuransi", BPFE Yogyakarta, 1995, h.45.

<sup>29</sup>Harkunti Rahayu, "A New Model of Risk Allocation for Construction Contracts based on Fair Liability between Parties", *Proceeding of ASCE Third Congress on Computing for Civil Engineering, Anaheim, USA., 1996, p.30.*



ada kesalahan pada kontraktor ia tetap tidak berhak menerima pembayaran. Hal demikian adalah sesuai dengan pembebanan resiko pada kontrak konstruksi dengan hubungan timbal balik, pada umumnya yaitu jika pihak yang satu terhalang untuk memenuhi prestasi, pihak yang lain juga dibebaskan dari kewajibannya. Dalam hal ini kontraktor dapat juga berhak atas pembayaran mengerjakan proyek tersebut. Jika owner lalai untuk melakukan pemeriksaan dan menyetujui pekerjaan atau bendanya menjadi rusak karena cacat atau kekurangan mutu pada bahan materialnya.

### **2.3.7. Timbulnya kenaikan harga bangunan**

Peranan bahan bangunan sangatlah penting, apabila bahan bangunan tersebut mengalami kenaikan harga, dan jika harga tersebut diluar perhitungan harga kontrak yang telah disepakati bersama antara owner dan kontraktor, maka hal tersebut akan menimbulkan hambatan bagi implementasi suatu kontrak konstruksi. Disatu sisi owner menghendaki agar proyek dapat selesai tepat pada waktunya, sedangkan pihak kontraktor mengalami kesulitan dalam hal keuangan karena melonjaknya harga bangunan diluar perhitungan harga kontrak.

Sebab-sebab timbulnya harga bangunan yang sesuai dengan perhitungan harga kontrak, artinya kenaikan harga yang masih dapat dijangkau oleh harga kontrak yang sudah diperhitungkan sebelumnya oleh kontraktor dan sudah dievaluasi. Dalam hal ini tidak ada masalah, karena kenaikan harganya masih terjangkau oleh harga kontrak yang telah disepakati, sehingga kontraktor tentu saja

tidak boleh mengajukan permohonan penyesuaian harga kepada owner. Misalnya kenaikan harga bahan bangunan yang kenaikannya itu disebabkan keinginan dari pihak penjual bahan bangunan yang kenaikannya telah diperhitungkan sebelumnya oleh owner.

Sedangkan sebab-sebab kenaikan harga bahan bangunan diluar perhitungan harga kontrak, dalam arti bahwa sebab-sebab kenaikan harga yang kenaikannya tidak dapat dijangkau oleh harga kontrak yang sudah diperhitungkan sebelumnya. Dalam hal ini kontraktor berhak mengajukan permohonan penyesuaian harga atau mengajukan claim sebagai ganti rugi kepada pihak owner, dengan syarat kontraknya menggunakan type escalation price (harga penyesuaian) dan apabila menggunakan type fixed price (harga tetap) mengenai penyesuaian harga harus sudah disepakati sebelumnya dan dicantumkan dalam dokumen kontrak. Misalnya kenaikan harga bahan bangunan sehubungan dengan adanya perubahan nilai tukar uang rupiah ke kurs valuta asing yang terjadi karena krisis moneter belakangan ini dan situasi politik yang tidak menentu menyebabkan Rupiah melemah terhadap Dollar. Sehingga dimungkinkan adanya kebijaksanaan pemerintah untuk meningkatkan atau mendorong ekspor (karena devaluasi rupiah) yang menyebabkan harga barang dan bahan bangunan mengalami kenaikan yang cukup tinggi, dalam rangka restrukturisasi ekonomi negara.

### **2.3.8. Krisis moneter dan situasi politik**

Krisis moneter telah menyebabkan tertundanya proyek-proyek, baik tertundanya proyek konstruksi. Hal ini berarti dapat menghambat proses

implementasi dari suatu kontrak konstruksi. Tertundanya proyek-proyek konstruksi tersebut, disamping menyisakan sejumlah permasalahan finansial diantara pihak-pihak terkait, juga dapat menimbulkan dampak buruk kinerja teknis suatu proyek itu sendiri, termasuk juga masalah hukumnya, yaitu hubungan kontraktual para pihak.

Pada dasarnya, pihak-pihak yang terkait tersebut akan sangat dirugikan dengan adanya krisis moneter. Akibat krisis ekonomi yang berbuntut pada penundaan proyek-proyek konstruksi, kontraktoralah yang paling berat menanggung akibatnya. Kontraktor boleh dikatakan terjepit. Disatu sisi piutangnya macet disisi lain ia harus membayar bunga bank dan menyelesaikan kewajibannya dengan para subkontraktor/supplier. Yang menjadi hambatan bagi implementasi kontrak konstruksi tersebut selain karena krisis ekonomi murni, juga karena adanya Keppres No.39 Tahun 1997 , yang menetapkan proyek-proyek yang diteruskan, dikaji dan ditunda karena terindikasi KKN. Hal ini dapat dikategorikan sebagai suatu alasan politis karena mempunyai banyak muatan politisnya.

Bila dalam keadaan normal suatu proyek konstruksi yang akan dihentikan ada suatu kesepakatan bersama, dan ada kompensasi bagi kontraktor, namun dalam keadaan krisis tidak demikian, kalau owner tidak masuk BPPN masih ada peluang untuk membicarakan penyelesaiannya, akan tetapi bila owner sudah masuk BPPN hanya ada dua pilihan yaitu melakukan klaim atau mempailitkan owner.

## **BAB III**

### **UPAYA MENGANTISIPASI DAN MENYELESAIKAN SENGKETA DALAM KONTRAK KONSTRUKSI**

#### **3.1. Upaya Preventif Dalam Mengantisipasi Sengketa Konstruksi**

Upaya preventif dalam mengantisipasi terjadinya sengketa dalam kontrak konstruksi bertujuan untuk meminimalisasi atau memperkecil kemungkinan terjadinya hambatan ataupun konflik dalam proses implementasi kontrak konstruksi. Upaya tersebut hanya sebatas meminimalisasi, hal ini mengingat bahwa suatu industri konstruksi sangat rumit dengan teknologi yang canggih dan keterlibatan pihak-pihak yang sangat banyak. Untuk itu perlu adanya pemikiran dalam hal meminimalisasi terjadinya hambatan dan konflik.

##### **3.1.1. Upaya mengantisipasi resiko dalam bentuk asuransi.**

Sebagaimana telah diuraikan sebelumnya, bahwa dalam mengantisipasi resiko yang timbul pada proyek konstruksi dapat dilakukan dengan penerapan manajemen resiko. Pada dasarnya ada beberapa cara atau metode dalam manajemen resiko yang dapat dipergunakan untuk menangani resiko proyek konstruksi<sup>30</sup>, yaitu :

- a. Penghindaran resiko (risk avoidance)
- b. Pengurangan resiko (risk reduction/mitigation)
- c. Penahanan/pemikulan resiko (risk retention)

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<sup>30</sup> Kuliah Umum "Construction Law and Construction Claims", 19 September 2000, Universitas Katolik Parahyangan, Bandung.

d. Pengalihan resiko (risk transfer)

Jenis dan besar perlindungan asuransi bagi pihak-pihak yang terlibat dalam penyelenggaraan proyek, harus ditentukan berdasarkan sifat-sifat proyek yang bersangkutan setelah mengkaji kemungkinan adanya resiko yang dapat menimbulkan kerusakan, kecelakaan, dan kerugian terhadap harta benda, keselamatan, dan sebagainya. Oleh sebab itu, baik kontraktor maupun owner sebaiknya melindungi diri dengan berbagai macam asuransi.

Asuransi berkaitan erat dengan masalah resiko secara keseluruhan. Dalam asuransi, khususnya asuransi kerugian, ada 4 prinsip utama yaitu kepentingan yang dapat diasuransikan (insurable interest) , jaminan atas ganti rugi (indemnity), kepercayaan (trustful) dan itikad baik (utmost goodfaith). Khusus dalam proyek konstruksi terdapat beberapa jenis asuransi yang digunakan dalam industri konstruksi<sup>31</sup>, yaitu:

- a. *Commercial General Liability Insurance* (CGL Insurance), resiko Akibat bodily injury dan property damage yang disebabkan pelaksanaan pekerjaan proyek.
- b. *Operation and Premises Liability Insurance*, akibat bodily injury dan property damage yang disebabkan pelaksanaan pekerjaan yang dilakukan kontraktor.
- c. *Contractor's and Owner's Protective Liability Insurance*, akibat bodily injury dan property damage yang disebabkan pekerjaan yang dilakukan subkontraktor untuk kontraktor dan owner.
- d. *Completed Operation Liability Insurance*, akibat property damage yang terjadi setelah pembangunan proyek selesai.
- e. *Contractual Liability Insurance*, akibat bodily injury and *property damage* yang disebabkan kelalaian subkontraktor dan kontraktor.

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<sup>31</sup> Makalah yang disampaikan pada “ Seminar Nasional Manajemen Konstruksi 2001”, Tanggal 24-25 April 2001, Grand Aquila, Bandung.

- f. *Professional Liability Insurance*, akibat *finansial loss*, *bodily injury*, dan *property damage* yang disebabkan kelalaian atau kesalahan yang dilakukan desainer atau engineer.
- g. *Automobile Liability Insurance*, akibat *bodily injury* dan *property damage* yang disebabkan pemakaian kendaraan yang diasuransikan sehubungan dengan pekerjaan proyek.
- h. *Cargo Insurance*, kehilangan atau kerusakan peralatan dan material konstruksi pada saat pengangkutan/ perjalanan hingga tiba dilokasi proyek.
- i. *Aircraft and Watercraft Insurance*, *bodily injury* dan *property damage* akibat penggunaan *aircraft* dan *watercraft* sehubungan dengan pekerjaan proyek.
- j. *Contractor's Equipment Floater Insurance*, kerusakan atau kehilangan peralatan yang dimiliki, disewa, atau dipinjam oleh kontraktor dan pemakaiannya berpindah-pindah dari satu proyek ke proyek lainnya.
- k. *XCU Insurance (Explosion, Collapse, and Underground)*, *property damage* akibat pelaksanaan pekerjaan dengan peledakan, operasi yang mengakibatkan keruntuhan, dan pekerjaan *exavasi*, *demolisi*, dan *grading*.
- l. *Builder's (Contractor's) All Risk Insurance*, seluruh kerusakan dan kerugian pada fisik proyek serta tanggung jawab hukum untuk ganti rugi kepada pihak ketiga yang terjadi saat pelaksanaan pekerjaan dan penyebabnya tidak dikecualikan didalam polis.
- m. *Installation All Risk Insurance*, seluruh kerusakan dan kerugian pada pekerjaan *mechanical* dan *engineering* (instalasi) dan penyebabnya tidak dikecualikan didalam polis.

Jenis asuransi yang dinilai cukup komprehensif dalam industri konstruksi adalah asuransi *CAR (Contractor's All Risk)*, asuransi ini memungkinkan kontraktor memperoleh nilai pertanggungan dari perusahaan asuransi untuk berbagai jenis resiko. Pengertian "*All Risk*" pada jenis asuransi ini tidak berarti semua jenis resiko proyek konstruksi akan dijamin, karena luas jaminan dari resiko-resiko tersebut dapat dibatasi atau diperluas dengan penerapan klausula tambahan.

*CAR* atau *Contractor's All Risk Insurance* yang memberikan jaminan kerugian atas kerugian fisik terhadap obyek yang ditanggungjawabkan atas pelaksanaan suatu proyek pekerjaan konstruksi. Kerugian yang dimaksudkan

dalam pekerjaan konstruksi ini terjadi dilokasi proyek, sifatnya secara tiba-tiba dan tidak terduga. Sedangkan tujuan CAR adalah melindungi kontraktor dari kerugian-kerugian yang bersifat alamiah seperti adanya bencana alam, penggunaan bahan-bahan yang keliru atau kurang sempurna maupun karena ada pencurian, kebakaran dan sebagainya. Dari uraian tersebut dapat dikatakan bahwa tujuan diadakannya *Contractor's All Risk Insurance* adalah untuk mengurangi resiko timbulnya kerugian terhadap pekerjaan konstruksi. Hal ini disebabkan dalam pelaksanaan pekerjaan konstruksi tersebut tidak mustahil selalu dihadapkan kepada adanya resiko yang kejadiannya tidak dapat dipastikan.

Asuransi CAR dikategorikan sebagai asuransi kerugian bidang engineering. Dalam asuransi engineering dapat digolongkan sebagai berikut<sup>32</sup> :

- a. *Erection Insurance/ Erection All Risk (EAR)*, merupakan pertanggungan untuk pekerjaan teknik listrik, teknik mesin atau kombinasinya.
- b. *Machinery Break Down*, adalah pertanggungan terhadap resiko mesin-mesin, instalasi listrik selama operasi.
- c. *Contractor's All Risk Insurance (CAR)*, merupakan pertanggungan untuk bermacam-macam resiko pelaksanaan pekerjaan teknik sipil.

Beberapa hal pokok yang berhubungan dengan asuransi CAR adalah<sup>33</sup> :

- a. Obyek pertanggungan dalam asuransi CAR yang terdiri dari proyek teknik sipil, proyek dimana harga kontrak pekerjaan sipilnya lebih dari 50 % dari total proyek.
- b. Subyek pertanggungan yaitu kontraktor utama, subkontraktor, dan owner.
- c. Harga pertanggungan sebesar harga kontrak antara kontraktor dengan owner seperti yang tercantum dalam kontrak. Harga kontrak dapat

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<sup>32</sup> Emmy Pangaribuan Simanjuntak, Hukum Pertanggungan dan Perkembangannya, Penerbit Seksi Hukum Dagang Fakultas Hukum UGM, Yogyakarta, 1983, h.136.

<sup>33</sup> Silaban S dan Budiarta W.M., Metode Pengalihan Resiko Proyek Konstruksi Melalui Kontrak Asuransi CAR, Skripsi, Jurusan Teknik Sipil ITB, 1998

disesuaikan kembali pada saat selesainya masa pekerjaan terhadap inflasi dan deflasi.

- d. Kepentingan yang dapat dipertanggungjawabkan seperti *contract works* adalah item-item yang terdapat dalam kontrak kerja konstruksi, yang terdiri dari pekerjaan utama, pekerjaan sementara yaitu pekerjaan penunjang pekerjaan utama atau pekerjaan yang bukan merupakan tujuan utama proyek, material yang disuplai *owner*, dan mesin dan peralatan yang digunakan dalam proyek dan tanggung jawab tertanggung pihak ketiga meliputi *material damage dan bodily injury*.
- e. Jangka waktu pertanggungan adalah selama periode pekerjaan proyek konstruksi, dimulai dari pekerjaan persiapan sampai penyerahan proyek kepada *owner*.

Di Indonesia, kontraktor-kontraktor yang telah mengerjakan proyek konstruksi cukup banyak, akan tetapi persepsi masyarakat industri konstruksi khususnya kontraktor akan pengalihan resiko dengan menggunakan asuransi khususnya asuransi CAR sangat rendah. Hal ini terlihat pada keikutsertaan mereka dalam asuransi CAR bukan karena kesadaran akan pentingnya pengalihan resiko, tetapi penekanannya lebih karena disyaratkan dalam kontrak atau sebagai satu-satunya alternatif yang disarankan oleh *owner*. Kondisi yang seperti ini, menunjukkan rendahnya tingkat pengetahuan kontraktor akan fungsi dari pengadaan asuransi sebagai alternatif pengalihan resiko proyek konstruksi. Standar model asuransi CAR yang digunakan di Indonesia mengacu pada model asuransi *Munich Re Standard*<sup>34</sup>, yang disusun berdasarkan latar belakang yang berbeda (secara geografis, ekonomi, sosial budaya, hukum perkembangan industri konstruksi) dengan keadaan di Indonesia. Sehingga penerapannya memerlukan beberapa penyesuaian agar dapat diterapkan dengan baik.

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<sup>34</sup> Munich Re Standard, "Underwriting and Rating Directives", Munich, 1998



Kondisi diatas menyebabkan asuransi CAR belum dapat sepenuhnya dimanfaatkan oleh kontraktor untuk mengalihkan resikonya, karena kontraktor mengalami kesulitan dalam mengalokasikan resiko-resiko yang akan dihadapi, kedalam bentuk asuransi CAR yang sesuai. Dampak yang lebih jauh dari kondisi ini, adalah kecenderungan kontraktor mengasuransikan proyeknya hanya berdasarkan kewajiban dalam kontrak konstruksi. Dalam asuransi all risk kontraktor, terdapat pengecualian, dimana resiko tersebut tidak dijamin yaitu dalam hal<sup>35</sup> :

- a. Kerugian yang disebabkan oleh perang, pemberontakan, pemogokan kerja.
- b. Kerugian yang disebabkan oleh reaksi nuklir, radiasi, kontaminasi radio aktif.
- c. Kerugian yang disebabkan oleh keaalpaan yang disengaja dari pihak tertanggung (kontraktor) ataupun anak buahnya.
- d. Konsekuensi dari berbagai kerugian apapun seperti klaim yang dikarenakan denda.
- e. Kerugian yang dikarenakan penundaan, hilangnya kontrak.
- f. Kerugian yang disebabkan gangguan mekanik dan listrik atau buruknya mesin dan peralatan.
- g. Kerugian yang dikarenakan gagalnya pendesignan.

Jadi kontraktor dapat mengajukan tuntutan ganti rugi kepada pihak asuransi dimana ia telah mengasuransikan proyeknya dengan syarat-syarat tertentu misalnya apabila proyeknya terkena kebakaran, overmact, dan sebagainya.

### **3.1.2. Jaminan dalam kontrak konstruksi**

Dalam dunia konstruksi dikenal adanya beberapa macam jaminan yaitu diantaranya, jaminan lelang (*bid bond*), jaminan kinerja (*performance bond*),

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<sup>35</sup> Zulnaldi dan Sudama T.W, "Pengembangan Model Asuransi CAR untuk proyek konstruksi di Bandung", Skripsi, Jurusan Teknik Sipil ITB, 1998.

jaminan pembayaran (*payment bond*), dan jaminan subkontraktor (*subcontractor bond*)<sup>36</sup>. Dengan adanya jaminan, maka dalam hal penjamin (kontraktor) tidak memenuhi kewajibannya sesuai dengan kontrak, maka pihak yang memegang jaminan (*owner*) dapat mencairkan jaminan tersebut.

Jaminan yang umumnya digunakan dalam suatu kontrak konstruksi adalah Bank Garansi. Selain dari bank garansi ada beberapa jenis warkat bank lain yang mempunyai kekuatan jaminan seperti bank garansi yaitu *standby letter of credit* (*Standby LC*) dan *Surety Bond*. Tetapi ada juga yang tidak mempunyai daya jamin seperti *Letter of Comfort* dan *warranty*. Dan ada juga yang daya jaminnya diragukan menurut hukum *Indonesia Indemnity*<sup>37</sup>.

Jaminan lelang misalnya, bertujuan untuk melindungi *owner* dari kerugian keuangan yang terjadi bila pemenang lelang mengundurkan diri. Mekanismenya dapat berupa bank garansi yang diserahkan kepada *owner* pada waktu menyerahkan proposal, sehingga memberi hak kepada *owner* untuk menarik sejumlah dana atas beban peserta lelang, bila oleh suatu sebab tidak bersedia menerima pekerjaan yang telah dimenangkan. Hal ini dapat dilakukan sebelum perumusan kontrak konstruksi. Demikian juga dengan jaminan kinerja, yang bertujuan untuk melindungi *owner* terhadap kemungkinan kontraktor tidak dapat memenuhi kewajiban seperti yang tertuang dalam kontrak, misalnya menghentikan

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<sup>36</sup> Imam Soeharto, *op.cit.*, h.652.

<sup>37</sup> Kuliah Umum Construction Law and Construction Claims, 19 September 2000, Universitas Katolik Parahyangan, Bandung.

pekerjaan karena kesulitan keuangan. Dalam kasus tersebut, *owner* berhak menarik dana yang dijaminan dari pihak asuransi untuk membayar pekerjaan yang dilakukan oleh pihak ketiga atas prakarsa *owner*, melanjutkan pekerjaan yang ditinggalkan oleh kontraktor.

Dalam hal jaminan peralatan, untuk proyek konstruksi yang melibatkan peralatan canggih, meskipun telah diadakan inspeksi dan testing, *owner* masih menginginkan suatu jaminan atas berfungsinya peralatan yang telah terpasang di proyek.

Jaminan tersebut, meliputi jaminan material dan mutu pengerjaan umumnya berlaku selama 1 tahun. Sedangkan jaminan pembayaran, dimaksudkan untuk melindungi subkontraktor dan rekanan jika kontraktor tidak melakukan pembayaran pada waktu dan jumlah yang telah dijanjikan dalam kontrak, dimana barang dan jasa telah diserahkan dan dikerjakan sesuai dengan ketentuan. Jaminan subkontraktor, dalam hal ini dipakai kontraktor untuk melindungi dirinya dalam masalah kerugian keuangan yang diakibatkan oleh subkontraktor yang tidak dapat melaksanakan pekerjaan sesuai dengan kontrak yang telah mereka setujui, memerlukan suatu jaminan prestasi dari subkontraktor.

Dari uraian tersebut, terlihat bahwa adanya jaminan yang meliputi berbagai aspek dan bentuk bermaksud untuk meringankan *owner* terhadap tambahan biaya yang akan timbul secara langsung akibat oleh kontraktor yang tidak melaksanakan tugasnya sesuai kontrak. Jaminan tersebut, tidak menutup kerugian yang ditanggung oleh *owner* sebagai dampak keterlambatan penyelesaian proyek. Selain

itu kesulitan-kesulitan yang timbul akibat terganggunya program pelaksanaan proyek tidak dapat diatasi oleh jaminan tersebut diatas.

### **3.1.3. Strategi dalam penyusunan kontrak.**

Perlu disadari bahwa kegiatan proyek yang sangat kompleks, sehingga bagaimanapun lengkapnya suatu dokumen kontrak tidak mungkin merumuskan dan menuliskan semua kegiatan, prosedur dan persyaratan yang diperlukan. Oleh karena itu harus diperhatikan aspek yang dapat dikendalikan dan bagaimana mengendalikannya secara efektif, kemudian memberikan rumusan perlindungan terhadap resiko untuk kejadian atau aspek yang diluar jangkauan kontrak. Dari gambaran tersebut, maka kontrak yang adil dan setara merupakan prasyarat untuk lancarnya suatu proyek konstruksi. Oleh karena itu, karena sifat keterbatasannya yang tidak dapat dihindari, maka diperlukan dukungan kemauan yang besar serta itikad baik dari pihak-pihak yang berkepentingan untuk bersama-sama berusaha mengatasi bila terjadi persoalan yang timbul dan belum tertuang secara spesifik dalam klausula kontrak.

Dalam hal perumusan kontrak yang adil dan setara, proses tersebut melibatkan interaksi antara owner dengan kontraktor. Hal ini dimulai dengan membahas rancangan kontrak, contoh materi kontrak, memilih jenis kontrak serta pembagian tanggung jawab antara penandatanganan. Pada dasarnya, setiap kontrak harus bersifat wajar (*fair*) dan setara terhadap kedua belah pihak, dan tidak bermaksud untuk mengambil keuntungan sepihak dengan cara merugikan pihak

lain. Fair dipersamakan dengan adil dimana kontrak tersebut diharapkan dapat memberikan rasa adil di kedua belah pihak. Sedangkan mendudukan para pihak secara setara dimaksudkan dengan keberadaan kontrak tersebut, maka menempatkan para pihak pada kedudukan yang setara, sejajar dengan tidak mengenal sistem kasta atau tingkatan-tingkatan. Artinya masing-masing pihak mempunyai kewajiban dan hak yang seimbang sehingga tidak ada diskriminasi sama sekali.

Faktor yang harus disadari adalah owner ingin yakin bahwa yang dipesan memnuhi harapannya padasaat penyerahan, sedangkan kontraktor disamping mendapat keuntunganjuga menghendaki untuk meringankan arus kas agar pembayaran diatur sesuai kemajuan proyek. Masing-masing pihak menginginkan perlindungan terhadap pemutusan kontrak konstruksi yang dilakukan secara sepihak. Dengan latar belakang pemikiran tersebut, maka pada kontrak konstruksi yang setara umumnya harus memperhatikan :

- Adanya klausula yang, melindungi kepentingan owner terhadap kemungkinan tidak tercapainya sasaran proyek, disebabkan oleh sesuatu yang menjadi tanggung jawab kontraktor.
- Adanya klausula yang memperhatikan hak-hak kontraktor.
- Memberikan keleluasaan kepada owner untuk dapat meyakini tercapainya sasaran-sasaran proyek tanpa mencampuri tanggung jawab kontraktor, hal ini dapat ditegaskan dengan memberikan kesempatan

pemantauan dan pengawasan yang luas sewaktu proyek sedang berjalan seperti laporan berkala, pengetesan, uji coba dan sebagainya.

- Penjabaran yang jelas akan segala sesuatu yang diinginkan oleh owner, misalnya definisi lingkup pekerjaan, material dan peralatan, demikian pula syarat dan kondisi aspek komersial.
- Adanya klausula tentang hubungan kesetaraan para pihak dalam proyek konstruksi.
- Dalam pengikatan tersebut ada klausula yang mengikat owner harus dapat membuktikan kemampuannya untuk membayar.
- Adanya klausula tentang larangan persekongkolan antara owner dengan kontraktor ataupun antar kontraktor.
- Dicantumkan pula mengenai bahasa kontrak dan hukum yang berlaku, tanggung jawab atas kegagalan bangunan, dan peran serta masyarakat dalam memantau proses konstruksi, serta penyelesaian sengketa.

Faktor lain yang perlu diperhatikan dalam menyusun kontrak adalah strukturnya, dimana harus dipilih prosedur dan tata laksana yang sederhana, tetapi memenuhi keperluan. Hal ini akan memudahkan pengelolaannya, seperti pemantauan, pengendalian, dan administrasi.

Bertitik tolak dari pemikiran bahwa akan banyak dijumpai permasalahan persoalan dan kesulitan dalam proses pelaksanaan kegiatan proyek, yang berarti akan mempertinggi resiko, maka dalam suatu kontrak yang adil dan setara, harus

dilengkapi dengan mekanisme yang efektif dan alat yang ampuh untuk menghadapi dan mengendalikannya. Bentuknya bermacam-macam, untuk owner dapat berupa :

- a. Jaminan pelaksanaan (*performance bond*);
- b. Garansi dan pertanggungan (*warranty*);
- c. Pembayaran berdasarkan kemajuan pekerjaan (*progress payment*);
- d. Hak untuk mengadakan inspeksi dan test;
- e. Hak mendapatkan laporan berkala;
- f. Hak untuk melaksanakan penjaminan mutu (*quality control*).<sup>38</sup>

Disamping itu perlu dicermati tentang suatu konsep kontrak konstruksi yang ideal, yang meliputi :

a. Perencanaan dan strategi

Strategi yang dipilih hendaknya sesuai dengan tujuan perusahaan secara keseluruhan, kemudian mempertimbangkan faktor obyektif dan spesifikasi proyek. Dalam strategi tersebut akan ditentukan sejauh mana keterlibatan *owner* dalam mengadministrasikan, memantau dan mengendalikan pelaksanaan kontrak. Dari pihak kontraktor, dengan mengetahui perencanaan dan strategi tersebut, dapat mempersiapkan diri untuk menanggapiya sebaik mungkin.

Dilihat dari segi tersebut, terdapat dua jenis kontrak dasar, yaitu kontrak harga tetap atau *lump-sum* dan kontrak harga tidak tetap atau *cost-plus*. Dari keduanya dikenal berbagai variasi seperti yang telah diuraikan dalam bab sebelumnya. Masing-masing memiliki keterbatasan dan keuntungan. Oleh karena

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<sup>38</sup> Kuliah Umum Construction Law and Construction Claims, 19 September 2000, Universitas Parahyangan, Bandung.

itu, dalam menentukan pilihan jenis kontrak, hendaknya dikenali secara mendalam faktor-faktor yang berkaitan dengan hal-hal tersebut diatas. Dalam hal ini, untuk pihak owner diberikan kesempatan untuk memilih jenis kontrak konstruksi. Pilihan tersebut mencerminkan tujuan perusahaan secara keseluruhan, kesiapan sumber daya untuk mengelola, dan keadaan spesifik yang berkaitan dengan proyek itu sendiri, dilihat dari tahap kegiatan, dan sebagainya.

Kelengkapan paket merupakan segala sesuatu yang berkaitan dengan definisi lingkup kerja proyek. Idealnya menyusun rancangan kontrak harus ditunjang dengan data teknis dan informasi nonteknis atau komersial yang lengkap dan mutakhir *up-to-date*. Namun demikian, tidak jarang terjadi oleh karena desakan situasi, suatu kontrak harus disusun dan diselesaikan meskipun informasi dan data tentang lingkup kerja yang tersedia masih amat terbatas. Keadaan ini akan besar pengaruhnya terhadap perencanaan strategi dan pemilihan jenis kontrak.

Kondisi lokal dapat disebabkan oleh faktor-faktor teknis obyektif, maupun oleh adanya peraturan yang berlaku, misalnya perusahaan harus memprioritaskan membeli barang dan jasa dalam negeri. Hal ini harus diperhitungkan dalam perencanaan pengelompokan paket-paket pembelian barang dan jasa. Demikian pula harus dipikirkan apakah akan diadakan kontrak langsung antara owner dengan sejumlah kontraktor, ataukah sebagai subkontraktor dari mainkontraktor.

Seringkali proyek memiliki kepentingan spesifik, misalnya teknologi proses yang akan dipakai relatif baru. Menghadapi keadaan demikian owner perlu



mempertimbangkan keterlibatan pihak yang berhubungan dengan mereka yang memiliki lisensi penerapan teknologi tersebut, dan membuat kontrak terpisah dengannya.

#### b. Pembentukan kontrak

Setelah penentuan strategi dan jenis kontrak yang akan dipakai, maka dimulailah kegiatan pembentukan kontrak. Proses pembentukan kontrak konstruksi tersebut, biasanya melalui proses negosiasi yang panjang. Dalam bernegosiasi, harus diperhatikan pedoman umum agar proses negosiasi dapat berjalan lancar. Hal pertama yang harus dipahami adalah karakter masing-masing pihak, komposisi para perunding, tata tertib berunding. Disamping itu juga harus dipikirkan tentang konsep kontrak yang dipakai. Otorita dari para perunding juga menjadi salah satu pedoman yang harus dipegang. Sehingga pada akhir negoisasi dapat diperoleh kemenangan tanpa mengalahkan artinya, dapat diperoleh suatu kontrak yang baik, fari dan equal, dimana para pihak memperoleh keuntungan yang seimbang, *win-win solution*.

Dalam hal penguasaan materi kontrak, para pihak harus benar-benar telah menguasai konsep kontrak sesuai dengan strategi awal yang disusun. Dalam hal ini perlu dipelajari konsep kontrak dengan seksama dimana faktor pentingnya adalah meneliti kata-kata dan kalimat yang mempunyai makna ganda. Terlebih lagi apabila konsep tersebut dituangkan dalam bahasa asing, Inggris, misalnya. Sebab apabila tidak ada penguasaan konsep, maka kontrak kostruksi akan tidak terarah

yang nantinya akan menimbulkan permasalahan-permasalahan dalam proses implementasinya, karena isi kontrak tidak lengkap dan terjadi banyak kerancuan.

Sumber referensi, harus dikuasai terlebih dahulu, harus ditelaah apakah peraturan perundang-undangan yang dipakai sebagai sumber acuan masih berlaku atau tidak. Acuan referensi tersebut tidak boleh bertentangan dengan kontrak. Kalimat-kalimat dalam kontrak harus menjabarkan bentuk kerjasama, baik dalam hal teknik, komersial, maupun dari segi hukum, dengan kata-kata yang jelas dan tidak berbelit-belit. Demikian juga harus dapat mengelompokkan kegiatan-kegiatan apa saja yang diharapkan dapat dikendalikan secara efektif dan membuat rumusan proteksi untuk menghadapi kemungkinan timbulnya resiko untuk kejadian-kejadian yang sukar diduga. Oleh karena itu, bagi perusahaan yang tidak sering menangani proyek bukanlah pekerjaan yang mudah untuk menyusun kontrak. Pendekatan yang digunakan adalah sebagai langkah awal memakai standar kontrak yang dikeluarkan oleh organisasi profesi sebagai referensi, kemudian disesuaikan dan dikembangkan untuk memenuhi keperluan owner dan kontraktor yang spesifik.

Dalam hal klausula pasal-pasal kontrak konstruksi, harus jelas adanya konsistensi antar pasal-pasal, maksudnya isi pasal-pasal tidak boleh bertentangan satu sama lain, disamping itu juga perlu dihindari pengulangan suatu masalah dalam pasal lain. Hal lain yang perlu sorotan khusus adalah :

- Nilai kontrak, jadwal penyelesaian, dan keterlambatan, nilai kontrak adalah jumlah kompensasi yang dijanjikan kepada kontraktor atas jasa dan

material yang telah diberikan. Pengaturan atau sifat pembayarannya bermacam-macam sesuai dengan kontrak yang telah disetujui, misalnya lump-sum, cost-plus dan sebagainya. Disini yang perlu mendapat perhatian adalah kedua belah pihak harus memahami prosedur yang mengatur mekanisme serta persyaratan pembayaran, sebelum realisasinya dapat dilaksanakan. Adapun mengenai jadwal, umumnya dinyatakan sebagai tanggal mulai dan tanggal berakhir, atau kurun waktu (jumlah hari/minggu/bulan) yang ditentukan. Dalam hubungan ini, kontrak harus jelas disebutkan bagaimana akibat yang harus ditanggung kontraktor bila ada keterlambatan yang disebabkan olehnya, dan mengakibatkan owner mengalami kerugian dan kesulitan. Sangat sulit untuk menghitung besarnya kerugian yang sesungguhnya, sehingga sebagai gantinya dicantumkan klausula tentang liquidated damage, yang menyatakan jumlah uang per hari sebagai ganti rugi keterlambatan, sampai pekerjaan selesai.

- Bonus, untuk merangsang kontraktor menyelesaikan pekerjaannya lebih cepat, dari yang tercantum dikontrak, maka kadang-kadang tercantum klausula-klausula mengenai berapa besar bonus yang akan diterima, bila pekerjaan selesai lebih awal per harinya. Umumnya dirumuskan sebagai imbalan adanya klausula liquidated damage. Kontrak dengan pemerintah pada umumnya tidak mencantumkan masalah bonus tersebut.
- Lingkup kerja, diberikan batasan dan dimensi dari jasa dan material yang akan dilakukan. Terutama bagi kontrak lump-sum, dengan angka jumlah

harga yang besarnya telah pasti dan tetap, serta jelas tercantum dalam kontrak maka harus diimbangi dengan jumlah jasa dan material yang jelas pula definisinya. Masalahnya, adalah tidak mudah untuk memberikan batasan atau definisi yang akurat bagi setiap jasa atau material untuk suatu proyek yang besar dan kompleks yang terdiri dari beribu-ribu komponen kegiatan. Salah satu jalan untuk membantu mengatasinya adalah dengan menyediakan gambar, spesifikasi dan kriteria selengkap mungkin. Demikian pula petunjuk referensi katalog, desain, dan engineering. Sebelum menjadi dokumen kontrak, pengkajian oleh mereka yang ahli masalah lingkup pekerjaan dari kedua belah pihak, misalnya dari bidang konstruksi akan amat bermanfaat untuk mencapai pengertian yang sama.

