

2019 Edition

PCSA/Scot

**Pre-Construction Services
Agreement for use in Scotland
(General Contractor)**

The Scottish Building Contract Committee Limited

Contents

Pre-Construction Services Agreement

Recitals

Section 1 Definitions and Interpretation

- 1.1 Definitions
- 1.2 Headings, references to persons, legislation etc.
- 1.3 Contract (Third Party Rights) (Scotland) Act 2017
- 1.4 Notices and other communications
- 1.5 Applicable law

Section 2 Contractor's General Obligations

- 2.1 Performing the Services
- 2.2 Compliance with instructions
- 2.3 Co-operation and supply of Information
- 2.4 Specification of materials
- 2.5 Joint Fire Code
- 2.6 Sub-contracting
- 2.7 Second Stage Tender
- 2.8 Liability for design work

Section 3 Employer's General Obligations

- 3.1 Supply of Employer information etc.
- 3.2 Decisions, approvals and instructions
- 3.3 Project Team – delay or default

Section 4 Representatives and Contractor's Key Personnel

- 4.1 Employer's Agent
- 4.2 Contractor's Representative and Contractor's Key Personnel – changes
- 4.3 Removal and replacement of Contractor appointees

Section 5 Additional Services, Fee Adjustment etc.

- 5.1 Additional Services
- 5.2 Changes, delaying events etc.
- 5.3 Notification by the Contractor
- 5.4 Adjustment of Fee or additional payment and time

Section 6 Payment

- 6.1 Amounts payable
- 6.2 Contractor's payment applications
- 6.3 Due date and final date for payment
- 6.4 Payment – amount and notices
- 6.5 Interest
- 6.6 Contractor's right of suspension

Section 7 Insurance

- 7.1 Professional Indemnity and Public Liability insurance
- 7.2 Evidence of insurance
- 7.3 Non-availability of Professional Indemnity insurance

Section 8 Use of Contractor's Information, Confidentiality etc.

- 8.1 Use of the Contractor's Information
- 8.2 Confidentiality and publicity
- 8.3 Transparency

Section 9 Assignment and Novation

- 9.1 Restrictions on assignment
- 9.2 Novation

Section 10 Suspension by the Employer, Termination, Adjudication and the PC (Scotland) Regulations

- 10.1 Suspension by the Employer
- 10.2 Remobilisation
- 10.3 Notification of costs
- 10.4 Extended suspension – termination by the Contractor
- 10.5 Termination at will or for default/insolvency or under regulation 73(1) of the PC (Scotland) Regulations
- 10.6 Consequences of termination
- 10.7 Adjudication
- 10.8 The Procurement Reform (Scotland) Act 2014 and the Public Contracts (Scotland) Regulations 2015

The Particulars

Signing

Annex A Fee, Rates, Additional Payments and Reimbursable Expenses

Annex B Pre-Construction Services

Guidance Notes

Pre-Construction Services Agreement

Between

The Employer _____

_____ (Company

No. _____)[¹]

of/whose registered office is at _____

And

The Contractor _____

_____ (Company No. _____)[¹]

of/whose registered office is at _____

[1]

Where the Employer or Contractor is neither a company incorporated under the Companies Acts nor a company registered under the laws of another country, delete the references to Company number and registered office. In the case of a company incorporated outside Scotland or England and Wales, particulars of its place of incorporation should be inserted immediately before its Company number.

As to execution by foreign companies and matters of jurisdiction, see the Guidance Notes.

Recitals

Whereas

First the Employer wishes to have the following work carried out:

at _____

_____ ('the Project'),
as described in greater detail in the document(s) identified in the Particulars, that work to be
carried out under a main contract ('the Main Contract') provisional details of which are also given
or referred to in the Particulars;

Second the Employer's Agent for the pre-construction phase of the Project ('the Pre-Construction Period')

is _____

of _____

or such other person as the Employer shall nominate and notify to the Contractor;

Third The Principal Designer for the purposes of the CDM Regulations is^[2]

of _____

or such replacement as the Employer at any time appoints to fulfil that role.

