**Security of Payment (SOP) Provisions for Public Works Contracts using NEC4 ECC**

 **(Options A to D)**

**Appendix [ ] to ACC – Security of Payment (SOP) Provisions**

[ *Note: The following SOP Provisions are to be incorporated in public works contracts using NEC4 Engineering and Construction Contract (ECC) (Options A to D). Contract drafters are reminded to remove the inapplicable ones and the relevant guidelines in blue.* ]

### Part 1 – Interpretation

1. In these SOP Provisions:

“**employee**” has the meaning given by section 2(1) of the Employment Ordinance (Cap. 57).

“**progress payment**” means any payment to be made under the contract for construction work carried out or undertaken to be carried out or for related goods and services supplied or undertaken to be supplied under the contract whether such payment is a single or one-off payment, interim or final payment or is based on an event or date.

“**reference date**” means a date determined by, or in accordance with, SOP Clause 2(2) as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract.

“**working day**” means a day that is not—

* 1. a General Holiday; or
	2. a Saturday.

### Part 2 – Payment

1. Rights to progress payments
2. The *Contractor* is entitled to a progress payment if the *Contractor*—
	1. has carried out or undertaken to carry out construction work in accordance with the contract; or
	2. has supplied or undertaken to supply related goods and services in accordance with

the contract.

1. The reference dates for progress payments are—
	1. each assessment date for the amount due under NEC Clause 5 (Payment); and

(b) the date, which is 14 days after the date of execution of the Articles of Agreement, for the advance payment under NEC Clause X14. *(delete this paragraph (b) if the advance payment, under capital works contracts, promulgated in DEVB’s memos of 14.2.2020, 5.3.2021 and 10.3.2022 is not adopted.)*

1. Amount of progress payment
2. The amount of a progress payment to which the *Contractor* is entitled under the contract is the amount calculated in accordance with the contract.
3. Payable date for progress payment
4. A progress payment becomes due and payable on the earlier of the following dates (“payable date”)—
	1. the date determined by, or in accordance with, the contract as the payable date;
	2. the date falling 60 days after the payment claim for the progress payment is served (or is taken to have been served) under SOP Clause 5.
5. However, if the payment claim for the progress payment is served under SOP Clause 5 on a date later than the reference date for the progress payment referred to in SOP Clause 2(2), for the purposes of sub-clause (1)(a) above—
	1. the reference date for the progress payment shall be the date on which the payment claim for the progress payment is served; and
	2. the payable date is determined accordingly.
6. Payment claims
7. The *Contractor* may serve a payment claim for a progress payment on the *Client* on or after the reference date for the payment.
8. However, if the *Contractor* serves a payment claim for a progress payment on the *Client* before the reference date for the progress payment referred to in SOP Clause 2(2), the payment claim is taken to have been served on the reference date.
9. A payment claim for a progress payment—
	1. must be in writing;
	2. must identify the construction work or related goods and services to which the payment relates; and
	3. must state the amount of the progress payment that the *Contractor* claims to be payable (“claimed amount”).
10. The *Contractor* shall not serve more than 1 payment claim for each reference date under the contract.
11. The *Contractor* may include in the claimed amount of a payment claim any amount that has been the subject of a previous payment claim only if the amount was disputed as due by the *Client*.
12. The *Contractor* is not to include in the claimed amount of a payment claim any amount that is the subject of an ongoing adjudication.
13. A claim or application for payment made under the contract that meets the requirements of this SOP Clause is taken to be a payment claim served on the *Client*.
14. Payment responses
15. The *Client* served with a payment claim may respond to the payment claim by serving a payment response, either by itself or through the *Project Manager*, on the *Contractor*.
16. A payment response—
	1. must be in writing;
	2. must identify the payment claim to which it relates;
	3. must state the amount (if any) admitted as due under the contract before any set off or withholding, and the basis of the calculation of the amount;
	4. must state the amount (if any) not admitted as due under the contract before any set off or withholding, the grounds for, and the basis of the calculation of the amount;
	5. must state the amount, the grounds for, and the basis of the calculation of any amount to be set off or withheld; and
	6. must state the net amount to be paid (if any) and the calculation of the amount.
17. A certificate or assessment issued under the contract by the *Project Manager* in response to a payment claim or application for payment made under the contract that meets the requirements of this SOP Clause is taken to be a payment response served by the *Client* save to the extent the *Client* issues its own payment response on or before the date referred to in SOP Clause 7(2), in which event such payment response shall take precedence over the certificate or assessment and / or supplement the same as appropriate.
18. The *Client* may, either by itself or through the *Project Manager*, amend or supplement any payment response (or part of the same) which the *Client* has served on the *Contractor*  by serving on the *Contractor* an amended response and / or a supplementary response on or before the date referred to in SOP Clause 7(2).
19. Time requirements for payment responses
20. This SOP Clause applies if the *Contractor* serves on the *Client* a payment claim for a progress payment under SOP Clause 5.
21. If the *Client* intends to serve a payment response under SOP Clause 6 in reply to a payment claim under SOP Clause 5, such payment response must be served on the *Contractor* no later than the earlier of the following dates—
	1. the date determined by, or in accordance with, the contract as the date by which a payment response is to be served; and
	2. the date falling 30 days after the payment claim is served (or is taken to have been served) under SOP Clause 5.
22. If the *Contractor* serves the payment claim for the progress payment under SOP Clause 5 on the *Client* on a date later than the reference date for the progress payment referred to in SOP Clause 2(2), for the purposes of sub-clause (2)(a)—
	1. the reference date for the progress payment shall be the date on which the payment claim is served; and
	2. the date by which a payment response is to be served is determined accordingly.
23. Consequences of not serving payment responses
24. If the *Client* does not serve a payment response on or before the date referred to in SOP Clause 7(2), the *Client* —
	1. is regarded as disputing in full the claimed amount; but
	2. will not be able to raise any set off in any adjudication in relation to the payment claim concerned.

