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CONTOH PERJANJIAN UTAMA PROGRAM ICP

NOT TO BE DISCLOSED WITHOUT THE WRITTEN CONSENT OF
SUPPLIER AND THE GOVERNMENT OF MALAYSIA

Document No.

AGREEMENT

BETWEEN

THE GOVERNMENT OF MALAYSIA

AND

ICP PROVIDER

**RELATING TO THE PROVISION OF
ICP PROGRAM UNDER PROCUREMENT OF**

NAME OF THE PROGRAM

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THIS AGREEMENT is made this _____ day of *Month*_____ *Year*_____

BETWEEN

THE GOVERNMENT OF MALAYSIA

as represented, for the purpose of this Agreement by:

Name of Ministry

(hereinafter called the “Government”) of one part;

AND

Name of ICP Provider

a company incorporated in [**] and whose registered office is at *Address*

(hereinafter referred as the “*Supplier*”) of the other part.

The Government and the *Supplier* are collectively referred to as the “Parties” and individually, as a “Party”.

WHEREAS:

- A. *The Supplier* and the Government of Malaysia have entered into a [General Terms Agreement] reference *XXX* (that and its related contracts, as may be amended, supplemented or varied by the parties thereto from time to time, being hereinafter collectively or individually called the “Supply contract”) for items defined in the Supply Contract [as “Products and Services”].
- B. In compliance with the Policy and Guideline on ICP Programs in Government Procurement published by the Government of Malaysia;
- i. As at 2005 (published by the Ministry of Defense);
 - ii. Revised as the Second Edition in 2011 (published by the Ministry of Finance) – which some terms and conditions of the latter supersedes the former;
 - iii. Revised as the Third Edition in 2014 may be amended by the Government of Malaysia from time to time (hereinafter referred as the “ICP Policy”); and
 - iv. As a condition for the awarding of the Supply Contract to *the Supplier*.

the Government requires the *Supplier* that supplies services, works or equipment to the Government which the value qualifies for ICP program to support the Supply contract with the provision of ICP Program(s) consist of activities, benefits, packages and programs pursuant to the terms of this Agreement, and for the *Supplier* to commit to the performance of its obligations in relation thereto.

- C. The ICP Policy shall be used as the reference basis for purposes of the implementing of the ICP programs/projects, and the claiming by the *Supplier* of ICP credits for ICP obligations’ relief, pursuant to this Agreement.
- D. The Government will coordinate the receipt of ICP benefits by such parties, as may be identified by the Government, in accordance with the ICP Policy.

In consideration of the mutual agreements and promises herein contained, the entering into of the agreements set out in the Supply contract or other valuable consideration (receipt of which is duly acknowledged by the *Supplier*), the *Supplier* agrees to provide the ICP Program(s) and undertake its obligations as set out in this Agreement, so as to satisfy the *Supplier’s* ICP obligations in accordance with the ICP Policy.

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

1. **DEFINITIONS**

In this Agreement, unless the context otherwise requires, the terms used shall have the same meanings as those ascribed to them in the Supply Contract and/or the ICP Policy, and the following words and expressions shall have the following meanings:

- 1.1 **'ICP Recipients'** shall mean local companies, institutions or organisation that are receiving the benefits, profits or advantages from the ICP Project. The ICP Recipients are subject to the approval of the OC (as herein defined).
- 1.2 **'ICP Projects'** shall mean the projects described in Clause 3 and "ICP Project" shall refer to any one or more of the ICP Projects.
- 1.3 **'Supply Contract'** shall mean the [General Terms Agreement] reference **XXX** between the *Supplier* and the Government.
- 1.4 **'ICP Credits Value'** shall mean the credits being generated by the ICP Project which is calculated based on nominal value multiplied by relevant multiplier set by the Government subject to the approval of the ICP Committee (OC).
- 1.5 **'Obligated ICP Credits Value'** shall mean ICP Credits Value which equivalent to the total value of the Supply Contract and must be generated by the Supplier in order to obtain Discharge Certificate apart from completing all ICP Project under this Agreement.
- 1.6 **'ICP Project Duration'** shall mean the period of which the ICP Project needs to be completed in accordance with the provisions of this Agreement.
- 1.7 **'ICP Committee'** shall mean the committee to be established pursuant to Clause 6.9 for purposes of monitoring and supervising the ICP Projects.
- 1.8 **'ICP Project Provider'** shall mean the party responsible for delivering and fulfilling an ICP Projects, as nominated by the *Supplier* and agreed by the Government.
- 1.9 **'Working Committee'** shall mean any committee established by the ICP Committee pursuant to Clause 6.9.

1.10 Interpretation:

- a. The recitals and schedules hereto as well as any documents therein referred to shall be taken, read and construed as an essential and integral part of this Agreement, provided however, that in the event of any conflict or inconsistency between the various documents forming this Agreement, the following order of precedence shall apply:
 - i. The Clauses; and
 - ii. The Schedules.
- b. Reference to recitals, Clauses and schedules are to be construed as references to recitals, Clauses and schedules of this Agreement, unless otherwise provided herein;
- c. All references to provisions of statutes include such provisions as amended, modified or re-enacted;
- d. The words 'law' and 'laws' mean any present or future law or any constitution, decree, judgment, legislation, order, ordinance, statute, treaty, directive, by-law, rule or regulation as amended from time to time;
- e. Words applicable to natural persons include any body of persons, companies, corporation, firm or partnership incorporated or unincorporated;
- f. The expression 'this Agreement' or any similar expression shall comprise the recitals, Clauses, schedules and appendices of this Agreement and include any supplemental written agreement thereto as may be executed and be in force from time to time;
- g. Words importing any gender shall include any other gender;
- h. Words importing the singular number shall include the plural number and vice versa including the definitions referred to in Clause 1;
- i. The heading and sub-headings to the Clauses of this Agreement are for convenience of reference only and shall not affect the interpretation and construction thereof;
- j. Where any word or expression is defined in this Agreement, the definition shall extend to all grammatical variations and cognate expressions of the word or expression defined;

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- k. For the purpose of calculating any period of time stipulated herein, or when an act is required to be done within a specified period after or from a specified date, the period is inclusive of and the time begins to run from the date so specified;
- l. Wherever there shall appear any reference to a time within which an act should be done or agreement reached or consent given, such reference shall be deemed to be read as including the expression ;or any other period agreed in writing by the Parties from time to time’;
- m. Any technical term not specifically defined in this Agreement shall be construed in accordance with the usage or definition commonly accepted by those in that profession in Malaysia;
- n. Any reference to a ‘business day’ is to a day other than Saturday, Sunday (except for States where Saturday and Sunday are working days, such reference excludes Thursday and Friday) and any other day which is declared by the Government of Malaysia as a public holiday and any reference to a ‘day’, ‘week’, ‘month’ or ‘year’ is to that day, week, month, or year in accordance with the Gregorian calendar; and
- o. Any reference to ‘writing’ or cognate expressions, include any communication effected by telex, cable, facsimile transmission and other comparable means.