[2] Insert the name of the Principal Designer in the Third Recital and that of the Principal Contractor in the Fourth Recital (if that is to be a person other than the Contractor) if appointed or, where appropriate, amend to state whom the Employer intends to appoint. Under the CDM Regulations 2015, regardless of whether or not a project is notifiable, there is a requirement to appoint a principal designer and a principal contractor in all cases where there is more than one contractor, or if it is reasonably foreseeable that more than one contractor will be working on a project at any time. The appointments must be made as soon as is practicable, and, in any event, before the construction phase begins. For these purposes, the term 'contractor' is broadly defined by the regulations and treats the Contractor's sub-contractors as separate contractors.

Fourth The Principal Contractor for the purposes of the CDM Regulations is the Contractor

(or)^[2] _____

of _____

_____ or such replacement as the Employer at any time appoints to fulfil that role.

Fifth prior to the execution of this Agreement, the Contractor has submitted to the Employer a first stage tender/the initial proposal document(s) identified in the Particulars^[3], on the basis of which the Employer has requested that, for the fee specified in Annex A ('the Fee') and other payments in accordance with this Agreement, the Contractor should during the Pre-Construction Period provide the pre-construction services listed in Annex B;

Sixth it is intended that work on the Construction Phase of the Project shall commence on site on _____ 20____ ('the Date of Possession') with a duration initially estimated at _____ weeks and that for the purposes of the Main Contract, not later than _____ weeks prior to the Date of Possession:

- the Contractor should submit his Second Stage Tender and, where applicable, Contractor's Proposals, and
- the Contract Sum should be agreed between the Parties in conformity with the requirements (the 'Second Stage Tender Requirements') identified in the Particulars;

Tender only

[3] Delete as appropriate.

Now it is hereby agreed as follows

Section 1

Definitions and Interpretation

Definitions

- 1.1 In addition to the capitalised terms defined above, the following expressions shall unless the context otherwise requires have the meanings stated or referred to below:

<i>Word or phrase</i>	<i>Meaning</i>
Additional Payments:	see clause 6.1.3 .
Additional Services:	see clause 5.1 .
BIM Protocol:	(where applicable) the document identified as such in the Particulars (against the reference to clause 1.1).
CDM Regulations:	the Construction (Design and Management) Regulations 2015.
Contractor's Information:	Information supplied or to be supplied by the Contractor under this Agreement whether under the BIM Protocol or otherwise.
Contractor's Key Personnel:	the persons identified as such in the Particulars (against the reference to clause 2.1.2) or any replacements appointed in accordance with clause 4.2.2 .
Contractor's Project Staff:	the Contractor's Representative, the Contractor's Key Personnel and his other staff engaged on the Project, as identified in paragraph 3 of Annex A .
Contractor's Representative:	the person identified as such in the Particulars (against the reference to clause 2.1.2) or any replacement appointed in accordance with clause 4.2.2 .
Cost Plan:	the plan identified as such in the Particulars (against the reference to clause 2.1), as amended/ revised from time to time.
Employer's Requirements:	the document identified as such in the Particulars (against the reference to clause 2.1).
Information:	all information, including designs, drawings, specifications, programmes, schedules and other material supplied or to be supplied by or on behalf of any member of the Project Team for the purposes of the Project, whether in hard copy form or stored in any electronic or other medium.
Interest Rate:	a rate 5% per annum above the official bank rate of the Bank of England current at the date that a payment due under this Agreement becomes overdue.
Joint Fire Code:	the Joint Code of Practice on the Protection from Fire of Construction Sites and Buildings Undergoing Renovation, published by Construction Industry Publications Ltd and the Fire Protection Association, as amended/ revised from time to time.
Local or Public Authority:	a body that is a 'contracting authority' as defined by the Procurement Act as modified by the Scottish Ministers.
Party:	the Employer or the Contractor.
PC (Scotland) Regulations:	the Public Contracts (Scotland) Regulations 2015.