### Part 3 – Adjudication

1. Emergence of a payment dispute
2. A payment dispute arises if the *Contractor* has served a payment claim compliant with SOP Clause 5 on the *Client* and—
	1. the *Client* has served a payment response on the *Contractor* under SOP Clause 6 in which—
		1. none of the payment claim is admitted as due;
		2. the amount admitted as due is less than the claimed amount; or
		3. set off or withholding of all or any part of the claimed amount is raised;
	2. the *Client* has—
		1. served a payment response on the *Contractor* under SOP Clause 6 in which a net amount is admitted as due and is to be paid (“net admitted amount”); but
		2. failed to pay the net admitted amount in full on or before the date on which the net admitted amount becomes payable under SOP Clause 4; or
	3. the *Client* does not serve a payment response under SOP Clause 6 in reply to the payment claim on or before the date referred to in SOP Clause 7(2) and fails to pay the claimed amount in full by the payable date.
3. For the purposes of SOP Clause 10, a payment dispute arises on the expiry of—
	1. for sub-clause (1)(a)—the date referred to in SOP Clause 7(2);
	2. for sub-clause (1)(b)—the date on which the net admitted amount becomes payable under SOP Clause 4; or
	3. for sub-clause (1)(c)—the date referred to in SOP Clause 7(2).
4. Notwithstanding sub-clause (1), a payment dispute, in respect of a claim of the

*Contractor* for additional payment pertaining to the happening of a compensable event as specified in the contract, does not arise unless and until the *Project Manager* has notified the *Contractor* of its rejection and / or assessment of such claim or has failed to notify the *Contractor* of its acceptance, rejection and / or assessment of such claim within any timescales for the same specified in the claim handling procedure or, where no timescales are specified, within a reasonable time in accordance with the claim handling procedure.

1. The claim handling procedure is any procedure provided in the contract in relation to a claim for additional payment pertaining to the happening of a compensable event as specified in the contract for the purposes of—
	1. analysing and determining the liability for such payment; and
	2. assessing the amount of such payment or assessing adjustments to rates and prices which may result in additional payment.
2. Without prejudice to the generality of sub-clauses (3) and (4) of this SOP Clause, the claim handling procedure includes all steps from the notification of a compensation event under NEC Clause 6 (Compensation events) until the *Project Manager* has (or should have) notified the *Contractor* of its decision under NEC Clause 61.4 or otherwise the implementation of the compensation event under NEC Clause 66.1 (including changes to the Prices as a result of the compensation event).
3. Right to refer payment dispute to adjudication

(1) The *Contractor* may, within 28 days after the date on which a payment dispute arises, initiate an adjudication of the payment dispute under SOP Clause 11.