2. **CONDITION(S) PRECEDENT AND EFFECTIVE DATE**

2.1 This Agreement shall be conditional upon, and shall be fully effective as at and from, the due execution of:

a. The Supply contract reference XXX between the Government and the Supplier

2.2 For each ICP Project under this Agreement, the *Supplier* shall procure, as appropriate, the obtaining of the necessary authorisations and licences that are required for the export and continued use in Malaysia of any technologies provided under this Agreement.

2.3 If the condition set out in Clause 2.1 above has not been fulfilled (or waived) by *Date Month Year* or such other date as the Parties may agree then this Agreement (other than the provisions of Clause 8) shall automatically cease and determine and all obligations and liabilities of the Parties under this Agreement shall cease to have effect and (except in respect of any antecedent breach of Clause 5 or any other relevant provisions of this Agreement), neither party shall have any claim of any nature whatsoever against the other party in relation to this Agreement.

2.4 Notwithstanding Clause 2.1 above, the *Supplier* confirms that as from *Date Month Year*, work preparatory to and in support of the ICP Projects has duly commenced and is currently in active progress.

3. ICP COMMITMENT

3.1 The *Supplier* agrees to procure the full delivery and completion of the ICP Projects in accordance with the schedule agreed by the Parties but the total Obligated ICP Credit Value for the ICP Projects shall always be amounting to a minimum value of hundred percent (100%) of total value of the Supply contract as stipulated in the ICP Policy. These ICP Projects shall include the following:

- a. **Project 1**
Description of Project 1
- b. **Project 2**
Description of Project 2
- c. **Project 3**
Description of Project 3
- d. **Project 4**
Description of Project 4
- e. **Project 5**
Description of Project 5
- f. **Project 6**
Description of Project 6
- g. **Project X.X**
Description of Project X.X

3.2 The requirements for each of the above *ICP Projects* are summarised at Schedule A, the details of which may be amended from time to time by the Parties [through the Working Committee and with the agreement of the ICP Committee].

3.3 The *Supplier* shall procure that each ICP Project Provider shall execute their respective *ICP Agreements*, in such form and substance as is agreed by the Government, with the relevant Recipients in order to duly implement the *ICP Project* in accordance with the agreed basis and timeline pursuant to this Agreement.

- 3.4 The *Supplier* shall procure that the ICP Projects above shall be planned and implemented in support of the Government aspiration. In doing so, the *Supplier* shall work closely with the Government in identifying the ICP Recipient deemed fit from local industry to carry out the aspiration and be part of the ICP Project.
- 3.5 In accordance with the ICP Policy, the *Supplier* acknowledges and agrees that the following principles shall be duly observed and applied for purposes of this Agreement:
- a. The Government will not pay any premium to support any *ICP Project*;
 - b. ICP credits will only be granted on the basis of substantiating documentation received from the *Supplier* or the *ICP Providers*, after due verification by the Government and compliance to the requirements set out in the Malaysian ICP Management Framework;
 - c. All costs incurred in the implementation of offsets shall be borne in full by the *ICP Provider(s)* and the *Supplier*.

4. REPRESENTATION AND WARRANTY

- 4.1 The *Supplier* hereby represents and warrants to the Government that:
- a. It is a corporation validly exist under the laws of the originating country;
 - b. It has the corporate power to enter into and perform its obligations under this Agreement;
 - c. It has taken all the necessary corporate actions to authorise the entry into and performance of this Agreement and to carry out its obligations and the transactions contemplated by this Agreement;
 - d. As at and from the date of its execution of this Agreement, neither the execution nor performance by it of this Agreement nor any transactions contemplated by this Agreement shall violate in any respect any provision of:
 - i. Its Memorandum and Articles of Association;
 - ii. Any other document or agreement, which is binding upon it or its assets;
 - e. No litigation arbitration, tax claim, dispute or administrative proceeding is presently current or pending or, to its best knowledge, threatened, which is likely to have a material adverse effect upon it or its ability to perform its

financial or other obligations under this Agreement;

- f. This Agreement constitutes its legal, valid and binding obligations and is fully enforceable against the *Supplier* in accordance with its terms and conditions;
 - g. It has the necessary capability, resources and powers to undertake and fully perform its obligations under this Agreement;
- 4.2 The *Supplier* warrants and undertakes to and with the Government to indemnify, and keep indemnified, the Government from and against all claims, damages, liabilities, deficiencies, penalties, losses, costs, expenses (including without limitation, legal fees and disbursements on a full indemnity basis) which the Government may suffer, incur or sustain as a result of or in consequence of or in relation to any inaccuracies, misrepresentations or breaches of any of the representations, warranties, undertakings and terms contained in this Agreement.
- 4.3 The representations and warranties set out in Clauses 4.1 and 4.2 above shall survive the termination or expiration of this Agreement.

5. UNDERTAKINGS OF THE PARTIES

The Parties agree that they will co-operate with each other in order that the *ICP Project* can be effectively and efficiently implemented.

5.1 *Supplier's* Undertakings

- a. *The Supplier* shall execute its obligation to procure the due and complete implementation of all ICP Project(s) in accordance with the provisions of this Agreement and the ICP Policy and ensure all of the ICP Project Providers shall complete its ICP Projects in accordance with the provisions of this Agreement and the ICP Policy. If the *Supplier* fails to perform, or through reasons solely and directly within its control fails to cause the ICP Project Provider(s) to perform an ICP Project(s) as agreed in this Agreement, the ICP Policy and the ICP Implementation Plan then:
 - i. The Working Committee shall, within thirty (30) days of the Government advising that it considers such a failure to have occurred, review the reasons therefore and if possible resolve the position.
 - ii. If the matter cannot be resolved at Working Committee level, the matter will be escalated to the ICP Committee (IC). If the IC confirms its agreement with the view of the Working Committee on the status of the *ICP Project(s)* being discussed, the *Supplier* and the Government shall

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promptly endeavour to identify a substitute program of equivalent value and cost.