- Kajian desain, perlu diadakan pada tahap tertentu antara kontraktor dan owner, tujuannya antara lain untuk mendapatkan konfirmasi perihal masalah-masalah seperti kecanggihan peralatan, pemeliharaan, keamanan, keluwesan, dan sebagainya. Pada kesempatan ini sering dijumpai perbedaan pendapat yang cukup lebar antara owner dan kontraktor. Pada kontrak lump-sum kontraktor umumnya akan bertahan pada pendiriannya perihal interpretasi masalah-masalah diatas. Oleh karena itu perlu diperiksa ulang apakah masalah tersebut telah cukup ditampung dalam klausula kontrak.
- Pekerjaan subkontraktor, pelaksanaan atau kontraktor proyek berukuran besar pada umumnya melaksanakan beberapa paket kerja diserahkan

kepada sub kontraktor. Meskipun seandainya penyerahan tersebut telah disetujui oleh *owner* sesuai dengan prosedur, tetapi kontraktor harus tetap bertanggung jawab sepenuhnya atas hasil kerja subkontraktor, untuk memenuhi persyaratan proyek. Keberadaan dan kelengkapan klausula kontrak yang mengatur masalah demikian hendaknya menjadi perhatian khusus.

- Persetujuan hasil pekerjaan, harus ada kejelasan tentang tanggung jawab yang terkandung didalam prosedur persetujuan. Misalnya sejauh mana dampak persetujuan yang telah diberikan oleh *owner* terhadap gambar-gambar *design*, inspeksi, keputusan tender, dan lain-lain. Apakah *owner* harus ikut bertanggung jawab atas kecanggihan atau integritas hasil konstruksi yang dibuat oleh kontraktor, karena *owner* sudah membubuhkan tanda tangan tanda persetujuan pada gambar yang bersangkutan, sejauh mana *owner* harus berurusan bilamana suatu peralatan ternyata kurang berfungsi sedangkan *owner* telah ikut menandatangani hasil inspeksi, dan sebagainya.
- Syarat pembayaran, *owner* berkeinginan agar pembayaran kepada kontraktor sesuai dengan kemajuan pekerjaan yang telah diselesaikan. Dalam hal ini, kontraktor bermaksud mencegah penggunaan arus kas perusahaannya untuk membiayai proyek. Umumnya tidak mudah mempertemukan keinginan kedua belah pihak dalam masalah tersebut,

oleh karena itu perhitungan dan formulasinya didalam kontrak hendaknya telah tuntas dan disepakati bersama sebelum pekerjaan dimulai.

- *Change order*, secara umum banyak dijumpai dalam kontrak konstruksi *type lump-sum*. Tujuannya sendiri adalah memberikan tanggung jawab kepada kontraktor untuk melaksanakan implementasi fisik proyek, dengan harga yang telah dibatasi jumlahnya atau dengan kata lain besarnya tetap. Namun ada satu kenyataan yang perlu diingat yaitu proyek terutama yang besar dan kompleks akan selalu mengalami perubahan lingkup pekerjaan baik dalam skala besar maupun kecil. Untuk menghadapi hal ini, artinya untuk tetap menjaga maksud dari suatu kontrak konstruksi (*lump sum*, misalnya) serta menghemat waktu, hendaknya dicantumkan harga satuan bagi pekerjaan yang mungkin sekali akan menjadi pekerjaan tambahan. Dalam hal ini guna mengendalikan kemungkinan perubahan lingkup pekerjaan (yang belum dapat ditentukan harga satuannya) terhadap aspek biaya, perlu dirumuskan prosedur yang dikenal sebagai *change order*. Pemecahannya akan lebih mudah bila sebelumnya telah siantisipasi dan dicoba merumuskannya didalam kontrak. Mengingat aspek materi kontrak yang sangat luas mencakup segala permasalahan dalam proyek konstruksi, maka dalam menyusunnya perlu mendapatkan masukan-masukan dari bidang-bidang fungsional, seperti hukum, keuangan, perburuhan, perpajakan, staf fungsional lain yang terkait.

c. Pemilihan kontrak konstruksi secara tepat

Faktor pemilihan jenis kontrak tersebut sangat berpengaruh karena apabila ternyata suatu jenis kontrak tidak cocok diterapkan dalam proses konstruksi maka akan terjadi permasalahan yang rumit. Beberapa faktor dapat mempengaruhi pemilihan jenis kontrak, sebelum menentukan pilihan, hendaknya perlu dipertimbangkan hal-hal berikut ini :

- Lengkap atau tidaknya definisi lingkup kerja, lebih baik dihindari kontrak type lump-sum apabila definisi lingkup kerjanya belum lengkap dan terinsi.
- Insentif, dalam memilih type kontrak konstruksi, hendaknya dipikirkan pula untuk memasukkan klausula unsur insentif didalam kontrak, seperti bonus (positif) dan penalti (negatif) terhadap pencapaian jadwal, biaya dan mutu.
- Eskalasi, yang dirancang untuk melindungi kontraktor dari kenaikan harga karena inflasi akan membuat ketenangan bekerja. Terutama untuk kontrak jangka panjang (multi years).
- Kurun waktu pelaksanaan proyek, semakin panjang kurun waktu proyek, terutama proyek-proyek berukuran besar, semakin banyak faktor ketidakpastian yang dihadapi oleh kontraktor. Mereka lebih condong untuk tidak memilih bentuk lump-sum.
- Sifat proyek, proyek dengan lingkup kerja yang masih asing belum pernah dikenal dan dipraktekkan, misalnya berkaitan dengan proses dan produk berteknologi baru, akan lebih sesuai untuk kontrak harga tidak tetap.

## **3.2. Upaya Represif Dalam Mengatasi Sengketa Konstruksi**

### **3.2.1. Pemutusan kontrak konstruksi**

Pemutusan kontrak konstruksi tersebut pada dasarnya merupakan jalan terakhir atau solusi terakhir *the last resort* apabila tidak didapati solusi lain yang telah ditempuh. Pemutusan kontrak tersebut bukanlah menjadi keinginan kedua belah pihak, karena kedua belah pihak akan dirugikan oleh adanya hal tersebut. Tetapi apabila ternyata pemutusan kontrak konstruksi harus terjadi maka perlu adanya negoisasi antar pihak secara baik tentang hal-hal yang akan menjadi konsekuensi setelah kontrak konstruksi tersebut putus. Negoisasi tersebut sebenarnya mempunyai tujuan yang memberi win-win solution terhadap para pihak misalnya dengan memikirkan siapa yang harus bertanggung jawab terhadap kerugian yang telah terjadi akibat putusnya kontrak. Secara umum, penyelesaian yang terbaik apabila owner yang memutuskan kontrak, maka owner harus memberi kompensasi ganti rugi kepada kontraktor. Sebaliknya bila kontraktor yang memutuskan kontrak maka kontraktor harus menyelesaikan hak dan kewajiban masing-masing pihak secara baik sebelum memutus kontrak. Hal ini perlu dilakukan agar kerugian akibat putusnya kontrak konstruksi tidak terlalu besar.

Dalam hal kontrak konstruksi, harus jelas hal-hal apa saja yang dapat mengakhiri kontrak, misalnya kelalaian kontraktor dalam melaksanakan pekerjaan, mutu pekerjaan yang tidak sesuai dengan yang dipersyaratkan, menyerahkan pekerjaan kepada pihak ketiga tanpa persetujuan owner, menghentikan pekerjaan



tanpa alasan., sebaliknya dari owner dapat juga terjadi kesalahan seperti menghambat jalannya pekerjaan dengan cara memerintahkan penghentian pekerjaan tanpa alasan yang wajar, menghalangi pembayaran dan sebagainya.

Dalam suatu kontrak yang adil dan setara, kedua belah pihak masing-masing dapat mengakhiri kontrak apabila ada kesalahan dari pihak lain. Di Indonesia, dalam kontrak dengan pemerintah, kontraktor tidak mempunyai kesempatan mengakhiri kontrak apabila ada kesalahan dari pihak owner. Apabila terjadi pemutusan kontrak, (tentunya sebagai akibat kelalaian atau kesalahan salah satu pihak) harus diatur secara tegas hak-hak dan kewajiban para pihak sebagai akibat pemutusan kontrak.

a. Ketidakterlaksanaan kontrak konstruksi.

Ketidakterlaksananya suatu kontrak konstruksi dapat diakibatkan oleh berbagai macam hambatan seperti yang telah diuraikan sebelumnya. Ketidakterlaksanaan kontrak konstruksi tersebut mempunyai tingkatan tersendiri, yaitu;

- Pada tingkatan yang sangat ringan, kontraktor mengalami kesalahan yang relatif sangat kecil dalam realisasi proyek, biasanya tidak perlu diperbaiki sama sekali, karena kesalahan tersebut sangat tidak menonjol dan tidak fatal.
- Pada tingkatan ringan, kesalahan pada realisasi proyek perlu ada perbaikan pada saat serah terima ataupun pada masa perawatan oleh pihak kontraktor.
- Pada tingkat yang sedikit berat, dalam hal ini perlu adanya perbaikan pada saat sedang berlangsungnya pembangunan tanpa harus mengubah kontrak.

- Pada tingkat yang agak berat, realisasi dalam proyek konstruksi dinilai lumayan berat dan agak menonjol sehingga perlu diperbaiki pada saat sedang berlangsungnya pembangunan dengan dilakukannya penyesuaian ataupun perubahan kontrak.
- Pada tingkatan yang berat, sehingga pelaksanaan kontrak harus ditunda.
- Pada tingkatan yang sangat berat, sehingga kontrak boleh diputus (terminasi kontrak) oleh salah satu pihak.

Ketidakterlaksanaan kontrak tersebut sebenarnya dapat dideteksi dari awal, hal ini perlu dilaksanakan untuk menghindari konflik-konflik hukum yang menjadi hambatan bagi terlaksananya suatu kontrak konstruksi, disamping juga untuk meminimalis kerugian diantara kedua belah pihak. Dalam mendeteksi adanya ketidak terlaksananya suatu kontrak konstruksi dapat dilakukan dengan cara menamati bangunan secara fisiknya sehingga jika ada penyimpangan atau ketidakberesan dapat segera diobservasi. Cara kedua adalah dengan mengamati dokumen yang ada, sebab banyak dokumen yang dibuat dalam proses pelaksanaan suatu pekerjaan proyek tersebut. Ketidakterlaksanaan kontrak konstruksi dapat berwujud sebagai berikut; keterlanbatan, ketidakcocokan, kegagalan, suspensi, repudiasi, determinasi, force majeure, variasi, exempsi, hardship, dan terminasi atau pemutusan kontrak.

#### b. Alasan pemicu terjadinya pemutusan kontrak.

Pemutusan kontrak konstruksi oleh pihak owner dapat terjadi karena kontraktor mengalami kegagalan dalam mengerjakan pekerjaannya. Alasan yang

juga dapat dipakai oleh pihak owner adalah pelanggaran pembatasan pengalihan kontrak, hal ini dapat terjadi apabila kontraktor mengalihkan atau mensubkontraktor pekerjaan tidak sesuai dengan klausula kontrak sebab untuk hal tersebut sebelumnya telah diperjanjikan terlebih dulu. Sehingga tergantung apakah sebelumnya telah diperjanjikan atau tidak, apabila dalam klausula kontraktor boleh mengalihkan atau mensubkontraktorkan maka owner tidak berhak memutuskan kontrak.

Pemutusan kontrak oleh owner dapat terjadi tanpa adanya alasan hukum, dalam praktek sering terjadi meskipun sebenarnya tidak dibolehkan oleh Undang-Undang, biasanya disebut juga *Termination by Convenience* (pemutusan sesuka hati). Pemutusan secara sepihak oleh owner ini dapat terjadi di luar dari alasan hukum yang dibenarkan, misalnya saja karena krisis ekonomi, karena alasan politis, kondisi situasi politik yang juga mempengaruhi jalannya kontrak konstruksi dan sebagainya. Dalam hal kepailitan dan likuidasi maka kontrak konstruksi memberikan hak kepada para pihak untuk melakukan terminasi kontrak, hal ini sama apabila terjadi dalam hal salah satu pihak melakukan pengalihan sebagian besar asset, reorganisasi, merger, pergantian kepemilikan yang kesemuanya berintikan bahwa salah satu pihak tidak dapat melaksanakan kewajiban sesuai dengan yang diperjanjikan dalam klausula kontrak. Selain itu, kontraktor juga diberikan hak untuk memutus kontrak dalam hal owner ikut campur terlalu jauh atau menghalangi pekerjaan kontraktor, hal ini tergantung kontraktor sampai sejauh mana memberi toleransi kepada owner untuk melakukan

tindakan yang destruktif. Disamping itu juga apabila owner tidak melakukan kewajibannya seperti yang telah diperjanjikan ataupun yang tertuang dalam klausula kontrak yaitu dalam hal tidak melakukan pembayaran tepat waktu, tidak memenuhi termin yang telah diperjanjikan dan apabila diperjanjikan owner menyediakan material dan equipment tetapi tidak juga dipenuhi maka kontraktor berhak untuk memutuskan kontrak.

Pemutusan kontrak sepihak pada umumnya tidak diperbolehkan oleh Undang-Undang, minimal keduabelah pihak mengetahui dan ada kesepakatan untuk memutuskan kontrak konstruksi. Tetapi ada kemungkinan pemutusan kontrak sepihak tersebut terjadi. Hal ini karena tidak diindahkannya peringatan yang diajukan oleh pihak yang merasa dirugikan haknya kepada pihak yang tidak melakukan kewajibannya sesuai kontrak. Dalam hal yang seperti itu, maka pihak yang akan melakukan pemutusan kontrak dapat memutuskan kontrak secara tertulis tanpa melalui kesepakatan.

Faktor putusnya kontrak konstruksi umumnya karena faktor ekstern dan faktor intern. Faktor ekstern yang mempengaruhi putusnya suatu kontrak konstruksi secara ekstern, dapat terjadi diluar para pihak, antara lain karena krisis ekonomi yang berkepanjangan dan mengakibatkan kenaikan harga material dan bahan-bahan pokok sehingga berpengaruh terhadap upah minimal dari pekerja konstruksi. Faktor yang lain dapat juga berasal dari pelaku bisnis yang kurang bisa menghitung secara cermat, bagaimana menghitung kebutuhan akan sarana prasarana berbagai fasilitas dibidang konstruksi. Faktor hambatan-hambatan dalam

implementasi kontrak konstruksi seperti faktor force majeure atau overmacht karena kebakaran, yang disebabkan gempa bumi, tanah longsor, banjir dan faktor alam lainnya, kebakaran, perang, huru-hara, pemogokan, pemberontakan, dan epidemi yang secara keseluruhan ada hubungannya dengan bidang konstruksi. Apabila ditelaah lebih lanjut, faktor ekstern yang menyebabkan putusnya kontrak lebih banyak tidak mempunyai alasan yang dibenarkan oleh hukum dalam hal ini tidak berdasarkan alasan justifikasi yang otomatis diatur didalam kontrak. Putusnya kontrak tanpa alasan justifikasi misalkan karena alasan krisis ekonomi, atau karena alasan politis misalkan dengan terbitnya Keppres yang menetapkan proyek-proyek dalam kategori diteruskan, dikaji, dan ditunda karena terindikasi KKN, contoh tersebut jelas-jelas tidak diperjanjikan dalam kontrak sehingga dapat dikatakan sebagai keputusan tanpa alasan justifikasi.

Selanjutnya adalah faktor intern, dalam hal ini terjadi diantara para pihak yang saling berhubungan kontraktual satu dengan yang lain. Pada umumnya, faktor intern terjadi karena permasalahan dalam kontraktual, yang menyangkut permasalahan intern, hubungan para pihak, permasalahan yang timbul karena klausula-klausula kontrak yang tidak jelas sehingga dapat mengakibatkan konflik dalam implementasinya. Biasanya faktor intern ini muncul bertolak dari kontrak konstruksi itu sendiri yang dapat berawal dari ketidaklengkapan kontrak konstruksi, sehingga menyebabkan perbedaan dalam menginterpretasikan yang kemudian akan berpengaruh terhadap hubungan kontraktual para pihak atau juga

dapat terjadi apabila salah satu pihak itu tidak melaksanakan klausula yang tertuang dalam kontrak.

c. Konsekuensi pemutusan kontrak konstruksi.

Konsekuensi pemutusan kontrak konstruksi dipihak kontraktor, kontraktor wajib meninggalkan lokasi proyek dan memindahkan barang-barangnya. Sebagai alternatif peralatan tersebut dapat disewakan kepada owner ataupun kepada kontraktor baru atas opsi dari pihak owner atau kontraktor baru tersebut. Selain itu juga harus dilakukan serah terima pekerjaan kepada owner. Dalam hal teknologi hanya dimiliki oleh kontraktor yang bersangkutan dan sulit untuk dikerjakan oleh kontraktor lain, maka sebenarnya dokumen-dokumen misalnya, dokumen drawings, design, description, calculation, dokumentasi dan engineering menjadi hak dari kontraktor berkaitan dengan hak intelektual kontraktor maka hal ini dapat dinegosiasi owner kepada kontraktor dengan kompensasi tertentu.

Pembayaran kepada kontraktor yang masih tersisa, harus diselesaikan. Demikian pula jika ada kerugian dari pihak yang tidak bersalah, harus diberikan ganti rugi atasnya. Sehingga bila telah terjadi penyerahan akibat pemutusan kontrak konstruksi tersebut dan belum terbayar, maka kontraktor berhak atas pembayaran tersebut. Sama halnya jika kontraktor telah melakukan servis tertentu kepada owner walaupun tidak berwujud bangunan fisik, maka kontraktor berhak atas imbalan atau kompensasi.

Dalam praktek, pemutusan kontrak konstruksi sering terjadi dalam dua alternatif yaitu, pada pemutusan kontrak biasa (*termination*), pada prinsipnya

akibat dari pemutusan kontrak, kontraktor lama tidak bertanggung jawab atas hal-hal yang terjadi sesudah kontrak tersebut. Dengan putusnya kontrak konstruksi maka resiko beralih ketangan owner atau dengan kata lain bahwa segala perhitungan utang piutang dan tanggungjawab kontraktor lama hanya sampai pada pemutusan kontrak tersebut. Pemutusan kontrak dengan tanggung jawab ada pada kontraktor (*forfeiture*) artinya keputusan dari owner untuk menghentikan kegiatan pelaksanaan pekerjaan yang dilakukan oleh kontraktor dengan alasan yang telah diatur dalam dokumen kontrak dengan kelanjutan pekerjaan dapat dilaksanakan sendiri atau dilimpahkan pada kontraktor lain dengan segala resiko keuangan menjadi tanggungjawab kontraktor lama atau segala akibat yang terjadi sampai proyek selesai menjadi tanggungjawab kontraktor lama dari segala pembayaran diperhitungkan setelah proyek selesai. Dengan ditetapkannya forfeiture maka secara otomatis segala peralatan milik kontraktor lama disita untuk sementara waktu oleh owner sebagai jaminan dan kalau masih ada utang ketika proyek selesai maka penyelesaian dengan cara sendiri atau dilelang melalui PUPN.

### **3.2.2. Penyelesaian Sengketa Konstruksi**

Bila telah terjadi wanprestasi salah satu pihak, misalnya kontraktor, maka upaya yang bisa dilakukan selain mengajukan pemutusan kontrak, maka sebelumnya dapat ditempuh langkah-langkah sebagai berikut :

- Apabila sebab-sebab wanprestasi masih dapat ditolerir, owner akan tetap meminta penyelesaian pekerjaan tanpa mengajukan tuntutan atau klaim ganti rugi akibat pemutusan kontrak.

- Apabila wanprestasi disebabkan oleh keterlambatan penyerahan hasil pekerjaan yaitu lebih dari 120 hari tanpa alasan yang jelas maka owner akan mengenakan denda atas keterlambatan anatar 1 % sampai dengan 5 % dari harga proyek atau sebesar jaminan pelaksanaan untuk setiap hari keterlambatan .

Bila langkah-langkah tersebut telah dilakukan dan kontraktor tetap tidak dapat memenuhi kewajibannya maka owner akan mengajukan pemutusan kontrak dan menuntut ganti rugi atas jaminan pelaksanaan dari bank garansi dengan memberitahukan secara tertulis kepada bank penjamin dalam batas waktu pengajuan terakhir sekurang-kurangnya 14 hari dan selambat-lambatnya 30 hari setelah berakhirnya bank garansi dengan melampirkan surat asli bank garansi yang bersangkutan dan disertai pula dengan bukti-bukti selengkapnya.

Upaya terakhir apabila upaya-upaya yang tersebut diatas tidak berhasil maka dapat ditempuh dengan menggunakan cara negoisasi antara kedua belah pihak yang prinsipnya musyawarah mufakat untuk mencari jalan tengah yang baik dan diharapkan memberi win-win solution kepada para pihak. Namun apabila ternyata tidak berhasil dilakukan negoisasi, dapat pula ditempuh dengan melakukan mediasi dimana melibatkan pihak lain yang netral sebagai pihak yang menengahi masalah tersebut. Tetapi apabila masih juga belum diperoleh suatu penyelesaian yang baik, dimana para pihak masih berdiri pada prinsipnya masing-masing, maka langkah yang terakhir ditempuh adalah melalui arbitase sebagai alternatif penyelesaian sengketa. Dalam praktek umumnya, hanya negoisasi dan



mediasi saja yang paling sering digunakan karena kedua cara tersebut membutuhkan waktu yang relatif cepat, biaya yang murah, dan prosedur penyelesaian yang tidak berbelit-belit. Apabila penyelesaian dilakukan dengan membawa ke pengadilan, para pihak umumnya masih enggan karena prosedural pengajuan gugatan ke pengadilan yang membutuhkan waktu dengan biaya yang relatif banyak dan dibayangi oleh kredibilitasnya yang terganggu. Lain halnya dengan adanya pemutusan kontrak akibat krisis moneter, jika ada sengketa secara normal, seperti yang telah diuraikan maka harus ada kesepakatan antara kedua belah pihak dan ada kompensasi terhadap kedua belah pihak, tetapi pada kondisi akibat krisis moneter dimana tidak ada suatu sengketa, tetapi berakibat tidak adanya kemampuan untuk melanjutkan proyek, maka apabila owner tidak masuk BPPN masih ada peluang untuk membicarakan penyelesaiannya, tetapi kalau owner proyeknya masuk BPPN hanya ada dua pilihan yaitu melakukan klaim atau mempailitkan owner. Pengajuan gugatan pailit sendiri belum tentu berhasil. Biasanya kalau masing-masing pihak punya itikad baik maka saling memberi kompensasi sesuai dengan kemampuannya. Dalam hal ini seharusnya owner menyediakan dana untuk dapat membayar progress pekerjaan yang ada, setelah dilakukan pemeriksaan pekerjaan terlebih dahulu. Kalau owner sudah memiliki dana untuk melanjutkan kembali proyek itu bisa dilakukan negosiasi dengan harga kontrak baru. Namun, jika akan dilakukan tender ulang maka hal ini juga bisa dilakukan sebagai penyelesaiannya. Untuk proyek-proyek yang diambil alih BPPN maka hal ini tergantung dari BPPN sendiri apakah dilanjutkan atau dihentikan,

Pada kenyataannya belum ada kasus proyek dibawah BPPN yang dilanjutkan, sehingga akhirnya kontraktor terpaksa mundur tanpa kompensasi.

Dalam menghadapi suatu masalah berkaitan dengan proyek konstruksi para pihak kontraktor dan owner, dalam prakteknya selalu tidak ingin diketahui umum, mereka tidak akan membuka masalah mereka didepan umum. Hal ini berkaitan dengan kontraktor misalnya, tidak mau kredibilitasnya tercemar. Karena apabila diketahui suatu perusahaan kontraktor pernah terjadi masalah, maka akan mempengaruhi keberadaannya dalam bisnis konstruksi. Kontraktor yang demikian akan mendapat black list dari para owner, dimana profesionalitasnya diragukan. Sebaliknya apabila reputasi yang dimiliki oleh kontraktor dipandang bagus oleh owner dalam artian bahwa owner merasa puas dengan hasil kerja kontraktor dalam proyek, maka kontraktor tersebut akan masuk short list owner yang terdiri dari para kontraktor favorit. Kefavoritan tersebut selain ditinjau dari segi performance, keprofesionalitasannya, cost, juga ditinjau dari apakah kontraktor tersebut pernah bermasalah dengan salah satu ownernya atau tidak. Demikian juga dengan owner apabila telah diketahui bahwa pernah terjadi masalah, maka kredibilitasnya tercemar, sehingga apabila suatu saat proyek konstruksi dengan owner yang sama, kontraktor menjadi enggan untuk terlibat dengan owner tersebut. Jadi secara umum apabila terjadi suatu masalah diantara para pihak mereka akan berusaha untuk menyelesaikan sendiri dan tetap merahasiakan masalah yang dihadapinya. Keadaan seperti ini yang pada akhirnya menempatkan posisi para pihak untuk saling mengalah dan memberikan suatu kompensasi yang baik agar nama baik

mereka tetap terjaga. Karena reputasi yang dimiliki oleh kontraktor dalam pekerjaannya dan owner dalam hal pemenuhan kewajibannya, misalnya pembayaran sangat berpengaruh pada bisnis konstruksi secara berkelanjutan.

### **3.2.3. Arbitrase Sebagai Alternatif Penyelesaian Sengketa.**

Masalah yang dapat diselesaikan diluar pengadilan adalah mengenai perikatan pekerjaan konstruksi, penyelenggaraan pekerjaan konstruksi, kegagalan bangunan. Penyelesaian sengketa dapat menggunakan jasa pihak ketiga yang disepakati para pihak yang dapat dibentuk pemerintah atau masyarakat konstruksi. Jika masyarakat dirugikan, akibat penyelenggaraan pekerjaan konstruksi, maka berhak menggugat ke pengadilan secara perorangan, kelompok orang dengan atau tanpa surat kuasa. Jika kerugian masyarakat akibat penyelenggaraan pekerjaan konstruksi mempengaruhi kehidupan masyarakat, pemerintah wajib berpihak kepada masyarakat. Jenis tuntutan dapat berupa biaya, pengeluaran nyata, bentuk lain sesuai Undang-Undang

Penyelesaian sengketa konstruksi sendiri seperti telah disebutkan dalam bab sebelumnya telah diatur dalam pasal 36 dan 37 UU Jasa Konstruksi, dimana ditentukan bahwa para pihak dapat memilih jalur yang ditempuh untuk menyelesaikan sengketa. Bila dipilih penyelesaian sengketa melalui Pengadilan penetapan domisili para pihak didalam suatu kontrak konstruksi diperlukan agar bila terjadi perselisihan antara para pihak, kedua belah pihak telah sepakat menetapkan tempat kediaman tetap dan tidak berubah disuatu Kantor Pengadilan.

Apabila telah dipilih penyelesaian melalui arbitrase, maka penetapan domisili menjadi tidak perlu. Kadang kala ada yang memasukkan keduanya dalam suatu kontrak konstruksi, yaitu perjanjian klausula penetapan domisili hukum sekaligus klausula arbitrase, hal ini merupakan hal yang tidak benar. Jadi dalam melakukan pilihan hukum, melalui penetapan domisili hukum atau arbitrase hanya boleh mencantumkan salah satu saja tidak boleh kedua-duanya dicantumkan.

Selain cara penyelesaian sengketa, didalam kontrak konstruksi, terutama kontrak dengan pihak asing, mutlak perlu mencantumkan hukum yang berlaku (*governing law*), dimana hukum yang berlaku harus satu hukum dari suatu negara, pemilihan hukum yang berlaku harus berdasarkan kesepakatan para pihak. Biasanya pihak asing yang menjadi owner menginginkan hukum negerinya yang berlaku, misalnya Inggris. Bagi pihak dari Indonesia, umumnya selalu menginginkan hukum Indonesia, karena pekerjaannya sendiri berada di Indonesia. Namun apabila pihak asing tersebut menginginkan hukum mereka yang berlaku, maka hal itu sebenarnya tidak terlalu merugikan pihak Indonesia. Apabila terjadi putusan Pengadilan ataupun arbitrase dari negara mereka, yang akan mengeksekusi putusan tersebut adalah pihak Badan Peradilan kita, dan kita dapat menolaknya.<sup>39</sup>

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<sup>39</sup> Hal ini sebenarnya menimbulkan ketidakpastian hukum mengingat bahwa klausula tentang arbitrase yang harus diperjanjikan dahulu, serta klausula arbitrase yang tidak boleh dicantumkan secara bersamaan dengan klausula pilihan hukum, sehingga semestinya secara konsisten kita harus tetap menerima segala putusan dari pilihan hukum ataupun arbitrase sesuai dengan kontrak. Apabila telah memilih arbitrase sebagai lembaga penyelesaian sengketa, maka sesuai dengan pasal 11 UU Arbitrase 1999 Pengadilan tidak berhak campur tangan apapun kecuali menetapkan eksekusi putusannya. Sehingga apabila dalam kontrak telah dilakukan pilihan penyelesaian sengketa baik melalui pengadilan maupun arbitrase, dan para pihak dalam kontrak telah menentukan domisili hukum, maka konsekuensinya harus diikuti, maksudnya adalah apapun bentuk putusannya apakah merugikan atau menguntungkan harusnya para pihak mematuhi dan melaksanakan sesuai dengan putusan tersebut.

Penyelesaian sengketa dengan prosedur pilihan secara sukarela, dapat dilakukan melalui pengadilan dan diluar pengadilan kecuali untuk suatu tindak pidana yang terjadi berkaitan dengan proyek konstruksi tersebut. Penyelesaian melalui pengadilan merupakan hal yang terakhir dapat dilakukan oleh para pihak apabila upaya penyelesaian diluar pengadilan gagal dilakukan. Obyek sengketa yang dapat diselesaikan melalui jalur diluar pengadilan secara umum seperti yang diatur dalam pasal 37 UU Jasa Konstruksi adalah perikatan pekerjaan konstruksi, penyelenggaraan pekerjaan konstruksi, kegagalan bangunan. Dimana penyelesaian sengketa dapat menggunakan jasa pihak ketiga yang telah disepakati para pihak yang dapat dibentuk pemerintah atau masyarakat hasa konstruksi. Lebih lanjut ditegaskan dalam PP Penyelenggaraan Jasa Konstruksi pasal 49, penyelesaian sengketa dapat dilakukan melalui pihak ketiga melalui mediasi atau konsiliasi dan arbitrase ad hoc maupun institusi.

Dalam hal arbitrase sebenarnya merupakan solusi yang baik untuk menyelesaikan suatu masalah yang terjadi. Keberadaan arbitrase tersebut belum disadari manfaatnya oleh para pelaku industri konstruksi. Hal ini dikarenakan kurangnya informasi tentang lembaga arbitrase. Dengan menggunakan acuan pasal 53 PP Penyelenggaraan Jasa Konstruksi, dimana penyelesaian sengketa menggunakan jasa arbitrase harus dilakukan sesuai peraturan perundang-undangan yang berlaku. Arbitrase sebagai alternatif penyelesaian sengketa, telah diakui keberadannya di Indonesia melalui UU No.30 Tahun 1999 Tentang Arbitrase dan Alternatif Penyelesaian Sengketa Lembaran Negara Republik Indonesi Tahun

1999 Nomor 138, Tambahan Lembaran Negara Republik Indonesia Nomor 3872 (selanjutnya disebut UU Arbitrase 1999). Dalam UU Arbitrase 1999, pengertian arbitrase diatur melalui pasal 1 ayat 1, yaitu cara penyelesaian satu sengketa perdata di luar peradilan umum yang berdasarkan pada perjanjian arbitrase yang dibuat secara tertulis oleh para pihak yang bersengketa. Dari pengertian tersebut maka dapat di ketahui keberadaan arbitrase adalah sebagai suatu lembaga non yuridis formal yang dapat dipilih dan digunakan masyarakat menjadi sarana guna menyelesaikan masalah hukum yang terjadi di lapangan hukum privat (keperdataan). Beberapa karakteristik arbitrase sehingga memungkinkan untuk penyelesaian sengketa konstruksi misalnya :

- Arbitrase bagi pihak asing secara relatif juga dapat memberi rasa aman dari ketidakpastian yang terjadi akibat perbedaan sistem hukum dengan negara tempat sengketa terjadi;
- Arbitrase memberi keleluasaan bagi pihak yang bersengketa untuk memilih arbiter-arbiter yang profesional dan pakar dalam bidang yang menjadi obyek sengketa, serta senantiasa dapat bersikap independen dalam menyelesaikan sengketa;
- Proses penyelesaian dalam arbitrase bersifat tertutup, sehingga memungkinkan adanya perlindungan bagi para pihak yang bersengketa untuk informasi atau data usaha yang bersifat rahasia atau tidak boleh diketahui secara umum.

Kerahasiaan ini berlaku agar privacy dari para pihak terjaga sehingga tidak mengganggu profesionalitas atau nama baik para pihak menjadi tercemar.

- Pertimbangan yang win-win solution dimana tidak ada pihak yang terkalahkan, sehingga dicari solusi yang sama-sama tidak merugikan para pihak. Pertimbangan hukum dalam arbitrase pada umumnya cenderung bersifat individual dan privat, yang lebih mengutamakan aspek individual privat para pihak dengan memposisikan para pihak yang sejajar dan setara. an.

Sehingga dari karakteristik arbitrase tersebut maka sangat cocok apabila sengketa konstruksi diselesaikan melalui arbitrase tersebut. Hal ini berkaitan dengan kerahasiaan yang diinginkan dalam sengketa industri dimana para pihak tidak mau diketahui apabila menghadapi perselisihan dengan pihak lain. Yang berkaitan dengan arbitrase yaitu :

a. Sengketa konstruksi sebagai obyek arbitrase.

Menurut UU Arbitrase 1999, dalam pasal 5 ayat 1 ditentukan bahwa obyek sengketa yang dapat diselesaikan melalui arbitrase hanya sengketa di bidang perdagangan dan hak yang menurut hukum dan peraturan perundang-undangan dikuasai sepenuhnya oleh pihak yang bersengketa. Dalam ketentuan tersebut tidak dijelaskan lebih lanjut mengenai jenis-jenis kegiatan dalam perdagangan ataupun hak-hak menurut hukum yang menjadi lingkup kewenangan penyelesaian sengketa oleh arbitrase. Sehingga untuk mengetahui sengketa dalam hal perdagangan ataupun hak yang dapat diselesaikan melalui lembaga arbitrase tersebut, maka

ketentuan dalam The United Nations Commission on International Trade Law (UNCITRAL) Tahun 1976 tentang pengertian komersial dapat dijadikan acuan, yaitu :

"The term commercial should be given a wide interpretation so as to cover matters arising from all relationships of a commercial in nature, whether contractual or not. Relationships of a commercial nature include, but not limited to, the following transaction : any trade transaction for the supply or exchange goods or services; distribution agreement; commercial representation or agency; factoring; licencing; investment; financing; banking; insurances; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passenger by air, sea, rail, or road".

Dari ketentuan tersebut, maka dapat disebutkan bahwa sengketa yang terjadi dalam bidang konstruksi adalah termasuk jenis sengketa yang dapat diselesaikan melalui arbitrase.

Seperti telah disebutkan sebelumnya bahwa industri konstruksi yang sangat complicated dan sophisticated, memuat dan terdiri dari bagian-bagian dan tahapan-tahapan pengerjaan konstruksi yang saling terkait antara tahapan yang telah ditentukan. Pelaksanaan pekerjaan konstruksi tersebut umumnya sangat mempengaruhi dari keseluruhan maupun sebagian tahapan implementasi proyek konstruksi tersebut, misalnya dari faktor biaya, mutu dan waktu. Sehingga, sesuai dengan sifat dan karakteristik industri konstruksi, maka sudah barang tentu memiliki cukup peluang untuk terjadinya sengketa, baik antara owner maupun kontraktor ataupun antara sesama kontraktor (main contractor dengan subcontractor) yang terlibat dalam satu proyek konstruksi.