1. How to initiate adjudication
2. The *Contractor* (as the Claimant) may initiate an adjudication of a payment dispute against the *Client* (as the Respondent) by serving a notice of adjudication on the Respondent. A copy of such notice shall be served to the *Project Manager* on the same day.
3. A notice of adjudication must be in writing and identify / describe—
	1. the Claimant and the Respondent;
	2. the relevant payment claim and any payment response;
	3. the nature and description of the payment dispute; and
	4. the claimed amount and remedy sought.
4. Subject to sub-clauses (4) and (5), the *Contractor* shall not serve more than 1 notice of adjudication in respect of a payment dispute.
5. If the *Contractor* withdraws an adjudication in respect of a payment dispute under SOP Clause 24, the *Contractor* may serve on the *Client* another notice of adjudication in respect of the same payment dispute within the period specified in SOP Clause 10.
6. If an adjudication in respect of a payment dispute is terminated on the ground set out in SOP Clause 25(1)(d), 25(1)(e) or 25(1)(h), the *Contractor* may serve on the *Client* another notice of adjudication in respect of the same payment dispute within 28 days after the date on which such adjudication is terminated.
7. Commencement of adjudication
8. An adjudication commences on the first working day after the date on which a notice of adjudication is served on the Respondent under SOP Clause 11.
9. Appointment of adjudicator by adjudicator nominating body
10. The Claimant must serve a notice of adjudication on the adjudicator nominating body specified in sub-clause (2) below on the same day on which the notice is served on the Respondent under SOP Clause 11.
11. The adjudicator nominating body shall be [ ] *(Project Office shall specify the ANB chosen from the DEVB’s Register of ANBs maintained by DEVB and published on the website: https://www.devb.gov.hk.)* and they must appoint a single adjudicator as the *Adjudicator* in accordance with the adjudication rules of the adjudicator nominating body and inform the Claimant and the Respondent in writing of the appointment, within 5 working days beginning on the commencement date of the adjudication.
12. The adjudication rules published by the adjudicator nominating body as specified in sub- clause (2) above shall apply to an adjudication initiated under SOP Clause 11. Notwithstanding, Part 3 of these SOP Provisions shall prevail over the adjudication rules in case of inconsistencies or ambiguities.
13. The *Contractor* (as the Claimant) and the *Client* (as the Respondent) agree and undertake that the *Adjudicator* shall be appointed on terms that give effect to SOP Clauses 14 to 36, 38 and 39.
14. Adjudicator to declare and disclose interests
15. The *Adjudicator* must, at the time of accepting the appointment as an adjudicator, make a declaration in writing that—
	1. there is no conflict of interest in respect of the adjudicator’s appointment;
	2. the *Adjudicator* will act independently, impartially and in a timely manner and avoid incurring unnecessary expenses;
	3. the *Adjudicator* will comply with the principles of natural justice and decide the payment dispute in accordance with the applicable law; and
	4. there are no circumstances likely to give rise to justifiable doubts as to the

*Adjudicator*’s impartiality and independence.

1. The *Adjudicator* must, from the time of accepting the appointment and throughout the adjudication proceedings, disclose to the parties to the adjudication any circumstances likely to give rise to justifiable doubts as to the *Adjudicator*’s impartiality and independence.
2. Claimant to serve adjudication submission
3. The Claimant must serve an adjudication submission on the *Adjudicator* and the Respondent within 1 working day after the date on which the *Adjudicator* is appointed.
4. An adjudication submission—
	1. must be in writing;
	2. must identify the notice of adjudication to which it relates; and
	3. must contain any supporting documents and evidence that the Claimant considers relevant to the adjudication.
5. Respondent to serve adjudication response
6. The Respondent may serve an adjudication response on the *Adjudicator* and the Claimant within—
	1. 20 working days after the date on which the adjudication submission is served on the Respondent; or
	2. any longer period the *Adjudicator* specifies.
7. An adjudication response—
	1. must be in writing;
	2. must set out the Respondent’s reply to the adjudication submission; and
	3. must include any supporting documents and evidence that the Respondent considers relevant to the adjudication.
8. Jurisdiction of adjudicators
9. The *Adjudicator*’s jurisdiction is limited to determining—
	1. the payment dispute that is referred to adjudication by the Claimant; and
	2. any other matters that are of a consequential or ancillary nature (including the time or extended time for completion of the *works*) necessary to exercise or complete the exercise of the jurisdiction conferred by paragraph (a).
10. The *Adjudicator* has the power to rule on its own jurisdiction.
11. ***Adjudicator* to conduct adjudication**
12. The *Adjudicator* must conduct the adjudication in the manner the *Adjudicator* considers appropriate within the powers provided under SOP Clause 19.
13. When conducting an adjudication, the *Adjudicator* is not bound by the rules of evidence and may receive and take into account any relevant evidence or information, whether or not it would be otherwise admissible in a court of law.
14. **Powers of the *Adjudicator***
15. The *Adjudicator* may—
	1. establish the procedures for conducting the adjudication proceedings;
	2. determine the language or languages to be used in the adjudication proceedings;
	3. extend the deadline for service of an adjudication response under SOP Clause 16;
	4. request or allow the Claimant or the Respondent (“party to the adjudication”) to submit further written submissions;
	5. request or allow a party to the adjudication to produce any document or provide any information that the *Adjudicator* reasonably requires;
	6. set deadlines for the submission, production of documents and provision of information;
	7. appoint, with the consent of the parties to the adjudication, an independent expert to inquire or report on any specific matter;
	8. call a conference of the parties to the adjudication;
	9. carry out an inspection of the construction site, any construction work or any other thing to which the payment dispute relates including opening up of any construction work done and conducting tests or experiments;
	10. decide on the proportion of the fees and expenses of the *Adjudicator* and any independent expert appointed under sub-clause (1)(g) to be paid by the parties to the adjudication; and
	11. issue any direction as may be necessary or expedient for the conduct of the adjudication.
16. The parties to the adjudication must comply with any request or direction of the

*Adjudicator* made or given in accordance with this SOP Clause. All communications between a party to the adjudication and the *Adjudicator* must be simultaneously copied to the other party.