- iii. Subject to another suitable ICP Provider or Beneficiary, as the case may be, being identified, the Parties shall negotiate in good faith an amendment to this Agreement that will allow incorporation of such a project into Schedule A.
 - iv. If the *Supplier* fails to satisfy the requirement(s) as stipulated in [Clause 5.1.a.i. and 5.1.a ii], the Government shall be entitled (among others) to exercise its rights pursuant to the ICP Policy.
- b. The *Supplier* shall ensure that the second tier ICP Project Agreement shall be executed within three (3) months upon signing of this Agreement.
 - c. The Supplier shall ensure that the Government is provided with copies of all ICP Project agreements (as referred to in Clause 3.3) in a proper and timely manner.
 - d. The *Supplier* shall comply with all requirements stipulated in the ICP Policy for the duration of implementation of the ICP Projects
 - e. The *Supplier* shall perform its obligations under this Agreement:
 - i. With due diligence and efficiency without interrupting or violating its obligations and responsibilities pursuant to the provisions of the Supply Contract;
 - ii. In such manner as shall always safeguard and protect the Government's interests and with all necessary and proper steps taken to prevent abuse or uneconomical or inefficient use of facilities or resources made available to the *Supplier*; and
 - iii. In accordance with the provisions of this Agreement.
 - f. All Intellectual Property ("IP") and know-how arising from or generated as a result of an *ICP Project*, either directly or indirectly (including via contracts placed with Malaysian institutions) will be owned and managed by an entity identified by the Government of Malaysia.

5.2 Government Undertakings

- a. The Government, through its representative, namely TDA shall coordinate the implementation of the *ICP Project(s)* in accordance with the Malaysian ICP

Management Framework as specified in the ICP Policy and shall provide the necessary direction of the ICP Project as and when required.

- b. The Government, through its representative, namely Technology Depository Agency (TDA) which the role and functions are specified in the ICP Policy shall provide all necessary assistance to the *Supplier* to ensure the smooth implementation of the ICP Projects and facilitate the *Supplier* with the necessary solution subject to the provisions of the ICP Policy and this Agreement.
- c. In the event of changes in the ICP Policy, the Parties with the guidance of the Government shall undertake reasonable and practical remedies to overcome any disputes arising from the changes.
- d. Provided the *Supplier* has performed its obligations in accordance with the provisions of this Agreement and the ICP Policy, the *Supplier* shall not be responsible for the failure of any *ICP Project* if the Recipients of the ICP Projects fail to perform their material undertakings and obligations in relation to such *ICP Project*.

6. MANAGEMENT OF ICP PROJECTS

- 6.1 The Parties hereby agree that the day to day management activity of the ICP Project(s) must largely be performed by the ICP Project Provider(s) and the Recipient(s) thereof. However, it is also recognised that these activities need to be supervised, monitored and approved such that it is clear that they are proceeding in accordance with both Parties' expectations.
- 6.2 The Government has appointed *ICP Management Unit (IMU) from Ministry* to undertake the relevant role, in accordance with ICP Policy, for purposes of the above functions.
- 6.3 TDA, IMU and *Supplier* recognised that the implementation of the ICP Project(s) shall be in compliance with the ICP Policy published by the Government of Malaysia.
- 6.4 The Parties shall procure that TDA, IMU and the *Supplier* will develop within ninety (90) days from the Effective Date, a detailed ICP Implementation Plan for each of the ICP Projects. The ICP Implementation Plan shall include the following:
 - a. Detailed description of the ICP Project;
 - b. Implementation schedule of each ICP Project;

- c. Project milestones including closure criteria;
 - d. Funding arrangement including relevant contributions from the Recipient;
 - e. Contracting arrangements between parties involved in the ICP Projects
- 6.5 TDA and IMU shall arrange regular reviews with the *Supplier* throughout the implementation period to monitor and determine the status of the ICP Project(s).
- 6.6 The detailed ICP Implementation Plan as stipulated in Clause 6.4 of this Agreement shall be incorporated in the respective second tier ICP agreement.
- 6.7 The ICP Project(s) shall be reviewed by the IMU for once in every 1 month in progress meetings set up by IMU for the ICP Project(s) and the IMU reserves the right to call for a meeting with the *Supplier at anytime deemed necessary by the IMU* throughout the implementation period to monitor and determine the status of the ICP Project.
- 6.8 The *Supplier* shall response to any correspondence issued by IMU within seven (7) days from the date of the notice.
- 6.9 In compliance with the ICP Policy, an ICP Committee (IC) and ICP Working Committee are established to monitor and manage the implementation of the ICP Project(s):
- a. **ICP Committee**
 - i. The Chairman of the IC shall be the Secretary General of the *Name of Ministry*.
 - ii. The Government shall nominate the following representatives to become members of the IC:
 - (a) At least two (2) representatives from the Ministry of Finance (MOF);
 - (b) At least a representative from regulator);
 - (c) A representative from Malaysian Industry-Government Group for High Technology (MIGHT);
 - (d) A representative from TDA;
 - (e) Any representatives from the related industry player and/or

operators (on need basis).

- iii. The IC shall meet on a monthly interval unless otherwise agreed.
- iv. Decisions of the IC shall require the consensus of the Parties. If the Parties are unable to achieve consensus, then the subject matter of the decision shall be referred for resolution to the Dispute Resolution Committee in accordance with the terms of [Clause 13.2].

b. Working Committee

- i. The ICP Working Committee shall consist of at least two (2) representatives from IMU and two (2) representatives from Ministry.
- ii. Its main responsibilities is to compile and consolidate all matters pertaining to the ICP Projects as gathered from the IMU during project meeting with the Contractor and then make the necessary recommendation to the IC final approval or MIEC.

6.10 The envisaged deliverables and timescales for completion of the ICP Project(s) are set forth in Schedule A.

7. ICP PROJECT PERFORMANCE

7.1 The IMU shall prepare, at three (3) monthly intervals, an ICP Implementation Report that formally records the status of each of the ICP Projects. The contents of such report will be co-ordinated with, and agreed by, the Parties prior to issue [and will not be disclosed to either the Recipients or *ICP Provider(s)* without the prior written agreement of the Parties]. In this regard, the *Supplier* must submit its status report on the progress of each *ICP Project* in a timely manner to TDA and IMU in order to enable the preparation of the ICP Implementation Reports.

7.2 Any ICP credits claimed by the *Supplier* shall only be credited upon due verification of such claims in compliance with the processes in the ICP Policy by TDA and IMU.