Obyek sengketa dalam proyek konstruksi sendiri dapat diklasifikasikan menjadi dua yaitu :

- Sengketa teknis, yaitu sengketa yang terjadi akibat adanya perbedaan atau ketidaksepahaman antara owner dengan kontraktor tentang sesuatu hal yang berkaitan dengan aspek teknis dalam implementasi/pengerjaan proyek konstruksi. Misalnya perbedaan perhitungan yang terjadi karena adanya perubahan (modifikasi) spesifikasi teknis atau bahan material yang digunakan dalam implementasi proyek konstruksi yang bersangkutan. Sengketa teknis tersebut terjadi ketika proyek sedang dalam proses pengerjaan atau dalam tahap implementasi proyek. Dampak yang dapat terjadi adalah berupa pengerjaan atau implementasi proyek tetap dilanjutkan sambil melakukan penyelesaian masalah atau penghentian pengerjaan atau implementasi proyek untuk jangka waktu tertentu oleh owner atau kontraktor, yang dalam kebanyakan kasus mungkin akan bermuara pada pemutusan kontrak.
- Sengketa klaim pembayaran, merupakan sengketa yang terjadi akibat tindakan owner yang menolak untuk membayar harga pengerjaan proyek kepada kontraktor sesuai dengan ketentuan dan syarat yang telah diperjanjikan dalam kontrak konstruksi. Sengketa ini dapat terjadi sesudah proyek selesai dikerjakan.

Dari seluruh jenis sengketa arbitrase tersebut dapat diselesaikan melalui lembaga arbitrase, sepanjang diperjanjikan dalam kontrak. Bagi para pelaku industri konstruksi, arbitrase bahkan dapat dijadikan pilihan sarana yang sangat efektif untuk menyelesaikan sengketa teknis, dimana pengerjaan proyek tetap dilaksanakan sekalipun sedang terjadi sengketa untuk bagaian atau tahapan pekerjaan tertentu. Para pihak yang bersengketa akan relatif lebih cepat dapat memperoleh kepastian mengenai perbedaan atau masalah teknis proyek yang terjadi sebelum pengerjaan proyek selesai, sehingga karenanya di bagian akhir pelaksanaan kontrak tidak ada lagi persengketaan.

b. Perjanjian atau klausula arbitrase.

Berbeda dari penyelesaian sengketa melalui jalur formal dilembaga pengadilan, maka terlebih dahulu diwajibkan adanya perjanjian atau klausula arbitrase untuk melakukan penyelesaian sengketa melalui arbitrase. Syarat ini sesuai dengan konsekuensi yuridis bahwa tidak mungkin dapat dilakukan pemeriksaan arbitrase yang sah menurut hukum tanpa adanya perjanjian atau klausula arbitrase.

UU Arbitrase 1999 dengan jelas dan tegas mengatur maksud dari klausula atau perjanjian arbitrase, yaitu ditemukan dalam pasal 1 ayat 3 yang menyatakan perjanjian arbitrase sebagai suatu kesepakatan berupa klausula arbitrase yang tercantum dalam suatu perjanjian tertulis yang dibuat para pihak sebelum timbul sengketa, atau suatu perjanjian arbitrase tersendiri yang dibuat para pihak setelah timbul sengketa. Eksistensi dari klausula atau perjanjian arbitrase yang dibuat para

sengketa dalam pelaksanaan kontrak; Ruang lingkup arbitrase , dimana dalam kontrak konstruksi dapat juga diatur untuk penyelesaian sengketa yang bersifat teknis; Lembaga arbitrase yang digunakan, apakah arbitrase institusi atau ad hoc, jika yang digunakan adalah ad hoc maka klausula harus mengatur cara penunjukan arbiter atau majelis arbitrase; Ketentuan prosedural yang digunakan; Tempat dan bahasa yang digunakan dalam arbitrase; Pilihan terhadap hukum substansi yang berlaku. Contoh klausula arbitrase secara sederhana yang dapat dimuat dalam kontrak, yang umumnya mengatur tentang penyelesaian perselisihan adalah :

“Setiap perselisihan, sengketa atau tuntutan yang terjadi dalam pelaksanaan atau yang berkenaan dengan kontrak ini, termasuk namun tidak terbatas pada perbuatan wanprestasi, pemutusan atau sah tidaknya kontrak, yang tidak dapat diselesaikan melalui musyawarah (negoisasi) akan diselesaikan melalui arbitrase yang dilaksanakan di..... sesuai dengan ketentuan dan prosedur dalam UU Arbitrase 1999. Masing-masing pihak dapat menunjuk arbiternya dan kedua arbiter terpilih wajib memilih dan menunjuk arbiter ketiga yang akan bertindak sebagai ketua arbiter. Apabila kedua arbiter itu tidak dapat memilih dan menunjuk arbiter ketiga dalam waktu 30 hari setelah tanggal penunjukan masing-masingnya, maka para pihak yang bersengketa dapat mengajukan permohonan penetapan arbiter kepada Ketua Pengadilan Negeri setempat agar menetapkan arbiter ketiga sebagai ketua arbitrase. Dalam hal salah satu pihak tidak menunjuk arbiternya dalam waktu 30 hari setelah menerima pemberitahuan arbitrase dari pihak lain, maka pihak lain itu dapat mengajukan permohonan penetapan arbiter untuk pihak kedua kepada Ketua Pengadilan Negeri setempat dan dalam waktu 30 hari setelah tanggal penetapan arbiter dari Pengadilan Negeri, kedua arbiter wajib menunjuk arbiter ketiga yang akan memimpin arbitrase”.

Apabila para pihak dalam kontrak ingin menentukan peraturan prosedur arbitrase tertentu yang hendak digunakan dalam proses arbitrase, maka contoh klausula arbitrasenya sebagai berikut :

pihak sebelum atau sesudah terjadi sengketa, menjadi sangat esensial karena secara langsung akan menentukan kewenangan (kompetensi) absolut dari lembaga arbitrase untuk memeriksa sengketa. Hal ini sesuai dengan ketentuan pasal 3 UU Arbitrase 1999 yang mengatur bahwa pengadilan negeri tidak berwenang untuk mengadili sengketa para pihak yang telah terikat dalam perjanjian arbitrase.

Ketegasan tersebut diperkuat oleh ketentuan pasal 11 UU Arbitrase 1999 yang secara lengkap mengatur sebagai berikut :

1. Adanya perjanjian arbitrase tertulis meniadakan hak para pihak untuk mengajukan penyelesaian sengketa atau beda pendapat yang termuat dalam perjanjiannya ke Pengadilan Negeri;
2. Pengadilan Negeri wajib menolak dan tidak akan campur tangan didalam suatu penyelesaian sengketa yang telah ditetapkan melalui arbitrase, kecuali dalam hal-hal tertentu yang ditetapkan dalam Undang-Undang ini.

Dalam hal demikian perjanjian arbitrase dapat dipahami sebagai suatu kontrak. Perjanjian itu dapat melekat pada suatu kontrak, yang dalam hal ini adalah kontrak konstruksi, dan dapat juga dibuat secara terpisah dari kontrak yang lainnya. Jika dibuat secara terpisah, baik sebelum atau sesudah terjadi sengketa, maka batalnya kontrak konstruksi tidak mengakibatkan batalnya perjanjian arbitrase. Sebaliknya, klausula arbitrase dapat dipahami sebagai kesepakatan untuk menyelesaikan sengketa yang akan terjadi melalui arbitrase yang turut dimuat dalam kontrak konstruksi. Klausula arbitrase dapat berbentuk perjanjian yang abstrak untuk melaksanakan arbitrase, dan dapat pula bersifat lebih komprehensif yang memuat syarat-syarat arbitrase. Secara garis besar klausula-klausula arbitrase yang baku dapat memuat : Kesepakatan para pihak untuk melaksanakan arbitrase jika terjadi

“Setiap perselisihan sengketa atau tuntutan apapun yang terjadi dalam pelaksanaan atau yang diberkenaan dengan perjanjian ini, akan diselesaikan melalui arbitrase yang dilaksanakan di..... dengan ketentuan dan prosedur Badan Arbitrase Nasional Indonesia (BANI)”.

c. Penetapan lembaga arbitrase.

Telah dikemukakan bahwa klausula arbitrase merupakan aspek yang sangat essensial untuk menentukan kelangsungan arbitrase dan cara-cara pelaksanaannya. Oleh sebab itu, dalam setiap klausula arbitrase sedapat mungkin harus ditentukan secara tegas dan jelas mengenai lembaga arbitrase yang akan melangsungkan pemeriksaan sengketa. Dalam hal itu ada dua alternatif lembaga arbitrase yang dapat digunakan yaitu arbitrase ad hoc dan arbitrase institusi.

Arbitrase ad hoc, merupakan lembaga arbitrase yang dibentuk atas dasar inisiatif dan persetujuan dari para pihak yang bersengketa. Penyelesaian sengketa melauai arbitrase ad hoc, kalusula arbitrasenya dirumuskan secara umum. Pada prakteknya, penyelesaian dengan arbitrase ad hoc kurang efisien, karena mengacu bahwa penyelenggaraan arbitrase ad hoc harus didasari persetujuan para pihak, syarat persetujuan itu umumnya sering terjadi perbedaan kehendak dari para pihak, sehingga syarat umum tersebut sering berbeda satu dengan lainnya. Contoh sederhana untuk merumuskan klausula arbitrase dengan lembaga arbitrase ad hoc adalah :

“Setiap perselisihan, sengketa atau tuntutan apapun yang terjadi dalam pelaksanaan atau yang berkenaan dengan perjanjian ini, akan diselesaikan melalui arbitrase berdasarkan peraturan perundang-undangan tenatng arbitrase yang berlaku.”

Arbitrase institusi, adalah arbitrase yang diselenggarakan oleh suatu lembaga atau organisasi tertentu yang didirikan dan mempunyai aturan prosedural tersendiri dalam melaksanakan arbitrase. Apabila para pihak ingin menentukan lembaga dan aturan prosedur yang akan digunakan arbitrase untuk menyelesaikan sengketa, maka contoh sederhana klausula yang dapat dimuat dalam kontrak konstruksi adalah sebagai berikut :

"All dispute arising in connection with the present contract shall be finally settled under the rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC) in..... by one or more arbitrators appointed in accordance with the said rules"

Jika ingin menggunakan institusi Badan Arbitrase Nasional Indonesia (BANI) dalam kontrak konstruksi maka dapat dirumuskan suatu klausula :

"Semua sengketa yang timbul dari kontrak konstruksi ini akan diselesaikan dan diputus oleh Badan Arbitrase Nasional Indonesia (BANI) menurut peraturan-peraturan prosedur arbitrase BANI yang keputusannya mengikat kedua belah pihak yang bersengketa sebagai keputusan dalam tingkat pertama dan terakhir".

Sehubungan dengan pelaksanaan arbitrase institusi dapat juga disebutkan mengenai adanya kemungkinan perumusan klausula yang variatif dalam kontrak. Klausula memuat pilihan suatu institusi yang memeriksa sengketa, namun menggunakan aturan prosedur dari institusi atau peraturan perundang-undangan arbitrase lain yang berlaku. Klausula variatif tersebut misalnya;

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be settled by arbitration in accordance with the UNICITRAL Arbitration Rules as at the present in force. The appointing authority shall be the ICC in accordance with the rules adopted by the ICC for this purpose".

#### d. Kelemahan UU Arbitrase 1999

UU Arbitrase 1999 sebenarnya masih jauh dari kesempurnaan, dimana masih banyak dijumpai kelemahan-kelemahan. Kelemahan-kelemahan tersebut tampak dari ketidak konsistensian antara pasal-pasal yang terdapat dalam UU Arbitrase 1999 tersebut, mengenai klausula arbitrase, dimana para pihak hanya diberikan pilihan mencantumkan domisili hukum atau arbitrase, tetapi untuk kemudian apabila melalui arbitrase gagal dilakukan maka ada ketentuan para pihak dapat mengajukan sengketa ke pengadilan. Sehingga lembaga arbitrase belum mempunyai eksistensi terhadap penyelesaian suatu sengketa, karena bagaimanapun juga penyelesaian melalui arbitrase pada akhirnya masih saja berujung kepada penyelesaian melalui pengadilan.

Disamping itu masalah prosedural dimana sesuai dengan azasnya penyelesaian sengketa melalui arbitrase adalah lebih efektif daripada penyelesaian melalui pengadilan. Dalam praktek, penyelesaian melalui arbitrase memerlukan prosedural yang rumit, para pihak harus menunjuk arbiternya sendiri hal ini dapat menimbulkan banyak permasalahan misalnya mengenai ketidak obyektifan seorang arbiter sehingga justru akan terjadi "permainan kotor" didalamnya, disamping itu juga prosedural penunjukan arbiter yang melibatkan pengadilan, dimana apabila salah satu pihak tidak dapat menunjuk arbiternya maka Ketua Pengadilan Negeri diberikan kewenangan untuk melakukan penunjukan. Hal ini tampak bahwa arbitrase sebenarnya bukan lembaga yang mandiri dari campur tangan pengadilan. Demikian pula masalah eksekusi putusan arbitrase yang harus

melalui penetapan oleh Ketua Pengadilan Negeri. Dalam hal putusan arbitrase internasional, kewenangan untuk mengakui dan melaksanakan berada pada Pengadilan Negeri Jakarta Pusat. Disini berarti Pengadilan berwenang untuk menolak maupun menerima putusan arbitrase tersebut. Hal ini bertolak belakang dengan ketentuan yang putusan arbitrase adalah final dan mempunyai kekuatan hukum tetap dan mengikat para pihak. Dari hal-hal tersebut diatas maka tampak bahwa keberadaan arbitrase menurut UU Arbitrase 1999 belum sepenuhnya menjamin penyelesaian sengketa seperti yang diharapkan yaitu win-win solution. Karena baik dari segi prosedural yang berbelit-belit, membutuhkan jangka waktu yang lama, keterlibatan pihak-pihak yang rumit, campur tangan pengadilan, dan disamping itu juga putusan arbitrase belum menjamin penyelesaian yang baik karena putusan arbitrase bersifat final, mempunyai kekuatan hukum tetap dan mengikat para pihak bertentangan dengan ketentuan bahwa terhadap putusan arbitrase dapat dilakukan pembatalan. Keberadaan arbitrase melalui UU Arbitrase 1999 sebetulnya adalah hal yang sia-sia, tidak efektif dan efisien seperti yang diharapkan dan tidak tepat apabila arbitrase adalah lembaga diluar pengadilan, karena apapun bentuknya arbitrase tidak luput dari campur tangan dan keterlibatan pengadilan, baik dalam penunjukan arbiter, pengajuan hak ingkar atas penunjukan arbiternya dan pelaksanaan putusan arbitrase, kesemuanya secara prosedur harus melewati pengadilan.

Disamping itu asas kerahasiaan yang ada dalam arbitrase tidak dapat terealisasi secara konkret. Hal ini dapat dipastikan kemungkinan karena pihak-



pihak yang terlibat misalnya para arbiternya, kemungkinan pihak ketiga diluar kontrak untuk turut serta dan menggabungkan diri dalam proses arbitrase tersebut. Sehingga secara prosedural arbitrase ini dapat disamakan dengan proses penyelesaian sengketa melalui pengadilan. Kemungkinan yang terjadi mengapa para pelaku industri konstruksi enggan memakai lembaga arbitrase untuk menyelesaikan sengketanya adalah selain kurangnya informasi juga pengalaman prosedural yang berbelit-belit (rumit), dan justru membutuhkan waktu yang cukup lama dengan biaya tinggi (karena keterlibatan pihak-pihak arbiter secara privat), sehingga dari hal-hal tersebut dapat dirasakan kurang menguntungkan sementara sengketa konstruksi membutuhkan penyelesaian yang relatif cepat dan tepat berkaitan dengan sifat dan karakteristik proyek konstruksi yang rumit, sehingga apabila terlalu lama terlarut dalam penyelesaian sengketa, maka proyek konstruksi akan tertunda dan terbengkalai, hal ini justru menimbulkan kerugian besar bagi para pihak.

## **BAB IV**

### **PENUTUP**

#### **4.1. Kesimpulan**

Dari uraian-uraian dalam penulisan hukum tersebut, maka dapat diambil kesimpulan sebagai berikut :

- a. Keberadaan UU Jasa Konstruksi beserta Peraturan Pemerintah yang berkaitan dengan Jasa Konstruksi, sebenarnya telah cukup menjadi media dalam mewujudkan suatu kontrak konstruksi berdasarkan kesetaraan, akan tetapi dalam hal realisasinya masih banyak kendala-kendala dan kelemahan-kelemahan yang terjadi akibat ketidak konsistenan para pihak. Sampai dengan saat keluarnya Peraturan Perundang-undangan yang mengatur usaha jasa konstruksi kontrak konstruksi di Indonesia jauh dari cerminan kesetaraan karena tidak ada acuan yang baku (secara hukum), kontraktor hampir selalu berada dalam kedudukan yang dirugikan. Setelah adanya Peraturan Perundang-undangan yang mengatur Jasa Konstruksi tersebut dan akan diikuti dengan Peraturan lainnya, terlepas dari sempurna tidaknya peraturan tersebut, kita boleh berharap dimasa mendatang kontrak konstruksi yang adil dan setara benar-benar dapat terwujud sehingga kondisi dunia konstruksi menjadi lebih ideal. Namun demikian berhasil tidaknya kita mendapatkan suatu kontrak konstruksi yang adil dan

setara berpulang semata kepada itikad baik serta kemauan dari para industri konstruksi itu sendiri.

- b. Media penyelesaian sengketa yang terdapat dalam klausula kontrak konstruksi berdasarkan kesetaraan sesuai UU Jasa Konstruksi dan PP yang terkait belum dapat direalisasikan, karena Peraturan Perundang-undangan sebagai acuannya yaitu UU Arbitrase 1999 masih mengalami kerancuan dan belum memberikan kepastian hukum, oleh karena itu upaya dalam menyelesaikan sengketa konstruksi yang paling ideal hingga saat ini adalah negosiasi diantara para pihak dan apabila hal itu tidak berhasil maka sengketa tersebut tetap akan menjadi sengketa yang tidak ada jalan penyelesaiannya.

#### **4.2. Saran**

Dengan adanya permasalahan-permasalahan hukum berkaitan dengan kontrak konstruksi yang adil dan setara maka saran yang dapat diberikan adalah :

- a. Perlu adanya suatu klausula standart yang diatur dalam Undang-Undang tetapi fleksibel agar dapat digunakan sebagai bahan acuan bagi kontrak konstruksi pada proyek yang berbeda karakteristiknya. Klausula baku tersebut adalah klausula primer yang harusnya termuat dalam suatu kontrak konstruksi untuk segala karakteristik proyek yang dapat mencerminkan kesetaraan para pihaknya. Misalnya mengenai kedudukan para pihak, hak dan kewajiban yang seimbang, tanggung jawab para pihak terhadap resiko

dan kendala selama implementasi, penyelesaian sengketa dan sebagainya. Fleksibel artinya para pihak boleh menentukan klausula diluar klausula primer sesuai dengan karakteristik proyek. Sehingga kontrak konstruksi dapat diterapkan secara tepat. Hal-hal yang fleksibel misalnya tentang spesifikasi pekerjaan, sistem pembayaran dan sebagainya. Sebelum perumusan kontrak hendaknya para pihak lebih jeli dan teliti mengenai spesifikasi pekerjaan dan karakteristik proyek, hal ini perlu dilakukan untuk meminimalisasi kendala yang akan terjadi selama implementasi proyek.

- b. UU Arbitrase 1999 perlu segera direvisi, agar kontrak konstruksi berdasarkan kesetaraan dapat segera terealisasikan dengan keberadaan lembaga arbitrase yang sifatnya mandiri terlepas dari badan peradilan. Sesuai dengan jiwa dan tujuan arbitrase sebagai alternatif penyelesaian sengketa diluar pengadilan dengan azas win-win solution , efisien, efektif dengan prosedur yang sederhana dan biaya yang murah. Mengenai pilihan hukum, untuk mencantumkan domisili hukum atau arbitrase dalam klausula kontrak konstruksi, maka hendaknya para pihak konsekuen sesuai yang tertuang dalam kontrak. Hal ini untuk memberikan kepastian hukum. Sehingga dari segi pengaturan dalam UU Arbitrase 1999 perlu dibenahi agar tidak memberi kerancuan hukum dan keberlakuannya dapat dimanfaatkan oleh pelaku industri konstruksi dalam memberi solusi terbaik apabila terjadi sengketa konstruksi.

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These General Conditions have been prepared for use with the Owner-Contractor Agreements (No. 1910-8-A-1 or 1910-8-A-2, 1983 editions). Their provisions are interrelated and a change in one may necessitate a change in the others. Comments concerning their usage are contained in the Commentary on Agreements for Engineering Services and Contract Documents, No. 1910-9, 1981 edition. For guidance in the preparation of Supplementary Conditions, see Guide to the Preparation of Supplementary Conditions (No. 1910-17, 1983 edition). When bidding is involved, the Standard Form of Instructions to Bidders (No. 1910-12, 1983 edition) may be used.



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1420 King Street, Alexandria, VA 22314

American Consulting Engineers Council  
1015 15th Street, N.W., Washington, D.C. 20005

American Society of Civil Engineers  
345 East 47th Street, New York, NY 10017

Construction Specifications Institute  
601 Madison St., Alexandria, VA 22314

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## GENERAL CONDITIONS

### ARTICLE I—DEFINITIONS

Wherever used in these General Conditions or in the other Contract Documents the following terms have the meanings indicated which are applicable to both the singular and plural thereof:

**Addenda**—Written or graphic instruments issued prior to the opening of Bids which clarify, correct or change the bidding documents or the Contract Documents.

**Agreement**—The written agreement between OWNER and CONTRACTOR covering the Work to be performed; other Contract Documents are attached to the Agreement and made a part thereof as provided therein.

**Application for Payment**—The form accepted by ENGINEER which is to be used by CONTRACTOR in requesting progress or final payments and which is to include such supporting documentation as is required by the Contract Documents.

**Bid**—The offer or proposal of the bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

**Bonds**—Bid, performance and payment bonds and other instruments of security.

**Change Order**—A document recommended by ENGINEER, which is signed by CONTRACTOR and OWNER and authorizes an addition, deletion or revision in the Work, or an adjustment in the Contract Price or the Contract Time, issued on or after the Effective Date of the Agreement.

**Contract Documents**—The Agreement, Addenda (which pertain to the Contract Documents), CONTRACTOR'S Bid (including documentation accompanying the Bid and any post-Bid documentation submitted prior to the Notice of Award) when attached as an exhibit to the Agreement, the Bonds, these General Conditions, the Supplementary Conditions, the Specifications and the Drawings as the same are more specifically identified in the Agreement, together with all amendments, modifications and supplements issued pursuant to paragraphs 3.4 and 3.5 on or after the Effective Date of the Agreement.

**Contract Price**—The moneys payable by OWNER to CONTRACTOR under the Contract Documents as stated in the Agreement (subject to the provisions of paragraph 11.9.1 in the case of Unit Price Work).

**Contract Time**—The number of days (computed as provided in paragraph 17.2) or the date stated in the Agreement for the completion of the Work.

**CONTRACTOR**—The person, firm or corporation with whom OWNER has entered into the Agreement.

**defective**—An adjective which when modifying the word Work refers to Work that is unsatisfactory, faulty or deficient, or does not conform to the Contract Documents, or does not meet the requirements of any inspection, reference standard, test or approval referred to in the Contract Documents, or has been damaged prior to ENGINEER'S recommendation of final payment (unless responsibility for the protection thereof has been assumed by OWNER at Substantial Completion in accordance with paragraph 14.8 or 14.10).

**Drawings**—The drawings which show the character and scope of the Work to be performed and which have been prepared or approved by ENGINEER and are referred to in the Contract Documents.

**Effective Date of the Agreement**—The date indicated in the Agreement on which it becomes effective, but if no such date is indicated it means the date on which the Agreement is signed and delivered by the last of the two parties to sign and deliver.

**ENGINEER**—The person, firm or corporation named as such in the Agreement.

**Field Order**—A written order issued by ENGINEER which orders minor changes in the Work in accordance with paragraph 9.5 but which does not involve a change in the Contract Price or the Contract Time.

**General Requirements**—Sections of Division I of the Specifications.

**Laws and Regulations; Laws or Regulations**—Laws, rules, regulations, ordinances, codes and/or orders.

**Notice of Award**—The written notice by OWNER to the apparent successful bidder stating that upon compliance by the apparent successful bidder with the conditions precedent enumerated therein, within the time specified, OWNER will sign and deliver the Agreement.

**Notice to Proceed**—A written notice given by OWNER to CONTRACTOR (with a copy to ENGINEER) fixing the date on which the Contract Time will commence to run and on which CONTRACTOR shall start to perform CONTRACTOR'S obligations under the Contract Documents.

**OWNER**—The public body or authority, corporation, association, firm or person with whom CONTRACTOR has entered into the Agreement and for whom the Work is to be provided.

**Partial Utilization**—Placing a portion of the Work in service for the purpose for which it is intended (or a related purpose) before reaching Substantial Completion for all the Work.

**Project**—The total construction of which the Work to be provided under the Contract Documents may be the whole, or a part as indicated elsewhere in the Contract Documents.

**Resident Project Representative**—The authorized representative of ENGINEER who is assigned to the site or any part thereof.

**Shop Drawings**—All drawings, diagrams, illustrations, schedules and other data which are specifically prepared by or for CONTRACTOR to illustrate some portion of the Work and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams and other information prepared by a Supplier and submitted by CONTRACTOR to illustrate material or equipment for some portion of the Work.

**Specifications**—Those portions of the Contract Documents consisting of written technical descriptions of materials, equipment, construction systems, standards and workmanship as applied to the Work and certain administrative details applicable thereto.

**Subcontractor**—An individual, firm or corporation having a direct contract with CONTRACTOR or with any other Subcontractor for the performance of a part of the Work at the site.

**Substantial Completion**—The Work (or a specified part thereof) has progressed to the point where, in the opinion of ENGINEER as evidenced by ENGINEER's definitive certificate of Substantial Completion, it is sufficiently complete, in accordance with the Contract Documents, so that the Work (or specified part) can be utilized for the purposes for which it is intended; or if there be no such certificate issued, when final payment is due in accordance with paragraph 14.13. The terms "substantially complete" and "substantially completed" as applied to any Work refer to Substantial Completion thereof.

**Supplementary Conditions**—The part of the Contract Documents which amends or supplements these General Conditions.

**Supplier**—A manufacturer, fabricator, supplier, distributor, materialman or vendor.

**Underground Facilities**—All pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels or other such facilities or attachments, and any encasements containing such facilities which have been installed underground to furnish any of the following services or materials: electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television, sewage and drainage removal, traffic or other control systems or water.

**Unit Price Work**—Work to be paid for on the basis of unit prices.

**Work**—The entire completed construction or the various separately identifiable parts thereof required to be furnished under the Contract Documents. Work is the result of performing services, furnishing labor and furnishing and incorporating materials and equipment into the construction, all as required by the Contract Documents.

**Work Directive Change**—A written directive to CONTRACTOR, issued on or after the Effective Date of the Agreement and signed by OWNER and recommended by ENGINEER,

ordering an addition, deletion or revision in the Work, or responding to differing or unforeseen physical conditions under which the Work is to be performed as provided in paragraph 4.2 or 4.3 or to emergencies under paragraph 6.22. A Work Directive Change may not change the Contract Price or the Contract Time, but is evidence that the parties expect that the change directed or documented by a Work Directive Change will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Time as provided in paragraph 10.2.

**Written Amendment**—A written amendment of the Contract Documents, signed by OWNER and CONTRACTOR on or after the Effective Date of the Agreement and normally dealing with the nonengineering or nontechnical rather than strictly Work-related aspects of the Contract Documents:

## ARTICLE 2—PRELIMINARY MATTERS

### *Delivery of Bonds:*

2.1. When CONTRACTOR delivers the executed Agreements to OWNER, CONTRACTOR shall also deliver to OWNER such Bonds as CONTRACTOR may be required to furnish in accordance with paragraph 5.1.

### *Copies of Documents:*

2.2. OWNER shall furnish to CONTRACTOR up to ten copies (unless otherwise specified in the Supplementary Conditions) of the Contract Documents as are reasonably necessary for the execution of the Work. Additional copies will be furnished, upon request, at the cost of reproduction.

### *Commencement of Contract Time; Notice to Proceed:*

2.3. The Contract Time will commence to run on the thirtieth day after the Effective Date of the Agreement, or, if a Notice to Proceed is given, on the day indicated in the Notice to Proceed. A Notice to Proceed may be given at any time within thirty days after the Effective Date of the Agreement. In no event will the Contract Time commence to run later than the seventy-fifth day after the day of Bid opening or the thirtieth day after the Effective Date of the Agreement, whichever date is earlier.

### *Starting the Project:*

2.4. CONTRACTOR shall start to perform the Work on the date when the Contract Time commences to run, but no Work shall be done at the site prior to the date on which the Contract Time commences to run.

### *Before Starting Construction:*

2.5. Before undertaking each part of the Work, CONTRACTOR shall carefully study and compare the Contract Documents and check and verify pertinent figures shown

thereon and all applicable field measurements. CONTRACTOR shall promptly report in writing to ENGINEER any conflict, error or discrepancy which CONTRACTOR may discover and shall obtain a written interpretation or clarification from ENGINEER before proceeding with any Work affected thereby; however, CONTRACTOR shall not be liable to OWNER or ENGINEER for failure to report any conflict, error or discrepancy in the Contract Documents, unless CONTRACTOR had actual knowledge thereof or should reasonably have known thereof.

2.6. Within ten days after the Effective Date of the Agreement (unless otherwise specified in the General Requirements), CONTRACTOR shall submit to ENGINEER for review:

2.6.1. an estimated progress schedule indicating the starting and completion dates of the various stages of the Work;

2.6.2. a preliminary schedule of Shop Drawing submissions; and

2.6.3. a preliminary schedule of values for all of the Work which will include quantities and prices of items aggregating the Contract Price and will subdivide the Work into component parts in sufficient detail to serve as the basis for progress payments during construction. Such prices will include an appropriate amount of overhead and profit applicable to each item of Work which will be confirmed in writing by CONTRACTOR at the time of submission.

2.7. Before any Work at the site is started, CONTRACTOR shall deliver to OWNER, with a copy to ENGINEER, certificates (and other evidence of insurance requested by OWNER) which CONTRACTOR is required to purchase and maintain in accordance with paragraphs 5.3 and 5.4, and OWNER shall deliver to CONTRACTOR certificates (and other evidence of insurance requested by CONTRACTOR) which OWNER is required to purchase and maintain in accordance with paragraphs 5.6 and 5.7.

#### *Preconstruction Conference:*

2.8. Within twenty days after the Effective Date of the Agreement, but before CONTRACTOR starts the Work at the site, a conference attended by CONTRACTOR, ENGINEER and others as appropriate will be held to discuss the schedules referred to in paragraph 2.6, to discuss procedures for handling Shop Drawings and other submittals and for processing Applications for Payment, and to establish a working understanding among the parties as to the Work.

#### *Finalizing Schedules:*

2.9. At least ten days before submission of the first Application for Payment a conference attended by CONTRACTOR, ENGINEER and others as appropriate will be held to finalize the schedules submitted in accordance with para-

graph 2.6. The finalized progress schedule will be acceptable to ENGINEER as providing an orderly progression of the Work to completion within the Contract Time, but such acceptance will neither impose on ENGINEER responsibility for the progress or scheduling of the Work nor relieve CONTRACTOR from full responsibility therefor. The finalized schedule of Shop Drawing submissions will be acceptable to ENGINEER as providing a workable arrangement for processing the submissions. The finalized schedule of values will be acceptable to ENGINEER as to form and substance.

### ARTICLE 3—CONTRACT DOCUMENTS: INTENT, AMENDING, REUSE

#### *Intent:*

3.1. The Contract Documents comprise the entire agreement between OWNER and CONTRACTOR concerning the Work. The Contract Documents are complementary; what is called for by one is as binding as if called for by all. The Contract Documents will be construed in accordance with the law of the place of the Project.

3.2. It is the intent of the Contract Documents to describe a functionally complete Project (or part thereof) to be constructed in accordance with the Contract Documents. Any Work, materials or equipment that may reasonably be inferred from the Contract Documents as being required to produce the intended result will be supplied whether or not specifically called for. When words which have a well-known technical or trade meaning are used to describe Work, materials or equipment such words shall be interpreted in accordance with that meaning. Reference to standard specifications, manuals or codes of any technical society, organization or association, or to the Laws or Regulations of any governmental authority, whether such reference be specific or by implication, shall mean the latest standard specification, manual, code or Laws or Regulations in effect at the time of opening of Bids (or, on the Effective Date of the Agreement if there were no Bids), except as may be otherwise specifically stated. However, no provision of any referenced standard specification, manual or code (whether or not specifically incorporated by reference in the Contract Documents) shall be effective to change the duties and responsibilities of OWNER, CONTRACTOR or ENGINEER, or any of their consultants, agents or employees from those set forth in the Contract Documents, nor shall it be effective to assign to ENGINEER, or any of ENGINEER's consultants, agents or employees, any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of paragraph 9.15 or 9.16. Clarifications and interpretations of the Contract Documents shall be issued by ENGINEER as provided in paragraph 9.4.

3.3. If, during the performance of the Work, CONTRACTOR finds a conflict, error or discrepancy in the Contract Documents, CONTRACTOR shall so report to ENGINEER in writing at once and before proceeding with the Work affected thereby shall obtain a written interpretation or clarification



from ENGINEER; however, CONTRACTOR shall not be liable to OWNER or ENGINEER for failure to report any conflict, error or discrepancy in the Contract Documents unless CONTRACTOR had actual knowledge thereof or should reasonably have known thereof.

*Amending and Supplementing Contract Documents:*

3.4. The Contract Documents may be amended to provide for additions, deletions and revisions in the Work or to modify the terms and conditions thereof in one or more of the following ways:

- 3.4.1. a formal Written Amendment,
- 3.4.2. a Change Order (pursuant to paragraph 10.4), or
- 3.4.3. a Work Directive Change (pursuant to paragraph 10.1).

As indicated in paragraphs 11.2 and 12.1, Contract Price and Contract Time may only be changed by a Change Order or a Written Amendment.

3.5. In addition, the requirements of the Contract Documents may be supplemented, and minor variations and deviations in the Work may be authorized, in one or more of the following ways:

- 3.5.1. a Field Order (pursuant to paragraph 9.5),
- 3.5.2. ENGINEER's approval of a Shop Drawing or sample (pursuant to paragraphs 6.26 and 6.27), or
- 3.5.3. ENGINEER's written interpretation or clarification (pursuant to paragraph 9.4).

*Reuse of Documents:*

3.6. Neither CONTRACTOR nor any Subcontractor or Supplier or other person or organization performing or furnishing any of the Work under a direct or indirect contract with OWNER shall have or acquire any title to or ownership rights in any of the Drawings, Specifications or other documents (or copies of any thereof) prepared by or bearing the seal of ENGINEER; and they shall not reuse any of them on extensions of the Project or any other project without written consent of OWNER and ENGINEER and specific written verification or adaptation by ENGINEER.

**ARTICLE 4—AVAILABILITY OF LANDS; PHYSICAL CONDITIONS; REFERENCE POINTS**

*Availability of Lands:*

4.1. OWNER shall furnish, as indicated in the Contract Documents, the lands upon which the Work is to be performed, rights-of-way and easements for access thereto, and

such other lands which are designated for the use of CONTRACTOR. Easements for permanent structures or permanent changes in existing facilities will be obtained and paid for by OWNER, unless otherwise provided in the Contract Documents. If CONTRACTOR believes that any delay in OWNER's furnishing these lands, rights-of-way or easements entitles CONTRACTOR to an extension of the Contract Time, CONTRACTOR may make a claim therefor as provided in Article 12. CONTRACTOR shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

*Physical Conditions:*

4.2.1. *Explorations and Reports:* Reference is made to the Supplementary Conditions for identification of those reports of explorations and tests of subsurface conditions at the site that have been utilized by ENGINEER in preparation of the Contract Documents. CONTRACTOR may rely upon the accuracy of the technical data contained in such reports, but not upon nontechnical data, interpretations or opinions contained therein or for the completeness thereof for CONTRACTOR's purposes. Except as indicated in the immediately preceding sentence and in paragraph 4.2.6, CONTRACTOR shall have full responsibility with respect to subsurface conditions at the site.