1. No decision, opinion, instruction, direction, certificate or valuation given by the *Project Manager* or *Supervisor* shall disqualify either from being called as a witness and giving evidence before an *Adjudicator*  on any matter whatsoever relevant to the payment dispute so referred to the *Adjudicator* as aforesaid.
2. Parties may be represented in adjudication proceedings

(1) A party to the adjudication may be represented by the representatives (whether legally qualified or not) that the party considers appropriate.

1. Circumstances where the *Adjudicator* must disregard submission etc.
2. The *Adjudicator* must not consider any submission or response made by a party to the adjudication unless it was given to the *Adjudicator* within the time that the party may give it to the *Adjudicator* pursuant to these SOP Provisions or, if no time limit can be determined under the SOP Provisions, in accordance with the adjudication rules of the adjudicator nominating body.
3. The *Adjudicator* must disregard any submission, evidence or document submitted by a party to the adjudication or any part of it to the extent that it comprises submission or evidence that—
	1. the other party was unaware of on the date on which the notice of adjudication was served;
	2. should reasonably have been served before the date on which the notice of adjudication was served; and
	3. cannot be fairly considered and responded to by the other party.
4. When the *Adjudicator*’s powers not affected
5. The *Adjudicator*’s power to determine a payment dispute is not affected by the failure of—
	1. the Respondent to serve an adjudication response on the Claimant under SOP Clause 16; or
	2. any of the parties to the adjudication to—
		1. make a submission (other than an adjudication submission under SOP Clause

15) within the time allowed by the *Adjudicator*;

* + 1. comply with the *Adjudicator*’s call for a conference of the parties; or
		2. do any other thing that the *Adjudicator* requests or directs.
1. **Resignation of the *Adjudicator***
2. The *Adjudicator* may resign by giving notice in writing to the parties to the adjudication if the *Adjudicator* considers that it is not possible to decide the dispute fairly within the period specified in SOP Clause 26.
3. A resignation takes effect on the later of—
	1. the date specified in the notice; and
	2. the date on which the notice is served on the parties to the adjudication.
4. Withdrawal of adjudication proceedings
5. The Claimant may at any time withdraw an adjudication by serving a notice of withdrawal in writing on the *Adjudicator*, the Respondent and the adjudicator nominating body on which the notice of adjudication has been served.
6. The Claimant who withdraws an adjudication must bear the fees and expenses of the

*Adjudicator* and of any independent expert appointed under SOP Clause 19(1)(g) unless the *Adjudicator* orders otherwise.

1. Termination of adjudication proceedings
2. An adjudication is terminated if—
	1. the Claimant fails to serve an adjudication submission on the *Adjudicator* and the Respondent within the time specified in SOP Clause 15;
	2. the Claimant serves a notice of withdrawal under SOP Clause 24(1);
	3. the Respondent pays the claimed amount stated in the notice of adjudication in full to the Claimant;
	4. the *Adjudicator* resigns under SOP Clause 23(1);
	5. the *Adjudicator* becomes unable or unsuitable to act as the *Adjudicator* under the adjudication rules of the adjudicator nominating body, or the *Adjudicator* becomes ineligible to act as the *Adjudicator* pursuant to SOP Clause 33 or under the adjudication rules of the adjudicator nominating body;
	6. the payment dispute is settled by agreement in writing between the parties to the adjudication;
	7. the payment dispute is determined by arbitration or court proceedings;
	8. the *Adjudicator* fails to deliver an adjudication decision in accordance with SOP Clause 26(2); or
	9. the *Adjudicator* decides under SOP Clause 17 that it has no jurisdiction on the payment dispute.
3. Adjudication decisions
4. The *Adjudicator* must determine—
	1. the payment dispute referred to the *Adjudicator*;
	2. the adjudicated amount, which means the amount of the progress payment, if any, to be paid by the Respondent to the Claimant, or, as the case may be, any amount to be paid by the Claimant to the Respondent;
	3. the interest payable on the adjudicated amount;
	4. the date on which the adjudicated amount is payable; and
	5. the proportion of the fees and expenses of the Adjudicator and of any independent expert appointed under SOP Clause 19(1)(g) payable by each party to the adjudication in accordance with SOP Clauses 35 and 36.
5. The *Adjudicator* must, through the adjudicator nominating body that appointed the *Adjudicator*, deliver an adjudication decision to the parties to the adjudication within—
	1. 55 working days after the date on which the *Adjudicator* is appointed; or
	2. any longer period agreed by the parties to the adjudication.
6. An adjudication decision—
	1. must be in writing; and
	2. must contain reasons for the decision unless otherwise agreed by the parties to the adjudication.
7. An adjudication decision must be delivered to the adjudicator nominating body and the parties to the adjudication under sub-clause (2) in a manner specified in the adjudication rules of the body.
8. Effect of adjudication decision
9. An adjudication decision made under these SOP Provisions is binding on the parties to the adjudication and enforceable as a matter of contractual obligation unless and until—
	1. the payment dispute to which the decision relates is settled by agreement in writing between the parties to the adjudication; or
	2. the payment dispute is determined by arbitration or court proceedings.
10. Adjudicators may correct typographical errors etc.
11. The *Adjudicator* may, on its own initiative or at the request of a party to the adjudication, correct in the adjudication decision any computational or typographical errors or any errors of a similar nature.
12. Any correction must be done within 5 working days after the date on which the decision is delivered to the parties to the adjudication under SOP Clause 26(2).
13. To avoid doubt—
	1. any correction done to an adjudication decision under this SOP Clause does not affect the validity of the decision; and
	2. the time limit set out in SOP Clause 30 runs from the date on which the decision is delivered to the parties to the adjudication under SOP Clause 26(2).
14. Valuation of work etc. in later adjudication
15. Sub-clause (2) applies if, in an adjudication, an *Adjudicator* has, under SOP Clause 26(1), determined—
	1. the value of any construction work carried out under the contract; or
	2. the value of any related goods and services supplied under the contract; or
	3. the value of any other entitlements specified in the contract.
16. The *Adjudicator* or another adjudicator must, in any later adjudication that involves the working out of the value of that work or of those goods and services or any entitlements specified in the contract, give the work, or the goods and services or such entitlements, the same value as that previously decided.
17. However, sub-clause (2) does not apply to the extent the Claimant or Respondent in the later adjudication satisfies the *Adjudicator* that due to circumstances affecting the carrying out of the construction works and / or supply of related goods and services arising after the decision in the earlier adjudication the value of the work, or the goods or services, or any entitlements specified in the contract in relation to the same has changed.
18. Settlement of adjudicated amount
19. If the *Adjudicator* determines in an adjudication decision that a party to the adjudication is required to pay an adjudicated amount to the other party, the party must pay the amount to that other party on or before the following date—
	1. the date specified by the *Adjudicator* in the adjudication decision; or
	2. if no date is specified by the *Adjudicator* in the adjudication decision—a date that is within 30 days after the date on which the adjudication decision is delivered to the parties to the adjudication under SOP Clause 26(2).