7.3 In the event the *Supplier* fail to submit status report on the progress of each ICP Project stated in clause 7.1 and/or based on the verification by the IMU that the *Supplier* does not achieve the target milestone as stated in the schedule A, IMU shall issue Reminder Letters to the Contractor to remedy the default within fourteen (14) days for each and every Reminder Letters. Failure to remedy the default by the Contractor upon Final Reminder Letter issued by IMU, IMU shall refer the matter to IC for their further action.

- 7.4 The *Supplier* shall only be regarded as having fulfilled its obligations under this Agreement when:
- a. All ICP Projects specified in Schedule A of this Agreement have been duly certified by the Government as being successfully completed in accordance with this Agreement and the processes stipulated in the ICP Policy;
 - b. The agreed [ICP Credits Value] has been achieved or, in the event that it has not been achieved, all claims for Liquidated Damages pursuant to [Clause 9.1] have been fully paid to the Government; and
 - c. A formal certificate for discharge (“Discharge Certificate”) has been duly issued by the Government to the *Supplier* in relation to this Agreement.

8. PERFORMANCE BOND

- 8.1 The *Supplier* shall, no later than the Effective Date, deposit with the Government an irrevocable Bank Guarantee (issued by an approved licensed bank or financial institution incorporated in Malaysia) in favour of the Government for a sum equivalent to five percent (5%) of the total Contract Sum [under the Supply contract] or the total Obligated ICP Credit Value (whichever is lower), as a Performance Bond to secure the due performance of the *Supplier's* obligations under this Agreement. The Performance Bond shall remain valid and effective from the date of issuance until the completion of the ICP Project (through the issuance of the Discharge Certificate pursuant to Clause 7.4.c.). Not later than sixty (60) days prior to the expiry date of the Performance Bond and the ICP Project Duration is extended beyond the expiry date, the Supplier, at its own cost, shall provide a replacement Performance Bond for the amount equivalent to five percent (5%) of the total Contract Sum [under the Supply contract] or the Total Obligated ICP Credit Value (whichever is lower) and the replaced Performance Bond shall be valid until the actual completion date as determined by the Government. The required form of the Performance Bond is as attached in Schedule B.
- 8.2 Notwithstanding anything contained in this Agreement and without prejudice to the other rights of the Government, if the *Supplier* fails to perform any of his obligations under the Agreement and such failure is not remedied in accordance with this Agreement, the Government shall be entitled to call upon the Performance Bond, whether wholly or partially, at any time and from time to time, as part compensation in relation to such unfulfilled obligation or breach on the part of the *Supplier*.

- 8.3 The Performance Bond (or any balance thereof remaining for the credit of the *Supplier*) may be released to the *Supplier* after the full completion of the *ICP Project*.
- 8.4 Notwithstanding Clause 8.2 and without prejudice to the other rights and remedies of the Government (whether under this Agreement or otherwise), in the event this Contract is terminated under [Clause 11.1], the Performance Bond (or any balance thereof, if applicable) shall be fully forfeited by the Government as part compensation from the *Supplier* in relation to such termination.

9 LIQUIDATED DAMAGES

- 9.1 In the event that, at the end of the [*ICP Project* Duration], the *Supplier* fails to achieve the *ICP Project* and/or the [*ICP Project* Value] as set forth in Schedule A, then following a six (6) months grace period, the Government shall be entitled to claim from the *Supplier* Liquidated Damages for a total amount not exceeding 5% of the total Obligated ICP Credit Value the calculation of which shall be subject to the second tier ICP Agreement and guidelines in the ICP Policy.
- 9.2 Payment of Liquidated Damages by the *Supplier* in accordance with Clause 9.1 above shall be in full discharge of the non-achieved [*ICP Project* Value] and the sole remedy of the Government against the *Supplier* for such failure in achieving the agreed [*ICP Project* Value] only. For the avoidance of doubt, the Government shall still be entitled to any other remedy to which it is entitled for (among others) any other failure or breach of this Agreement by the *Supplier*.

10 FORCE MAJEURE

- 10.1 Neither party shall be in breach of its obligations under this Agreement if it is unable to perform or fulfil any of its obligations under this Agreement as a result of the occurrence of acts of God, fire, explosions, strikes, lockouts, riots, civil commotions, mobilizations threat or existence of war, blockades, embargoes, requisitions of vessels, epidemics, acts of authorities concerned or from any other causes beyond the reasonable control of either party which affects the performance of any of the ICP Projects ('event of Force Majeure').
- 10.2 If an event of Force Majeure occurs by reason of which either Party is unable to perform any of its obligations under this Agreement, that Party shall notify the other Party as soon as practicable of the occurrence of the event of Force Majeure and take all reasonable measures to mitigate any delay or interruption to its obligations.
- 10.3 The time for performance of the ICP obligation to be performed under this Agreement shall be extended by a period equivalent to the time lost as a result of such delay, plus

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such reasonable schedule recovery time as the parties agree to be reasonable in light of the circumstances surrounding such event of delay.

- 10.4 If either Party considers the event of Force Majeure to be of such severity or to be continuing for such period that the affected Party is unable to perform any of its obligations under this Agreement, this Agreement may be terminated by mutual agreement.
- 10.5 Neither Party shall be entitled to rely upon the provisions of Clause 10.4 above if one Party reasonably determined that an event of Force Majeure has not occurred. If the other Party does not agree that an event of Force Majeure has occurred, the dispute may be referred to the [Dispute Resolution Committee].
- 10.6 Where this Agreement is terminated pursuant to Clause 10.4, the *Supplier* shall comply with all instructions and directions given by the Government.
- 10.7 For the avoidance of doubt, the Parties shall continue to perform those parts of their obligations not affected, delayed or interrupted by an event of Force Majeure and such obligations shall, pending the outcome of Clause 10.5, continue in full force and effect.

11. FURTHER EVENTS OF TERMINATION

11.1 Termination by the Government

- a. In the event the *Supplier* without reasonable cause:
- i. Persistently neglects to carry out its obligations under this Agreement;
 - ii. Defaults in performing its duties under this Agreement; or
 - iii. Breaches any of its obligations or fails to comply with any other terms and conditions of this Agreement,

then the Government shall give notice in writing to the *Supplier* specifying the default and requiring the *Supplier* to remedy such default within fourteen (14) days after date of the notice. If the *Supplier* fails to remedy the relevant default within such period or such other period as may be determined by the Government, the Government shall have the right to terminate this Agreement at any time thereafter by giving notice to that effect.