4.2.2. *Existing Structures:* Reference is made to the Supplementary Conditions for identification of those drawings of physical conditions in or relating to existing surface and subsurface structures (except Underground Facilities referred to in paragraph 4.3) which are at or contiguous to the site that have been utilized by ENGINEER in preparation of the Contract Documents. CONTRACTOR may rely upon the accuracy of the technical data contained in such drawings, but not for the completeness thereof for CONTRACTOR's purposes. Except as indicated in the immediately preceding sentence and in paragraph 4.2.6, CONTRACTOR shall have full responsibility with respect to physical conditions in or relating to such structures.

4.2.3. *Report of Differing Conditions:* If CONTRACTOR believes that:

4.2.3.1. any technical data on which CONTRACTOR is entitled to rely as provided in paragraphs 4.2.1 and 4.2.2 is inaccurate, or

4.2.3.2. any physical condition uncovered or revealed at the site differs materially from that indicated, reflected or referred to in the Contract Documents,

CONTRACTOR shall, promptly after becoming aware thereof and before performing any Work in connection therewith (except in an emergency as permitted by paragraph 6.22), notify OWNER and ENGINEER in writing about the inaccuracy or difference.

4.2.4. *ENGINEER's Review:* ENGINEER will promptly review the pertinent conditions, determine the necessity of obtaining additional explorations or tests with respect thereto and advise OWNER in writing (with a copy to CONTRACTOR) of ENGINEER's findings and conclusions.

4.2.5. *Possible Document Change:* If ENGINEER concludes that there is a material error in the Contract Documents or that because of newly discovered conditions a change in the Contract Documents is required, a Work Directive Change or a Change Order will be issued as provided in Article 10 to reflect and document the consequences of the inaccuracy or difference.

4.2.6. *Possible Price and Time Adjustments:* In each such case, an increase or decrease in the Contract Price or an extension or shortening of the Contract Time, or any combination thereof, will be allowable to the extent that they are attributable to any such inaccuracy or difference. If OWNER and CONTRACTOR are unable to agree as to the amount or length thereof, a claim may be made therefor as provided in Articles 11 and 12.

#### *Physical Conditions—Underground Facilities:*

4.3.1. *Shown or Indicated:* The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the site is based on information and data furnished to OWNER or ENGINEER by the owners of such Underground Facilities or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

4.3.1.1. OWNER and ENGINEER shall not be responsible for the accuracy or completeness of any such information or data; and,

4.3.1.2. CONTRACTOR shall have full responsibility for reviewing and checking all such information and data, for locating all Underground Facilities shown or indicated in the Contract Documents, for coordination of the Work with the owners of such Underground Facilities during construction, for the safety and protection thereof as provided in paragraph 6.20 and repairing any damage thereto resulting from the Work, the cost of all of which will be considered as having been included in the Contract Price.

4.3.2. *Not Shown or Indicated.* If an Underground Facility is uncovered or revealed at or contiguous to the site which was not shown or indicated in the Contract Documents and which CONTRACTOR could not reasonably have been expected to be aware of, CONTRACTOR shall, promptly after becoming aware thereof and before performing any Work affected thereby (except in an emergency as permitted by paragraph 6.22), identify the owner of such Underground Facility and give written notice thereof to that owner and to OWNER and ENGINEER. ENGINEER will promptly review the Underground Facility to

determine the extent to which the Contract Documents should be modified to reflect and document the consequences of the existence of the Underground Facility, and the Contract Documents will be amended or supplemented to the extent necessary. During such time, CONTRACTOR shall be responsible for the safety and protection of such Underground Facility as provided in paragraph 6.20. CONTRACTOR shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, to the extent that they are attributable to the existence of any Underground Facility that was not shown or indicated in the Contract Documents and which CONTRACTOR could not reasonably have been expected to be aware of. If the parties are unable to agree as to the amount or length thereof, CONTRACTOR may make a claim therefor as provided in Articles 11 and 12.

#### *Reference Points:*

4.4. OWNER shall provide engineering surveys to establish reference points for construction which in ENGINEER's judgment are necessary to enable CONTRACTOR to proceed with the Work. CONTRACTOR shall be responsible for laying out the Work (unless otherwise specified in the General Requirements), shall protect and preserve the established reference points and shall make no changes or relocations without the prior written approval of OWNER. CONTRACTOR shall report to ENGINEER whenever any reference point is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points by professionally qualified personnel.

## ARTICLE 5—BONDS AND INSURANCE

#### *Performance and Other Bonds:*

5.1. CONTRACTOR shall furnish performance and payment Bonds, each in an amount at least equal to the Contract Price as security for the faithful performance and payment of all CONTRACTOR's obligations under the Contract Documents. These Bonds shall remain in effect at least until one year after the date when final payment becomes due, except as otherwise provided by Law or Regulation or by the Contract Documents. CONTRACTOR shall also furnish such other Bonds as are required by the Supplementary Conditions. All Bonds shall be in the forms prescribed by Law or Regulation or by the Contract Documents and be executed by such sureties as are named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570 (amended) by the Audit Staff Bureau of Accounts, U.S. Treasury Department. All Bonds signed by an agent must be accompanied by a certified copy of the authority to act.

5.2. If the surety on any Bond furnished by CONTRACTOR is declared a bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of

the Project is located or it ceases to meet the requirements of paragraph 5.1. CONTRACTOR shall within five days thereafter substitute another Bond and Surety, both of which must be acceptable to OWNER.

*Contractor's Liability Insurance:*

5.3. CONTRACTOR shall purchase and maintain such comprehensive general liability and other insurance as is appropriate for the Work being performed and furnished and as will provide protection from claims set forth below which may arise out of or result from CONTRACTOR's performance and furnishing of the Work and CONTRACTOR's other obligations under the Contract Documents, whether it is to be performed or furnished by CONTRACTOR, by any Subcontractor, by anyone directly or indirectly employed by any of them to perform or furnish any of the Work, or by anyone for whose acts any of them may be liable:

5.3.1. Claims under workers' or workmen's compensation, disability benefits and other similar employee benefit acts;

5.3.2. Claims for damages because of bodily injury, occupational sickness or disease, or death of CONTRACTOR's employees;

5.3.3. Claims for damages because of bodily injury, sickness or disease, or death of any person other than CONTRACTOR's employees;

5.3.4. Claims for damages insured by personal injury liability coverage which are sustained (a) by any person as a result of an offense directly or indirectly related to the employment of such person by CONTRACTOR, or (b) by any other person for any other reason;

5.3.5. Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property wherever located, including loss of use resulting therefrom;

5.3.6. Claims arising out of operation of Laws or Regulations for damages because of bodily injury or death of any person or for damage to property; and

5.3.7. Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

The insurance required by this paragraph 5.3 shall include the specific coverages and be written for not less than the limits of liability and coverages provided in the Supplementary Conditions, or required by law, whichever is greater. The comprehensive general liability insurance shall include completed operations insurance. All of the policies of insurance so required to be purchased and maintained (or the certificates or other evidence thereof) shall contain a provision or endorsement that the coverage afforded will not be cancelled, materially changed or renewal refused until at least

thirty days' prior written notice has been given to OWNER and ENGINEER by certified mail. All such insurance shall remain in effect until final payment and at all times thereafter when CONTRACTOR may be correcting, removing or replacing defective Work in accordance with paragraph 13.12. In addition, CONTRACTOR shall maintain such completed operations insurance for at least two years after final payment and furnish OWNER with evidence of continuation of such insurance at final payment and one year thereafter.

*Contractual Liability Insurance:*

5.4. The comprehensive general liability insurance required by paragraph 5.3 will include contractual liability insurance applicable to CONTRACTOR's obligations under paragraphs 6.30 and 6.31.

*Owner's Liability Insurance:*

5.5. OWNER shall be responsible for purchasing and maintaining OWNER's own liability insurance and, at OWNER's option, may purchase and maintain such insurance as will protect OWNER against claims which may arise from operations under the Contract Documents.

*Property Insurance:*

5.6. Unless otherwise provided in the Supplementary Conditions, OWNER shall purchase and maintain property insurance upon the Work at the site to the full insurable value thereof (subject to such deductible amounts as may be provided in the Supplementary Conditions or required by Laws and Regulations). This insurance shall include the interests of OWNER, CONTRACTOR, Subcontractors, ENGINEER and ENGINEER's consultants in the Work, all of whom shall be listed as insureds or additional insured parties, shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss and damage including theft, vandalism and malicious mischief, collapse and water damage, and such other perils as may be provided in the Supplementary Conditions, and shall include damages, losses and expenses arising out of or resulting from any insured loss or incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers, architects, attorneys and other professionals). If not covered under the "all risk" insurance or otherwise provided in the Supplementary Conditions, CONTRACTOR shall purchase and maintain similar property insurance on portions of the Work stored on and off the site or in transit when such portions of the Work are to be included in an Application for Payment.

5.7. OWNER shall purchase and maintain such boiler and machinery insurance or additional property insurance as may be required by the Supplementary Conditions or Laws and Regulations which will include the interests of OWNER, CONTRACTOR, Subcontractors, ENGINEER AND ENGINEER's consultants in the Work, all of whom shall be listed as insured or additional insured parties.

5.8. All the policies of insurance (or the certificates or other evidence thereof) required to be purchased and maintained by OWNER in accordance with paragraphs 5.6 and 5.7 will contain a provision or endorsement that the coverage afforded will not be cancelled or materially changed or renewal refused until at least thirty days' prior written notice has been given to CONTRACTOR by certified mail and will contain waiver provisions in accordance with paragraph 5.11.2.

5.9. OWNER shall not be responsible for purchasing and maintaining any property insurance to protect the interests of CONTRACTOR, Subcontractors or others in the Work to the extent of any deductible amounts that are provided in the Supplementary Conditions. The risk of loss within the deductible amount, will be borne by CONTRACTOR. Subcontractor or others suffering any such loss and if any of them wishes property insurance coverage within the limits of such amounts, each may purchase and maintain it at the purchaser's own expense.

5.10. If CONTRACTOR requests in writing that other special insurance be included in the property insurance policy, OWNER shall, if possible, include such insurance, and the cost thereof will be charged to CONTRACTOR by appropriate Change Order or Written Amendment. Prior to commencement of the Work at the site, OWNER shall in writing advise CONTRACTOR whether or not such other insurance has been procured by OWNER.

#### *Waiver of Rights:*

5.11.1. OWNER and CONTRACTOR waive all rights against each other for all losses and damages caused by any of the perils covered by the policies of insurance provided in response to paragraphs 5.6 and 5.7 and any other property insurance applicable to the Work, and also waive all such rights against the Subcontractors, ENGINEER, ENGINEER's consultants and all other parties named as insureds in such policies for losses and damages so caused. As required by paragraph 6.11, each subcontract between CONTRACTOR and a Subcontractor will contain similar waiver provisions by the Subcontractor in favor of OWNER, CONTRACTOR, ENGINEER, ENGINEER's consultants and all other parties named as insureds. None of the above waivers shall extend to the rights that any of the insured parties may have to the proceeds of insurance held by OWNER as trustee or otherwise payable under any policy so issued.

5.11.2. OWNER and CONTRACTOR intend that any policies provided in response to paragraphs 5.6 and 5.7 shall protect all of the parties insured and provide primary coverage for all losses and damages caused by the perils covered thereby. Accordingly, all such policies shall contain provisions to the effect that in the event of payment of any loss or damage the insurer will have no rights of recovery against any of the parties named as insureds or additional insureds, and if the insurers require separate waiver forms to be signed by ENGINEER or ENGINEER's consultant OWNER will obtain the same, and if

such waiver forms are required of any Subcontractor, CONTRACTOR will obtain the same.

#### *Receipt and Application of Proceeds:*

5.12. Any insured loss under the policies of insurance required by paragraphs 5.6 and 5.7 will be adjusted with OWNER and made payable to OWNER as trustee for the insureds, as their interests may appear, subject to the requirements of any applicable mortgage clause and of paragraph 5.13. OWNER shall deposit in a separate account any money so received, and shall distribute it in accordance with such agreement as the parties in interest may reach. If no other special agreement is reached the damaged Work shall be repaired or replaced, the moneys so received applied on account thereof and the Work and the cost thereof covered by an appropriate Change Order or Written Amendment.

5.13. OWNER as trustee shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object in writing within fifteen days after the occurrence of loss to OWNER's exercise of this power. If such objection be made, OWNER as trustee shall make settlement with the insurers in accordance with such agreement as the parties in interest may reach. If required in writing by any party in interest, OWNER as trustee shall, upon the occurrence of an insured loss, give bond for the proper performance of such duties.

#### *Acceptance of Insurance:*

5.14. If OWNER has any objection to the coverage afforded by or other provisions of the insurance required to be purchased and maintained by CONTRACTOR in accordance with paragraphs 5.3 and 5.4 on the basis of its not complying with the Contract Documents, OWNER shall notify CONTRACTOR in writing thereof within ten days of the date of delivery of such certificates to OWNER in accordance with paragraph 2.7. If CONTRACTOR has any objection to the coverage afforded by or other provisions of the policies of insurance required to be purchased and maintained by OWNER in accordance with paragraphs 5.6 and 5.7 on the basis of their not complying with the Contract Documents, CONTRACTOR shall notify OWNER in writing thereof within ten days of the date of delivery of such certificates to CONTRACTOR in accordance with paragraph 2.7. OWNER and CONTRACTOR shall each provide to the other such additional information in respect of insurance provided by each as the other may reasonably request. Failure by OWNER or CONTRACTOR to give any such notice of objection within the time provided shall constitute acceptance of such insurance purchased by the other as complying with the Contract Documents.

#### *Partial Utilization—Property Insurance:*

5.15. If OWNER finds it necessary to occupy or use a portion or portions of the Work prior to Substantial Completion of all the Work, such use or occupancy may be accomplished in accordance with paragraph 14.10: provided that no

such use or occupancy shall commence before the insurers providing the property insurance have acknowledged notice thereof and in writing effected the changes in coverage necessitated thereby. The insurers providing the property insurance shall consent by endorsement on the policy or policies, but the property insurance shall not be cancelled or lapse on account of any such partial use or occupancy.

## ARTICLE 6—CONTRACTOR'S RESPONSIBILITIES

### *Supervision and Superintendence:*

6.1. CONTRACTOR shall supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. CONTRACTOR shall be solely responsible for the means, methods, techniques, sequences and procedures of construction, but CONTRACTOR shall not be responsible for the negligence of others in the design or selection of a specific means, method, technique, sequence or procedure of construction which is indicated in and required by the Contract Documents. CONTRACTOR shall be responsible to see that the finished Work complies accurately with the Contract Documents.

6.2. CONTRACTOR shall keep on the Work at all times during its progress a competent resident superintendent, who shall not be replaced without written notice to OWNER and ENGINEER except under extraordinary circumstances. The superintendent will be CONTRACTOR's representative at the site and shall have authority to act on behalf of CONTRACTOR. All communications given to the superintendent shall be as binding as if given to CONTRACTOR.

### *Labor, Materials and Equipment:*

6.3. CONTRACTOR shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. CONTRACTOR shall at all times maintain good discipline and order at the site. Except in connection with the safety or protection of persons or the Work or property at the site or adjacent thereto, and except as otherwise indicated in the Contract Documents, all Work at the site shall be performed during regular working hours, and CONTRACTOR will not permit overtime work or the performance of Work on Saturday, Sunday or any legal holiday without OWNER's written consent given after prior written notice to ENGINEER.

6.4. Unless otherwise specified in the General Requirements, CONTRACTOR shall furnish and assume full responsibility for all materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities and all other facilities and incidentals necessary for the furnishing, performance, testing, start-up and completion of the Work.

6.5. All materials and equipment shall be of good quality and new, except as otherwise provided in the Contract Documents. If required by ENGINEER, CONTRACTOR shall furnish satisfactory evidence (including reports of required tests) as to the kind and quality of materials and equipment. All materials and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned in accordance with the instructions of the applicable Supplier except as otherwise provided in the Contract Documents; but no provision of any such instructions will be effective to assign to ENGINEER, or any of ENGINEER's consultants, agents or employees, any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of paragraph 9.15 or 9.16.

### *Adjusting Progress Schedule:*

6.6. CONTRACTOR shall submit to ENGINEER for acceptance (to the extent indicated in paragraph 2.9) adjustments in the progress schedule to reflect the impact thereon of new developments; these will conform generally to the progress schedule then in effect and additionally will comply with any provisions of the General Requirements applicable thereto.

### *Substitutes or "Or-Equal" Items:*

6.7.1. Whenever materials or equipment are specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier the naming of the item is intended to establish the type, function and quality required. Unless the name is followed by words indicating that no substitution is permitted, materials or equipment of other Suppliers may be accepted by ENGINEER if sufficient information is submitted by CONTRACTOR to allow ENGINEER to determine that the material or equipment proposed is equivalent or equal to that named. The procedure for review by ENGINEER will include the following as supplemented in the General Requirements. Requests for review of substitute items of material and equipment will not be accepted by ENGINEER from anyone other than CONTRACTOR. If CONTRACTOR wishes to furnish or use a substitute item of material or equipment, CONTRACTOR shall make written application to ENGINEER for acceptance thereof, certifying that the proposed substitute will perform adequately the functions and achieve the results called for by the general design, be similar and of equal substance to that specified and be suited to the same use as that specified. The application will state that the evaluation and acceptance of the proposed substitute will not prejudice CONTRACTOR's achievement of Substantial Completion on time, whether or not acceptance of the substitute for use in the Work will require a change in any of the Contract Documents (or in the provisions of any other direct contract with OWNER for work on the Project) to adapt the design to the proposed substitute and whether or not incorporation or use of the substitute in connection with the Work is subject to payment of any license fee or

royalty. All variations of the proposed substitute from that specified will be identified in the application and available maintenance, repair and replacement service will be indicated. The application will also contain an itemized estimate of all costs that will result directly or indirectly from acceptance of such substitute, including costs of redesign and claims of other contractors affected by the resulting change, all of which shall be considered by ENGINEER in evaluating the proposed substitute. ENGINEER may require CONTRACTOR to furnish at CONTRACTOR's expense additional data about the proposed substitute.

6.7.2. If a specific means, method, technique, sequence or procedure of construction is indicated in or required by the Contract Documents, CONTRACTOR may furnish or utilize a substitute means, method, sequence, technique or procedure of construction acceptable to ENGINEER, if CONTRACTOR submits sufficient information to allow ENGINEER to determine that the substitute proposed is equivalent to that indicated or required by the Contract Documents. The procedure for review by ENGINEER will be similar to that provided in paragraph 6.7.1 as applied by ENGINEER and as may be supplemented in the General Requirements.

6.7.3. ENGINEER will be allowed a reasonable time within which to evaluate each proposed substitute. ENGINEER will be the sole judge of acceptability, and no substitute will be ordered, installed or utilized without ENGINEER's prior written acceptance which will be evidenced by either a Change Order or an approved Shop Drawing. OWNER may require CONTRACTOR to furnish at CONTRACTOR's expense a special performance guarantee or other surety with respect to any substitute. ENGINEER will record time required by ENGINEER and ENGINEER's consultants in evaluating substitutions proposed by CONTRACTOR and in making changes in the Contract Documents occasioned thereby. Whether or not ENGINEER accepts a proposed substitute, CONTRACTOR shall reimburse OWNER for the charges of ENGINEER and ENGINEER's consultants for evaluating each proposed substitute.

#### *Concerning Subcontractors, Suppliers and Others:*

6.8.1. CONTRACTOR shall not employ any Subcontractor, Supplier or other person or organization (including those acceptable to OWNER and ENGINEER as indicated in paragraph 6.8.2), whether initially or as a substitute, against whom OWNER or ENGINEER may have reasonable objection. CONTRACTOR shall not be required to employ any Subcontractor, Supplier or other person or organization to furnish or perform any of the Work against whom CONTRACTOR has reasonable objection.

6.8.2. If the Supplementary Conditions require the identity of certain Subcontractors, Suppliers or other persons or organizations (including those who are to furnish the principal items of materials and equipment) to be submitted to OWNER in advance of the specified date prior to the Effective Date of the Agreement for acceptance by

OWNER and ENGINEER and if CONTRACTOR has submitted a list thereof in accordance with the Supplementary Conditions, OWNER's or ENGINEER's acceptance (either in writing or by failing to make written objection thereto by the date indicated for acceptance or objection in the bidding documents or the Contract Documents) of any such Subcontractor, Supplier or other person or organization so identified may be revoked on the basis of reasonable objection after due investigation, in which case CONTRACTOR shall submit an acceptable substitute, the Contract Price will be increased by the difference in the cost occasioned by such substitution and an appropriate Change Order will be issued or Written Amendment signed. No acceptance by OWNER or ENGINEER of any such Subcontractor, Supplier or other person or organization shall constitute a waiver of any right of OWNER or ENGINEER to reject defective Work.

6.9. CONTRACTOR shall be fully responsible to OWNER and ENGINEER for all acts and omissions of the Subcontractors, Suppliers and other persons and organizations performing or furnishing any of the Work under a direct or indirect contract with CONTRACTOR just as CONTRACTOR is responsible for CONTRACTOR's own acts and omissions. Nothing in the Contract Documents shall create any contractual relationship between OWNER or ENGINEER and any such Subcontractor, Supplier or other person or organization, nor shall it create any obligation on the part of OWNER or ENGINEER to pay or to see to the payment of any moneys due any such Subcontractor, Supplier or other person or organization except as may otherwise be required by Laws and Regulations.

6.10. The divisions and sections of the Specifications and the identifications of any Drawings shall not control CONTRACTOR in dividing the Work among Subcontractors or Suppliers or delineating the Work to be performed by any specific trade.

6.11. All Work performed for CONTRACTOR by a Subcontractor will be pursuant to an appropriate agreement between CONTRACTOR and the Subcontractor which specifically binds the Subcontractor to the applicable terms and conditions of the Contract Documents for the benefit of OWNER and ENGINEER and contains waiver provisions as required by paragraph 5.11. CONTRACTOR shall pay each Subcontractor a just share of any insurance moneys received by CONTRACTOR on account of losses under policies issued pursuant to paragraphs 5.6 and 5.7.

#### *Patent Fees and Royalties:*

6.12. CONTRACTOR shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, product or device is specified in the Contract Documents for use in the performance of the Work and if to the actual knowledge of OWNER

or ENGINEER its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by OWNER in the Contract Documents. CONTRACTOR shall indemnify and hold harmless OWNER and ENGINEER and anyone directly or indirectly employed by either of them from and against all claims, damages, losses and expenses (including attorneys' fees and court and arbitration costs) arising out of any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product or device not specified in the Contract Documents, and shall defend all such claims in connection with any alleged infringement of such rights.

**Permits:**

6.13. Unless otherwise provided in the Supplementary Conditions, CONTRACTOR shall obtain and pay for all construction permits and licenses. OWNER shall assist CONTRACTOR, when necessary, in obtaining such permits and licenses. CONTRACTOR shall pay all governmental charges and inspection fees necessary for the prosecution of the Work, which are applicable at the time of opening of Bids, or if there are no Bids on the Effective Date of the Agreement. CONTRACTOR shall pay all charges of utility owners for connections to the Work, and OWNER shall pay all charges of such utility owners for capital costs related thereto such as plant investment fees.

**Laws and Regulations:**

6.14.1. CONTRACTOR shall give all notices and comply with all Laws and Regulations applicable to furnishing and performance of the Work. Except where otherwise expressly required by applicable Laws and Regulations, neither OWNER nor ENGINEER shall be responsible for monitoring CONTRACTOR's compliance with any Laws or Regulations.

6.14.2. If CONTRACTOR observes that the Specifications or Drawings are at variance with any Laws or Regulations, CONTRACTOR shall give ENGINEER prompt written notice thereof, and any necessary changes will be authorized by one of the methods indicated in paragraph 3.4. If CONTRACTOR performs any Work knowing or having reason to know that it is contrary to such Laws or Regulations, and without such notice to ENGINEER, CONTRACTOR shall bear all costs arising therefrom; however, it shall not be CONTRACTOR's primary responsibility to make certain that the Specifications and Drawings are in accordance with such Laws and Regulations.

**Taxes:**

6.15. CONTRACTOR shall pay all sales, consumer, use and other similar taxes required to be paid by CONTRACTOR in accordance with the Laws and Regulations of the

place of the Project which are applicable during the performance of the Work.

**Use of Premises:**

6.16. CONTRACTOR shall confine construction equipment, the storage of materials and equipment and the operations of workers to the Project site and land and areas identified in and permitted by the Contract Documents and other land and areas permitted by Laws and Regulations, rights-of-way, permits and easements, and shall not unreasonably encumber the premises with construction equipment or other materials or equipment. CONTRACTOR shall assume full responsibility for any damage to any such land or area, or to the owner or occupant thereof or of any land or areas contiguous thereto, resulting from the performance of the Work. Should any claim be made against OWNER or ENGINEER by any such owner or occupant because of the performance of the Work, CONTRACTOR shall promptly attempt to settle with such other party by agreement or otherwise resolve the claim by arbitration or at law. CONTRACTOR shall, to the fullest extent permitted by Laws and Regulations, indemnify and hold OWNER and ENGINEER harmless from and against all claims, damages, losses and expenses (including, but not limited to, fees of engineers, architects, attorneys and other professionals and court and arbitration costs) arising directly, indirectly or consequentially out of any action, legal or equitable, brought by any such other party against OWNER or ENGINEER to the extent based on a claim arising out of CONTRACTOR's performance of the Work.

6.17. During the progress of the Work, CONTRACTOR shall keep the premises free from accumulations of waste materials, rubbish and other debris resulting from the Work. At the completion of the Work CONTRACTOR shall remove all waste materials, rubbish and debris from and about the premises as well as all tools, appliances, construction equipment and machinery, and surplus materials, and shall leave the site clean and ready for occupancy by OWNER. CONTRACTOR shall restore to original condition all property not designated for alteration by the Contract Documents.

6.18. CONTRACTOR shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall CONTRACTOR subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

**Record Documents:**

6.19. CONTRACTOR shall maintain in a safe place at the site one record copy of all Drawings, Specifications, Addenda, Written Amendments, Change Orders, Work Directive Changes, Field Orders and written interpretations and clarifications (issued pursuant to paragraph 9.4) in good order and annotated to show all changes made during construction. These record documents together with all approved samples and a counterpart of all approved Shop Drawings will be available to ENGINEER for reference. Upon com-

pletion of the Work, these record documents, samples and Shop Drawings will be delivered to ENGINEER for OWNER.

*Safety and Protection:*

6.20. CONTRACTOR shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. CONTRACTOR shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

6.20.1. all employees on the Work and other persons and organizations who may be affected thereby;

6.20.2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the site; and

6.20.3. other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities and Underground Facilities not designated for removal, relocation or replacement in the course of construction.

CONTRACTOR shall comply with all applicable Laws and Regulations of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss; and shall erect and maintain all necessary safeguards for such safety and protection. CONTRACTOR shall notify owners of adjacent property and of Underground Facilities and utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation and replacement of their property. All damage, injury or loss to any property referred to in paragraph 6.20.2 or 6.20.3 caused, directly or indirectly, in whole or in part, by CONTRACTOR, any Subcontractor, Supplier or any other person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, shall be remedied by CONTRACTOR (except damage or loss attributable to the fault of Drawings or Specifications or to the acts or omissions of OWNER or ENGINEER or anyone employed by either of them or anyone for whose acts either of them may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of CONTRACTOR). CONTRACTOR's duties and responsibilities for the safety and protection of the Work shall continue until such time as all the Work is completed and ENGINEER has issued a notice to OWNER and CONTRACTOR in accordance with paragraph 14.13 that the Work is acceptable (except as otherwise expressly provided in connection with Substantial Completion).

6.21. CONTRACTOR shall designate a responsible representative at the site whose duty shall be the prevention of accidents. This person shall be CONTRACTOR's superintendent unless otherwise designated in writing by CONTRACTOR to OWNER.

*Emergencies:*

6.22. In emergencies affecting the safety or protection of persons or the Work or property at the site or adjacent thereto, CONTRACTOR, without special instruction or authorization from ENGINEER or OWNER, is obligated to act to prevent threatened damage, injury or loss. CONTRACTOR shall give ENGINEER prompt written notice if CONTRACTOR believes that any significant changes in the Work or variations from the Contract Documents have been caused thereby. If ENGINEER determines that a change in the Contract Documents is required because of the action taken in response to an emergency, a Work Directive Change or Change Order will be issued to document the consequences of the changes or variations.

*Shop Drawings and Samples:*

6.23. After checking and verifying all field measurements and after complying with applicable procedures specified in the General Requirements, CONTRACTOR shall submit to ENGINEER for review and approval in accordance with the accepted schedule of Shop Drawing submissions (see paragraph 2.9), or for other appropriate action if so indicated in the Supplementary Conditions, five copies (unless otherwise specified in the General Requirements) of all Shop Drawings, which will bear a stamp or specific written indication that CONTRACTOR has satisfied CONTRACTOR's responsibilities under the Contract Documents with respect to the review of the submission. All submissions will be identified as ENGINEER may require. The data shown on the Shop Drawings will be complete with respect to quantities, dimensions, specified performance and design criteria, materials and similar data to enable ENGINEER to review the information as required.

6.24. CONTRACTOR shall also submit to ENGINEER for review and approval with such promptness as to cause no delay in Work, all samples required by the Contract Documents. All samples will have been checked by and accompanied by a specific written indication that CONTRACTOR has satisfied CONTRACTOR's responsibilities under the Contract Documents with respect to the review of the submission and will be identified clearly as to material, Supplier, pertinent data such as catalog numbers and the use for which intended.

6.25.1. Before submission of each Shop Drawing or sample CONTRACTOR shall have determined and verified all quantities, dimensions, specified performance criteria, installation requirements, materials, catalog numbers and similar data with respect thereto and reviewed or coordinated each Shop Drawing or sample with other Shop Drawings and samples and with the requirements of the Work and the Contract Documents.

6.25.2. At the time of each submission, CONTRACTOR shall give ENGINEER specific written notice of each variation that the Shop Drawings or samples may have from the requirements of the Contract Documents, and, in addition, shall cause a specific notation to be made on



each Shop Drawing submitted to ENGINEER for review and approval of each such variation.

6.26. ENGINEER will review and approve with reasonable promptness Shop Drawings and samples, but ENGINEER's review and approval will be only for conformance with the design concept of the Project and for compliance with the information given in the Contract Documents and shall not extend to means, methods, techniques, sequences or procedures of construction (except where a specific means, method, technique, sequence or procedure of construction is indicated in or required by the Contract Documents) or to safety precautions or programs incident thereto. The review and approval of a separate item as such will not indicate approval of the assembly in which the item functions. CONTRACTOR shall make corrections required by ENGINEER, and shall return the required number of corrected copies of Shop Drawings and submit as required new samples for review and approval. CONTRACTOR shall direct specific attention in writing to revisions other than the corrections called for by ENGINEER on previous submittals.

6.27. ENGINEER's review and approval of Shop Drawings or samples shall not relieve CONTRACTOR from responsibility for any variation from the requirements of the Contract Documents unless CONTRACTOR has in writing called ENGINEER's attention to each such variation at the time of submission as required by paragraph 6.25.2 and ENGINEER has given written approval of each such variation by a specific written notation thereof incorporated in or accompanying the Shop Drawing or sample approval; nor will any approval by ENGINEER relieve CONTRACTOR from responsibility for errors or omissions in the Shop Drawings or from responsibility for having complied with the provisions of paragraph 6.25.1.

6.28. Where a Shop Drawing or sample is required by the Specifications, any related Work performed prior to ENGINEER's review and approval of the pertinent submission will be the sole expense and responsibility of CONTRACTOR.

#### *Continuing the Work:*

6.29. CONTRACTOR shall carry on the Work and adhere to the progress schedule during all disputes or disagreements with OWNER. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted by paragraph 15.5 or as CONTRACTOR and OWNER may otherwise agree in writing.

#### *Indemnification:*

6.30. To the fullest extent permitted by Laws and Regulations CONTRACTOR shall indemnify and hold harmless OWNER and ENGINEER and their consultants, agents and employees from and against all claims, damages, losses and expenses, direct, indirect or consequential (including but not limited to fees and charges of engineers, architects, attorneys and other professionals and court and arbitration costs) arising out of or resulting from the performance of the Work,

provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom and (b) is caused in whole or in part by any negligent act or omission of CONTRACTOR, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by Law and Regulations regardless of the negligence of any such party.

6.31. In any and all claims against OWNER or ENGINEER or any of their consultants, agents or employees by any employee of CONTRACTOR, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, the indemnification obligation under paragraph 6.30 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for CONTRACTOR or any such Subcontractor or other person or organization under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

6.32. The obligations of CONTRACTOR under paragraph 6.30 shall not extend to the liability of ENGINEER, ENGINEER's consultants, agents or employees arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications.

## ARTICLE 7—OTHER WORK

### *Related Work at Site:*

7.1. OWNER may perform other work related to the Project at the site by OWNER's own forces, have other work performed by utility owners or let other direct contracts therefor which shall contain General Conditions similar to these. If the fact that such other work is to be performed was not noted in the Contract Documents, written notice thereof will be given to CONTRACTOR prior to starting any such other work; and, if CONTRACTOR believes that such performance will involve additional expense to CONTRACTOR or requires additional time and the parties are unable to agree as to the extent thereof, CONTRACTOR may make a claim therefor as provided in Articles 11 and 12.

7.2. CONTRACTOR shall afford each utility owner and other contractor who is a party to such a direct contract (or OWNER, if OWNER is performing the additional work with OWNER's employees) proper and safe access to the site and a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such work, and shall properly connect and coordinate the Work with theirs. CONTRACTOR shall do all cutting, fitting and patching of the Work that may be required to make its several parts come together properly and integrate with such other work. CON-

TRACTOR shall not endanger any work of others by cutting, excavating or otherwise altering their work and will only cut or alter their work with the written consent of ENGINEER and the others whose work will be affected. The duties and responsibilities of CONTRACTOR under this paragraph are for the benefit of such utility owners and other contractors to the extent that there are comparable provisions for the benefit of CONTRACTOR in said direct contracts between OWNER and such utility owners and other contractors.

7.3. If any part of CONTRACTOR's Work depends for proper execution or results upon the work of any such other contractor or utility owner (or OWNER), CONTRACTOR shall inspect and promptly report to ENGINEER in writing any delays, defects or deficiencies in such work that render it unavailable or unsuitable for such proper execution and results. CONTRACTOR's failure so to report will constitute an acceptance of the other work as fit and proper for integration with CONTRACTOR's Work except for latent or non-apparent defects and deficiencies in the other work.

*Coordination:*

7.4. If OWNER contracts with others for the performance of other work on the Project at the site, the person or organization who will have authority and responsibility for coordination of the activities among the various prime contractors will be identified in the Supplementary Conditions, and the specific matters to be covered by such authority and responsibility will be itemized, and the extent of such authority and responsibilities will be provided, in the Supplementary Conditions. Unless otherwise provided in the Supplementary Conditions, neither OWNER nor ENGINEER shall have any authority or responsibility in respect of such coordination.

#### ARTICLE 8—OWNER'S RESPONSIBILITIES

8.1. OWNER shall issue all communications to CONTRACTOR through ENGINEER.

8.2. In case of termination of the employment of ENGINEER, OWNER shall appoint an engineer against whom CONTRACTOR makes no reasonable objection, whose status under the Contract Documents shall be that of the former ENGINEER. Any dispute in connection with such appointment shall be subject to arbitration.