Pre-Construction Services:	the services listed in Annex B and any Additional Services instructed under clause 5.1 .
Procurement Act:	the Procurement Reform (Scotland) Act 2014.
Programme:	the document identified as such in the Particulars (against the reference to clause 2.1), as amended/ revised from time to time.
Project Team:	the Contractor and the other persons listed in the Particulars (against the reference to clause 2.1), together with any other members from time to time nominated by the Employer.
Reimbursable Expenses:	see Annex A .
Scheme:	Part 1 of the Schedule to The Scheme for Construction Contracts (Scotland) Regulations 1998 as amended.
Statutory Requirements:	any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the Project or performance of any obligations under this Agreement and any regulation or bye-law of any local authority or statutory undertaker which has any jurisdiction with regard to the Project or with whose systems the Project is to be connected.
Third Party Agreements:	any agreement or licence between the Employer and any person other than members of the Project Team that relates to the Project, the Project site or the use of it and of which the relevant details have been given to the Contractor (including, without limitation, agreements with actual or prospective purchasers, tenants and funders and those relating to planning, highways, rights of way, light, oversailing or other easements) as listed in or by the Particulars (by reference to clause 2.1).

VAT: Value Added Tax.

Headings, references to persons, legislation etc.

- 1.2**
- .1 Nothing in the documents identified in the Particulars shall override or modify the other provisions of this Agreement.
 - .2 In this Agreement, unless the context otherwise requires:
 - .1 the headings, notes and footnotes are included for convenience only and shall not affect the interpretation of this Agreement;
 - .2 the singular includes the plural and vice versa;
 - .3 a gender includes any other gender;
 - .4 a reference to a 'person' includes any individual, firm, partnership, company and any other body corporate;
 - .5 a reference to a statute, statutory instrument or other subordinate legislation ('legislation') is to such legislation as amended and in force from time to time, including any legislation which re-enacts or consolidates it, with or without modification; and
 - .6 references to documents shall, where there is a BIM Protocol or other protocol relating to the supply of documents or information under this Agreement, be deemed to include information in a form or medium conforming to that protocol.

Contract (Third Party Rights) (Scotland) Act 2017

- 1.3** Nothing in this Agreement confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it.

Notices and other communications

- 1.4** .1 Any notice or instruction under this Agreement shall be in writing.

- .2 Any notice required to be given in accordance with this clause 1.4.2 shall be delivered by hand or sent by Recorded Signed for or Special Delivery post, in which case it shall be deemed to be given on delivery.
- .3 Any other communications may be sent by such other means as the Parties shall agree from time to time.

Applicable law

- 1.5 This Agreement shall be governed by and construed in accordance with the law of Scotland.^[4]

Section 2 Contractor's General Obligations

Performing the Services

- 2.1 The Contractor shall perform the Pre-Construction Services in accordance with the Employer's Requirements, the Statutory Requirements and the Programme and with due regard to the Cost Plan and any Third Party Agreements. In performing those services the Contractor shall:
 - .1 exercise the level of skill, care and diligence reasonably to be expected of a contractor experienced in projects of similar size, scope and complexity;
 - .2 ensure that, unless otherwise agreed with the Employer, Contractor's Key Personnel shall fulfil their identified roles and that they and the Contractor's Representative (or competent deputies) are at all reasonable times available for communication and consultation with the Employer and Project Team; and
 - .3 duly consult with members of his supply chain and, at the Employer's request, endeavour so far as practicable to ensure the attendance at relevant Project meetings of those suppliers whose attendance is necessary or desirable.

Compliance with instructions

- 2.2 The Contractor shall comply with all lawful instructions from the Employer or Employer's Agent as to all matters within the scope of the Pre-Construction Services and the Contractor's competence. For these purposes:
 - .1 instructions given to the Contractor's Representative shall be deemed to have been issued to the Contractor;
 - .2 if the Contractor considers that, irrespective of any additional time or financial adjustment under section 5, an instruction would compromise or materially and adversely affect the Project, performance of the Pre-Construction Services or compliance with the Statutory Requirements, he shall notify the Employer in writing and the Parties shall promptly meet with a view to immediate resolution of the matter, consulting as necessary with other relevant members of the Project Team.

Co-operation and supply of Information

- 2.3 The Contractor shall liaise and co-operate fully with other members of the Project Team, both directly and through Project Team meetings, and in accordance both with any identified framework agreements and with such procedures as the Employer may establish from time to time. In particular (but without limitation) the Contractor shall:
 - .1 supply in accordance with the Programme all the Contractor's Information required as part of the Pre-Construction Services, together with any other Information reasonably requested by the Employer or Project Team;

[4] Where the Parties do not wish the law applicable to this Agreement to be the law of Scotland appropriate amendments should be made.