- b. If at any time during the subsistence of this Agreement:

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- i. An order is made or a resolution is passed for the winding-up of the *Supplier*, except for the purpose of reconstruction or amalgamation not involving the realization of assets in which the interest of creditors are protected;
- ii. The *Supplier* goes into liquidation or a receiver is appointed over the assets of the *Supplier* or the *Supplier* makes an assignment for the benefit of or enters into an arrangement or composition with its creditors stops payment or is unable to pay its debts;
- iii. As execution is levied against a substantial portion of the *Supplier*'s assets, unless it has instituted proceedings in good faith to set aside such execution; or
- iv. The Supply contract is terminated for any reasons (other than by virtue of the events referred to in [Clauses 11.2.b.i. and 11.2.b.ii.] below, then the Government shall have the right to terminate this Agreement forthwith by giving notice to that effect.

11.2 Termination by the *Supplier*

- a. If the Government without reasonable cause fails to perform or fulfil any of its obligations which adversely affect the *Supplier*'s obligations under this Agreement, the *Supplier* may give notice in writing to the Government specifying the default and the Government shall remedy the relevant default within thirty (30) days after receipt of such notice or such other extended period as agreed by the Parties. If the Government fails to remedy the relevant default within such period or such other extended period as agreed by the Parties, the *Supplier* shall be entitled to terminate this Agreement at any time by giving notice to that effect.
- b. The *Supplier* shall have the right to terminate this Agreement forthwith if:
 - i. The Supply contract is terminated for any reason not attributable to any default, breach, act or omission on the part of the *Supplier*, or
 - ii. Government is in material default of its obligations under the Supply contract and fail(s) to remedy such fault within thirty (30) days' notice of such default.

11.3 Consequences of Termination

- a. Upon termination of this Agreement:
 - i. The powers and rights granted by and the obligations in this Agreement of the Parties shall terminate immediately (except for those obligations which are expressed to continue after termination);
 - ii. (In the event of termination under Clause 11.1) the Government shall claim against the *Supplier* for all losses and damages suffered as a result of the termination of this Agreement.
- b. Provided that the termination shall not affect or prejudice the rights of any Party which have accrued prior to the date of termination of this Agreement and the obligations under this Agreement shall continue even after the termination of this Agreement in respect of an act, deed, matter or thing happening prior to such termination. However, the total liability of the Supply contractor under this Agreement shall not exceed 5% of the total Obligated ICP Credit Value.

12. CONFIDENTIALITY AND NON-DISCLOSURE

12.1 The Government and *Supplier* agree that this Agreement and all matters pertaining to this Agreement (including, without limitation, the terms of this Agreement, the Supply contract or any commercial and technical information that arises out of this Agreement) shall be considered as confidential information ('Confidential Information').

12.2 Except with the prior written consent of the Government and subject to Clause 12.3 below, the *Supplier*, its personnel, sub-*contractors*, agents and their personnel shall not at any time:

- a. Communicate to any person or body or entity except those employees, agents, sub-*contractors* and other *contractors* who are on a need-to-know basis, any Confidential Information disclosed to it for this Agreement or otherwise received by it as a result of the Parties' relationship under and pursuant to this Agreement);
- b. Make public any information as to the recommendations, assessments and opinions formulated in the course of or pursuant to this Agreement;
- c. Make or cause to be made any press statement or otherwise relating to this Agreement nor publish or cause to be published any material whatsoever relating to this Agreement.

12.3 The obligations in Clause 12.2 above shall not apply to any Confidential Information which:

- a. Have been in the *Supplier*'s possession (with full right to disclose) before receiving it from the Government;
- b. Is or becomes public knowledge other than by breach of Clause 12.2 above;
- c. Is independent or developed by the *Supplier* without access to or use of the Confidential Information; or
- d. Is lawfully received from a third party (with full rights to disclose).

12.4 The provisions of this Clause shall survive and continue to have effect after expiry or termination for any reason whatsoever of this Agreement.

13. DISPUTE RESOLUTION COMMITTEE

13.1 Any dispute between the Parties in respect of any matter under this Agreement (except in relation to the Government exercising its sole discretion under this Agreement) may be referred to a dispute resolution committee (the 'Dispute Resolution Committee') comprising:

- a. *TKSU (D)* as the Chairman;
- b. Two (2) representatives appointed by the Government; and
- c. Two (2) representatives appointed by the *Supplier*.

13.2 The Dispute Resolution Committee may appoint an independent expert to advise it on any matter referred to it and all costs, fees and expenses of any independent expert so appointed shall be borne equally by the Parties.

13.3 The Dispute Resolution Committee shall determine its own procedures. The Dispute Resolution Committee shall meet and endeavour to achieve an amicable settlement between the Parties in respect of any matter referred to it. If any matter, dispute or claim referred to the Dispute Resolution Committee cannot be mutually agreed by the Parties within thirty (30) days after the date of referral, then either Party may refer that matter, dispute or claim to an arbitrator or pursuant to Clause 14.

14. GOVERNING LAW AND ARBITRATION

- 14.1 This agreement shall be governed by and interpreted and construed in accordance with the laws of Malaysia.
- 14.2 Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Rules for Arbitration of the Kuala Lumpur Regional Centre for Arbitration by [one] arbitrator to be appointed jointly by the Parties, or failing such agreement, to be nominated on the application of either Party by the Director of Kuala Lumpur Regional Centre for Arbitration. Any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 2005.
- 14.3 The arbitration shall be held at the Kuala Lumpur Regional Centre for Arbitration using the arbitration rules of the centre and utilising the facilities and system available at that centre.
- 14.4 The arbitration proceedings shall be conducted in the English language and/or Bahasa Malaysia.
- 14.5 Each party shall bear its own costs of the arbitration proceedings.
- 14.6 The decision and award of the arbitrator shall be final and binding on the parties.
- 14.7 The referral of any matter, dispute or claim to arbitration pursuant to this Clause or the continuance of any arbitration proceedings consequent thereto shall in no way operate as a waiver of the obligations of the Parties to perform their respective obligations under this Agreement.

15. RELEASE OF OBLIGATION

- 15.1 The *Supplier* is entitled to submit a written request with supporting document to the GOVERNMENT for the release of its *ICP Project* obligation. A certificate of completion duly signed by the authorized representative of the GOVERNMENT and the *Supplier* shall form part of that supporting document. The *Supplier* is deemed to have fulfilled its Offsets obligations under this Contract if:
- a. All *ICP Project* specified in Schedule A of this Contract have been fully certified as completed by the Government as defined in Clause 7;
 - b. The last Progress Report has been submitted by the *Supplier* to the GOVERNMENT in accordance with Clause 7; and

- c. Formal Discharge Certificate issued by the Government in relation to this Agreement to the Supplier.