30A. Interest on late payment of adjudicated amount

(1) If the *Client* fails to pay the adjudicated amount in accordance with SOP Clause 30, it pays interest on the unpaid portion of the adjudicated amount to the *Contractor*. Interest is calculated on a simple interest basis at the judgment debt rate prescribed from time to time by the Rules of the High Court (Chapter 4 of the Laws of Hong Kong) from the day after the payment due date under SOP Clause 30.

1. Effect of adjudication on other proceedings
2. Part 3 of these SOP Provisions does not affect any right that the *Client* or *Contractor* may have to submit a payment dispute relating to or arising from the contract to mediation or arbitration.
3. The submission of a payment dispute being adjudicated to a mediation or arbitration does not terminate or otherwise affect the adjudication.
4. Confidentiality of adjudication
5. The parties to the adjudication, the *Project Manager*, the *Supervisor* and the *Adjudicator* must not disclose or give to another person any information relating to—
	1. an adjudication; or
	2. an adjudication decision made in the adjudication.
6. Despite sub-clause (1), the parties to the adjudication may disclose or give to another person information referred to in sub-clause (1) if—
	1. the information is in the public domain;
	2. the disclosure is made with the consent of—
		1. each of the parties to the adjudication; and
		2. the adjudicator for the adjudication;
	3. the disclosure is made to an adjudicator nominating body because of the operation of Part 3 of these SOP Provisions;
	4. the disclosure is necessary for the purpose of settlement of the adjudicated amount;
	5. the disclosure is made in another adjudication, a court proceeding, arbitration or any other dispute resolution proceeding in connection with the contract in respect of which the payment dispute under the adjudication arises;
	6. the disclosure is made in accordance with the contract or a requirement imposed by law; or
	7. the disclosure is made to—
		1. a professional or any other adviser of the party for the purpose of seeking legal or other professional advice;
		2. insurers or bankers for reasonable commercial purposes;
		3. enable proper applications for or assessments of payments; or
		4. the *Project Manager* or the *Supervisor*.
7. Eligibility of adjudicators
8. An individual is eligible to be appointed and act as the *Adjudicator* if the individual is on the panel of adjudicators of the adjudicator nominating body specified in SOP Clause 13(2).
9. An individual is not eligible to be appointed and act as the *Adjudicator* for an adjudication of a payment dispute if—
	1. the individual is a Party (or employee or agent of a Party) to the contract under which the payment dispute arose; or
	2. circumstances exist that give rise to justifiable doubts as to the individual’s impartiality or independence.
10. Costs and expenses of adjudication incurred by parties
11. A party to an adjudication is not liable to pay any costs or expenses incurred by the other party to the adjudication as a result of or in relation to the adjudication.
12. Sub-clause (1) applies even if a party has caused the costs or expenses to be incurred by the other party unnecessarily or for any other reason.
13. Adjudicator’s fees
14. The *Adjudicator* is entitled to be paid for adjudicating a payment dispute—
	1. the amount, by way of fees and expenses, agreed between the *Adjudicator* and the parties to the adjudication; or
	2. if no amount is agreed, the amount, for fees and expenses, that is reasonable having regard to the work done and the expenses incurred by the *Adjudicator*.
15. The Claimant and Respondent are jointly and severally liable to pay the *Adjudicator*’s fees and expenses.
16. The Claimant and Respondent are each liable to contribute to the payment of the