8.3. OWNER shall furnish the data required of OWNER under the Contract Documents promptly and shall make payments to CONTRACTOR promptly after they are due as provided in paragraphs 14.4 and 14.13.

8.4. OWNER's duties in respect of providing lands and easements and providing engineering surveys to establish reference points are set forth in paragraphs 4.1 and 4.4. Paragraph 4.2 refers to OWNER's identifying and making available to CONTRACTOR copies of reports of explorations and tests of subsurface conditions at the site and in existing struc-

tures which have been utilized by ENGINEER in preparing the Drawings and Specifications.

8.5. OWNER's responsibilities in respect of purchasing and maintaining liability and property insurance are set forth in paragraphs 5.5 through 5.8.

8.6. OWNER is obligated to execute Change Orders as indicated in paragraph 10.4.

8.7. OWNER's responsibility in respect of certain inspections, tests and approvals is set forth in paragraph 13.4.

8.8. In connection with OWNER's right to stop Work or suspend Work, see paragraphs 13.10 and 13.11. Paragraph 15.2 deals with OWNER's right to terminate services of CONTRACTOR under certain circumstances.

#### ARTICLE 9—ENGINEER'S STATUS DURING CONSTRUCTION

*Owner's Representative:*

9.1. ENGINEER will be OWNER's representative during the construction period. The duties and responsibilities and the limitations of authority of ENGINEER as OWNER's representative during construction are set forth in the Contract Documents and shall not be extended without written consent of OWNER and ENGINEER.

*Visits to Site:*

9.2. ENGINEER will make visits to the site at intervals appropriate to the various stages of construction to observe the progress and quality of the executed Work and to determine, in general, if the Work is proceeding in accordance with the Contract Documents. ENGINEER will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. ENGINEER's efforts will be directed toward providing for OWNER a greater degree of confidence that the completed Work will conform to the Contract Documents. On the basis of such visits and on-site observations as an experienced and qualified design professional, ENGINEER will keep OWNER informed of the progress of the Work and will endeavor to guard OWNER against defects and deficiencies in the Work.

*Project Representation:*

9.3. If OWNER and ENGINEER agree, ENGINEER will furnish a Resident Project Representative to assist ENGINEER in observing the performance of the Work. The duties, responsibilities and limitations of authority of any such Resident Project Representative and assistants will be as provided in the Supplementary Conditions. If OWNER designates another agent to represent OWNER at the site who is not ENGINEER's agent or employee, the duties, responsibilities and limitations of authority of such other person will be as provided in the Supplementary Conditions.

#### *Clarifications and Interpretations:*

9.4. ENGINEER will issue with reasonable promptness such written clarifications or interpretations of the requirements of the Contract Documents (in the form of Drawings or otherwise) as ENGINEER may determine necessary, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. If CONTRACTOR believes that a written clarification or interpretation justifies an increase in the Contract Price or an extension of the Contract Time and the parties are unable to agree to the amount or extent thereof, CONTRACTOR may make a claim therefor as provided in Article 11 or Article 12.

#### *Authorized Variations in Work:*

9.5. ENGINEER may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Price or the Contract Time and are consistent with the overall intent of the Contract Documents. These may be accomplished by a Field Order and will be binding on OWNER, and also on CONTRACTOR who shall perform the Work involved promptly. If CONTRACTOR believes that a Field Order justifies an increase in the Contract Price or an extension of the Contract Time and the parties are unable to agree as to the amount or extent thereof, CONTRACTOR may make a claim therefor as provided in Article 11 or 12.

#### *Rejecting Defective Work:*

9.6. ENGINEER will have authority to disapprove or reject Work which ENGINEER believes to be defective, and will also have authority to require special inspection or testing of the Work as provided in paragraph 13.9, whether or not the Work is fabricated, installed or completed.

#### *Shop Drawings, Change Orders and Payments:*

9.7. In connection with ENGINEER's responsibility for Shop Drawings and samples, see paragraphs 6.23 through 6.28 inclusive.

9.8. In connection with ENGINEER's responsibilities as to Change Orders, see Articles 10, 11 and 12.

9.9. In connection with ENGINEER's responsibilities in respect of Applications for Payment, etc., see Article 14.

#### *Determinations for Unit Prices:*

9.10. ENGINEER will determine the actual quantities and classifications of Unit Price Work performed by CONTRACTOR. ENGINEER will review with CONTRACTOR ENGINEER's preliminary determinations on such matters before rendering a written decision thereon (by recommendation of an Application for Payment or otherwise). ENGINEER's written decisions thereon will be final and binding upon OWNER and CONTRACTOR, unless, within ten days after the date of any such decision, either OWNER or CONTRACTOR delivers to the other party to the Agreement and

to ENGINEER written notice of intention to appeal from such a decision.

#### *Decisions on Disputes:*

9.11. ENGINEER will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. Claims, disputes and other matters relating to the acceptability of the Work or the interpretation of the requirements of the Contract Documents pertaining to the performance and furnishing of the Work and claims under Articles 11 and 12 in respect of changes in the Contract Price or Contract Time will be referred initially to ENGINEER in writing with a request for a formal decision in accordance with this paragraph, which ENGINEER will render in writing within a reasonable time. Written notice of each such claim, dispute and other matter will be delivered by the claimant to ENGINEER and the other party to the Agreement promptly (but in no event later than thirty days) after the occurrence of the event giving rise thereto, and written supporting data will be submitted to ENGINEER and the other party within sixty days after such occurrence unless ENGINEER allows an additional period of time to ascertain more accurate data in support of the claim.

9.12. When functioning as interpreter and judge under paragraphs 9.10 and 9.11, ENGINEER will not show partiality to OWNER or CONTRACTOR and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity. The rendering of a decision by ENGINEER pursuant to paragraphs 9.10 and 9.11 with respect to any such claim, dispute or other matter (except any which have been waived by the making or acceptance of final payment as provided in paragraph 14.16) will be a condition precedent to any exercise by OWNER or CONTRACTOR of such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any such claim, dispute or other matter.

#### *Limitations on ENGINEER's Responsibilities:*

9.13. Neither ENGINEER's authority to act under this Article 9 or elsewhere in the Contract Documents nor any decision made by ENGINEER in good faith either to exercise or not exercise such authority shall give rise to any duty or responsibility of ENGINEER to CONTRACTOR, any Sub-contractor, any Supplier, or any other person or organization performing any of the Work, or to any surety for any of them.

9.14. Whenever in the Contract Documents the terms "as ordered", "as directed", "as required", "as allowed", "as approved" or terms of like effect or import are used, or the adjectives "reasonable", "suitable", "acceptable", "proper" or "satisfactory" or adjectives of like effect or import are used to describe a requirement, direction, review or judgment of ENGINEER as to the Work, it is intended that such requirement, direction, review or judgment will be solely to evaluate the Work for compliance with the Contract Documents (unless there is a specific statement indicating otherwise). The use of any such term or adjective shall not be

effective to assign to ENGINEER any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of paragraph 9.15 or 9.16.

9.15. ENGINEER will not be responsible for CONTRACTOR's means, methods, techniques, sequences or procedures of construction, or the safety precautions and programs incident thereto, and ENGINEER will not be responsible for CONTRACTOR's failure to perform or furnish the Work in accordance with the Contract Documents.

9.16. ENGINEER will not be responsible for the acts or omissions of CONTRACTOR or of any Subcontractor, any Supplier, or of any other person or organization performing or furnishing any of the Work.

#### ARTICLE 10—CHANGES IN THE WORK

10.1. Without invalidating the Agreement and without notice to any surety, OWNER may, at any time or from time to time, order additions, deletions or revisions in the Work; these will be authorized by a Written Amendment, a Change Order, or a Work Directive Change. Upon receipt of any such document, CONTRACTOR shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents (except as otherwise specifically provided).

10.2. If OWNER and CONTRACTOR are unable to agree as to the extent, if any, of an increase or decrease in the Contract Price or an extension or shortening of the Contract Time that should be allowed as a result of a Work Directive Change, a claim may be made therefor as provided in Article 11 or Article 12.

10.3. CONTRACTOR shall not be entitled to an increase in the Contract Price or an extension of the Contract Time with respect to any Work performed that is not required by the Contract Documents as amended, modified and supplemented as provided in paragraphs 3.4 and 3.5, except in the case of an emergency as provided in paragraph 6.22 and except in the case of uncovering Work as provided in paragraph 13.9.

10.4. OWNER and CONTRACTOR shall execute appropriate Change Orders (or Written Amendments) covering:

10.4.1. changes in the Work which are ordered by OWNER pursuant to paragraph 10.1, are required because of acceptance of defective Work under paragraph 13.13 or correcting defective Work under paragraph 13.14, or are agreed to by the parties;

10.4.2. changes in the Contract Price or Contract Time which are agreed to by the parties; and

10.4.3. changes in the Contract Price or Contract Time which embody the substance of any written decision rendered by ENGINEER pursuant to paragraph 9.11;

provided that, in lieu of executing any such Change Order, an appeal may be taken from any such decision in accordance with the provisions of the Contract Documents and applicable Laws and Regulations, but during any such appeal, CONTRACTOR shall carry on the Work and adhere to the progress schedule as provided in paragraph 6.29.

10.5. If notice of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Time) is required by the provisions of any Bond to be given to a surety, the giving of any such notice will be CONTRACTOR's responsibility, and the amount of each applicable Bond will be adjusted accordingly.

#### ARTICLE 11—CHANGE OF CONTRACT PRICE

11.1. The Contract Price constitutes the total compensation (subject to authorized adjustments) payable to CONTRACTOR for performing the Work. All duties, responsibilities and obligations assigned to or undertaken by CONTRACTOR shall be at his expense without change in the Contract Price.

11.2. The Contract Price may only be changed by a Change Order or by a Written Amendment. Any claim for an increase or decrease in the Contract Price shall be based on written notice delivered by the party making the claim to the other party and to ENGINEER promptly (but in no event later than thirty days) after the occurrence of the event giving rise to the claim and stating the general nature of the claim. Notice of the amount of the claim with supporting data shall be delivered within sixty days after such occurrence (unless ENGINEER allows an additional period of time to ascertain more accurate data in support of the claim) and shall be accompanied by claimant's written statement that the amount claimed covers all known amounts (direct, indirect and consequential) to which the claimant is entitled as a result of the occurrence of said event. All claims for adjustment in the Contract Price shall be determined by ENGINEER in accordance with paragraph 9.11 if OWNER and CONTRACTOR cannot otherwise agree on the amount involved. No claim for an adjustment in the Contract Price will be valid if not submitted in accordance with this paragraph 11.2.

11.3. The value of any Work covered by a Change Order or of any claim for an increase or decrease in the Contract Price shall be determined in one of the following ways:

11.3.1. Where the Work involved is covered by unit prices contained in the Contract Documents, by application of unit prices to the quantities of the items involved (subject to the provisions of paragraphs 11.9.1. through 11.9.3, inclusive).

11.3.2. By mutual acceptance of a lump sum (which may include an allowance for overhead and profit not necessarily in accordance with paragraph 11.6.2.1).

11.3.3. On the basis of the Cost of the Work (determined as provided in paragraphs 11.4 and 11.5) plus a CONTRACTOR's Fee for overhead and profit (determined as provided in paragraphs 11.6 and 11.7).

*Cost of the Work:*

11.4. The term Cost of the Work means the sum of all costs necessarily incurred and paid by CONTRACTOR in the proper performance of the Work. Except as otherwise may be agreed to in writing by OWNER, such costs shall be in amounts no higher than those prevailing in the locality of the Project, shall include only the following items and shall not include any of the costs itemized in paragraph 11.5:

11.4.1. Payroll costs for employees in the direct employ of CONTRACTOR in the performance of the Work under schedules of job classifications agreed upon by OWNER and CONTRACTOR. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits which shall include social security contributions, unemployment, excise and payroll taxes, workers' or workmen's compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. Such employees shall include superintendents and foremen at the site. The expenses of performing Work after regular working hours, on Saturday, Sunday or legal holidays, shall be included in the above to the extent authorized by OWNER.

11.4.2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts shall accrue to CONTRACTOR unless OWNER deposits funds with CONTRACTOR with which to make payments, in which case the cash discounts shall accrue to OWNER. All trade discounts, rebates and refunds and all returns from sale of surplus materials and equipment shall accrue to OWNER, and CONTRACTOR shall make provisions so that they may be obtained.

11.4.3. Payments made by CONTRACTOR to the Subcontractors for Work performed by Subcontractors. If required by OWNER, CONTRACTOR shall obtain competitive bids from Subcontractors acceptable to CONTRACTOR and shall deliver such bids to OWNER who will then determine, with the advice of ENGINEER, which bids will be accepted. If a subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work Plus a Fee, the Subcontractor's Cost of the Work shall be determined in the same manner as CONTRACTOR's Cost of the Work. All subcontracts shall be subject

to the other provisions of the Contract Documents insofar as applicable.

11.4.4. Costs of special consultants (including but not limited to engineers, architects, testing laboratories, surveyors, attorneys and accountants) employed for services specifically related to the Work.

11.4.5. Supplemental costs including the following:

11.4.5.1. The proportion of necessary transportation, travel and subsistence expenses of CONTRACTOR's employees incurred in discharge of duties connected with the Work.

11.4.5.2. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office and temporary facilities at the site and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost less market value of such items used but not consumed which remain the property of CONTRACTOR.

11.4.5.3. Rentals of all construction equipment and machinery and the parts thereof whether rented from CONTRACTOR or others in accordance with rental agreements approved by OWNER with the advice of ENGINEER, and the costs of transportation, loading, unloading, installation, dismantling and removal thereof—all in accordance with terms of said rental agreements. The rental of any such equipment, machinery or parts shall cease when the use thereof is no longer necessary for the Work.

11.4.5.4. Sales, consumer, use or similar taxes related to the Work, and for which CONTRACTOR is liable, imposed by Laws and Regulations.

11.4.5.5. Deposits lost for causes other than negligence of CONTRACTOR, any Subcontractor or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.

11.4.5.6. Losses and damages (and related expenses), not compensated by insurance or otherwise, to the Work or otherwise sustained by CONTRACTOR in connection with the performance and furnishing of the Work (except losses and damages within the deductible amounts of property insurance established by OWNER in accordance with paragraph 5.9), provided they have resulted from causes other than the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of OWNER. No such losses, damages and expenses shall be included in the Cost of the Work for the purpose of determining CONTRACTOR's Fee. If, however, any such loss or damage

requires reconstruction and CONTRACTOR is placed in charge thereof. CONTRACTOR shall be paid for services a fee proportionate to that stated in paragraph 11.6.2.

11.4.5.7. The cost of utilities, fuel and sanitary facilities at the site.

11.4.5.8. Minor expenses such as telegrams, long distance telephone calls, telephone service at the site, expressage and similar petty cash items in connection with the Work.

11.4.5.9. Cost of premiums for additional Bonds and insurance required because of changes in the Work and premiums for property insurance coverage within the limits of the deductible amounts established by OWNER in accordance with paragraph 5.9.

11.5. The term Cost of the Work shall not include any of the following:

11.5.1. Payroll costs and other compensation of CONTRACTOR's officers, executives, principals (of partnership and sole proprietorships), general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks and other personnel employed by CONTRACTOR whether at the site or in CONTRACTOR's principal or a branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in paragraph 11.4.1 or specifically covered by paragraph 11.4.4— all of which are to be considered administrative costs covered by the CONTRACTOR's Fee.

11.5.2. Expenses of CONTRACTOR's principal and branch offices other than CONTRACTOR's office at the site.

11.5.3. Any part of CONTRACTOR's capital expenses, including interest on CONTRACTOR'S capital employed for the Work and charges against CONTRACTOR for delinquent payments.

11.5.4. Cost of premiums for all Bonds and for all insurance whether or not CONTRACTOR is required by the Contract Documents to purchase and maintain the same (except for the cost of premiums covered by subparagraph 11.4.5.9 above).

11.5.5. Costs due to the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied and making good any damage to property.

11.5.6. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in paragraph 11.4.

#### CONTRACTOR's Fee:

11.6. The CONTRACTOR's Fee allowed to CONTRACTOR for overhead and profit shall be determined as follows:

11.6.1. a mutually acceptable fixed fee; or if none can be agreed upon.

11.6.2. a fee based on the following percentages of the various portions of the Cost of the Work:

11.6.2.1. for costs incurred under paragraphs 11.4.1 and 11.4.2, the CONTRACTOR's Fee shall be fifteen percent;

11.6.2.2. for costs incurred under paragraph 11.4.3, the CONTRACTOR's Fee shall be five percent; and if a subcontract is on the basis of Cost of the Work Plus a Fee, the maximum allowable to CONTRACTOR on account of overhead and profit of all Subcontractors shall be fifteen percent;

11.6.2.3. no fee shall be payable on the basis of costs itemized under paragraphs 11.4.4, 11.4.5 and 11.5;

11.6.2.4. the amount of credit to be allowed by CONTRACTOR to OWNER for any such change which results in a net decrease in cost will be the amount of the actual net decrease plus a deduction in CONTRACTOR's Fee by an amount equal to ten percent of the net decrease; and

11.6.2.5. when both additions and credits are involved in any one change, the adjustment in CONTRACTOR's Fee shall be computed on the basis of the net change in accordance with paragraphs 11.6.2.1 through 11.6.2.4, inclusive.

11.7. Whenever the cost of any Work is to be determined pursuant to paragraph 11.4 or 11.5, CONTRACTOR will submit in form acceptable to ENGINEER an itemized cost breakdown together with supporting data.

#### Cash Allowances:

11.8. It is understood that CONTRACTOR has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be done by such Subcontractors or Suppliers and for such sums within the limit of the allowances as may be acceptable to ENGINEER. CONTRACTOR agrees that:

11.8.1. The allowances include the cost to CONTRACTOR (less any applicable trade discounts) of materials and equipment required by the allowances to be delivered at the site, and all applicable taxes; and

11.8.2. CONTRACTOR's costs for unloading and handling on the site, labor, installation costs, overhead, profit and other expenses contemplated for the allowances have been included in the Contract Price and not in the

allowances. No demand for additional payment on account of any thereof will be valid.

Prior to final payment, an appropriate Change Order will be issued as recommended by ENGINEER to reflect actual amounts due CONTRACTOR on account of Work covered by allowances, and the Contract Price shall be correspondingly adjusted.

#### *Unit Price Work:*

11.9.1. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the established unit prices for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Determinations of the actual quantities and classifications of Unit Price Work performed by CONTRACTOR will be made by ENGINEER in accordance with Paragraph 9.10.

11.9.2. Each unit price will be deemed to include an amount considered by CONTRACTOR to be adequate to cover CONTRACTOR's overhead and profit for each separately identified item.

11.9.3. Where the quantity of any item of Unit Price Work performed by CONTRACTOR differs materially and significantly from the estimated quantity of such item indicated in the Agreement and there is no corresponding adjustment with respect to any other item of Work and if CONTRACTOR believes that CONTRACTOR has incurred additional expense as a result thereof, CONTRACTOR may make a claim for an increase in the Contract Price in accordance with Article 11 if the parties are unable to agree as to the amount of any such increase.

#### ARTICLE 12—CHANGE OF CONTRACT TIME

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12.1. The Contract Time may only be changed by a Change Order or a Written Amendment. Any claim for an extension or shortening of the Contract Time shall be based on written notice delivered by the party making the claim to the other party and to ENGINEER promptly (but in no event later than thirty days) after the occurrence of the event giving rise to the claim and stating the general nature of the claim. Notice of the extent of the claim with supporting data shall be delivered within sixty days after such occurrence (unless ENGINEER allows an additional period of time to ascertain more accurate data in support of the claim) and shall be accompanied by the claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant has reason to believe it is entitled as a result of the occurrence of said event. All claims for adjustment in the Contract Time

shall be determined by ENGINEER in accordance with paragraph 9.11 if OWNER and CONTRACTOR cannot otherwise agree. No claim for an adjustment in the Contract Time will be valid if not submitted in accordance with the requirements of this paragraph 12.1.

12.2. The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of CONTRACTOR if a claim is made therefor as provided in paragraph 12.1. Such delays shall include, but not be limited to, acts or neglect by OWNER or others performing additional work as contemplated by Article 7, or to fires, floods, labor disputes, epidemics, abnormal weather conditions or acts of God.

12.3. All time limits stated in the Contract Documents are of the essence of the Agreement. The provisions of this Article 12 shall not exclude recovery for damages (including but not limited to fees and charges of engineers, architects, attorneys and other professionals and court and arbitration costs) for delay by either party.

#### ARTICLE 13—WARRANTY AND GUARANTEE; TESTS AND INSPECTIONS; CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK

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##### *Warranty and Guarantee:*

13.1. CONTRACTOR warrants and guarantees to OWNER and ENGINEER that all Work will be in accordance with the Contract Documents and will not be defective. Prompt notice of all defects shall be given to CONTRACTOR. All defective Work, whether or not in place, may be rejected, corrected or accepted as provided in this Article 13.

##### *Access to Work:*

13.2. ENGINEER and ENGINEER's representatives, other representatives of OWNER, testing agencies and governmental agencies with jurisdictional interests will have access to the Work at reasonable times for their observation, inspecting and testing. CONTRACTOR shall provide proper and safe conditions for such access.

##### *Tests and Inspections:*

13.3. CONTRACTOR shall give ENGINEER timely notice of readiness of the Work for all required inspections, tests or approvals.

13.4. If Laws or Regulations of any public body having jurisdiction require any Work (or part thereof) to specifically be inspected, tested or approved, CONTRACTOR shall assume full responsibility therefor, pay all costs in connection therewith and furnish ENGINEER the required certificates of inspection, testing or approval. CONTRACTOR shall also

be responsible for and shall pay all costs in connection with any inspection or testing required in connection with OWNER's or ENGINEER's acceptance of a Supplier of materials or equipment proposed to be incorporated in the Work, or of materials or equipment submitted for approval prior to CONTRACTOR's purchase thereof for incorporation in the Work. The cost of all inspections, tests and approvals in addition to the above which are required by the Contract Documents shall be paid by OWNER (unless otherwise specified).

13.5. All inspections, tests or approvals other than those required by Laws or Regulations of any public body having jurisdiction shall be performed by organizations acceptable to OWNER and CONTRACTOR (or by ENGINEER if so specified).

13.6. If any Work (including the work of others) that is to be inspected, tested or approved is covered without written concurrence of ENGINEER, it must, if requested by ENGINEER, be uncovered for observation. Such uncovering shall be at CONTRACTOR's expense unless CONTRACTOR has given ENGINEER timely notice of CONTRACTOR's intention to cover the same and ENGINEER has not acted with reasonable promptness in response to such notice.

13.7. Neither observations by ENGINEER nor inspections, tests or approvals by others shall relieve CONTRACTOR from CONTRACTOR's obligations to perform the Work in accordance with the Contract Documents.

#### *Uncovering Work:*

13.8. If any Work is covered contrary to the written request of ENGINEER, it must, if requested by ENGINEER, be uncovered for ENGINEER's observation and replaced at CONTRACTOR's expense.

13.9. If ENGINEER considers it necessary or advisable that covered Work be observed by ENGINEER or inspected or tested by others, CONTRACTOR, at ENGINEER's request, shall uncover, expose or otherwise make available for observation, inspection or testing as ENGINEER may require, that portion of the Work in question, furnishing all necessary labor, material and equipment. If it is found that such Work is defective, CONTRACTOR shall bear all direct, indirect and consequential costs of such uncovering, exposure, observation, inspection and testing and of satisfactory reconstruction, (including but not limited to fees and charges of engineers, architects, attorneys and other professionals), and OWNER shall be entitled to an appropriate decrease in the Contract Price, and, if the parties are unable to agree as to the amount thereof, may make a claim therefor as provided in Article 11. If, however, such Work is not found to be defective, CONTRACTOR shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to such uncovering, exposure, observation, inspection, testing and reconstruction; and, if the parties are unable to agree as to the amount or extent

thereof, CONTRACTOR may make a claim therefor as provided in Articles 11 and 12.

#### *Owner May Stop the Work:*

13.10. If the Work is defective, or CONTRACTOR fails to supply sufficient skilled workers or suitable materials or equipment, or fails to furnish or perform the Work in such a way that the completed Work will conform to the Contract Documents, OWNER may order CONTRACTOR to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of OWNER to stop the Work shall not give rise to any duty on the part of OWNER to exercise this right for the benefit of CONTRACTOR or any other party.

#### *Correction or Removal of Defective Work:*

13.11. If required by ENGINEER, CONTRACTOR shall promptly, as directed, either correct all defective Work, whether or not fabricated, installed or completed, or, if the Work has been rejected by ENGINEER, remove it from the site and replace it with nondefective Work. CONTRACTOR shall bear all direct, indirect and consequential costs of such correction or removal (including but not limited to fees and charges of engineers, architects, attorneys and other professionals) made necessary thereby.

#### *One Year Correction Period:*

13.12. If within one year after the date of Substantial Completion or such longer period of time as may be prescribed by Laws or Regulations or by the terms of any applicable special guarantee required by the Contract Documents, or by any specific provision of the Contract Documents, any Work is found to be defective, CONTRACTOR shall promptly, without cost to OWNER and in accordance with OWNER's written instructions, either correct such defective Work, or, if it has been rejected by OWNER, remove it from the site and replace it with nondefective Work. If CONTRACTOR does not promptly comply with the terms of such instructions, or in an emergency where delay would cause serious risk of loss or damage, OWNER may have the defective Work corrected or the rejected Work removed and replaced, and all direct, indirect and consequential costs of such removal and replacement (including but not limited to fees and charges of engineers, architects, attorneys and other professionals) will be paid by CONTRACTOR. In special circumstances where a particular item of equipment is placed in continuous service before Substantial Completion of all the Work, the correction period for that item may start to run from an earlier date if so provided in the Specifications or by Written Amendment.

#### *Acceptance of Defective Work:*

13.13. If, instead of requiring correction or removal and replacement of defective Work, OWNER (and, prior to ENGINEER's recommendation of final payment, also ENGINEER) prefers to accept it, OWNER may do so. CONTRACTOR shall bear all direct, indirect and consequential



costs attributable to OWNER's evaluation of and determination to accept such *defective* Work (such costs to be approved by ENGINEER as to reasonableness and to include but not be limited to fees and charges of engineers, architects, attorneys and other professionals). If any such acceptance occurs prior to ENGINEER's recommendation of final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work; and OWNER shall be entitled to an appropriate decrease in the Contract Price, and, if the parties are unable to agree as to the amount thereof, OWNER may make a claim therefor as provided in Article 11. If the acceptance occurs after such recommendation, an appropriate amount will be paid by CONTRACTOR to OWNER.

**OWNER May Correct Defective Work:**

13.14. If CONTRACTOR fails within a reasonable time after written notice of ENGINEER to proceed to correct and to correct *defective* Work or to remove and replace rejected Work as required by ENGINEER in accordance with paragraph 13.11, or if CONTRACTOR fails to perform the Work in accordance with the Contract Documents, or if CONTRACTOR fails to comply with any other provision of the Contract Documents, OWNER may, after seven days' written notice to CONTRACTOR, correct and remedy any such deficiency. In exercising the rights and remedies under this paragraph OWNER shall proceed expeditiously. To the extent necessary to complete corrective and remedial action, OWNER may exclude CONTRACTOR from all or part of the site, take possession of all or part of the Work, and suspend CONTRACTOR's services related thereto, take possession of CONTRACTOR's tools, appliances, construction equipment and machinery at the site and incorporate in the Work all materials and equipment stored at the site or for which OWNER has paid CONTRACTOR but which are stored elsewhere. CONTRACTOR shall allow OWNER, OWNER's representatives, agents and employees such access to the site as may be necessary to enable OWNER to exercise the rights and remedies under this paragraph. All direct, indirect and consequential costs of OWNER in exercising such rights and remedies will be charged against CONTRACTOR in an amount approved as to reasonableness by ENGINEER, and a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work; and OWNER shall be entitled to an appropriate decrease in the Contract Price, and, if the parties are unable to agree as to the amount thereof, OWNER may make a claim therefor as provided in Article 11. Such direct, indirect and consequential costs will include but not be limited to fees and charges of engineers, architects, attorneys and other professionals, all court and arbitration costs and all costs of repair and replacement of work of others destroyed or damaged by correction, removal or replacement of CONTRACTOR's *defective* Work. CONTRACTOR shall not be allowed an extension of the Contract Time because of any delay in performance of the Work attributable to the exercise by OWNER of OWNER's rights and remedies hereunder.

ARTICLE 14—PAYMENTS TO CONTRACTOR AND COMPLETION

*Schedule of Values:*

14.1. The schedule of values established as provided in paragraph 2.9 will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to ENGINEER. Progress payments on account of Unit Price Work will be based on the number of units completed.

*Application for Progress Payment:*

14.2. At least twenty days before each progress payment is scheduled (but not more often than once a month), CONTRACTOR shall submit to ENGINEER for review an Application for Payment filled out and signed by CONTRACTOR covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the site or at another location agreed to in writing, the Application for Payment shall also be accompanied by a bill of sale, invoice or other documentation warranting that OWNER has received the materials and equipment free and clear of all liens, charges, security interests and encumbrances (which are hereinafter in these General Conditions referred to as "Liens") and evidence that the materials and equipment are covered by appropriate property insurance and other arrangements to protect OWNER's interest therein, all of which will be satisfactory to OWNER. The amount of retainage with respect to progress payments will be as stipulated in the Agreement.

*CONTRACTOR's Warranty of Title:*

14.3. CONTRACTOR warrants and guarantees that title to all Work, materials and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to OWNER no later than the time of payment free and clear of all Liens.

*Review of Applications for Progress Payment:*

14.4. ENGINEER will, within ten days after receipt of each Application for Payment, either indicate in writing a recommendation of payment and present the Application to OWNER, or return the Application to CONTRACTOR indicating in writing ENGINEER's reasons for refusing to recommend payment. In the latter case, CONTRACTOR may make the necessary corrections and resubmit the Application. Ten days after presentation of the Application for Payment with ENGINEER's recommendation, the amount recommended will (subject to the provisions of the last sentence of paragraph 14.7) become due and when due will be paid by OWNER to CONTRACTOR.

14.5. ENGINEER's recommendation of any payment requested in an Application for Payment will constitute a

representation by ENGINEER to OWNER, based on ENGINEER's on-site observations of the Work in progress as an experienced and qualified design professional and on ENGINEER's review of the Application for Payment and the accompanying data and schedules that the Work has progressed to the point indicated; that, to the best of ENGINEER's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Contract Documents, to a final determination of quantities and classifications for Unit Price Work under paragraph 9.10, and to any other qualifications stated in the recommendation); and that CONTRACTOR is entitled to payment of the amount recommended. However, by recommending any such payment ENGINEER will not thereby be deemed to have represented that exhaustive or continuous on-site inspections have been made to check the quality or the quantity of the Work beyond the responsibilities specifically assigned to ENGINEER in the Contract Documents or that there may not be other matters or issues between the parties that might entitle CONTRACTOR to be paid additionally by OWNER or OWNER to withhold payment to CONTRACTOR.

14.6. ENGINEER's recommendation of final payment will constitute an additional representation by ENGINEER to OWNER that the conditions precedent to CONTRACTOR's being entitled to final payment as set forth in paragraph 14.13 have been fulfilled.

14.7. ENGINEER may refuse to recommend the whole or any part of any payment if, in ENGINEER's opinion, it would be incorrect to make such representations to OWNER. ENGINEER may also refuse to recommend any such payment, or, because of subsequently discovered evidence or the results of subsequent inspections or tests, nullify any such payment previously recommended, to such extent as may be necessary in ENGINEER's opinion to protect OWNER from loss because:

14.7.1. the Work is defective, or completed Work has been damaged requiring correction or replacement,

14.7.2. the Contract Price has been reduced by Written Amendment or Change Order,

14.7.3. OWNER has been required to correct defective Work or complete Work in accordance with paragraph 13.14, or

14.7.4. of ENGINEER's actual knowledge of the occurrence of any of the events enumerated in paragraphs 15.2.1 through 15.2.9 inclusive.

OWNER may refuse to make payment of the full amount recommended by ENGINEER because claims have been made against OWNER on account of CONTRACTOR's performance or furnishing of the Work or Liens have been filed in connection with the Work or there are other items entitling

OWNER to a set-off against the amount recommended, but OWNER must give CONTRACTOR immediate written notice (with a copy to ENGINEER) stating the reasons for such action.

#### *Substantial Completion:*

14.8. When CONTRACTOR considers the entire Work ready for its intended use CONTRACTOR shall notify OWNER and ENGINEER in writing that the entire Work is substantially complete (except for items specifically listed by CONTRACTOR as incomplete) and request that ENGINEER issue a certificate of Substantial Completion. Within a reasonable time thereafter, OWNER, CONTRACTOR and ENGINEER shall make an inspection of the Work to determine the status of completion. If ENGINEER does not consider the Work substantially complete, ENGINEER will notify CONTRACTOR in writing giving the reasons therefor. If ENGINEER considers the Work substantially complete, ENGINEER will prepare and deliver to OWNER a tentative certificate of Substantial Completion which shall fix the date of Substantial Completion. There shall be attached to the certificate a tentative list of items to be completed or corrected before final payment. OWNER shall have seven days after receipt of the tentative certificate during which to make written objection to ENGINEER as to any provisions of the certificate or attached list. If, after considering such objections, ENGINEER concludes that the Work is not substantially complete, ENGINEER will within fourteen days after submission of the tentative certificate to OWNER notify CONTRACTOR in writing, stating the reasons therefor. If, after consideration of OWNER's objections, ENGINEER considers the Work substantially complete, ENGINEER will within said fourteen days execute and deliver to OWNER and CONTRACTOR a definitive certificate of Substantial Completion (with a revised tentative list of items to be completed or corrected) reflecting such changes from the tentative certificate as ENGINEER believes justified after consideration of any objections from OWNER. At the time of delivery of the tentative certificate of Substantial Completion ENGINEER will deliver to OWNER and CONTRACTOR a written recommendation as to division of responsibilities pending final payment between OWNER and CONTRACTOR with respect to security, operation, safety, maintenance, heat, utilities, insurance and warranties. Unless OWNER and CONTRACTOR agree otherwise in writing and so inform ENGINEER prior to ENGINEER's issuing the definitive certificate of Substantial Completion, ENGINEER's aforesaid recommendation will be binding on OWNER and CONTRACTOR until final payment.

14.9. OWNER shall have the right to exclude CONTRACTOR from the Work after the date of Substantial Completion, but OWNER shall allow CONTRACTOR reasonable access to complete or correct items on the tentative list.

#### *Partial Utilization:*

14.10. Use by OWNER of any finished part of the Work, which has specifically been identified in the Contract Docu-

ments, or which OWNER, ENGINEER and CONTRACTOR agree constitutes a separately functioning and useable part of the Work that can be used by OWNER without significant interference with CONTRACTOR's performance of the remainder of the Work, may be accomplished prior to Substantial Completion of all the Work subject to the following:

14.10.1. OWNER at any time may request CONTRACTOR in writing to permit OWNER to use any such part of the Work which OWNER believes to be ready for its intended use and substantially complete. If CONTRACTOR agrees, CONTRACTOR will certify to OWNER and ENGINEER that said part of the Work is substantially complete and request ENGINEER to issue a certificate of Substantial Completion for that part of the Work. CONTRACTOR at any time may notify OWNER and ENGINEER in writing that CONTRACTOR considers any such part of the Work ready for its intended use and substantially complete and request ENGINEER to issue a certificate of Substantial Completion for that part of the Work. Within a reasonable time after either such request, OWNER, CONTRACTOR and ENGINEER shall make an inspection of that part of the Work to determine its status of completion. If ENGINEER does not consider that part of the Work to be substantially complete, ENGINEER will notify OWNER and CONTRACTOR in writing giving the reasons therefor. If ENGINEER considers that part of the Work to be substantially complete, the provisions of paragraphs 14.8 and 14.9 will apply with respect to certification of Substantial Completion of that part of the Work and the division of responsibility in respect thereof and access thereto.