15.2 The GOVERNMENT shall confirm in writing to the *Supplier* that its obligations under this Contract have been fulfilled.

15.3 All data and information supplied pursuant to the ICP Program shall be treated as strictly confidential.

16. EXCUSABLE DELAY

16.1 Neither party shall be responsible for any failure to perform ICP Projects which may arise from acts of God, fire, explosions, strikes, lockouts, riots, civil commotions, mobilizations threat or existence of war, blockades, embargoes, requisitions of vessels, epidemics, acts of authorities concerned or from any other causes beyond the reasonable control of either party which affects the performance of any of the ICP Projects.

16.2 The affected party shall notify the other party of such failure or delay within one month of the date of actual occurrence of the cause of any delay.

16.3 The time for performance of the ICP obligation to be performed under this Agreement shall be extended by a period equivalent to the time lost as a result of such delay, plus such reasonable schedule recovery time as the parties agree to be reasonable in light of the circumstances surrounding such event of delay.

16.4 If the cause continues for more than ninety (90) days from the date of issuance of notification, then the ICP Project which is affected by such cause may be terminated.

17. FURTHER ASSURANCE

Each Party shall execute and do all such documents and things as are necessary to carry this Agreement into effect or to give full effect to this Agreement.

18. AMENDMENT

The provisions of this Agreement shall not be amended, modified or waived in any way other than by agreement in writing duly entered into by the Parties after the date of this Agreement.

19. ASSIGNMENT

This Agreement may not be assigned (by operation of law or otherwise) or otherwise transferred in whole or in part by the *Supplier* unless the Supplier has received prior written consent from the Government. To the extent the *Supplier* is permitted to assign this Agreement, all provisions of this Agreement shall be binding upon the *Supplier*'s successors or assigns.

20. SEVERABILITY

If any provision of this Agreement or any part thereof is rendered void, illegal or unenforceable by any legislation to which it is subject to, it shall be rendered void, illegal or unenforceable to that extent and no further. Such provision which is rendered void, illegal or unenforceable shall be deemed to be restated to reflect as nearly as possible the original intentions of the parties. The remainder of this Agreement shall remain in full force and effect as if this Agreement had been entered into without the void, illegal or unenforceable portion.

21. WAIVER

No failure, omission or delay on the part of any Party in exercising any right, power, privilege or remedy accruing to the other Party under this Agreement upon any default on the part of the other Party, shall impair any such right, power, privilege or remedy or be construed as a waiver thereof or any acquiescence in such default.

22. COMPLIANCE WITH APPLICABLE LAWS

The *Supplier* shall comply with all applicable laws and with all directions, orders, requirements and instructions given to the *Supplier* by any authority competent to do so under any applicable Malaysian laws.

23. COST AND STAMP DUTY

All costs incidental to the preparation and completion of this Agreement, including the stamp duty payable thereon, shall be borne and paid for by the *Supplier*.

24. NOTICES

Without affecting any other effective mode of service (whether in relation to service of legal process or otherwise), any notice to be given under this Agreement shall be delivered personally or sent by registered post or by facsimile to the address or facsimile number notified from time to time by each party to this Agreement and marked for the attention of the person or department (if any) from time to time designated by that Party for the purposes of this Agreement. The address and facsimile number for service of a Party is its address and facsimile number as reflected in this Agreement or such other address / facsimile number as may be notified by one Party to the other Party from time to time. The address for service of a Party is its address shown below or the address last notified by the intended recipient to the sender.

In the case of notice to the Government:

TDA

ICP Management Services,
XXXXXXX
XXXXXXX
(Attention: Director)
Fax: XXXXXXXX

In the case of notice to *Supplier*

Supplier's Address

Fax: +XXXX XXXX

A notice is deemed to have been served as follows:

- (a) If personally delivered, at the time of delivery;
- (b) If posted, at the expiration of seventy two (72) hours after the envelope containing it is delivered to the postal authorities; or
- (c) If by facsimile transmission (if transmitted during normal working hours on a business day), upon receipt of the successful transmission report referred to below or (if otherwise) at 9.30 a.m. on the business day following successful transmission.

In proving service, it is sufficient to prove that personal delivery was made, or that the envelope containing the notice was properly addressed and delivered to the postal authority by registered post or that a successful facsimile transmission report was received in the ordinary course of the process.

25. WHOLE AGREEMENT

This Agreement, including the Schedules, contains the whole agreement between the Parties and supersedes any prior written or oral agreement between them in relation to its subject matter and the Parties confirm that they have not entered into this Agreement on the basis of any representations that are not expressly incorporated into this Agreement.

***** *END OF CLAUSES* *****

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IN WITNESS WHEREOF the parties hereto have caused this Agreement to be signed on (day)_____ (month)_____ (year)_____ on their behalf by the hands of their authorised officers/representatives.

For The Government of Malaysia

For *Supplier*

Ministry of KKKK

Head of Organization

Name of Supplier

In the presence of

In the presence of

.....

.....

Title

Title

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SCHEDULE A

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Name of The ICP Program		Doc. No.	
Ref No.		Title	Title of the Project
Supplier <i>Name of the Supplier</i>		Type <i>Work Package(s)</i> <input type="checkbox"/> <i>Technology Transfer(s)</i> <input type="checkbox"/> <i>Market Access</i> <input type="checkbox"/> <i>Investment</i> <input type="checkbox"/> <i>Others</i> <input type="checkbox"/> <i>Please explain:</i> _____	
Description			
Beneficiary(ies) <ul style="list-style-type: none"> <i>Name of the ICP Recipient(s)</i> <i>Address</i> <i>Contact number(s)</i> 		ICP Provider <ul style="list-style-type: none"> <i>Name of the ICP Recipient(s)</i> <i>Address</i> <i>Contact number(s)</i> 	
Benefits to Malaysia			

Task & Milestones		Target	
1. Milestone 1		20xx	
2. Milestone 2		20xx	
3. Milestone 3		20xx	
Deliverables			
1. Technology 1			
2. Technology x			
3. Others (JV, Investment, contract manufacturing, market access, etc)			
ICP Valuation			
ORD Clause	Nominal Value (RM)	Multiplier	ICP Credit Value
3.x.x			
• Activity 1	Please provide supporting		
• Activity 2	Please provide supporting		
• Activity n	Please provide supporting		
TOTAL			
Discharge Milestone			
Milestones	% of Total ICP Credit Value	Credit Value	Evidence
Milestone 1			
Milestone 2			
Milestone... XX			
TOTAL			
Miscellaneous			

Concurrence			
Government:		<i>Supplier:</i>	
Date		Date	

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SCHEDULE B

CONFIDENTIAL

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FORM OF PERFORMANCE BOND FORMAT

(To Be Typed Onto Bank Letter Head)

To,

[*Name of Company*]

[*Address*]

BANK GUARANTEE

[*Name of Company*] (Company No. [**]) ("*Supplier*") has entered into an Agreement relating to the provision of ICP projects implementation in connection with the works package of "*Name of the Procurement Program*" ("Agreement") with the Government of Malaysia (as represented by the [*TDA or DID or Name of OMU*] as ICP Management Unit), for purposes of the Agreement) ("*Government*").