*Adjudicator*’s fees and expenses—

* 1. in the proportions the *Adjudicator* decides; or
	2. if the *Adjudicator* has not so decided—in equal proportions.
1. The *Adjudicator* is not entitled to be paid any fees or expenses for the adjudication if—
	1. the *Adjudicator* fails to deliver an adjudication decision either within the time required under SOP Clause 26(2) or at all;
	2. the *Adjudicator* resigns during the course of the adjudication; or
	3. the *Adjudicator* becomes ineligible to act as the *Adjudicator* pursuant to SOP Clause 33 or under the adjudication rules of the adjudicator nominating body.
2. However, sub-clause (4) does not apply if the adjudication is terminated pursuant to SOP Clause 25(1)(b) or (i).
3. For the purposes of sub-clause (4), the *Adjudicator* will not be regarded to have failed to deliver an adjudication decision if:
	1. the *Adjudicator* refuses to deliver the adjudication decision to the parties to the adjudication pursuant to SOP Clause 26(2) until its fees and expenses are paid; or
	2. the *Adjudicator* has delivered the adjudication decision to the adjudicator nominating body within the time required under SOP Clause 26(2), but the adjudicator nominating body fails to deliver the adjudication decision to the parties to the adjudication within the time required under SOP Clause 26(2) or at all.
4. For the avoidance of doubt, the *Adjudicator* has the power to decide their fees and expenses after termination of an adjudication under SOP Clause 25 save and except where the adjudication is terminated on any of the grounds set out in SOP Clause 35(4).
5. Matters to be considered in deciding fees
6. This SOP Clause applies if the *Adjudicator* is making a decision about the proportion of the *Adjudicator*’s fees and expenses to be paid by the Claimant and Respondent under SOP Clause 19(1)(j).
7. In making the decision, the *Adjudicator* may consider the following matters—
	1. the relative success of the Claimant or Respondent in the adjudication;
	2. whether the Claimant or Respondent commenced or participated in the adjudication for an improper purpose;
	3. whether the Claimant or Respondent commenced or participated in the adjudication without reasonable prospects of success;
	4. whether the Claimant or Respondent has acted unreasonably leading up to the adjudication;
	5. whether the Claimant or Respondent has acted unreasonably in the conduct of the adjudication;
	6. the reasons given by the Respondent for not making the progress payment the subject of the adjudication application;
	7. whether the Respondent included additional reasons for not making the progress payment in the adjudication response that were not included in the payment response served on the Claimant;
	8. whether an adjudication application is withdrawn;
	9. the services provided by the *Adjudicator* in adjudicating the payment dispute, including the amount of time taken to consider discrete aspects of the amount claimed; and
	10. any other matter the *Adjudicator* considers relevant in making the decision.

### Part 4 – Right to Suspend Work or Supply or Reduce Rate of Progress of Work or Supply

1. *Contractor*’s right to suspend work or supply or reduce rate of progress of work or supply
2. The *Contractor* may suspend, or reduce the rate of progress of, the *works* under the contract if all the conditions set out in either sub-clause (2) or (3) are satisfied.
3. The conditions are—
	1. the *Contractor* has served on the *Client* a payment claim under SOP Clause 5;
	2. the *Client* has—
		1. served a payment response on the *Contractor* under SOP Clause 6 in which a net admitted amount is stated to be paid; but
		2. failed to pay the net admitted amount in full on or before the date on which the net admitted amount became payable under SOP Clause 4;
	3. after the date as referred to in paragraph (b)(ii) and at least 5 working days before the date (“intended starting date”), on which he intends to start suspending, or reducing the rate of progress of the *works* under the contract, the *Contractor* has served on the *Client* a notice of intention that meets the requirements set out in sub-clause (4); and
	4. the net admitted amount is not paid in full before the intended starting date.
4. The conditions are—
	1. the *Client* has not paid to the *Contractor* the adjudicated amount in full on or before the date specified under SOP Clause 30 (“payment deadline”);
	2. after the payment deadline and at least 5 working days before the date (“intended starting date”), on which he intends to start suspending, or reducing the rate of progress of the *works* under the contract, the *Contractor* has served on the *Client* a notice of intention that meets the requirements set out in sub-clause (4); and
	3. the adjudicated amount is not paid in full before the intended starting date.
5. The notice of intention—
	1. must be in writing;
	2. must state that it is given under these SOP Provisions;
	3. must indicate the *Contractor*’s intention to suspend, or reduce the rate of progress of, the *works* under the contract; and
	4. may specify the intended starting date.
6. If no intended starting date is specified in the notice of intention, for the purposes of sub-clause (2) or (3), the date falling 5 working days after the date on which the notice of intention is served on the *Client* is taken to be the intended starting date.
7. The *Contractor* exercising the right under sub-clause (1)—
	1. is not in breach of the contract;
	2. is not liable for any loss or damage suffered by the *Client*, or by any person claiming through the *Client*, as a result of suspending, or reducing the rate of progress of, the *works*; and
	3. must resume the progress of the *works* within 7 working days after receiving the net admitted amount or the adjudicated amount in full.