14.10.2. OWNER may at any time request CONTRACTOR in writing to permit OWNER to take over operation of any such part of the Work although it is not substantially complete. A copy of such request will be sent to ENGINEER and within a reasonable time thereafter OWNER, CONTRACTOR and ENGINEER shall make an inspection of that part of the Work to determine its status of completion and will prepare a list of the items remaining to be completed or corrected thereon before final payment. If CONTRACTOR does not object in writing to OWNER and ENGINEER that such part of the Work is not ready for separate operation by OWNER, ENGINEER will finalize the list of items to be completed or corrected and will deliver such list to OWNER and CONTRACTOR together with a written recommendation as to the division of responsibilities pending final payment between OWNER and CONTRACTOR with respect to security, operation, safety, maintenance, utilities, insurance, warranties and guarantees for that part of the Work which will become binding upon OWNER and CONTRACTOR at the time when OWNER takes over such operation (unless they shall have otherwise agreed in writing and so informed ENGINEER). During such operation and prior to Substantial Completion of such part of the Work, OWNER shall allow CONTRACTOR reasonable access to complete or correct items on said list and to complete other related Work.

14.10.3. No occupancy or separate operation of part of the Work will be accomplished prior to compliance with the requirements of paragraph 5.15 in respect of property insurance.

*Final Inspection:*

14.11. Upon written notice from CONTRACTOR that the entire Work or an agreed portion thereof is complete, ENGINEER will make a final inspection with OWNER and CONTRACTOR and will notify CONTRACTOR in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. CONTRACTOR shall immediately take such measures as are necessary to remedy such deficiencies.

*Final Application for Payment:*

14.12. After CONTRACTOR has completed all such corrections to the satisfaction of ENGINEER and delivered all maintenance and operating instructions, schedules, guarantees, Bonds, certificates of inspection, marked-up record documents (as provided in paragraph 6.19) and other documents—all as required by the Contract Documents, and after ENGINEER has indicated that the Work is acceptable (subject to the provisions of paragraph 14.16), CONTRACTOR may make application for final payment following the procedure for progress payments. The final Application for Payment shall be accompanied by all documentation called for in the Contract Documents, together with complete and legally effective releases or waivers (satisfactory to OWNER) of all Liens arising out of or filed in connection with the Work. In lieu thereof and as approved by OWNER, CONTRACTOR may furnish receipts or releases in full; an affidavit of CONTRACTOR that the releases and receipts include all labor, services, material and equipment for which a Lien could be filed, and that all payrolls, material and equipment bills, and other indebtedness connected with the Work for which OWNER or OWNER's property might in any way be responsible, have been paid or otherwise satisfied; and consent of the surety, if any, to final payment. If any Subcontractor or Supplier fails to furnish a release or receipt in full, CONTRACTOR may furnish a Bond or other collateral satisfactory to OWNER to indemnify OWNER against any Lien.

*Final Payment and Acceptance:*

14.13. If, on the basis of ENGINEER's observation of the Work during construction and final inspection, and ENGINEER's review of the final Application for Payment and accompanying documentation—all as required by the Contract Documents, ENGINEER is satisfied that the Work has been completed and CONTRACTOR's other obligations under the Contract Documents have been fulfilled, ENGINEER will, within ten days after receipt of the final Application for Payment, indicate in writing ENGINEER's recommendation of payment and present the Application to OWNER for payment. Thereupon ENGINEER will give written notice to OWNER and CONTRACTOR that the Work is acceptable subject to the provisions of paragraph 14.16.

Otherwise, ENGINEER will return the Application to CONTRACTOR, indicating in writing the reasons for refusing to recommend final payment, in which case CONTRACTOR shall make the necessary corrections and resubmit the Application. Thirty days after presentation to OWNER of the Application and accompanying documentation, in appropriate form and substance, and with ENGINEER's recommendation and notice of acceptability, the amount recommended by ENGINEER will become due and will be paid by OWNER to CONTRACTOR.

14.14. If, through no fault of CONTRACTOR, final completion of the Work is significantly delayed and if ENGINEER so confirms, OWNER shall, upon receipt of CONTRACTOR's final Application for Payment and recommendation of ENGINEER, and without terminating the Agreement, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance to be held by OWNER for Work not fully completed or corrected is less than the retainage stipulated in the Agreement, and if Bonds have been furnished as required in paragraph 5.1, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by CONTRACTOR to ENGINEER with the Application for such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

*Contractor's Continuing Obligation:*

14.15. CONTRACTOR's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. Neither recommendation of any progress or final payment by ENGINEER, nor the issuance of a certificate of Substantial Completion, nor any payment by OWNER to CONTRACTOR under the Contract Documents, nor any use or occupancy of the Work or any part thereof by OWNER, nor any act of acceptance by OWNER nor any failure to do so, nor any review and approval of a Shop Drawing or sample submission, nor the issuance of a notice of acceptability by ENGINEER pursuant to paragraph 14.13, nor any correction of defective Work by OWNER will constitute an acceptance of Work not in accordance with the Contract Documents or a release of CONTRACTOR's obligation to perform the Work in accordance with the Contract Documents (except as provided in paragraph 14.16).

*Waiver of Claims:*

14.16. The making and acceptance of final payment will constitute:

14.16.1. a waiver of all claims by OWNER against CONTRACTOR, except claims arising from unsettled Liens, from defective Work appearing after final inspection pursuant to paragraph 14.11 or from failure to comply with the Contract Documents or the terms of any special guarantees specified therein; however, it will not constitute a waiver by OWNER of any rights in respect of

CONTRACTOR's continuing obligations under the Contract Documents; and

14.16.2. a waiver of all claims by CONTRACTOR against OWNER other than those previously made in writing and still unsettled.

ARTICLE 15—SUSPENSION OF WORK AND TERMINATION

*Owner May Suspend Work:*

15.1. OWNER may, at any time and without cause, suspend the Work or any portion thereof for a period of not more than ninety days by notice in writing to CONTRACTOR and ENGINEER which will fix the date on which Work will be resumed. CONTRACTOR shall resume the Work on the date so fixed. CONTRACTOR shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to any suspension if CONTRACTOR makes an approved claim therefor as provided in Articles 11 and 12.

*Owner May Terminate:*

15.2. Upon the occurrence of any one or more of the following events:

15.2.1. if CONTRACTOR commences a voluntary case under any chapter of the Bankruptcy Code (Title 11, United States Code), as now or hereafter in effect, or if CONTRACTOR takes any equivalent or similar action by filing a petition or otherwise under any other federal or state law in effect at such time relating to the bankruptcy or insolvency;

15.2.2. if a petition is filed against CONTRACTOR under any chapter of the Bankruptcy Code as now or hereafter in effect at the time of filing, or if a petition is filed seeking any such equivalent or similar relief against CONTRACTOR under any other federal or state law in effect at the time relating to bankruptcy or insolvency;

15.2.3. if CONTRACTOR makes a general assignment for the benefit of creditors;

15.2.4. if a trustee, receiver, custodian or agent of CONTRACTOR is appointed under applicable law or under contract, whose appointment or authority to take charge of property of CONTRACTOR is for the purpose of enforcing a Lien against such property or for the purpose of general administration of such property for the benefit of CONTRACTOR's creditors;

15.2.5. if CONTRACTOR admits in writing an inability to pay its debts generally as they become due;

15.2.6. if CONTRACTOR persistently fails to perform the Work in accordance with the Contract Documents

(including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the progress schedule established under paragraph 2.9 as revised from time to time);

15.2.7. if CONTRACTOR disregards Laws or Regulations of any public body having jurisdiction;

15.2.8. if CONTRACTOR disregards the authority of ENGINEER; or

15.2.9. if CONTRACTOR otherwise violates in any substantial way any provisions of the Contract Documents;

OWNER may, after giving CONTRACTOR (and the surety, if there be one) seven days' written notice and to the extent permitted by Laws and Regulations, terminate the services of CONTRACTOR, exclude CONTRACTOR from the site and take possession of the Work and of all CONTRACTOR's tools, appliances, construction equipment and machinery at the site and use the same to the full extent they could be used by CONTRACTOR (without liability to CONTRACTOR for trespass or conversion), incorporate in the Work all materials and equipment stored at the site or for which OWNER has paid CONTRACTOR but which are stored elsewhere, and finish the Work as OWNER may deem expedient. In such case CONTRACTOR shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds the direct, indirect and consequential costs of completing the Work (including but not limited to fees and charges of engineers, architects, attorneys and other professionals and court and arbitration costs) such excess will be paid to CONTRACTOR. If such costs exceed such unpaid balance, CONTRACTOR shall pay the difference to OWNER. Such costs incurred by OWNER will be approved as to reasonableness by ENGINEER and incorporated in a Change Order, but when exercising any rights or remedies under this paragraph OWNER shall not be required to obtain the lowest price for the Work performed.

15.3. Where CONTRACTOR's services have been so terminated by OWNER, the termination will not affect any rights or remedies of OWNER against CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of moneys due CONTRACTOR by OWNER will not release CONTRACTOR from liability.

15.4. Upon seven days' written notice to CONTRACTOR and ENGINEER, OWNER may, without cause and without prejudice to any other right or remedy, elect to abandon the Work and terminate the Agreement. In such case, CONTRACTOR shall be paid for all Work executed and any expense sustained plus reasonable termination expenses, which will include, but not be limited to, direct, indirect and consequential costs (including, but not limited to, fees and charges of engineers, architects, attorneys and other professionals and court and arbitration costs).

*Contractor May Stop Work or Terminate:*

15.5. If, through no act or fault of CONTRACTOR, the Work is suspended for a period of more than ninety days by OWNER or under an order of court or other public authority, or ENGINEER fails to act on any Application for Payment within thirty days after it is submitted, or OWNER fails for thirty days to pay CONTRACTOR any sum finally determined to be due, then CONTRACTOR may, upon seven days' written notice to OWNER and ENGINEER, terminate the Agreement and recover from OWNER payment for all Work executed and any expense sustained plus reasonable termination expenses. In addition and in lieu of terminating the Agreement, if ENGINEER has failed to act on an Application for Payment or OWNER has failed to make any payment as aforesaid, CONTRACTOR may upon seven days' written notice to OWNER and ENGINEER stop the Work until payment of all amounts then due. The provisions of this paragraph shall not relieve CONTRACTOR of the obligations under paragraph 6.29 to carry on the Work in accordance with the progress schedule and without delay during disputes and disagreements with OWNER.

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## ARTICLE 16—ARBITRATION

16.1. All claims, disputes and other matters in question between OWNER and CONTRACTOR arising out of, or relating to the Contract Documents or the breach thereof (except for claims which have been waived by the making or acceptance of final payment as provided by paragraph 14.16) will be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining subject to the limitations of this Article 16. This agreement so to arbitrate and any other agreement or consent to arbitrate entered into in accordance herewith as provided in this Article 16 will be specifically enforceable under the prevailing law of any court having jurisdiction.

16.2. No demand for arbitration of any claim, dispute or other matter that is required to be referred to ENGINEER initially for decision in accordance with paragraph 9.11 will be made until the earlier of (a) the date on which ENGINEER has rendered a decision or (b) the tenth day after the parties have presented their evidence to ENGINEER if a written decision has not been rendered by ENGINEER before that date. No demand for arbitration of any such claim, dispute or other matter will be made later than thirty days after the date on which ENGINEER has rendered a written decision in respect thereof in accordance with paragraph 9.11; and the failure to demand arbitration within said thirty days' period shall result in ENGINEER's decision being final and binding upon OWNER and CONTRACTOR. If ENGINEER renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence but will not supersede the arbitration proceedings, except where the decision is acceptable to the parties concerned. No demand for arbitration of any written decision of ENGINEER rendered in accordance with paragraph 9.10 will be made later than ten days after the party making such demand has delivered written notice of intention to appeal as provided in paragraph 9.10.

16.3. Notice of the demand for arbitration will be filed in writing with the other party to the Agreement and with the

American Arbitration Association, and a copy will be sent to ENGINEER for information. The demand for arbitration will be made within the thirty-day or ten-day period specified in paragraph 16.2 as applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall any such demand be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

16.4. No arbitration arising out of or relating to the Contract Documents shall include by consolidation, joinder or in any other manner any other person or entity (including ENGINEER, ENGINEER's agents, employees or consultants) who is not a party to this contract unless:

16.4.1. the inclusion of such other person or entity is necessary if complete relief is to be afforded among those who are already parties to the arbitration.

16.4.2. such other person or entity is substantially involved in a question of law or fact which is common to those who are already parties to the arbitration and which will arise in such proceedings, and

16.4.3. the written consent of the other person or entity sought to be included and of OWNER and CONTRACTOR has been obtained for such inclusion, which consent shall make specific reference to this paragraph; but no such consent shall constitute consent to arbitration of any dispute not specifically described in such consent or to arbitration with any party not specifically identified in such consent.

16.5. The award rendered by the arbitrators will be final, judgment may be entered upon it in any court having jurisdiction thereof, and will not be subject to modification or appeal except to the extent permitted by Sections 10 and 11 of the Federal Arbitration Act (9 U.S.C. §§10,11).

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## ARTICLE 17—MISCELLANEOUS

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### *Giving Notice:*

17.1. Whenever any provision of the Contract Documents requires the giving of written notice, it will be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the notice.

### *Computation of Time:*

17.2.1. When any period of time is referred to in the Contract Documents by days, it will be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday by the law of the applicable jurisdiction, such day will be omitted from the computation.

17.2.2. A calendar day of twenty-four hours measured from midnight to the next midnight shall constitute a day.

### *General:*

17.3. Should OWNER or CONTRACTOR suffer injury or damage to person or property because of any error, omis-

sion or act of the other party or of any of the other party's employees or agents or others for whose acts the other party is legally liable, claim will be made in writing to the other party within a reasonable time of the first observance of such injury or damage. The provisions of this paragraph 17.3 shall not be construed as a substitute for or a waiver of the provisions of any applicable statute of limitations or repose.

17.4. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto, and, in particular but without limitation, the warranties, guarantees and obligations imposed upon CONTRACTOR by paragraphs 6.30, 13.1, 13.12, 13.14, 14.3 and 15.2 and all of the rights and remedies available to OWNER and ENGINEER thereunder, are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Laws or Regulations, by special warranty or guarantee or by other provisions of the Contract Documents, and the provisions of this paragraph will be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right and remedy to which they apply. All representations, warranties and guarantees made in the Contract Documents will survive final payment and termination or completion of the Agreement.



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AIA Document A107

## Abbreviated Form of Agreement Between Owner and Contractor

For CONSTRUCTION PROJECTS OF LIMITED SCOPE where  
the Basis of Payment is a STIPULATED SUM

1987 EDITION

*THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH  
AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.*

This document includes abbreviated General Conditions and should not be used with other general conditions.  
It has been approved and endorsed by The Associated General Contractors of America.

### AGREEMENT

made as of the  
Nineteen Hundred and

day of

in the year of

BETWEEN the Owner:

(Name and address)

and the Contractor:

(Name and address)

The Project is:

(Name and location)

The Architect is:

(Name and address)

The Owner and Contractor agree as set forth below.

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ARTICLE 1

THE WORK OF THIS CONTRACT

1.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

ARTICLE 2

DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1 The date of commencement is the date from which the Contract Time of Paragraph 2.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

*(Insert the date of commencement, if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)*

2.2 The Contractor shall achieve Substantial Completion of the entire Work not later than

*(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)*

SAMPLE

, subject to adjustments of this Contract Time as provided in the Contract Documents.

*(Insert provisions, if any, for liquidated damages relating to failure to complete on time.)*

ARTICLE 3

CONTRACT SUM

3.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of Dollars (\$ \_\_\_\_\_), subject to additions and deductions as provided in the Contract Documents.

2. The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:

*(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)*

3.3 Unit prices, if any, are as follows:

**ARTICLE 4**  
**PROGRESS PAYMENTS**

4.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

4.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located:

*(Insert rate of interest agreed upon if any.)*

*(If state laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations of the lender and contractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision, legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures of interest.)*

**ARTICLE 5**  
**FINAL PAYMENT**

1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

**ARTICLE 6**  
**ENUMERATION OF CONTRACT DOCUMENTS**

1 The Contract Documents are listed in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A107, 1987 Edition.

1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated \_\_\_\_\_, and are as follows:

Document	Title	Pages
----------	-------	-------

1.3 The Specifications are those contained in the Project Manual dated as in Subparagraph 6.1.2, and are as follows:  
(*either list the Specifications here or refer to an exhibit attached to this Agreement*)

Section	Title	Pages
---------	-------	-------

SAMPLE

**6.1.4** The Drawings are as follows, and are dated  
(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

unless a different date is shown below:

Number	Title	Date
--------	-------	------

**6.1.5** The Addenda, if any, are as follows:

Number	Date	Pages
--------	------	-------

SAMPLE

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 6.

**6.1.6** Other documents, if any, forming part of the Contract Documents are as follows:

(List any additional documents which are intended to form part of the Contract Documents.)

## GENERAL CONDITIONS

### ARTICLE 7 CONTRACT DOCUMENTS

7.1 The Contract Documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

7.2 The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

7.3 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

7.4 The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

### ARTICLE 8 OWNER

8.1 The Owner shall furnish surveys and a legal description of the site.

8.2 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.

8.3 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

### ARTICLE 9 CONTRACTOR

9.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

9.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

9.4 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

9.5 Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer, use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

9.6 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

9.7 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

9.8 The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals. When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications.

9.9 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

9.10 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

9.11 The Contractor shall pay all royalties and license fees; shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents unless the Contractor has reason to believe that there is an infringement of patent.

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting herefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 9.12.

9.12.1 In claims against any person or entity indemnified under this Paragraph 9.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 9.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.12.2 The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

## ARTICLE 10

### ADMINISTRATION OF THE CONTRACT

10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1

10.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.

10.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraphs 9.1 and 16.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

10.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance of final payment, shall be subject to arbitration upon the written demand of either party.

10.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

10.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

10.8 All claims or disputes between the Contractor and the Owner arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by

the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

#### **ARTICLE 11**

##### **SUBCONTRACTS**

11.1 A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

#### **ARTICLE 12**

##### **CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS**

12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such claim as provided elsewhere in the Contract Documents.

12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

12.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

#### **ARTICLE 13**

##### **CHANGES IN THE WORK**

13.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construction Change Directive signed by the Owner and Architect.

13.2 The Contract Sum and Contract Time shall be changed only by Change Order.

13.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

#### **ARTICLE 14**

##### **TIME**

14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

14.2 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 15.3.

14.3 If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

#### **ARTICLE 15**

##### **PAYMENTS AND COMPLETION**

15.1 Payments shall be made as provided in Articles 4 and 5 of this Agreement.

15.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to the Owner or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

15.3 When the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion.

15.4 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such



lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

**15.5** The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

- .1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 failure of the Work to comply with the requirements of the Contract Documents; or
- .3 terms of special warranties required by the Contract Documents.

Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

## **ARTICLE 16**

### **PROTECTION OF PERSONS AND PROPERTY**

**16.1** The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- .1 employees on the Work and other persons who may be affected thereby;
- .2 the Work and materials and equipment to be incorporated therein; and
- .3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

**16.2** The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

## **ARTICLE 17**

### **INSURANCE**

**17.1** The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work

itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates of such insurance shall be filed with the Owner prior to the commencement of the Work.

**17.2** The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents.

**17.3** Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.

**17.4** A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

**17.5** The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

**17.6** The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 12, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 17 or any other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 12, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them.

## **ARTICLE 18**

### **CORRECTION OF WORK**

**18.1** The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Com-

pletion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

**18.2** Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

#### **ARTICLE 19**

##### **MISCELLANEOUS PROVISIONS**

**19.1** The Contract shall be governed by the law of the place where the Project is located.

**19.2** As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

- .1 not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion;
- .2 not later than the date of issuance of the final Certificate for Payment for acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and
- .3 not later than the date of the relevant act or failure to act by the Contractor for acts or failures to act occurring after the date of the final Certificate for Payment.

#### **ARTICLE 20**

##### **TERMINATION OF THE CONTRACT**

**20.1** If the Architect fails to recommend payment for a period of 30 days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of 30 days, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

**20.2** If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of the Contract, the Owner, after seven days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively, at the Owner's option, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

SAMPLE

**ARTICLE 21**  
**OTHER CONDITIONS OR PROVISIONS**

SAMPLE

This Agreement entered into as of the day and year first written above.

OWNER

CONTRACTOR

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Signature)*

\_\_\_\_\_  
*(Printed name and title)*

\_\_\_\_\_  
*(Printed name and title)*

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AIA Document A201

# General Conditions of the Contract for Construction

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# GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION

## ARTICLE 1

### GENERAL PROVISIONS

#### BASIC DEFINITIONS

##### 1.1 THE CONTRACT DOCUMENTS

The Contract Documents consist of the Agreement between Owner and Contractor (hereinafter the Agreement), Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, addenda issued prior to execution of the Contract, other documents listed in the Agreement and Modifications issued after execution of the Contract. A Modification is (1) a written amendment to the Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Architect. Unless specifically enumerated in the Agreement, the Contract Documents do not include other documents such as bidding requirements (advertisement or invitation to bid, Instructions to Bidders, sample forms, the Contractor's bid or portions of addenda relating to bidding requirements).

##### 1.2 THE CONTRACT

The Contract Documents form the Contract for Construction. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. The Contract may be amended or modified only by a Modification. The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor. The Architect shall, however, be entitled to performance and enforcement of obligations under the Contract intended to facilitate performance of the Architect's duties.

##### 1.1.3 THE WORK

The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, material, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

##### 1.1.4 THE PROJECT

The Project is the total construction in which the Work performed under the Contract Documents may be the whole or a part and which may include construction by the Owner or by separate contractors.

##### 1.1.5 THE DRAWINGS

The Drawings are the graphic and pictorial portions of the Contract Documents, wherever located and whenever issued, showing the design, location and dimensions of the Work, generally including plans, elevations, sections, details, schedules and diagrams.

##### 1.1.6 THE SPECIFICATIONS

The Specifications are that portion of the Contract Documents consisting of the written requirements for materials, equip-

ment, construction systems, standards and workmanship for the Work, and performance of related services.

##### 1.1.7 THE PROJECT MANUAL

The Project Manual is the volume usually assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications.

#### 1.2 EXECUTION, CORRELATION AND INTENT

1.2.1 The Contract Documents shall be signed by the Owner and Contractor as provided in the Agreement. If either the Owner or Contractor or both do not sign all the Contract Documents, the Architect shall identify such unsigned Documents upon request.

1.2.2 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents.

1.2.3 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

1.2.4 Organization of the Specifications into divisions, sections and articles, and arrangement of Drawings shall not control the Contractor in dividing the Work among Subcontractors or in establishing the extent of Work to be performed by any trade.

1.2.5 Unless otherwise stated in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

##### 1.3 OWNERSHIP AND USE OF ARCHITECT'S DRAWINGS, SPECIFICATIONS AND OTHER DOCUMENTS

1.3.1 The Drawings, Specifications and other documents prepared by the Architect are instruments of the Architect's service through which the Work to be executed by the Contractor is described. The Contractor may retain one contract record set. Neither the Contractor nor any Subcontractor, Sub-subcontractor or material or equipment supplier shall own or claim a copyright in the Drawings, Specifications and other documents prepared by the Architect, and unless otherwise indicated the Architect shall be deemed the author of them and will retain all common law, statutory and other reserved rights, in addition to the copyright. All copies of them, except the Contractor's record set, shall be returned or suitably accounted for to the Architect, on request, upon completion of the Work. The Drawings, Specifications and other documents prepared by the Architect, and copies thereof furnished to the Contractor, are for use solely with respect to this Project. They are not to be used by the Contractor or any Subcontractor, Sub-subcontractor or material or equipment supplier on other projects or for additions to this Project outside the scope of the

Work without the specific written consent of the Owner and Architect. The Contractor, Subcontractors, Sub-subcontractors and material or equipment suppliers are granted a limited license to use and reproduce applicable portions of the Drawings, Specifications and other documents prepared by the Architect appropriate to and for use in the execution of their Work under the Contract Documents. All copies made under this license shall bear the statutory copyright notice, if any, shown on the Drawings, Specifications and other documents prepared by the Architect. Submittal or distribution to meet official regulatory requirements or for other purposes in connection with this Project is not to be construed as publication in derogation of the Architect's copyright or other reserved rights.

#### 1.4 CAPITALIZATION

1.4.1 Terms capitalized in these General Conditions include those which are (1) specifically defined, (2) the titles of numbered articles and identified references to Paragraphs, Subparagraphs and Clauses in the document or (3) the titles of other documents published by the American Institute of Architects.

#### 1.5 INTERPRETATION

1.5.1 In the interest of brevity the Contract Documents frequently omit modifying words such as "all" and "any" and articles such as "the" and "an," but the fact that a modifier or an article is absent from one statement and appears in another is not intended to affect the interpretation of either statement.

### ARTICLE 2

#### OWNER

##### 2.1 DEFINITION

2.1.1 The Owner is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Owner" means the Owner or the Owner's authorized representative.

2.1.2 The Owner upon reasonable written request shall furnish to the Contractor in writing information which is necessary and relevant for the Contractor to evaluate, give notice of or enforce mechanic's lien rights. Such information shall include a correct statement of the record legal title to the property on which the Project is located, usually referred to as the site, and the Owner's interest therein at the time of execution of the Agreement and, within five days after any change in information of such change in title, recorded or unrecorded.

##### 2.2 INFORMATION AND SERVICES REQUIRED OF THE OWNER

2.2.1 The Owner shall, at the request of the Contractor, prior to execution of the Agreement and promptly from time to time thereafter, furnish to the Contractor reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract. *[Note: Unless such reasonable evidence were furnished on request prior to the execution of the Agreement, the prospective contractor would not be required to execute the Agreement or to commence the Work.]*

2.2.2 The Owner shall furnish surveys describing physical characteristics, legal limitations and utility locations for the site of the Project, and a legal description of the site.

2.2.3 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assess-

ments and charges required for construction, use or occupancy of permanent structures or for permanent changes in existing facilities.

2.2.4 Information or services under the Owner's control shall be furnished by the Owner with reasonable promptness to avoid delay in orderly progress of the Work.

2.2.5 Unless otherwise provided in the Contract Documents, the Contractor will be furnished, free of charge, such copies of Drawings and Project Manuals as are reasonably necessary for execution of the Work.

2.2.6 The foregoing are in addition to other duties and responsibilities of the Owner enumerated herein and especially those in respect to Article 6 (Construction by Owner or by Separate Contractors), Article 9 (Payments and Completion) and Article 11 (Insurance and Bonds).

##### 2.3 OWNER'S RIGHT TO STOP THE WORK

2.3.1 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents as required by Paragraph 12.2 or persistently fails to carry out Work in accordance with the Contract Documents, the Owner, by written order signed personally or by an agent specifically so empowered by the Owner in writing, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity, except to the extent required by Subparagraph 6.1.5.

##### 2.4 OWNER'S RIGHT TO CARRY OUT THE WORK

2.4.1 If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven-day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may after such seven-day period give the Contractor a second written notice to correct such deficiencies within a second seven-day period. If the Contractor within such second seven-day period after receipt of such second notice fails to commence and continue to correct any deficiencies, the Owner may, without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor the cost of correcting such deficiencies, including compensation for the Architect's additional services and expenses made necessary by such default, neglect or failure. Such action by the Owner and amounts charged to the Contractor are both subject to prior approval of the Architect. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner.

### ARTICLE 3

#### CONTRACTOR

##### 3.1 DEFINITION

3.1.1 The Contractor is the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Contractor" means the Contractor or the Contractor's authorized representative.

## REVIEW OF CONTRACT DOCUMENTS AND FIELD CONDITIONS BY CONTRACTOR

2.1 The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner pursuant to Subparagraph 2.2.2 and shall at once report to the Architect errors, inconsistencies or omissions discovered. The Contractor shall not be liable to the Owner or Architect for damage resulting from errors, inconsistencies or omissions in the Contract Documents unless the Contractor recognized such error, inconsistency or omission and knowingly failed to report it to the Architect. If the Contractor performs any construction activity knowing it involves a recognized error, inconsistency or omission in the Contract Documents without such notice to the Architect, the Contractor shall assume appropriate responsibility for such performance and shall bear an appropriate amount of the attributable costs for correction.

2.2 The Contractor shall take field measurements and verify field conditions and shall carefully compare such field measurements and conditions and other information known to the Contractor with the Contract Documents before commencing activities. Errors, inconsistencies or omissions discovered shall be reported to the Architect at once.

2.3 The Contractor shall perform the Work in accordance with the Contract Documents and submittals approved pursuant to Paragraph 3.12.

## 3 SUPERVISION AND CONSTRUCTION PROCEDURES

3.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

3.2 The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

3.3 The Contractor shall not be relieved of obligations to perform the Work in accordance with the Contract Documents, whether by activities or duties of the Architect in the Architect's administration of the Contract, or by tests, inspections or approvals required or performed by persons other than the Contractor.

3.4 The Contractor shall be responsible for inspection of portions of Work already performed under this Contract to determine that such portions are in proper condition to receive subsequent Work.

## 4 LABOR AND MATERIALS

4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

4.2 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

## 3.5 WARRANTY

3.5.1 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

## 3.6 TAXES

3.6.1 The Contractor shall pay sales, consumer, use and similar taxes for the Work or portions thereof provided by the Contractor which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect.

## 3.7 PERMITS, FEES AND NOTICES

3.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required when bids are received or negotiations concluded.

3.7.2 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work.

3.7.3 It is not the Contractor's responsibility to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes, and rules and regulations. However, if the Contractor observes that portions of the Contract Documents are in variance therewith, the Contractor shall promptly notify the Architect and Owner in writing, and necessary changes shall be accomplished by appropriate Modification.

3.7.4 If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations without such notice to the Architect and Owner, the Contractor shall assume full responsibility for such Work and shall bear the attributable costs.

## 3.8 ALLOWANCES

3.8.1 The Contractor shall include in the Contract Sum all allowances stated in the Contract Documents. Items covered by allowances shall be supplied for such amounts and by such persons or entities as the Owner may direct, but the Contractor shall not be required to employ persons or entities against which the Contractor makes reasonable objection.

3.8.2 Unless otherwise provided in the Contract Documents:

- 1 materials and equipment under an allowance shall be selected promptly by the Owner to avoid delay in the Work;
- 2 allowances shall cover the cost to the Contractor of materials and equipment delivered at the site and all required taxes, less applicable trade discounts;

3 Contractor's costs for unloading and handling at the site, labor, installation costs, overhead, profit and other expenses contemplated for stated allowance amounts shall be included in the Contract Sum and not in the allowances;

4 whenever costs are more than or less than allowances, the Contract Sum shall be adjusted accordingly by Change Order. The amount of the Change Order shall reflect (1) the difference between actual costs and the allowances under Clause 3.8.2.2 and (2) changes in Contractor's costs under Clause 3.8.2.3.

### 3.9 SUPERINTENDENT

3.9.1 The Contractor shall employ a competent superintendent and necessary assistants who shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor. Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case.

### 3.10 CONTRACTOR'S CONSTRUCTION SCHEDULES

3.10.1 The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work. The schedule shall not exceed time limits current under the Contract Documents, shall be revised at appropriate intervals as required by the conditions of the Work and Project, shall be related to the entire Project to the extent required by the Contract Documents, and shall provide for expeditious and practicable execution of the Work.

3.10.2 The Contractor shall prepare and keep current, for the Architect's approval, a schedule of submittals which is coordinated with the Contractor's construction schedule and allows the Architect reasonable time to review submittals.

3.10.3 The Contractor shall conform to the most recent schedules.

### 3.11 DOCUMENTS AND SAMPLES AT THE SITE

3.11.1 The Contractor shall maintain at the site for the Owner one record copy of the Drawings, Specifications, addenda, Change Orders and other Modifications, in good order and marked currently to record changes and selections made during construction, and in addition approved Shop Drawings, Product Data, Samples and similar required submittals. These shall be available to the Architect and shall be delivered to the Architect for submittal to the Owner upon completion of the Work.

### 3.12 SHOP DRAWINGS, PRODUCT DATA AND SAMPLES

3.12.1 Shop Drawings are drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work.

3.12.2 Product Data are illustrations, standard schedules, performance charts, instructions, brochures, diagrams and other information furnished by the Contractor to illustrate materials or equipment for some portion of the Work.

3.12.3 Samples are physical examples which illustrate materials, equipment or workmanship and establish standards by which the Work will be judged.

3.12.4 Shop Drawings, Product Data, Samples and similar submittals are not Contract Documents. The purpose of their submittal is to demonstrate for those portions of the Work for

which submittals are required the way the Contractor proposes to conform to the information given and the design concept expressed in the Contract Documents. Review by the Architect is subject to the limitations of Subparagraph 4.2.7.

3.12.5 The Contractor shall review, approve and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness and in such sequence as to cause no delay in the Work or in the activities of the Owner or of separate contractors. Submittals made by the Contractor which are not required by the Contract Documents may be returned without action.

3.12.6 The Contractor shall perform no portion of the Work requiring submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect. Such Work shall be in accordance with approved submittals.

3.12.7 By approving and submitting Shop Drawings, Product Data, Samples and similar submittals, the Contractor represents that the Contractor has determined and verified materials, field measurements and field construction criteria related thereto, or will do so, and has checked and coordinated the information contained within such submittals with the requirements of the Work and of the Contract Documents.

3.12.8 The Contractor shall not be relieved of responsibility for deviations from requirements of the Contract Documents by the Architect's approval of Shop Drawings, Product Data, Samples or similar submittals unless the Contractor has specifically informed the Architect in writing of such deviation at the time of submittal and the Architect has given written approval to the specific deviation. The Contractor shall not be relieved of responsibility for errors or omissions in Shop Drawings, Product Data, Samples or similar submittals by the Architect's approval thereof.

3.12.9 The Contractor shall direct specific attention, in writing or on resubmitted Shop Drawings, Product Data, Samples or similar submittals, to revisions other than those requested by the Architect on previous submittals.

3.12.10 Informational submittals upon which the Architect is not expected to take responsive action may be so identified in the Contract Documents.

3.12.11 When professional certification of performance criteria of materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such calculations and certifications.

### 3.13 USE OF SITE

3.13.1 The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits and the Contract Documents and shall not unreasonably encumber the site with materials or equipment.

### 3.14 CUTTING AND PATCHING

3.14.1 The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make its parts fit together properly.

3.14.2 The Contractor shall not damage or endanger a portion of the Work or fully or partially completed construction of the Owner or separate contractors by cutting, patching or otherwise altering such construction, or by excavation. The Contractor shall not cut or otherwise alter such construction by the

owner or a separate contractor except with written consent of the Owner and of such separate contractor; such consent shall not be unreasonably withheld. The Contractor shall not unreasonably withhold from the Owner or a separate contractor the Contractor's consent to cutting or otherwise altering the Work.

#### 15 CLEANING UP

15.1 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

15.2 If the Contractor fails to clean up as provided in the Contract Documents, the Owner may do so and the cost thereof shall be charged to the Contractor.

#### 16 ACCESS TO WORK

16.1 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

#### 17 ROYALTIES AND PATENTS

17.1 The Contractor shall pay all royalties and license fees. The Contractor shall defend suits or claims for infringement of patent rights and shall hold the Owner and Architect harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents. However, if the Contractor has reason to believe that the required design, process or product is an infringement of a patent, the Contractor shall be responsible for such loss unless such information is promptly furnished to the Architect.