WHEREAS one of the express conditions of the Agreement is the receipt by the Government of this Guarantee duly executed by (Name of Bank) _____ and the maintenance by the *Supplier* of such valid and enforceable Guarantee in favour of the Government throughout the required period.

Now therefore (Name of Bank) _____ (hereinafter called the "Guarantor") at the request of the *Supplier* and for good and valuable consideration (receipt of which is acknowledged by the Guarantor), hereby irrevocably and unconditionally guarantees and undertakes to the Government as follows: -

1. The Guarantor shall immediately pay to the Government, upon the Government's demand at any time, and from time to time, the amount specified in such demand(s), up to a total maximum amount of Ringgit Malaysia [**] only (RM[**]). Payment under this Guarantee in the manner specified above will be made by the Guarantor to the Government, without any requirement for proof or fulfilment of any other conditions, notwithstanding any protest or contestation by the *Supplier* or any third party and without any right to set-off or counterclaim.
2. The Guarantor shall not be discharged or released from this Guarantee by:
 - a. any arrangement made between the Government and the *Supplier*, with or without the consent of the Guarantor; or
 - b. any alteration in the obligations undertaken by the *Supplier* or

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- c. any forbearance whether as to payment, time, performance or otherwise;
or
 - d. any change in the name or constitution of the *Supplier*, Government or the Guarantor; or
 - e. any act or omission which would otherwise discharge or affect its liability as Guarantor under this Guarantee.
3. The Guarantor agrees that this Guarantee is a continuing guarantee and is given regardless of whether or not the sum payable by the Guarantor is recoverable by legal action or arbitration.
 4. This Guarantee shall be in addition to any present or future collateral instrument or any other right or remedy held by, or available to, the Government against the *Supplier*.
 5. A written demand or statement from the Government shall be final and conclusive evidence against the Guarantor for all purposes whatsoever (including, without limitation, in relation to any amount due from the *Supplier* to the Government or any legal proceedings).
 6. This Guarantee is irrevocable and shall be effective for an initial period of one (1) year from _____ until [date] (“Initial Expiry Date”). After the Initial Expiry Date, the Guarantor shall automatically extend the effective period of this Guarantee to such successive annual periods as may be required by the Government.
 7. All claims and demands under this Guarantee shall be received by the Guarantor not later than [sixty (60) days] after the expiry of this Guarantee pursuant to Item 6 above.
 8. This Guarantee shall not be assigned without the Bank/Guarantor’s prior written consent.
 9. For the avoidance of doubt, the total amount payable by the Guarantor pursuant to this Guarantee shall not exceed RM[**].

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This Guarantee shall be governed by and construed in accordance with the laws of Malaysia.