### Part 5 – Miscellaneous Matters

1. Exclusion of civil liability of adjudicators and adjudicator nominating bodies

(1) The *Client* and the *Contractor* agree that, save to the extent prohibited by law or in relation to liability for fraud, an *Adjudicator* and an adjudicator nominating body shall not be liable to the *Client* and the *Contractor* in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, costs or expenses of any nature whatsoever incurred or suffered by the *Client* or the *Contractor* of an indirect or consequential nature including without limitation any economic loss or other loss of turnover, profits, business or goodwill for an act done or omitted to be done by the *Adjudicator* or the adjudicator nominating body in good faith pursuant to these SOP Provisions.

1. Adjudicators not required to act as witnesses

(1) The *Client* and the *Contractor* agree that they shall not require the *Adjudicator* to give evidence or provide or produce any document or other material in an arbitration or other proceedings in connection with the payment dispute.

1. Service: adjudication documents
2. This SOP Clause applies to a document that is authorized or required to be served under Part 3 (Adjudication) of these SOP Provisions.
3. Such documents must be served—
	1. in a manner specified in these SOP Provisions; or
	2. if no manner is so specified—in a manner specified by the *Adjudicator* or in the adjudication rules published by the adjudicator nominating body as specified in SOP Clause 13.
4. Service: other documents
5. This SOP Clause applies to a document that is authorized or required to be served under—
	1. Part 2 (Payments) of these SOP Provisions; or
	2. Part 4 (Right to Suspend Work or Supply or Reduce Rate of Progress of Work or Supply) of these SOP Provisions.
6. The document may be served by a party on another party (“receiving party”) in the manner in accordance with NEC Clause 13.
7. Security of Payment for Relevant Subcontract
8. Without prejudice to the generality of Clause C2 of the *additional conditions of contact* and NEC Clause 26, this Clause applies in relation to any subcontract of any tier for constructing or installing part of the *works* (“Relevant Subcontract”) (whether or not supplying a service, Equipment, Plant and Materials in order to Provide the Works is included as part of the Relevant Subcontract), but does not apply to—
	1. a Relevant Subcontract to the extent that it contains provisions under which a party undertakes
		1. to lend money or to repay money lent;
		2. to guarantee repayment of money owing or repayment of money lent; or
		3. to act as an insurer with respect to any part of the *works* carried out, or the service, Equipment, Plant and Materials supplied, under the Relevant Subcontract;
	2. a Relevant Subcontract under which it is agreed that the consideration payable is to be calculated otherwise than by reference to the value of any part of the *works* carried out, or the service, Equipment, Plant and Materials supplied; or
	3. a Relevant Subcontract to the extent that it contains provisions under which a party undertakes to carry out any part of the *works* or to supply the service, Equipment, Plant and Materials as an employee of the other party.
9. The *Contractor* shall ensure that the Mandatory Subcontract Conditions and the SOP Provisions for Relevant Subcontracts in the form appearing in Appendix [ ]1 to the *additional conditions of contract* are included in all Relevant Subcontracts entered into with the *Contractor*. The *Contractor* shall, if necessary, within a reasonable time enter into a supplemental agreement with its Subcontractor to ensure that the Relevant Subcontract complies with the requirements in this sub-clause.
10. For Relevant Subcontracts at any lower tiers of subcontracting, the *Contractor* shall take all reasonable steps to ensure that the Mandatory Subcontract Conditions and the SOP Provisions for Relevant Subcontracts in the form appearing in Appendix [ ]1 to the *additional conditions of contract* are included *mutatis mutandis* and are effective in all such Relevant Subcontracts. The *Contractor* shall take all reasonable steps to ensure that subcontractors at any lower tiers of subcontracting shall, if necessary, within a reasonable time enter into supplemental agreements to comply with the requirements in this sub-clause.
11. The *Contractor* shall submit copies of the contract documents of all Relevant Subcontracts to the *Project Manager* for the purpose of checking if the Mandatory Subcontract Conditions and the SOP Provisions for Relevant Subcontracts referred to in sub-clauses (2) and (3) of this Clause are included in the Relevant Subcontracts. Upon request by the *Project Manager*, the *Contractor* shall provide the original documents of the Relevant Subcontract for inspection by the *Project Manager*.
12. The *Contractor* shall display a Site Notice using the pro forma at Appendix [ ]2 to the *additional conditions of contract*. The Site Notice shall be updated from time to time or as per request by the *Project Manager*.
13. Direct payment for settlement of unpaid Adjudicated Amount under Relevant Subcontract
14. “Adjudicated Amount under Relevant Subcontract” means an amount as shown in the original or certified true copy of the adjudication decision issued under an adjudication conducted in accordance with the SOP Provisions for Relevant Subcontracts that a party to a Relevant Subcontract is required to pay to another party to the same Relevant Subcontract.
15. The *Contractor* shall report at monthly intervals to the *Project Manager* all notices of adjudication served under any Relevant Subcontract and the status of payment or settlement of any Adjudicated Amount under Relevant Subcontract.