- .2 notify other members of the Project Team in due time of any requirements that the Contractor may have for Information from them that is not provided for in the Programme or other agreed information release schedule;
- .3 promptly notify the Employer's Agent of any inconsistency or divergence (actual or prospective) of which he becomes aware in relation to the Employer's Requirements or other documents referred to in clause 2.1 and of any delay or impediment in performing the Pre-Construction Services; and
- .4 promptly notify those to whom the Contractor has supplied Contractor's Information of any changes to it, and of any inaccuracies or inconsistencies in it of which he becomes aware, together with any necessary corrections, and similarly notify those from whom he has received Information if he becomes aware of inaccuracies or inconsistencies in the items received.

Specification of materials

- 2.4** Unless required by this Agreement or otherwise authorised in writing by the Employer, the Contractor will not select or recommend the use of materials for the Project other than in accordance with the guidelines contained in the edition of 'Good Practice in the Selection of Construction Materials' (British Council for Offices) current at the date of this Agreement.

Joint Fire Code

- 2.5** Insofar as the Pre-Construction Services concern matters within the Joint Fire Code, the Contractor shall observe its provisions.

Sub-contracting

- 2.6** The Contractor shall not sub-contract the performance of any of the Pre-Construction Services without the Employer's prior consent. The Contractor shall remain fully responsible for any work sub-contracted.

Second Stage Tender

- 2.7** .1 The Contractor shall duly prepare and submit his Second Stage Tender in accordance with the Second Stage Tender Requirements and (unless otherwise agreed) within the time specified in the Sixth Recital.
- .2 The Employer is under no obligation to accept any Second Stage Tender and, unless the Parties otherwise agree in writing, no binding contract in respect of the Construction Phase of the Project shall come into existence unless and until the Parties execute and deliver the Main Contract.

Liability for design work^[5]

- 2.8** Where the Pre-Construction Services include design work, the Contractor shall unless otherwise specifically provided in Annex B have no liability of any kind to the Employer under this Agreement for that design work, whether in contract, negligence, breach of duty or otherwise (other than any personal injury or death arising from that work), unless and until the Main Contract is entered into by the Parties, upon entry into which the Contractor's obligations and liability in respect of that design work shall be the same as if it formed part of the design work undertaken by him under the Main Contract and shall be subject to any relevant exclusions or limitations of liability contained in that contract.

[5] See the Guidance Notes.

Section 3

Employer's General Obligations

Supply of Employer information etc.

- 3.1 The Employer shall in relation to the Pre-Construction Services duly comply with applicable CDM Regulations and provide the Contractor with such information in his possession or control as is relevant to the Pre-Construction Services and compliance with the Statutory Requirements, that information to be supplied in accordance with the Programme or promptly upon the Contractor's reasonable request. In addition the Employer shall promptly notify the Contractor of:
- .1 additions to or other changes in the Project Team; and
 - .2 any necessary updates or corrections to any information supplied under this clause 3.1.

Decisions, approvals and instructions

- 3.2 Decisions, approvals and instructions reasonably required by the Contractor shall be made or given by the Employer or by the Employer's Agent within a reasonable time of the Contractor's request.

Project Team – delay or default

- 3.3 If the Contractor is at any time materially delayed or hindered in performing the Pre-Construction Services by any delay or default on the part of any other member of the Project Team and notifies the Employer with relevant particulars, the Employer shall exercise his powers to ensure, as far as is reasonably practicable, that the delay or default is promptly corrected.

Section 4

Representatives and Contractor's Key Personnel

Employer's Agent

- 4.1 The Employer's Agent shall be the authorised recipient for all notices to and other communications with the Employer under this Agreement and, subject only to any limits on his authority as are from time to time notified in writing to the Contractor, shall otherwise have full power and authority to represent the Employer. If at any time the appointee ceases to hold the post, the Employer shall promptly appoint a replacement and notify the Contractor.