Signed for and on Behalf : _____

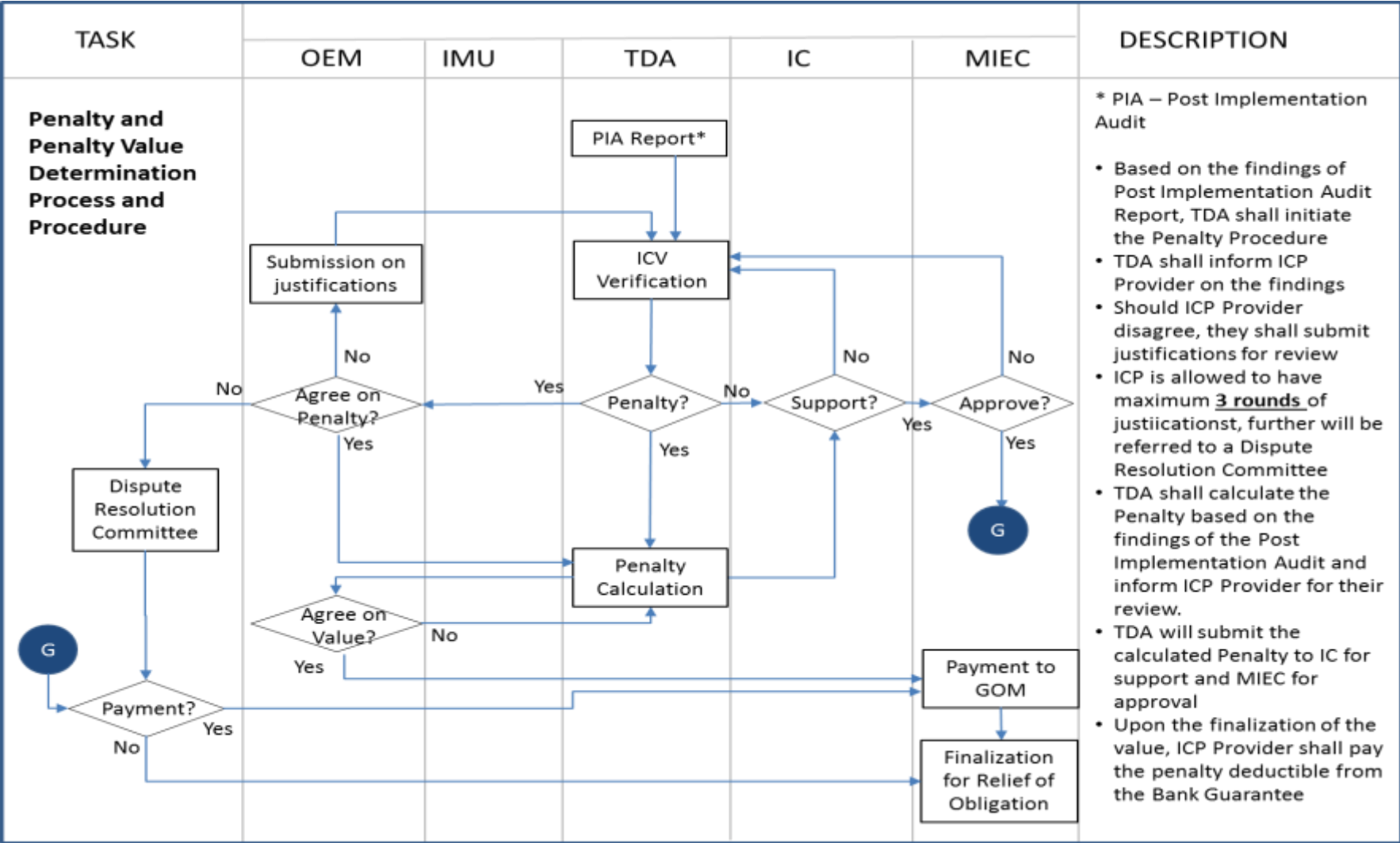
Name of the Bank : _____

Address : _____

Date : _____

PENGURUSAN PENALTI

1. Proses Pengurusan Penalti



2. Pengiraan Penalti

$$ICV_{Project} = \underbrace{(ICV_{EEP} + ICV_{offset} + ICV_{CT})_{Project}}_{\text{Other element}} + \underbrace{[MLC]}_{\text{Localization}}$$

Penalty would be calculated based on:

- Un-achievement of the localization (MLC) - where minimum value is 30% of Mandatory ICV
- Un-achievement of other element

Un-achievement of a Project Localization

$$Unachieved\ MLC_{Pr} = [(MLC_{Pr} (\%) - MLC_{Pr_v} (\%))]$$

Un-achievement of a Program Localization

$$Unachieved\ MLC_{Program} = \sum_{i=1}^n [(MLC_{Pr} (\%) - MLC_{Pr_v} (\%))]_i$$

Un-achievement of Other Element of a Project

$$Unachieved\ Other\ Element_{Pr} = [(Other\ Element_{Pr} (\%) - Other\ Element_{Pr_v} (\%))]$$

Un-achievement of Other Element of a Program

$$Unachieved\ Other\ Element_{Program} = \sum_{i=1}^n [(Other\ Element_{Pr} (\%) - Other\ Element_{Pr_v} (\%))]_i$$

Therefore

$$Unachieved\ ICV_{Program} = [Unachieved\ MLC_{Program} + Unachieved\ Other\ Element_{Program}]$$

$$Penalty_{Total} = ICV_{Program} * (Unachieved\ ICV_{Program}) * 5\%$$

LAMPIRAN 6

CONTOH LAPORAN BERKALA

LAPORAN PRESTASI KEMAJUAN **IMU** KEPADA **TDA**

Laporan Prestasi Kemajuan **IMU** kepada **TDA** hendaklah mengandungi perincian perkara-perkara berikut:

1. LATARBELAKANG PROGRAM:

- 1.1. Tarikh Laporan:
- 1.2. Perincian Syarikat **STU/OEM** (*nama, alamat syarikat, nombor telefon dll yang difikirkan perlu*)
- 1.3. Nama Program, Rujukan Kontrak dan Jumlah Nilai Keseluruhan **ICP**
- 1.4. Nama Pengurus Program
- 1.5. Ringkasan Latarbelakang: (*jika ada*)

2. PELAKSANAAN **ICP**

- 2.1. Pelan Pelaksanaan dan Jangkamasa Keseluruhan Pelaksanaan **ICP**
- 2.2. Tahap Pencapaian Keseluruhan Pelaksanaan **ICP** semasa tarikh laporan
- 2.3. Nilai Keseluruhan **ICP** yang telah **dICapai** semasa tarikh laporan
- 2.4. Isu-isu pelaksanaan keseluruhan **ICP**
- 2.5. Risiko yang berkaitan dengan isu-isu dan impak terhadap pelaksanaan **ICP**
- 2.6. Saranan-saranan bagi menyelesaikan isu berkaitan (*mitigation plans*)
- 2.7. Iktibar (*lessons learned - sekiranya ada*)

3. PERINCIAN PROJEK YANG DILAKSANAKAN OLEH PENERIMA **ICP**

- 3.1. Nama Syarikat Penerima **ICP** yang Menerima Projek (*nama, alamat syarikat, nombor telefon dll yang difikirkan perlu*)
- 3.2. Nama Projek dan Rujukan Kontrak dan Nilai **ICP**
- 3.3. Nama Pengurus Projek
- 3.4. Jenis **ICP** (*Langsung/Tidak Langsung*), Jumlah Nilai Projek dan Jenis Projek yang dilaksanakan (*Pakej kerja Tempatan, pembuatan komponen, ToT dll*)
- 3.5. Tahap Pencapaian Pelaksanaan semasa tarikh laporan Nilai **ICP** projek yang telah **dICapai** semasa tarikh laporan.
- 3.6. Nilai keseluruhan kredit **ICP** semasa laporan dikemukakan.

LAMPIRAN 7

CONTOH

SURAT PELEPASAN OBLIGASI PROGRAM KOLABORASI INDUSTRI (*ICP*)

Nama Program *ICP*: _____ No Rujukan: _____

Tarikh: _____

(*Nama dan Alamat Penyedia ICP*)

Tuan,

SURAT PELEPASAN OBLIGASI *ICP* BAGI PROGRAM _____

Sukacita kami merujuk kepada Perjanjian Utama *ICP* bagi Program _____ dengan nombor rujukan _____ yang telah ditandatangani pada tarikh ____ bulan ____ 20 ____ (disebut sebagai ‘Obligasi *ICP*’) antara pihak tuan _____ (*penyedia ICP*) _____ dan Kerajaan Malaysia.

Kami dengan ini melepaskan sepenuhnya tanggungjawab pihak tuan berkaitan dengan Obligasi *ICP* tersebut mulai dari tarikh surat ini ditandatangani. Salinan-salinan asal kontrak dan dokumen-dokumen lain berkaitan pelaksanaan Obligasi *ICP* akan disimpan oleh pejabat ini sebagai rekod.

“BERKHIDMAT UNTUK NEGARA”

Saya yang menurut perintah,

.....

Nama dan Jawatan

Bahagian Perolehan Kerajaan

b/p Ketua Setiausaha Perbendaharaan dan Pengerusi *MIEC*

LAMPIRAN 8

ORGANISASI PENGURUSAN ICP MALAYSIA