#### 18 INDEMNIFICATION

18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use, resulting herefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 3.18.

18.2 In claims against any person or entity indemnified under this Paragraph 3.18 by an employee of the Contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 3.18 shall not be limited by limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

18.3 The obligations of the Contractor under this Paragraph 3.18 shall not extend to the liability of the Architect, the Archi-

tect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

## ARTICLE 4

### ADMINISTRATION OF THE CONTRACT

#### 4.1 ARCHITECT

4.1.1 The Architect is the person lawfully licensed to practice architecture or an entity lawfully practicing architecture identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The term "Architect" means the Architect or the Architect's authorized representative.

4.1.2 Duties, responsibilities and limitations of authority of the Architect as set forth in the Contract Documents shall not be restricted, modified or extended without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

4.1.3 In case of termination of employment of the Architect, the Owner shall appoint an architect against whom the Contractor makes no reasonable objection and whose status under the Contract Documents shall be that of the former architect.

4.1.4 Disputes arising under Subparagraphs 4.1.2 and 4.1.3 shall be subject to arbitration.

#### 4.2 ARCHITECT'S ADMINISTRATION OF THE CONTRACT

4.2.1 The Architect will provide administration of the Contract as described in the Contract Documents, and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 12.2. The Architect will advise and consult with the Owner. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents, unless otherwise modified by written instrument in accordance with other provisions of the Contract.

4.2.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work.

4.2.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraph 3.3. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The Architect will not have control over or charge of and will not be responsible for acts or omissions of the Con-

tractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

**4.2.4 Communications Facilitating Contract Administration.** Except as otherwise provided in the Contract Documents or when direct communications have been specially authorized, the Owner and Contractor shall endeavor to communicate through the Architect. Communications by and with the Architect's consultants shall be through the Architect. Communications by and with Subcontractors and material suppliers shall be through the Contractor. Communications by and with separate contractors shall be through the Owner.

**4.2.5** Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

**4.2.6** The Architect will have authority to reject Work which does not conform to the Contract Documents. Whenever the Architect considers it necessary or advisable for implementation of the intent of the Contract Documents, the Architect will have authority to require additional inspection or testing of the Work in accordance with Subparagraphs 13.5.2 and 13.5.3, whether or not such Work is fabricated, installed or completed. However, neither this authority of the Architect nor a decision made in good faith either to exercise or not to exercise such authority shall give rise to a duty or responsibility of the Architect to the Contractor, Subcontractors, material and equipment suppliers, their agents or employees, or other persons performing portions of the Work.

**4.2.7** The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents. The Architect's action will be taken with such reasonable promptness as to cause no delay in the Work or in the activities of the Owner, Contractor or separate contractors, while allowing sufficient time in the Architect's professional judgment to permit adequate review. Review of such submittals is not conducted for the purpose of determining the accuracy and completeness of other details such as dimensions and quantities, or for substantiating instructions for installation or performance of equipment or systems, all of which remain the responsibility of the Contractor as required by the Contract Documents. The Architect's review of the Contractor's submittals shall not relieve the Contractor of the obligations under Paragraphs 3.3, 3.5 and 3.12. The Architect's review shall not constitute approval of safety precautions or unless otherwise specifically stated by the Architect of any construction means, methods, techniques, sequences or procedures. The Architect's approval of a specific item shall not indicate approval of an assembly of which the item is a component.

**4.2.8** The Architect will prepare Change Orders and Construction Change Directives, and may authorize minor changes in the Work as provided in Paragraph 7.4.

**4.2.9** The Architect will conduct inspections to determine the date or dates of Substantial Completion and the date of final completion, will receive and forward to the Owner for the Owner's review and records written warranties and related documents required by the Contract and assembled by the Contractor, and will issue a final Certificate for Payment upon compliance with the requirements of the Contract Documents.

**4.2.10** If the Owner and Architect agree, the Architect will provide one or more project representatives to assist in carrying

out the Architect's responsibilities at the site. The duties, responsibilities and limitations of authority of such project representatives shall be as set forth in an exhibit to be incorporated in the Contract Documents.

**4.2.11** The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect's response to such requests will be made with reasonable promptness and within any time limits agreed upon. If no agreement is made concerning the time within which interpretations required of the Architect shall be furnished in compliance with this Paragraph 4.2, then delay shall not be recognized on account of failure by the Architect to furnish such interpretations until 15 days after written request is made for them.

**4.2.12** Interpretations and decisions of the Architect will be consistent with the intent of and reasonably inferable from the Contract Documents and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions so rendered in good faith.

**4.2.13** The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

#### 4.3 CLAIMS AND DISPUTES

**4.3.1 Definition.** A Claim is a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of Contract terms, payment of money, extension of time or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. Claims must be made by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

**4.3.2 Decision of Architect.** Claims, including those alleging an error or omission by the Architect, shall be referred initially to the Architect for action as provided in Paragraph 4.4. A decision by the Architect, as provided in Subparagraph 4.4.4, shall be required as a condition precedent to arbitration or litigation of a Claim between the Contractor and Owner as to all such matters arising prior to the date final payment is due, regardless of (1) whether such matters relate to execution and progress of the Work or (2) the extent to which the Work has been completed. The decision by the Architect in response to a Claim shall not be a condition precedent to arbitration or litigation in the event (1) the position of Architect is vacant, (2) the Architect has not received evidence or has failed to render a decision within agreed time limits, (3) the Architect has failed to take action required under Subparagraph 4.4.4 within 30 days after the Claim is made, (4) 45 days have passed after the Claim has been referred to the Architect or (5) the Claim relates to a mechanic's lien.

**4.3.3 Time Limits on Claims.** Claims by either party must be made within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later. Claims must be made by written notice. An additional Claim made after the initial Claim has been implemented by Change Order will not be considered unless submitted in a timely manner.

**3.4 Continuing Contract Performance.** Pending final resolution of a Claim including arbitration, unless otherwise agreed in writing the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

**3.5 Waiver of Claims: Final Payment.** The making of final payment shall constitute a waiver of Claims by the Owner except those arising from:

- 1 liens, Claims, security interests or encumbrances arising out of the Contract and unsettled;
- 2 failure of the Work to comply with the requirements of the Contract Documents; or
- 3 terms of special warranties required by the Contract Documents.

**3.6 Claims for Concealed or Unknown Conditions.** If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within 21 days after the Architect has given notice of the decision. If the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

**4.3.7 Claims for Additional Cost.** If the Contractor wishes to make Claim for an increase in the Contract Sum, written notice as provided herein shall be given before proceeding to execute the Work. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Paragraph 10.3. If the Contractor believes additional cost is involved for reasons including but not limited to (1) a written interpretation from the Architect, (2) an order by the Owner to stop the Work where the Contractor was not at fault, (3) a written order for a minor change in the Work issued by the Architect, (4) failure of payment by the Owner, (5) termination of the Contract by the Owner, (6) Owner's suspension or (7) other reasonable grounds, Claim shall be filed in accordance with the procedure established herein.

#### **4.3.8 Claims for Additional Time**

**4.3.8.1** If the Contractor wishes to make Claim for an increase in the Contract Time, written notice as provided herein shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay only one Claim is necessary.

**4.3.8.2** If adverse weather conditions are the basis for a Claim for additional time, such Claim shall be documented by data

substantiating that weather conditions were abnormal for the period of time and could not have been reasonably anticipated, and that weather conditions had an adverse effect on the scheduled construction.

**4.3.9 Injury or Damage to Person or Property.** If either party to the Contract suffers injury or damage to person or property because of an act or omission of the other party, of any of the other party's employees or agents, or of others for whose acts such party is legally liable, written notice of such injury or damage, whether or not insured, shall be given to the other party within a reasonable time not exceeding 21 days after first observance. The notice shall provide sufficient detail to enable the other party to investigate the matter. If a Claim for additional cost or time related to this Claim is to be asserted, it shall be filed as provided in Subparagraphs 4.3.7 or 4.3.8.

#### **4.4 RESOLUTION OF CLAIMS AND DISPUTES**

**4.4.1** The Architect will review Claims and take one or more of the following preliminary actions within ten days of receipt of a Claim: (1) request additional supporting data from the claimant, (2) submit a schedule to the parties indicating when the Architect expects to take action, (3) reject the Claim in whole or in part, stating reasons for rejection, (4) recommend approval of the Claim by the other party or (5) suggest a compromise. The Architect may also, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim.

**4.4.2** If a Claim has been resolved, the Architect will prepare or obtain appropriate documentation.

**4.4.3** If a Claim has not been resolved, the party making the Claim shall, within ten days after the Architect's preliminary response, take one or more of the following actions: (1) submit additional supporting data requested by the Architect, (2) modify the initial Claim or (3) notify the Architect that the initial Claim stands.

**4.4.4** If a Claim has not been resolved after consideration of the foregoing and of further evidence presented by the parties or requested by the Architect, the Architect will notify the parties in writing that the Architect's decision will be made within seven days, which decision shall be final and binding on the parties but subject to arbitration. Upon expiration of such time period, the Architect will render to the parties the Architect's written decision relative to the Claim, including any change in the Contract Sum or Contract Time or both. If there is a surety and there appears to be a possibility of a Contractor's default, the Architect may, but is not obligated to, notify the surety and request the surety's assistance in resolving the controversy.

#### **4.5 ARBITRATION**

**4.5.1 Controversies and Claims Subject to Arbitration.** Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, except controversies or Claims relating to aesthetic effect and except those waived as provided for in Subparagraph 4.3.5. Such controversies or Claims upon which the Architect has given notice and rendered a decision as provided in Subparagraph 4.4.4 shall be subject to arbitration upon written demand of either party. Arbitration may be commenced when 45 days have passed after a Claim has been referred to the Architect as provided in Paragraph 4.3 and no decision has been rendered.

**4.5.2 Rules and Notices for Arbitration.** Claims between the Owner and Contractor not resolved under Paragraph 4.4 shall, if subject to arbitration under Subparagraph 4.5.1, be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect, unless the parties mutually agree otherwise. Notice of demand for arbitration shall be filed in writing with the other party to the Agreement between the Owner and Contractor and with the American Arbitration Association, and a copy shall be filed with the Architect.

**4.5.3 Contract Performance During Arbitration.** During arbitration proceedings, the Owner and Contractor shall comply with Subparagraph 4.3.4.

**4.5.4 When Arbitration May Be Demanded.** Demand for arbitration of any Claim may not be made until the earlier of (1) the date on which the Architect has rendered a final written decision on the Claim, (2) the tenth day after the parties have presented evidence to the Architect or have been given reasonable opportunity to do so, if the Architect has not rendered a final written decision by that date, or (3) any of the five events described in Subparagraph 4.3.2.

**4.5.4.1** When a written decision of the Architect states that (1) the decision is final but subject to arbitration and (2) a demand for arbitration of a Claim covered by such decision must be made within 30 days after the date on which the party making the demand receives the final written decision, then failure to demand arbitration within said 30 days' period shall result in the Architect's decision becoming final and binding upon the Owner and Contractor. If the Architect renders a decision after arbitration proceedings have been initiated, such decision may be entered as evidence, but shall not supersede arbitration proceedings unless the decision is acceptable to all parties concerned.

**4.5.4.2** A demand for arbitration shall be made within the time limits specified in Subparagraphs 4.5.1 and 4.5.4 and Clause 4.5.4.1 as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7.

**4.5.5 Limitation on Consolidation or Joinder.** No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Architect, the Architect's employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, a separate contractor as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No person or entity other than the Owner, Contractor or a separate contractor as described in Article 6 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

**4.5.6 Claims and Timely Assertion of Claims.** A party who files a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded. When a party fails to include a Claim through oversight, inadvertence or excusable neglect, or when a Claim has matured or been acquired subsequently, the arbitrator or arbitrators may permit amendment.

**4.5.7 Judgment on Final Award.** The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

## ARTICLE 5

### SUBCONTRACTORS

#### 5.1 DEFINITIONS

**5.1.1** A Subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site. The term "Subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Subcontractor or an authorized representative of the Subcontractor. The term "Subcontractor" does not include a separate contractor or subcontractors of a separate contractor.

**5.1.2** A Sub-subcontractor is a person or entity who has a direct or indirect contract with a Subcontractor to perform a portion of the Work at the site. The term "Sub-subcontractor" is referred to throughout the Contract Documents as if singular in number and means a Sub-subcontractor or an authorized representative of the Sub-subcontractor.

#### 5.2 AWARD OF SUBCONTRACTS AND OTHER CONTRACTS FOR PORTIONS OF THE WORK

**5.2.1** Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

**5.2.2** The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not be required to contract with anyone to whom the Contractor has made reasonable objection.

**5.2.3** If the Owner or Architect has reasonable objection to a person or entity proposed by the Contractor, the Contractor shall propose another to whom the Owner or Architect has no reasonable objection. The Contract Sum shall be increased or decreased by the difference in cost occasioned by such change and an appropriate Change Order shall be issued. However, no increase in the Contract Sum shall be allowed for such change unless the Contractor has acted promptly and responsively in submitting names as required.

**5.2.4** The Contractor shall not change a Subcontractor, person or entity previously selected if the Owner or Architect makes reasonable objection to such change.



### 5.3 SUBCONTRACTUAL RELATIONS

**5.3.1** By appropriate agreement, written where legally required for validity, the Contractor shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by these Documents, assumes toward the Owner and Architect. Each subcontract agreement shall preserve and protect the rights of the Owner and Architect under the Contract Documents with respect to the Work to be performed by the Subcontractor so that subcontracting thereof will not prejudice such rights, and shall allow to the Subcontractor, unless specifically provided otherwise in the subcontract agreement, the benefit of all rights, remedies and redress against the Contractor that the Contractor, by the Contract Documents, has against the Owner. Where appropriate, the Contractor shall require each Subcontractor to enter into similar agreements with Sub-subcontractors. The Contractor shall make available to each proposed Subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the Subcontractor will be bound, and, upon written request of the Subcontractor, identify to the Subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors shall similarly make copies of applicable portions of such documents available to their respective proposed Sub-subcontractors.

### 5.4 CONTINGENT ASSIGNMENT OF SUBCONTRACTS

**5.4.1** Each subcontract agreement for a portion of the Work is assigned by the Contractor to the Owner provided that:

- 1 assignment is effective only after termination of the Contract by the Owner for cause pursuant to Paragraph 1.4.2 and only for those subcontract agreements which the Owner accepts by notifying the Subcontractor in writing; and
- 2 assignment is subject to the prior rights of the surety, if any, obligated under bond relating to the Contract.

**5.4.2** If the Work has been suspended for more than 30 days, the Subcontractor's compensation shall be equitably adjusted.

## ARTICLE 6

### CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

#### 6.1 OWNER'S RIGHT TO PERFORM CONSTRUCTION AND TO AWARD SEPARATE CONTRACTS

**6.1.1** The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided elsewhere in the Contract Documents.

**6.1.2** When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

**6.1.3** The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule and Contract Sum deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Owner until subsequently revised.

**6.1.4** Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

#### 6.2 MUTUAL RESPONSIBILITY

**6.2.1** The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

**6.2.2** If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractors' completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

**6.2.3** Costs caused by delays or by improperly timed activities or defective construction shall be borne by the party responsible therefor.

**6.2.4** The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

**6.2.5** Claims and other disputes and matters in question between the Contractor and a separate contractor shall be subject to the provisions of Paragraph 4.3 provided the separate contractor has reciprocal obligations.

**6.2.6** The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Paragraph 3.14.

#### 6.3 OWNER'S RIGHT TO CLEAN UP

**6.3.1** If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish as described in Paragraph 3.15, the Owner may clean up and allocate the cost among those responsible as the Architect determines to be just.

## ARTICLE 7

### CHANGES IN THE WORK

#### 7.1 CHANGES

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

7.1.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor, the applicable unit prices shall be equitably adjusted.

#### 7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- 1 a change in the Work;
- 2 the amount of the adjustment in the Contract Sum, if any; and
- 3 the extent of the adjustment in the Contract Time, if any.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

#### 7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- 1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- 2 unit prices stated in the Contract Documents or subsequently agreed upon;

3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or

4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- 1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' or workmen's compensation insurance;
- 2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- 3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- 4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- 5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7 Pending final determination of cost to the Owner, amounts not in dispute may be included in Applications for Payment. The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 If the Owner and Contractor do not agree with the adjustment in Contract Time or the method for determining it, the adjustment or the method shall be referred to the Architect for determination.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

#### 4 MINOR CHANGES IN THE WORK

4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

### ARTICLE 8

#### TIME

##### 1.1 DEFINITIONS

1.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.

1.1.2 The date of commencement of the Work is the date established in the Agreement. The date shall not be postponed by the failure to act of the Contractor or of persons or entities for whom the Contractor is responsible.

1.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

1.1.4 The term "day" as used in the Contract Documents shall mean calendar day unless otherwise specifically defined.

##### 1.2 PROGRESS AND COMPLETION

1.2.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

1.2.2 The Contractor shall not knowingly, except by agreement or instruction of the Owner in writing, prematurely commence operations on the site or elsewhere prior to the effective date of insurance required by Article 11 to be furnished by the Contractor. The date of commencement of the Work shall not be changed by the effective date of such insurance. Unless the date of commencement is established by a notice to proceed given by the Owner, the Contractor shall notify the Owner in writing not less than five days or other agreed period before commencing the Work to permit the timely filing of mortgage, mechanic's liens and other security interests.

1.2.3 The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time.

##### 1.3 DELAYS AND EXTENSIONS OF TIME

1.3.1 If the Contractor is delayed at any time in progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

1.3.2 Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.5.

1.3.3 This Paragraph 1.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

### ARTICLE 9

#### PAYMENTS AND COMPLETION

##### 9.1 CONTRACT SUM

9.1.1 The Contract Sum is stated in the Agreement and, including authorized adjustments, is the total amount payable by the Owner to the Contractor for performance of the Work under the Contract Documents.

##### 9.2 SCHEDULE OF VALUES

9.2.1 Before the first Application for Payment, the Contractor shall submit to the Architect a schedule of values allocated to various portions of the Work, prepared in such form and supported by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

##### 9.3 APPLICATIONS FOR PAYMENT

9.3.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for operations completed in accordance with the schedule of values. Such application shall be notarized, if required, and supported by such data substantiating the Contractor's right to payment as the Owner or Architect may require, such as copies of requisitions from Subcontractors and material suppliers, and reflecting retainage if provided for elsewhere in the Contract Documents.

9.3.1.1 Such applications may include requests for payment on account of changes in the Work which have been properly authorized by Construction Change Directives but not yet included in Change Orders.

9.3.1.2 Such applications may not include requests for payment of amounts the Contractor does not intend to pay to a Subcontractor or material supplier because of a dispute or other reason.

9.3.2 Unless otherwise provided in the Contract Documents, payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work if approved in advance by the Owner. Payment may similarly be made for materials and equipment suitably stored on the site at a location agreed upon in writing. Payment for materials and equipment stored on or off the site shall be conditioned upon compliance by the Contractor with procedures satisfactory to the Owner to establish the Owner's title to such materials and equipment or otherwise protect the Owner's interest, and shall include applicable insurance, storage and transportation to the site for such materials and equipment stored off the site.

9.3.3 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information and belief, be free and clear of liens, claims, security interests or encumbrances in favor of the Contractor, Subcontractors, material suppliers, or other persons or entities making a claim by reason of having provided labor, materials and equipment relating to the Work.

##### 9.4 CERTIFICATES FOR PAYMENT

9.4.1 The Architect will, within seven days after receipt of the Contractor's Application for Payment, either issue to the

Owner a Certificate for Payment, with a copy to the Contractor, for such amount as the Architect determines is properly due, or notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in whole or in part as provided in Subparagraph 9.5.1.

**9.4.2** The issuance of a Certificate for Payment will constitute a representation by the Architect to the Owner, based on the Architect's observations at the site and the data comprising the Application for Payment, that the Work has progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, quality of the Work is in accordance with the Contract Documents. The foregoing representations are subject to an evaluation of the Work for conformance with the Contract Documents upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Contract Documents correctable prior to completion and to specific qualifications expressed by the Architect. The issuance of a Certificate for Payment will further constitute a representation that the Contractor is entitled to payment in the amount certified. However, the issuance of a Certificate for Payment will not be a representation that the Architect has (1) made exhaustive or continuous on-site inspections to check the quality or quantity of the Work, (2) reviewed construction means, methods, techniques, sequences or procedures, (3) reviewed copies of requisitions received from Subcontractors and material suppliers and other data requested by the Owner to substantiate the Contractor's right to payment or (4) made examination to ascertain how or for what purpose the Contractor has used money previously paid on account of the Contract Sum.

## 9.5 DECISIONS TO WITHHOLD CERTIFICATION

**9.5.1** The Architect may decide not to certify payment and may withhold a Certificate for Payment in whole or in part, to the extent reasonably necessary to protect the Owner, if in the Architect's opinion the representations to the Owner required by Subparagraph 9.4.2 cannot be made. If the Architect is unable to certify payment in the amount of the Application, the Architect will notify the Contractor and Owner as provided in Subparagraph 9.4.1. If the Contractor and Architect cannot agree on a revised amount, the Architect will promptly issue a Certificate for Payment for the amount for which the Architect is able to make such representations to the Owner. The Architect may also decide not to certify payment on behalf of subsequently discovered evidence or subsequent observations, may nullify the whole or a part of a Certificate for Payment previously issued, to such extent as may be necessary in the Architect's opinion to protect the Owner from loss because of:

- .1 defective Work not remedied;
- .2 third party claims filed for reasonable evidence indicating probable filing of such claims;
- .3 failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment;
- .4 reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum;
- .5 damage to the Owner or another contractor;
- .6 reasonable evidence that the Work will not be completed within the Contract Time, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay; or
- .7 persistent failure to carry out the Work in accordance with the Contract Documents.

**9.5.2** When the above reasons for withholding certification are removed, certification will be made for amounts previously withheld.

## 9.6 PROGRESS PAYMENTS

**9.6.1** After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner and within the time provided in the Contract Documents, and shall so notify the Architect.

**9.6.2** The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor's portion of the Work, the amount to which said Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of such Subcontractor's portion of the Work. The Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to Sub-subcontractors in similar manner.

**9.6.3** The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.

**9.6.4** Neither the Owner nor Architect shall have an obligation to pay or to see to the payment of money to a Subcontractor except as may otherwise be required by law.

**9.6.5** Payment to material suppliers shall be treated in a manner similar to that provided in Subparagraphs 9.6.2, 9.6.3 and 9.6.4.

**9.6.6** A Certificate for Payment, a progress payment, or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the Contract Documents.

## 9.7 FAILURE OF PAYMENT

**9.7.1** If the Architect does not issue a Certificate for Payment, through no fault of the Contractor, within seven days after receipt of the Contractor's Application for Payment, or if the Owner does not pay the Contractor within seven days after the date established in the Contract Documents the amount certified by the Architect or awarded by arbitration, then the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, which shall be accomplished as provided in Article 7.

## 9.8 SUBSTANTIAL COMPLETION

**9.8.1** Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use.

**9.8.2** When the Contractor considers that the Work, or a portion thereof which the Owner agrees to accept separately, is substantially complete, the Contractor shall prepare and submit to the Architect a comprehensive list of items to be completed or corrected. The Contractor shall proceed promptly to complete and correct items on the list. Failure to include an item on such list does not alter the responsibility of the Contractor to complete all Work in accordance with the Contract Documents. Upon receipt of the Contractor's list, the Architect will make an inspection to determine whether the Work or desig-

nated portion thereof is substantially complete. If the Architect's inspection discloses any item, whether or not included on the Contractor's list, which is not in accordance with the requirements of the Contract Documents, the Contractor shall, before issuance of the Certificate of Substantial Completion, complete or correct such item upon notification by the Architect. The Contractor shall then submit a request for another inspection by the Architect to determine Substantial Completion. When the Work or designated portion thereof is substantially complete, the Architect will prepare a Certificate of Substantial Completion which shall establish the date of Substantial Completion, shall establish responsibilities of the Owner and Contractor for security, maintenance, heat, utilities, damage to the Work and insurance, and shall fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion. The Certificate of Substantial Completion shall be submitted to the Owner and Contractor for their written acceptance of responsibilities assigned to them in such Certificate.

**9.8.3** Upon Substantial Completion of the Work or designated portion thereof and upon application by the Contractor and certification by the Architect, the Owner shall make payment, reflecting adjustment in retainage, if any, for such Work or portion thereof as provided in the Contract Documents.

#### **9.9 PARTIAL OCCUPANCY OR USE**

**9.9.1** The Owner may occupy or use any completed or partially completed portion of the Work at any stage when such portion is designated by separate agreement with the Contractor, provided such occupancy or use is consented to by the insurer as required under Subparagraph 11.3.11 and authorized by public authorities having jurisdiction over the Work. Such partial occupancy or use may commence whether or not the portion is substantially complete, provided the Owner and Contractor have accepted in writing the responsibilities assigned to each of them for payments, retainage if any, security, maintenance, heat, utilities, damage to the Work and insurance, and have agreed in writing concerning the period for correction of the Work and commencement of warranties required by the Contract Documents. When the Contractor considers a portion substantially complete, the Contractor shall prepare and submit a list to the Architect as provided under Subparagraph 9.8.2. Consent of the Contractor to partial occupancy or use shall not be unreasonably withheld. The stage of the progress of the Work shall be determined by written agreement between the Owner and Contractor or, if no agreement is reached, by decision of the Architect.

**9.9.2** Immediately prior to such partial occupancy or use, the Owner, Contractor and Architect shall jointly inspect the area to be occupied or portion of the Work to be used in order to determine and record the condition of the Work.

**9.9.3** Unless otherwise agreed upon, partial occupancy or use of a portion or portions of the Work shall not constitute acceptance of Work not complying with the requirements of the Contract Documents.

#### **9.10 FINAL COMPLETION AND FINAL PAYMENT**

**9.10.1** Upon receipt of written notice that the Work is ready for final inspection and acceptance and upon receipt of a final Application for Payment, the Architect will promptly make

such inspection and, when the Architect finds the Work acceptable under the Contract Documents and the Contract fully performed, the Architect will promptly issue a final Certificate for Payment stating that to the best of the Architect's knowledge, information and belief, and on the basis of the Architect's observations and inspections, the Work has been completed in accordance with terms and conditions of the Contract Documents and that the entire balance found to be due the Contractor and noted in said final Certificate is due and payable. The Architect's final Certificate for Payment will constitute a further representation that conditions listed in Subparagraph 9.10.2 as precedent to the Contractor's being entitled to final payment have been fulfilled.

**9.10.2** Neither final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or the Owner's property might be responsible or encumbered (less amounts withheld by Owner) have been paid or otherwise satisfied, (2) a certificate evidencing that insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Owner, (3) a written statement that the Contractor knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents, (4) consent of surety, if any, to final payment and (5), if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such form as may be designated by the Owner. If a Subcontractor refuses to furnish a release or waiver required by the Owner, the Contractor may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorney's fees.

**9.10.3** If, after Substantial Completion of the Work, final completion thereof is materially delayed through no fault of the Contractor or by issuance of Change Orders affecting final completion, and the Architect so confirms, the Owner shall, upon application by the Contractor and certification by the Architect, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance for Work not fully completed or corrected is less than retainage stipulated in the Contract Documents, and if bonds have been furnished, the written consent of surety to payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by the Contractor to the Architect prior to certification of such payment. Such payment shall be made under terms and conditions governing final payment, except that it shall not constitute a waiver of claims. The making of final payment shall constitute a waiver of claims by the Owner as provided in Subparagraph 4.3.5.

**9.10.4** Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment. Such waivers shall be in addition to the waiver described in Subparagraph 4.3.5.

## ARTICLE 10

### PROTECTION OF PERSONS AND PROPERTY

#### 10.1 SAFETY PRECAUTIONS AND PROGRAMS

10.1.1 The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

10.1.2 In the event the Contractor encounters on the site material reasonably believed to be asbestos or polychlorinated biphenyl (PCB) which has not been rendered harmless, the Contractor shall immediately stop Work in the area affected and report the condition to the Owner and Architect in writing. The Work in the affected area shall not thereafter be resumed except by written agreement of the Owner and Contractor if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless. The Work in the affected area shall be resumed in the absence of asbestos or polychlorinated biphenyl (PCB), or when it has been rendered harmless, by written agreement of the Owner and Contractor, or in accordance with final determination by the Architect on which arbitration has not been demanded, or by arbitration under Article 4.

10.1.3 The Contractor shall not be required pursuant to Article 7 to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

10.1.4 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work in the affected area if in fact the material is asbestos or polychlorinated biphenyl (PCB) and has not been rendered harmless, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Owner, anyone directly or indirectly employed by the Owner or anyone for whose acts the Owner may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist in a party or person described in this Subparagraph 10.1.4.

#### 10.2 SAFETY OF PERSONS AND PROPERTY

10.2.1 The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

- 1 employees on the Work and other persons who may be affected thereby;
- 2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and
- 3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

10.2.2 The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

10.2.3 The Contractor shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

10.2.4 When use or storage of explosives or other hazardous materials or equipment or unusual methods are necessary for execution of the Work, the Contractor shall exercise utmost care and carry on such activities under supervision of properly qualified personnel.

10.2.5 The Contractor shall promptly remedy damage and loss (other than damage or loss insured under property insurance required by the Contract Documents) to property referred to in Clauses 10.2.1.2 and 10.2.1.3 caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Clauses 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of the Owner or Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 3.18.

10.2.6 The Contractor shall designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents. This person shall be the Contractor's superintendent unless otherwise designated by the Contractor in writing to the Owner and Architect.

10.2.7 The Contractor shall not load or permit any part of the construction or site to be loaded so as to endanger its safety.

#### 10.3 EMERGENCIES

10.3.1 In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Paragraph 4.3 and Article 7.

## ARTICLE 11

### INSURANCE AND BONDS

#### 11.1 CONTRACTOR'S LIABILITY INSURANCE

11.1.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect the Contractor from claims set forth below which may arise out of or result from the Contractor's operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- 1 claims under workers' or workmen's compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed.

- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
- .4 claims for damages insured by usual personal injury liability coverage which are sustained (1) by a person as a result of an offense directly or indirectly related to employment of such person by the Contractor, or (2) by another person;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle; and
- .7 claims involving contractual liability insurance applicable to the Contractor's obligations under Paragraph 3.18.

11.1.2 The insurance required by Subparagraph 11.1.1 shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

11.1.3 Certificates of Insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. These Certificates and the insurance policies required by this Paragraph 11.1 shall contain a provision that coverages afforded under the policies will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final Application for Payment as required by Subparagraph 9.10.2. Information concerning reduction of coverage shall be furnished by the Contractor with reasonable promptness in accordance with the Contractor's information and belief.

## 11.2 OWNER'S LIABILITY INSURANCE

11.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents.

## 11.3 PROPERTY INSURANCE

11.3.1 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance in the amount of the initial Contract Sum as well as subsequent modifications thereto for the entire Work at the site on a replacement cost basis without voluntary deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made as provided in Paragraph 9.10 or until no person or entity

other than the Owner has an insurable interest in the property required by this Paragraph 11.3 to be covered, whichever is earlier. This insurance shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work.

11.3.1.1 Property insurance shall be on an all-risk policy form and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, false-work, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Architect's services and expenses required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

11.3.1.2 If the Owner does not intend to purchase such property insurance required by the Contract and with all of the coverages in the amount described above, the Owner shall so inform the Contractor in writing prior to commencement of the Work. The Contractor may then effect insurance which will protect the interests of the Contractor, Subcontractors and Sub-subcontractors in the Work, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Contractor is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, without so notifying the Contractor, then the Owner shall bear all reasonable costs properly attributable thereto.

11.3.1.3 If the property insurance requires minimum deductibles and such deductibles are identified in the Contract Documents, the Contractor shall pay costs not covered because of such deductibles. If the Owner or insurer increases the required minimum deductibles above the amounts so identified or if the Owner elects to purchase this insurance with voluntary deductible amounts, the Owner shall be responsible for payment of the additional costs not covered because of such increased or voluntary deductibles. If deductibles are not identified in the Contract Documents, the Owner shall pay costs not covered because of deductibles.

11.3.1.4 Unless otherwise provided in the Contract Documents, this property insurance shall cover portions of the Work stored off the site after written approval of the Owner at the value established in the approval, and also portions of the Work in transit.

11.3.2 **Boiler and Machinery Insurance.** The Owner shall purchase and maintain boiler and machinery insurance required by the Contract Documents or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner; this insurance shall include interests of the Owner, Contractor, Subcontractors and Sub-subcontractors in the Work, and the Owner and Contractor shall be named insureds.

11.3.3 **Loss of Use Insurance.** The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Contractor for loss of use of the Owner's property, including consequential losses due to fire or other hazards however caused.

11.3.4 If the Contractor requests in writing that insurance for risks other than those described herein or for other special hazards be included in the property insurance policy, the Owner shall, if possible, include such insurance, and the cost thereof shall be charged to the Contractor by appropriate Change Order.

**11.3.5** If during the Project construction period the Owner insures properties, real or personal or both, adjoining or adjacent to the site by property insurance under policies separate from those insuring the Project, or if after final payment property insurance is to be provided on the completed Project through a policy or policies other than those insuring the Project during the construction period, the Owner shall waive all rights in accordance with the terms of Subparagraph 11.3.7 for damages caused by fire or other perils covered by this separate property insurance. All separate policies shall provide this waiver of subrogation by endorsement or otherwise.

**11.3.6** Before an exposure to loss may occur, the Owner shall file with the Contractor a copy of each policy that includes insurance coverages required by this Paragraph 11.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

**11.3.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, separate contractors described in Article 6, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary. The Owner or Contractor, as appropriate, shall require of the Architect, Architect's consultants, separate contractors described in Article 6, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

**11.3.8** A loss insured under Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 11.3.10. The Contractor shall pay Subcontractors their just share of insurance proceeds received by the Contractor, and by appropriate agreements, written where legally required for validity, shall require Subcontractors to make payments to their sub-subcontractors in similar manner.

**11.3.9** If required in writing by a party in interest, the Owner as fiduciary shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Paragraph 4.5. If after such loss no other special agreement is made, replacement of damaged property shall be covered by appropriate Change Order.

**11.3.10** The Owner as fiduciary shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing within five days after occurrence of loss to the Owner's exercise of this power; if such objection be made, arbitrators shall be chosen as provided in Paragraph 4.5. The Owner as fiduciary shall, in that case, make settlement with insurers in accordance with directions of such arbitrators. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

**11.3.11** Partial occupancy or use in accordance with Paragraph 9.9 shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of insurance.

#### **11.4 PERFORMANCE BOND AND PAYMENT BOND**

**11.4.1** The Owner shall have the right to require the Contractor to furnish bonds covering faithful performance of the Contract and payment of obligations arising thereunder as stipulated in bidding requirements or specifically required in the Contract Documents on the date of execution of the Contract.

**11.4.2** Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made.

### **ARTICLE 12**

#### **UNCOVERING AND CORRECTION OF WORK**

##### **12.1 UNCOVERING OF WORK**

**12.1.1** If a portion of the Work is covered contrary to the Architect's request or to requirements specifically expressed in the Contract Documents, it must, if required in writing by the Architect, be uncovered for the Architect's observation and be replaced at the Contractor's expense without change in the Contract Time.

**12.1.2** If a portion of the Work has been covered which the Architect has not specifically requested to observe prior to its being covered, the Architect may request to see such Work and it shall be uncovered by the Contractor. If such Work is in accordance with the Contract Documents, costs of uncovering and replacement shall, by appropriate Change Order, be charged to the Owner. If such Work is not in accordance with the Contract Documents, the Contractor shall pay such costs unless the condition was caused by the Owner or a separate contractor in which event the Owner shall be responsible for payment of such costs.