Contractor's Representative and Contractor's Key Personnel – changes

- 4.2
- .1 The Contractor shall not remove the Contractor's Representative or any of the Contractor's Key Personnel from their post or replace such person without the Employer's prior approval of the removal or of the replacement appointee. Where practicable, the Contractor shall arrange an appropriate handover period. The Employer shall not unreasonably withhold or delay his approval.
 - .2 If the Contractor's Representative or any of the Contractor's Key Personnel ceases for any reason to hold their post, the Contractor shall, subject to such approval, promptly appoint a replacement.

Removal and replacement of Contractor appointees

- 4.3 After consultation with the Contractor, the Employer may require the removal of the Contractor's Representative, of any of the Contractor's Key Personnel or of any other person engaged in the Pre-Construction Services if, in the Employer's reasonable opinion, their performance or conduct is or has been unsatisfactory.

Section 5

Additional Services, Fee Adjustment etc.

Additional Services

- 5.1 The Employer may instruct the Contractor to perform services which are additional to or represent an alteration in the Pre-Construction Services as then specified (including advice in relation to any changes to the definitive design) ('Additional Services') to the extent that they are within the scope of the Project and the Contractor's competence. The Contractor shall promptly notify the Employer of any Additional Service that he considers necessary or desirable.

Changes, delaying events etc.

- 5.2 The Fee and/or other amounts payable under this Agreement shall be adjusted for additional work and for any additional costs that the Contractor incurs as a result of:

- .1 instructions for any Additional Services that cannot readily be undertaken by the Contractor's Project Staff in the ordinary course and within the Programme timetable; or
- .2 any event or cause related to the Project that is beyond the Contractor's control and materially alters, delays, prolongs or disrupts the performance of the Pre-Construction Services, including delay in finalisation of the Employer's design or any default on the part of the Employer or any member of the Project Team.

Notification by the Contractor

- 5.3 If the Contractor wishes to claim an adjustment of the Fee and/or any additional payment or reimbursement in respect of any Additional Services or of any event or cause within clause 5.2 and/or to claim any additional time, he shall promptly notify the Employer to that effect either upon receipt of the instruction (and before implementing it, except in the case of an emergency) or upon the occurrence of the relevant event or cause, as the case may be. Such notification shall include an estimate of any additional time required, cost and/or (where appropriate) loss and/or expense, which, in the case of cost, shall be consistent with any rates set out in Annex A, so far as properly applicable.

Adjustment of Fee or additional payment and time

- 5.4 Where following notification by the Contractor under clause 5.3 the Employer confirms his instruction for any Additional Services or the Contractor is able to demonstrate loss and/or expense arising from an event or cause within clause 5.2.2, the addition to the Fee or other payment shall be such amount as is agreed between the Parties or, in default of such agreement, fairly valued by or on behalf of the Employer, based in the case of Additional Services on the net additional time spent in performing them and on any relevant rates given in Annex A. Where relevant a fair adjustment of time shall be made.

Section 6

Payment

Amounts payable

- 6.1 The Employer shall in accordance with Annex A and the following provisions of this section pay the Contractor:

- .1 the Fee;
- .2 Reimbursable Expenses;
- .3 any additional amounts payable pursuant to section 5 that are not included by way of adjustment of the Fee ('Additional Payments'),

together with any VAT properly payable in respect of such sums.

Contractor's payment applications

- 6.2** The Contractor may make payment applications as at the application dates or stages/milestones specified in Annex A. Each such application shall state the sum the Contractor considers due to him at that date or stage/milestone, including the amount of any Reimbursable Expenses paid or incurred in the period preceding the specified date or stage/milestone and the amount of any Additional Payment, so far as it relates to that period and is then due and payable, and shall set out the basis on which that sum has been calculated. The application shall be accompanied by such documents, vouchers and receipts as are specified in paragraph 6 of Annex A or are otherwise reasonably required by the Employer.

Due date and final date for payment

- 6.3** .1 The due date for payment of any amount payable under section 6 shall be the application date or stage/milestone or, if later, the date of receipt of the Contractor's payment application by the Employer.
- .2 The final date for payment shall be 14 days from the due date.