**1** Annex D to DEVB TC(W) No. 6/2021.

**2** Annex H to DEVB TC(W) No. 6/2021.

1. Where a party to a Relevant Subcontract at any of the tiers of subcontracting (as the claimant) applies to the *Client* stating that the other party to that Relevant Subcontract (as the respondent) has failed to pay the whole or any part of an Adjudicated Amount under Relevant Subcontract in accordance with the SOP Provisions for Relevant Subcontracts, and the application is supported by submission of: (i) a certified true copy of the adjudication decision; (ii) identification of the work done to which the Adjudicated Amount under Relevant Subcontract relates; and (iii) a written declaration that the whole or any part of the Adjudicated Amount under Relevant Subcontract is outstanding, the

*Client* may make direct payment of the outstanding amount, or any part thereof, to the claimant in accordance with the following:

* 1. the *Client* serves a letter, which incorporates the contents set out in Annex [ ]3 to these *additional conditions of contract*, on the *Contractor*, with a copy to the claimant;
	2. the *Contractor* certifies and submits documentary proof to the *Client* within 28 days after receipt of the letter referred to in paragraph (a) if :
		1. it or any subcontractors of any tier has paid the Adjudicated Amount under Relevant Subcontract to the claimant or the claimant has been satisfied with any payment as full settlement of the Adjudicated Amount under Relevant Subcontract;
		2. the adjudication decision is no longer binding on the respondent by reason of clause 27(1)(a) or 27(1)(b) under the SOP Provisions for Relevant Subcontracts or otherwise;
		3. a subcontractor at any higher tier to the claimant: -
			1. has become bankrupt; or
			2. has had a receiving order made against it; or
			3. has presented a petition in bankruptcy; or
			4. has made an arrangement with or assignment in favour of its creditors; or
			5. has agreed to carry out its Relevant Subcontract under a committee of inspection of its creditors; or
			6. being a corporation, has gone into liquidation (other than voluntary liquidation for the purposes or amalgamation or reconstruction), administration or receivership or otherwise became insolvent; or
		4. any subcontractor at higher tiers to the respondent will be unable to recover the amount of direct payment (to be made by the *Client*) by way of deduction from its payments due or which may become due to its subcontracting parties at next lower tier under the Relevant Subcontracts;

**3** Annex G to DEVB TC(W) No. 6/2021.

* 1. if the *Contractor* fails to certify or submit documentary proof to the *Client* in accordance with paragraph (b), the *Client* may directly pay the outstanding amount of the Adjudicated Amount under Relevant Subcontract, or any part thereof as advised by the *Contractor* in its reply to the *Client*’s letter under paragraph (a) above, or such amount as appears reasonable to the *Client*, to the claimant but the amount of such direct payment shall not exceed the total payments due or which may become due to the *Contractor* under the contract; however, if the *Contractor* submits proof that a subcontractor at any higher tier to the claimant has become bankrupt or has had a receiving order made against it or has presented a petition in bankruptcy or has made an arrangement with or assignment in favour of its creditors or has agreed to carry out its Relevant Subcontract under a committee of inspection of its creditors or (being a corporation) has gone into liquidation (other than voluntary liquidation for the purposes or amalgamation or reconstruction), administration or receivership or otherwise became insolvent, the *Client* shall not make the direct payment as requested. For the avoidance of doubt, the *Client* shall not be under any obligation to make direct payment of the Adjudicated Amount under Relevant Subcontract;
	2. the *Client* is entitled to deduct the amount of any direct payment made in accordance with paragraph (c) from any payments due or which may become due to the *Contractor* under the contract or to otherwise recover the amount of direct payment made from the *Contractor*.

The entitlement of the *Client*, under sub-clause (3), to make direct payment to the subcontractor claimant and to deduct the same amount from payments due to the *Contractor* is not affected by any subsequent arbitration, court or other proceedings or settlement resulting in the amount due being different from the Adjudicated Amount under Relevant Subcontract or if the adjudication decision is no longer binding on the parties to the adjudication.

1. The right of the *Client* to make direct payments pursuant to sub-clause (3) above does not relieve the *Contractor* of any of its obligations under the contract.