##### **12.2 CORRECTION OF WORK**

**12.2.1** The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed. The Contractor shall bear costs of correcting such rejected Work, including additional testing and inspections and compensation for the Architect's services and expenses made necessary thereby.

**12.2.2** If, within one year after the date of Substantial Completion of the Work or designated portion thereof, or after the date



## ARTICLE 13

### MISCELLANEOUS PROVISIONS

#### 13.1 GOVERNING LAW

13.1.1 The Contract shall be governed by the law of the place where the Project is located.

#### 13.2 SUCCESSORS AND ASSIGNS

13.2.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns and legal representatives to the other party hereto and to partners, successors, assigns and legal representatives of such other party in respect to covenants, agreements and obligations contained in the Contract Documents. Neither party to the Contract shall assign the Contract as a whole without written consent of the other. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

#### 13.3 WRITTEN NOTICE

13.3.1 Written notice shall be deemed to have been duly served if delivered in person to the individual or a member of the firm or entity or to an officer of the corporation for which it was intended, or if delivered at or sent by registered or certified mail to the last business address known to the party giving notice.

#### 13.4 RIGHTS AND REMEDIES

13.4.1 Duties and obligations imposed by the Contract Documents and rights and remedies available thereunder shall be in addition to and not a limitation of duties, obligations, rights and remedies otherwise imposed or available by law.

13.4.2 No action or failure to act by the Owner, Architect or Contractor shall constitute a waiver of a right or duty afforded them under the Contract, nor shall such action or failure to act constitute approval or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

#### 13.5 TESTS AND INSPECTIONS

13.5.1 Tests, inspections and approvals of portions of the Work required by the Contract Documents or by laws, ordinances, rules, regulations or orders of public authorities having jurisdiction shall be made at an appropriate time. Unless otherwise provided, the Contractor shall make arrangements for such tests, inspections and approvals with an independent testing laboratory or entity acceptable to the Owner, or with the appropriate public authority, and shall bear all related costs of tests, inspections and approvals. The Contractor shall give the Architect timely notice of when and where tests and inspections are to be made so the Architect may observe such procedures. The Owner shall bear costs of tests, inspections or approvals which do not become requirements until after bids are received or negotiations concluded.

13.5.2 If the Architect, Owner or public authorities having jurisdiction determine that portions of the Work require additional testing, inspection or approval not included under Subparagraph 13.5.1, the Architect will, upon written authorization from the Owner, instruct the Contractor to make arrangements for such additional testing, inspection or approval by an entity acceptable to the Owner, and the Contractor shall give timely notice to the Architect of when and where tests and inspections are to be made so the Architect may observe such procedures.

commencement of warranties established under Subparagraph 9.9.1, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so unless the Owner has previously given the Contractor a written acceptance of such condition. This period of one year shall be extended with respect to portions of Work first performed after Substantial Completion by the period of time between Substantial Completion and the actual performance of the Work. This obligation under this Subparagraph 12.2.2 shall survive acceptance of the Work under the Contract and termination of the contract. The Owner shall give such notice promptly after discovery of the condition.

12.2.3 The Contractor shall remove from the site portions of the Work which are not in accordance with the requirements of the Contract Documents and are neither corrected by the Contractor nor accepted by the Owner.

12.2.4 If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Paragraph 2.4. If the Contractor does not proceed with correction of such nonconforming Work within a reasonable time fixed by written notice from the Architect, the Owner may remove it and store the salvable materials or equipment at the Contractor's expense. If the Contractor does not pay costs of such removal and storage within ten days after written notice, the Owner may upon ten additional days' written notice sell such materials and equipment at auction or at private sale and shall account for the proceeds thereof, after deducting costs and damages that should have been borne by the Contractor, including compensation for the Architect's services and expenses made necessary thereby. If such proceeds of sale do not cover costs which the Contractor should have borne, the Contract Sum shall be reduced by the deficiency. If payments then or thereafter due the Contractor are not sufficient to cover such amount, the Contractor shall pay the difference to the Owner.

12.2.5 The Contractor shall bear the cost of correcting destroyed or damaged construction, whether completed or partially completed, of the Owner or separate contractors caused by the Contractor's correction or removal of Work which is not in accordance with the requirements of the Contract Documents.

12.2.6 Nothing contained in this Paragraph 12.2 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Subparagraph 12.2.2 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

#### 12.3 ACCEPTANCE OF NONCONFORMING WORK

12.3.1 If the Owner prefers to accept Work which is not in accordance with the requirements of the Contract Documents, the Owner may do so instead of requiring its removal and correction, in which case the Contract Sum will be reduced as appropriate and equitable. Such adjustment shall be effected whether or not final payment has been made.

The Owner shall bear such costs except as provided in Subparagraph 13.5.3.

**13.5.3** If such procedures for testing, inspection or approval under Subparagraphs 13.5.1 and 13.5.2 reveal failure of the portions of the Work to comply with requirements established by the Contract Documents, the Contractor shall bear all costs made necessary by such failure including those of repeated procedures and compensation for the Architect's services and expenses.

**13.5.4** Required certificates of testing, inspection or approval shall, unless otherwise required by the Contract Documents, be secured by the Contractor and promptly delivered to the Architect.

**13.5.5** If the Architect is to observe tests, inspections or approvals required by the Contract Documents, the Architect will do so promptly and, where practicable, at the normal place of testing.

**13.5.6** Tests or inspections conducted pursuant to the Contract Documents shall be made promptly to avoid unreasonable delay in the Work.

### 13.6 INTEREST

**13.6.1** Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at such rate as the parties may agree upon in writing or, in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

### 13.7 COMMENCEMENT OF STATUTORY LIMITATION PERIOD

**13.7.1** As between the Owner and Contractor:

- 1 Before Substantial Completion.** As to acts or failures to act occurring prior to the relevant date of Substantial Completion, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than such date of Substantial Completion.
- 2 Between Substantial Completion and Final Certificate for Payment.** As to acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of issuance of the final Certificate for Payment, and
- 3 After Final Certificate for Payment.** As to acts or failures to act occurring after the relevant date of issuance of the final Certificate for Payment, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued in any and all events not later than the date of any act or failure to act by the Contractor pursuant to any warranty provided under Paragraph 3.5, the date of any correction of the Work or failure to correct the Work by the Contractor under Paragraph 12.2, or the date of actual commission of any other act or failure to perform any duty or obligation by the Contractor or Owner, whichever occurs last.

## ARTICLE 14

### TERMINATION OR SUSPENSION OF THE CONTRACT

#### 14.1 TERMINATION BY THE CONTRACTOR

**14.1.1** The Contractor may terminate the Contract if the Work is stopped for a period of 30 days through no act or fault of the Contractor or a Subcontractor, Sub-subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor, for any of the following reasons:

- 1 issuance of an order of a court or other public authority having jurisdiction;
- 2 an act of government, such as a declaration of national emergency, making material unavailable;
- 3 because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Subparagraph 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents;
- 4 if repeated suspensions, delays or interruptions by the Owner as described in Paragraph 14.3 constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less; or
- 5 the Owner has failed to furnish to the Contractor promptly, upon the Contractor's request, reasonable evidence as required by Subparagraph 2.2.1.

**14.1.2** If one of the above reasons exists, the Contractor may, upon seven additional days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

**14.1.3** If the Work is stopped for a period of 60 days through no act or fault of the Contractor or a Subcontractor or their agents or employees or any other persons performing portions of the Work under contract with the Contractor because the Owner has persistently failed to fulfill the Owner's obligations under the Contract Documents with respect to matters important to the progress of the Work, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner as provided in Subparagraph 14.1.2.

#### 14.2 TERMINATION BY THE OWNER FOR CAUSE

**14.2.1** The Owner may terminate the Contract if the Contractor:

- 1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
- 2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractors;
- 3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
- 4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

**14.2.2** When any of the above reasons exist, the Owner, upon certification by the Architect that sufficient cause exists to justify

fy such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Paragraph 5.4; and
- .3 finish the Work by whatever reasonable method the Owner may deem expedient.

**14.2.3** When the Owner terminates the Contract for one of the reasons stated in Subparagraph 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

**14.2.4** If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the

Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall be certified by the Architect, upon application, and this obligation for payment shall survive termination of the Contract.

#### **14.3 SUSPENSION BY THE OWNER FOR CONVENIENCE**

**14.3.1** The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work in whole or in part for such period of time as the Owner may determine.

**14.3.2** An adjustment shall be made for increases in the cost of performance of the Contract, including profit on the increased cost of performance, caused by suspension, delay or interruption. No adjustment shall be made to the extent:

- .1 that performance is, was or would have been so suspended, delayed or interrupted by another cause for which the Contractor is responsible; or
- .2 that an equitable adjustment is made or denied under another provision of this Contract.

**14.3.3** Adjustments made in the cost of performance may have a mutually agreed fixed or percentage fee.

SAMPLE

**FORM OF AGREEMENT FOR ENGINEERING CONSTRUCTION  
COST-PLUS BASIS**

**THIS AGREEMENT**, made on the.....day of....., 19.....,  
by and between .....  
party of the first part, hereinafter called the OWNER, and .....  
.....  
.....  
party of the second part, hereinafter called the CONTRACTOR.

It is understood ENGINEER representing Owner shall be .....

WITNESSETH, That the Contractor and the Owner, for the considerations hereinafter named, agree as follows:

**ARTICLE I—Scope of the Work**

The Contractor hereby agrees to furnish all of the materials and all of the equipment and labor necessary, and to perform all of the work shown on the Drawings and described in the specification for the project entitled .....

all in accordance with the requirements and provisions of the following Documents which are hereby made a part of this Agreement:

(a) Drawings prepared for same by .....  
numbered .....  
and dated ....., 19.....

(b) Specifications consisting of:

1. "Standard General Specifications" issued by .....  
..... Edition.

2. "Special Conditions" as prepared by.....  
 ..... dated .....
3. The "General Conditions of Contract for Engineering Construction"—1966 Edition.
4. Addenda  
 No. .... Date .....

**ARTICLE II — Time of Completion**

- (a) The work to be completed under this Contract shall be commenced within ..... calendar days after receipt of notice to proceed.
- (b) The work shall be completed within .....calendar days after receipt of notice to proceed.
- (c) Failure to complete the work within the number of calendar days stated in this Article, including extension granted thereto as determined by Section 19 of the General Conditions, shall entitle the Owner to deduct from the moneys due to the Contractor as "Liquidated Damages" an amount equal to \$..... for each calendar day of delay in the completion of work.
- (d) If the Contractor completes the work earlier than the date determined in accordance with Paragraph (b), and the Engineer shall so certify in writing, the Owner shall pay the Contractor an additional amount equal to \$..... for each calendar day by which the time of completion so determined has been reduced.

**ARTICLE III — The Contract Sum**

- (a) The Owner shall pay the Contractor for the performance of the work an amount equal to the actual "Cost of the Work" as defined below, plus .....% of all costs to reimburse the Contractor for indirect overhead and general supervision, plus .....% of all costs, including indirect overhead and general supervision, as commission or profit.
- (b) The "Cost of the Work" shall be determined as the net sum of the following items:
  1. Job Office and all necessary temporary facilities such as buildings, use of land not furnished by the Owner, access roads and utilities. The costs of these items include construction, furnishings and equipment, maintenance during the period that they are needed, demolition and removal. Salvage values agreed on or received by the Contractor shall be credited to the Owner.
  2. All materials used on the work whether for temporary or permanent construction.
  3. All small tools and supplies; all fuel, lubricants, power, light, water and telephone service.

4. All plant and equipment at specified rental rates and terms of use. If the rental rates do not include an allowance for running repairs and repair parts needed for ordinary maintenance of the plant and equipment, then such items of cost are to be included in the Cost of the Work.
5. All transportation costs on equipment, materials and men.
6. All labor for the project and including the salaries of superintendents, foremen, engineers, inspectors, clerks and other employees while engaged on the work but excluding salaries of general supervisory employees or officers, who do not devote their full time to the work.
7. All payroll charges such as Social Security payments, unemployment insurance, workmen's compensation insurance premiums, pension and retirement allowances, and social insurance premiums, vacation and sick-leave allowances applicable to wages or salaries paid to employees for work done in connection with the contract.
8. All premiums on fire, public liability, property damage or other insurance coverage authorized or required by the Engineer or the Owner, or regularly paid by the Contractor in the conduct of his business.
9. All sales, use, excise, privilege, business, occupation, gross receipt and all other taxes paid by the Contractor in connection with the work, but excluding state income taxes based solely on net income derived from this contract and Federal income taxes.
10. All travel or other related expense of general supervisory employees for necessary visits to the job excluding expenses of such employees incurred at the Home Office of the Contractor.
11. All Subcontracts approved by the Engineer or Owner.
12. (Insert other costs proper for inclusion in this Contract.)
  - a. ....
  - b. ....
  - c. ....
13. Any other costs incurred by the Contractor as a direct result of executing the Order, subject to approval by the Engineer.
14. Credit to the Owner for the following items:
  - a. Such discounts on invoices as may be obtainable provided that the Owner advances sufficient funds to pay the invoices within the discount period.
  - b. The mutually agreed salvage value of materials, tools or equipment charged to the Owner and taken over by the Contractor for his use or sale at the completion of the work.
  - c. Any rebates, refunds, returned deposits or other allowances properly credited to the Cost of the Work.

## ARTICLE IV — Progress Payments

The Owner shall make payments on account of the Contract as follows:

As early as possible after the first day of each month the Contractor shall present to the Owner a statement of all costs incurred on account of the work involved in this Contract during the preceding month. This statement shall be accompanied by copies of supporting invoices and such copies of payrolls, or totalization and distribution of same, as may be required; lists of plant and equipment used, with rates for same, together with any other information necessary to allow the Engineer to verify the accuracy of the statement. The total of the costs incurred there shall be added the full amount of the percentages earned as set up in Article III, and the full amount shall be paid to the Contractor within 10 days after the receipt of the statement.\*

IN WITNESS WHEREOF the parties hereto have executed this Agreement, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_, and year first above written.

WITNESS:

\_\_\_\_\_  
By: \_\_\_\_\_  
Title

WITNESS:

\_\_\_\_\_  
By: \_\_\_\_\_  
Title

\* Here may be inserted a provision for a retained percentage if desired.

GENERAL CONTRACT

Definitions  
The Contract Documents for Bids or Notices to Bidders, Form of Agreement, the General Contract, the Drawings, and all modifications of any of the documents.  
The Owner, the Contractor, and any person named as such in the Contract Documents throughout the Contract, where of singular number.  
Whenever in this Contract it shall be understood that the Contractor, his assistants duly authorized.  
When notice shall be given if delivered in person to the member of the firm or representative of such person, or if delivered at the last business address of the Contractor, with a copy of the notice to the Contractor.  
The term "Subcontractor" shall mean any person other than the Contractor who enters into an Agreement with the Contractor for labor and materials.

OW

Definitions

CONTRACT

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CONTRACT

Form of Agreement—Turnkey Type of Contract with Base Fee  
& Award Fee Based upon Kind of Performance of the Contract

A G R E E M E N T

THIS AGREEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_  
1969, between \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, (hereinafter called the  
Owner) and \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, (herein-  
after called the "Contractor").

WHEREAS Owner proposes to \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ and,

WHEREAS Contractor is engaged in the design and construction  
business and desires to design and construct the project upon the terms and  
conditions hereinafter set forth,

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE I

SCOPE OF WORK

1. The Owner agrees to employ Contractor to do the following:

(a) Prepare preliminary studies, sketch plans and outline speci-  
fications, including preliminary estimates of cost covering the project  
which is more fully described as follows:

Plant Site - \_\_\_\_\_  
\_\_\_\_\_



Description of the Work



2. Contractor at all times during the progress of the work shall be and act subject to the general direction and control of Owner insofar as results to be attained hereunder are concerned, but not as to the mode and manner of performing the work.

## ARTICLE II

### Owner's Responsibilities

The Owner will:

1. Provide full information as to its requirements for the work.
2. Assist Contractor by placing at its disposal all available information pertinent to the site of the work including previous reports and any other data relative to design and construction of the work.
3. Guarantee access to and make all provisions for Contractor to enter upon public and private lands as required to perform its work under this Agreement.
4. Examine all studies, reports, sketches, estimates, specifications, drawings, proposals and other documents presented by Contractor and shall render in writing decisions pertaining thereto within a reasonable time so as not to delay the work of Contractor.
5. Designate in writing a person to act as Owner's representative with respect to the work to be performed under this Agreement; and such person shall have complete authority to transmit instructions, receive information, interpret and define Owner's policies and decisions with respect to materials, equipment elements and systems pertinent to the work covered by this Agreement.
6. Obtain approval of all governmental authorities having jurisdiction over the work and such approvals and consents from such other individuals or bodies as may be necessary for the completion of the work, with the exception of construction permits and licenses.

## ARTICLE III

### Contractor's Responsibilities

Contractor will:

1. Designate a Project Design Engineer to act as Contractor's representative during all design phases, and he shall have complete authority to receive instructions and notices.
2. Consult with Owner to determine the requirements of the work.
3. Prepare engineering and architectural studies and report on the work in sufficient detail to indicate clearly the problems involved and

the alternate solutions available to Owner, to include schematic layouts and sketches and a general cost estimate for the work and to set forth recommendations.

After agreement to proceed with the final design, Contractor will:

1. Prepare detailed construction drawings and specifications for the work.
2. Furnish to Owner engineering data for and assist in the preparation of the required documents so that Owner may secure approval of such governmental authorities as have jurisdiction over design criteria applicable to the work.
3. Advise Owner of any adjustment of the cost estimate for the work caused by changes in scope, design requirements or construction costs and furnish a revised cost estimate for the work based on the completed drawings and specifications.
4. Advise Owner of the proposed construction schedule.

After agreement to proceed with the construction phase, Contractor will:

1. Commence each stage of the work immediately following authorization by Owner, and shall prosecute the work continuously and diligently to completion, in accordance with a construction schedule agreed upon by the parties. It is expressly understood and agreed that the time limits set out in the construction schedules are of the essence, provided that adjustments of the time limits set out in the construction schedule may be made by Owner, as hereinafter defined, when delays have been caused by matters beyond the reasonable control of the parties; and provided, further, that each stage of the work may be stopped or placed on a different construction schedule, in whole or in part, by written agreement of the parties.
2. Exercise its best knowledge, skill and experience in planning, purchasing materials, obtaining and furnishing skilled and competent labor and personnel, supplying tools and equipment, and performing all work incident to the full and satisfactory completion of the work in accordance with the construction schedule and approved plans and specifications, and shall do everything possible on its part to establish and follow a fast, economical and efficient construction program.
3. Obtain the most favorable prices and discount privileges available, and shall pay all bills for purchases within the allowed best discount period.
4. Constantly keep at the work during its progress, a competent project manager, and any information given to such project manager or any notices served upon him shall have the same force and effect as if given to or served upon Contractor.

5. Employ on the project only persons who are qualified and competent to perform the work entrusted to them.

6. Secure all construction permits and licenses and all governmental and public utility charges and inspections necessary for the prosecution of the work.

7. Give all notices and comply with all laws, ordinances, rules and regulations applicable to the work.

8. Take all necessary precautions for the safety of, and provide the necessary protection to prevent damage, injury or loss to:

(a) all employees on the work and other persons who may be affected thereby,

(b) all the work and all materials or equipment to be incorporated therein, whether in storage on or off the site, and,

(c) other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

#### ARTICLE IV

##### Compensation

Owner agrees to pay, and Contractor agrees to accept as full compensation, satisfaction and discharge for all work done, materials furnished, costs and expenses incurred and damages sustained and for each and every matter, thing or act performed, furnished or suffered in the performance of this Agreement, the following:

A. All actual costs, charges and expenses incurred by Contractor in the performance of the work, which shall include, but not be limited to:

1. ENGINEERING: The actual cost to Contractor as approved by Owner's representative for preparation of designs, plans, specifications, estimates and material lists; for checking shop details and for shop inspections; for architectural and engineering inspections of the work, more specifically, but not necessarily exclusively the following:

(a) Salaries and wages of engineering personnel, estimators, and stenographers and clerks for their time devoted to the work. (Salaries and wages to include a proportionate share of vacation, holiday and sick leave allowance.)

(1) Fringe benefits in accordance with company practices, labor agreements or required by law or regulation.

(2) Taxes on employees' earnings.

(3) Workmen's compensation and other insurance premiums measured by payroll costs.

(b) Seventy-five per cent (75%) of salary and wage charges under item 1(a) above for engineering and main office overhead expenses.

(c) Traveling and living expenses for engineering personnel and estimators while away from their home office on this work.

(d) The cost of blueprints, photostats, other reproductions and models.

(e) Any sales, use or gross receipts taxes payable on purchases for the work or on receipts under this contract.

(f) The cost of toll telephone and telegraph service.

(g) Insurance premiums for coverage normally carried by company, the cost of which is measured by company receipts.

(h) The cost of soil bearing and other tests required for foundation design, or other purposes.

(i) The cost of surveys and outside consultants, if required.

(j) The cost of temporary drafting rooms and engineering offices including their equipment, maintenance and operation at the site, or elsewhere, except at Contractor's main and sub-offices.

(k) The cost of computer center time directly devoted to the engineering work, based on Contractor's hourly rate for each piece of equipment used.

(l) Any other costs not described above which are proper charges to the work and approved by the Owner's representative.

(m) Fee - In addition to the reimbursable costs set forth above, Contractor shall be paid by Owner an amount equal to \_\_\_\_\_ per cent ( %) of the aggregate amount of the items set forth in Section 1(a) through (l), as a fee for engineering services.

2. CONSTRUCTION: The actual cost to Contractor of constructing the work for wages, salaries, expenditures and expenses in connection therewith, as approved by Owner's representative, more specifically but not necessarily exclusively the following:

(a) The cost to Contractor of salaries and wages and all other benefits, except bonuses, paid to Contractor's employees (excluding executive officers and other employees performing generally a company-wide function at Contractor's home office); all necessary expenses paid by Contractor to or for the benefit of such employees, and all costs and expenditures under or arising out of employment agreements entered into with such employees. Cost of labor paid on an hourly basis shall not exceed the rates prevailing in the area, including rates determined

by bargaining agreement, if any, to which Contractor is bound.

(b) Contractor's expenditures for payroll taxes on salaries and wages, and applicable group insurance costs, retirement benefits, vacation allowances and sick leave benefits, for employees engaged on the work in accordance with Contractor's established practices; provided that such allowances and benefits provided by Contractor for employees not engaged on the work exclusively shall be chargeable to actual costs only for the time the employee or employees are directly employed on the work.

(c) The cost to Contractor of establishing and maintaining a project construction office and such other temporary field offices as may be required for the project, including office supplies, telephone and telegraph charges, and other office operating costs, and construction, maintenance and operation of warehouses, machine shops and other temporary facilities.

(d) Compensation for use and/or availability at the work site of Contractor-owned equipment at rates specified in the current edition of Contractor's Equipment Red Book, and the cost of fuel, lubricants, equipment operating supplies and minor repair parts necessary to maintain said equipment in good operating condition (major repair parts will be paid for by Contractor).

(e) Consumable materials and supplies purchased by Contractor for use in the work, including all actual necessary freight, express and drayage paid by Contractor.

(f) Traveling expenses of Contractor's employees when traveling necessarily and solely in the interest of the project.

(g) Moving expenses to the job and return of salaried personnel assigned to the work.

(h) Small tools, office furniture and equipment, job apparatus, minor equipment and similar items of property, where the current value or original cost to Contractor of each item is \$1,000.00 or less.

(i) Actual transportation expense of construction plant and construction equipment to the site of the work and return, including loading and unloading costs, and assembly and disassembly costs.

(j) Excise and other taxes payable by Contractor directly applicable to the work, except those based on income.

(k) First-aid and job safety expenses.

(l) Payment to subcontractors for work performed.

(m) Materials and supplies purchased by Contractor for physical incorporation in and as a part of the finished work, including all actual necessary freight, express and drayage.

(n) The cost of renting equipment from others.

(o) Premiums for all necessary insurance coverages carried by Contractor applicable to the work including the cost of general and automobile liability insurance, workmen's compensation insurance, employer's liability insurance, builder's risk insurance, contractor's equipment insurance, etc.

(p) Royalties, custom duties, licenses, permits, testing, and inspection fees incurred because of the work.

(q) Cost of repairing damages or payment for liabilities therefor, and for personal injuries, or of resetting work destroyed or repaired or replacement of materials, supplies and equipment as a result of accidents occurring during or because of the prosecution of the work (if not recoverable under insurance policies).

B. Home office costs amounting to three per cent ( ) of all actual costs determined in A2 above only.

C. Base fee amounting to four per cent ( ) of the sum of the costs of A2 and B above.

D. Award fee of up to eight per cent ( ) of the sum of costs of A (less A 1(m) and B above based on a Performance Evaluation Grade assigned every three months by Owner for Contractor's performance.

Owner will grade Contractor's total performance every three months (December 1, March 1, June 1 and September 1 of each year) for all work. Owner will have the right to request and receive such information from Contractor as may be reasonably required.

In arriving at the grade for each category, Owner will multiply the assigned rating in terms of percentage times the various weighting factors. The Performance Evaluation Grade shall be the sum of the grades for each category and shall be used to determine percentage of award fee earned by Contractor by entering the award fee payment schedule which is attached as Exhibit "A" (see p. 405).

CATEGORIES TO BE EVALUATED	Weighting Factor
(1) Quality of Work	20
(2) Early Completion	40
(3) Control and Reduction of Costs	40
Total Weighting Factor	100

In arriving at the assigned score and ultimate grade for each of the above categories, Owner will consider each of the above categories from the following standpoints:



(1) QUALITY

Workmanship  
Skills demonstrated  
Completeness  
Technical Competence

(2) EARLY COMPLETION

Meet or beat milestone or other schedule dates  
Anticipate schedule problems caused by changes  
Ability to recover in changing program  
Planning

(3) COSTS

Cost consciousness  
Accomplishment within estimated costs  
Minimization of waste  
Control and cost accounting  
Efficiency

As soon as possible after the end of each three-month period, Owner's grading of Contractor's performance will be made known to Contractor. Should Contractor take any exceptions to Owner's grading, such exceptions must be made known to Owner in writing, within ten days after receipt of the grading. After receipt of any exceptions, Owner will make a final determination with respect to the final performance evaluation. Grade will be final and will not be subject to the "Arbitration" clause of this Agreement.

ARTICLE V

Manner and Times of Payment

1. On or before the fifteenth (15) day of the month next succeeding the month in which work was commenced, and on or before the fifteenth (15) day of each month thereafter, Contractor shall submit to Owner an invoice in triplicate, including such invoices and other supporting data as Owner may require, setting forth for the preceding calendar month the billing for items of actual cost incurred by Contractor, as provided in Article IV. In addition, each monthly invoice shall include Contractor's home office costs fee, base fee and award fee when determined.

2. The invoices referred to in the preceding paragraph shall be checked by Owner and said invoices in such amount as shall be approved by Owner shall be paid to Contractor not later than fifteen (15) days after receipt by Owner of said invoices together with applicable fees. Contractor shall be notified of the items not approved and the reasons thereof.

3. Payment by Owner of monthly invoices shall not constitute final settlement thereof, and all invoices shall be subject to further

checking or auditing by Owner within a reasonable length of time.

## ARTICLE VI

### Accounting and Records

1. Contractor shall maintain a system of accounts and accounting records in accordance with company policy, together with supporting papers for all work performed under this Agreement and including in monthly statements submitted by Contractor to Owner. Contractor shall also keep such cost records as may be necessary to provide for control of field operations. Owner shall have the right to examine Contractor's original records of the cost of all work performed under this Agreement, and may audit the same during the progress of construction and upon completion of the work.

2. Contractor shall retain all time cards, material records, and other accounting records for all work performed by Contractor hereunder, and Owner shall have the right to audit the same at all reasonable times. Upon completion of the work, all such accounting records shall be forwarded to Owner for its permanent files.

3. Contractor shall prepare and submit to Owner comprehensive monthly progress reports of work performed by Contractor, including pictorial record of work progression.

## ARTICLE VII

### Changes in Plans and Specifications

Changes in plans or specifications may be made by Owner when found necessary or desirable.

## ARTICLE VIII

### Authorized Purchases

For purchases in excess of \$1,000.00, Contractor will submit its requisition to Owner for approval, and such approval shall be given within ten days of the submission. If Owner does not return the requisition to Contractor within ten days of submission, then it shall be considered approved without further action by Owner. It is understood that Contractor is responsible for the proper and speedy execution of the work, and that therefore Owner's approval of Contractor's procurement requisitions will not be unreasonably withheld.

## ARTICLE IX

### Subcontracts

No subcontracts shall be made in connection with this Agreement

without the advance written consent of Owner, but such consent shall in no way modify or affect any of the terms and provisions of this Agreement. All subcontracts shall be in writing, and two copies thereof shall be furnished to Owner.

2. Contractor shall be responsible to Owner (a) for all work performed by, and for the acts, omissions or negligence of subcontractors and of all employees or agents of subcontractors, and (b) for the compliance by each subcontractor with the requirements of all of the applicable provisions of this Agreement, and of all applicable laws, rules and regulations, to the same extent that Contractor would be responsible if it were doing the work directly.

3. No subcontract, and nothing contained herein or in any subcontract, shall be construed to create any contractual relationship between any subcontractor and Owner or to make Owner in any way liable or responsible to any subcontractor or its employees.

## ARTICLE X

### Liens and Litigation

1. Contractor shall not suffer or permit any laborer's, materialmen's or other liens to arise or exist upon or against the work or other property of Owner or against Owner by reason of Contractor's operations under or performance of this Agreement.

2. If, during the progress of the work, Contractor shall allow any indebtedness to accrue to manufacturers, suppliers, subcontractors or others, and shall fail to pay or discharge the same within thirty (30) days after any demand, following the due date thereof, Owner may pay such bills directly, and such payment shall be considered a payment to Contractor under this Agreement.

## ARTICLE XI

### Taxes, Fines or Penalties

Contractor shall pay promptly all social security and unemployment compensation taxes, sales, use and other excise taxes, and all other taxes, fees, charges, or other costs due and payable by Contractor to the United States or to any state or political subdivision thereof in connection with any and all work performed, labor done and materials provided under this Agreement; and Contractor shall protect and defend, and hold Owner harmless from any cost or liability on account of any fines or other penalties, that may be assessed resulting from any acts of negligence, omission, wrongdoing or violation of law on the part of Contractor.

## ARTICLE XII

### Ownership of Documents

All documents, including original drawings, estimates, specifica-

tions, field notes and data are and remain the property of Contractor as instruments of service. Owner shall be supplied a set of reproducible record prints of drawings and copies of other documents but shall use them solely in connection with the work and not for the purpose of making subsequent extensions or enlargements thereto and will not sell, publish or display them publicly. Reuse for extensions of the work or for new projects, shall require written permission of Contractor and shall entitle it to further compensation at a rate to be agreed upon by Owner and Contractor.

### ARTICLE XIII

#### Termination or Suspension of Agreement; Default

1. Should Contractor at any time, in the opinion of Owner fail, refuse or neglect to provide proper or sufficient equipment, materials, or workmen, or to make satisfactory progress with the work, Owner shall, at any time, upon ten (10) days' written notice to Contractor, have the right to discontinue any or all work, or any part thereof, and/or to terminate Contractor's services in connection therewith. In the event of any such termination of Contractor's work, Owner may proceed with or complete the work itself or through others, but this shall not relieve Contractor of its responsibility hereunder for full satisfactory completion of all work not so terminated, or of any liability for damages for breach of contract.

2. Should Contractor at any time cease or suspend the work or any part thereof, or should Contractor be adjudged a bankrupt or make a general assignment for the benefit of creditors, or should a receiver be appointed for Contractor, Owner, itself, shall have the right to provide labor and materials and proceed with, or to contract with or hire others to proceed with, and to finish the work, and Owner shall have the right, at its options, to take over and assume any or all contracts made or orders placed by Contractor for materials, equipment and supplies.

3. In the event of discontinuance of all work on the project under the provisions above, Contractor shall not be entitled to receive any further payment under this Agreement until the work shall be wholly finished, at which time Contractor shall be paid whatever net balance is found to be due to Contractor for payments of actual costs, plus Contractor's base fee for the work actually performed.

4. If the work is halted by reason of court action or litigation, or by governmental act or authority, Owner may, at its option, terminate this Agreement in its entirety; or Owner, in any event, may require Contractor to place its operations on a standby basis, or may direct Contractor as to the amount, order or rate of progress of work to be performed hereunder, and Contractor, upon such requirement or direction, shall make every reasonable effort to reduce the actual costs to a minimum during such period, and Contractor shall be paid in accordance with this Agreement for the work performed by it during such period, and shall resume construction immediately upon notification by Owner.

## ARTICLE XIV

### Guarantees and Correction of Work After Substantial Completion

Contractor warrants and guarantees that all work, materials and equipment will be of good quality and free from faults or defects. Upon receipt of written instructions from Owner, it will correct all faults and deficiencies in the work which appear within one year after substantial completion. Owner will give prompt written notice of observed defects. The warranties and guarantees provided in this Article shall be in addition to and not a limitation of any other remedies provided by this Agreement or by law. If Contractor after notice, fails to proceed promptly to comply with the terms of this guarantee, Owner may have the work corrected and Contractor shall be liable for all expenses incurred.

## ARTICLE XV

### Arbitration

Arbitration of all questions in dispute under this Agreement shall be at the choice of either party and shall be in accordance with either the provisions, then in effect, of the Standard Form of Arbitration Procedure of the American Institute of Architects or the rules, then in effect, of the American Arbitration Association, as such party shall designate. This Agreement shall be specifically enforceable under the prevailing arbitration law and judgment upon the award rendered may be entered in the court of the forum, state, or federal, having jurisdiction. The decision of the arbiters shall be a condition precedent to the right of any legal action. If the applicable statute of limitations would bar the institution of any legal or equitable proceedings based on a claim or dispute under this Agreement, neither party shall have the right to seek arbitration of such claim or dispute under this paragraph.

## ARTICLE XVI

### Successors and Assigns

All the covenants and agreements herein contained shall be binding upon, and inure to the benefit of the successors and assigns of the parties; provided, however, that this Agreement shall not be assigned or transferred in whole or in part except with the advance written consent of the other party, nor shall the same be transferred by or through any action, either legal or equitable, or any court proceeding of any kind or character whatsoever.

## ARTICLE XVII

### Final Acceptance

Upon completion of all work to be performed by Contractor and

acceptance thereof, Owner shall notify Contractor in writing that the work has been satisfactorily completed, and such notice shall release Contractor from all obligations hereunder, excepting claims in respect to which written notices shall have been previously given by Owner to Contractor.

#### ARTICLE XVIII

##### Force Majeure

Neither party shall be considered in default of performance of its obligations hereunder, or any of them, to the extent that performance of such obligations, or any of them, is delayed by

Force Majeure. Force Majeure shall include, but not be limited to, hostilities, revolution, civil commotion, strike, epidemic, fire, flood, wind, explosion or embargo, or any law, proclamation, regulation or ordinance of any government or governmental agency having or claiming to have jurisdiction in the premises, or any act of God, or any cause, whether of the same or different nature, existing or future, which is beyond the control of the parties hereto.

#### ARTICLE XIX

##### Independent Contractor

Contractor, in performing the services under this Agreement, shall act as an independent contractor and not as an agent or employee of the Owner.

#### ARTICLE XX

##### Not For Benefit of Third Parties

This Agreement and each and every provision thereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party.

#### ARTICLE XXI

##### Interpretation

This Agreement shall be interpreted in accordance with laws of the State of Arizona.

ARTICLE XXII

Article Headings

All article headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement at \_\_\_\_\_, on the day and year first above written.

ATTEST:

\_\_\_\_\_

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

By: \_\_\_\_\_

ATTEST:

\_\_\_\_\_

By: \_\_\_\_\_

EXHIBIT "A"

PAYMENT SCHEDULE