Payment – amount and notices

- 6.4** .1 Not later than 5 days after the due date the Employer shall give a payment notice to the Contractor, stating the sum he considers to be due from him calculated in accordance with clause 6.1 and the basis on which that sum has been calculated.
- .2 Subject to any notice given under clause 6.4.3, the Employer shall no later than the final date for payment pay the Contractor the amount specified in the payment notice under clause 6.4.1 or, if that notice is not given in accordance with that clause, the amount stated as due in the Contractor's payment application.
- .3 If the Employer intends to pay less than the sum stated as due from him in his payment notice or, where applicable, in the Contractor's payment application, he shall not later than 5 days before the final date for payment give notice to the Contractor of that intention stating the sum that he considers to be due to the Contractor at the date he gives notice under this clause 6.4.3 and the basis on which that sum has been calculated. Where such notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice.
- .4 A notice to be given by the Employer under clause 6.4.1 or 6.4.3 may be given on his behalf by the Employer's Agent or by any other person who the Employer notifies the Contractor as being authorised to do so.
- .5 In relation to the requirements for the giving of notices under this clause 6.4, it is immaterial that the amount then considered to be due may be zero.

Interest

- 6.5** If the Employer fails to pay a sum, or any part of it, due to the Contractor under this Agreement by its final date for payment, the Employer shall, in addition to any unpaid amount that should properly have been paid, pay the Contractor simple interest on that amount at the Interest Rate for the period from the final date for payment until payment is made. Any such unpaid amount and any interest under this clause 6.5 shall be recoverable as a debt.

Contractor's right of suspension

- 6.6** .1 If the Employer fails to pay a sum payable to the Contractor in accordance with clause 6.4 (together with any VAT properly chargeable in respect of that payment) by the final date for payment and the failure continues for 7 days after the Contractor has given notice to the Employer of his intention to suspend the performance of the Pre-Construction Services and the grounds for such suspension, the Contractor, without affecting his other rights and remedies, may suspend performance of any or all of those obligations until payment is made in full. Where payment is made in full the Contractor shall notify the Employer of the resumption of those services.
- .2 Where the Contractor exercises his right of suspension under clause 6.6.1, he shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by him as a result of exercising the right.

- .3 Applications in respect of any such costs and expenses shall be made to the Employer's Agent and the Contractor shall with his application or on request submit such details of them as are reasonably necessary for ascertaining the amount in question.

Section 7 Insurance

Professional Indemnity and Public Liability insurance

- 7.1 Where stated as required in the Particulars, the Contractor shall during the Pre-Construction Period maintain with reputable insurers that have a place of business in the United Kingdom:
- .1 Professional Indemnity insurance with limits of indemnity of the types and in amounts not less than those stated in the Particulars; and
 - .2 Public Liability insurance in respect of death and personal injury and injury or damage to property in a sum not less than the amount stated in the Particulars for any one occurrence or series of occurrences arising out of one event,

provided in the case of any renewal of Professional Indemnity insurance that it remains available at commercially reasonable rates.

Evidence of insurance

- 7.2 When reasonably requested by the Employer, the Contractor shall send to the Employer appropriate documentary evidence that such insurances have been effected and/or are being maintained.

Non-availability of Professional Indemnity insurance

- 7.3 If Professional Indemnity insurance is required but as at renewal has ceased to be available at commercially reasonable rates, the Contractor shall promptly notify the Employer in order that they may discuss the means of best protecting their respective positions.

Section 8 Use of Contractor's Information, Confidentiality etc.

Use of the Contractor's Information

- 8.1
- .1 Unless otherwise agreed in writing in relation to any specific items, all rights including (without limitation) copyright in the Contractor's Information shall remain vested in the Contractor.
 - .2 Subject to all monies due and payable under this Agreement to the Contractor having been paid, the Contractor grants to the Employer an irrevocable royalty-free licence to copy and use the Contractor's Information and to reproduce that information for the execution and completion of the Project and the subsequent maintenance, letting, occupation, management, sale, advertisement, alteration, refurbishment, reinstatement and repair of it.
 - .3 The licence referred to in clause 8.1.2:
 - .1 shall enable the Employer to copy and use the Contractor's Information for an extension of the Project, but not to reproduce any designs comprised in that information for any such extension;
 - .2 includes the right to grant sub-licences; and
 - .3 shall continue in force notwithstanding the expiry or termination of the Contractor's employment under this Agreement.
 - .4 The Contractor's liability for the consequences of any use of the Contractor's Information by

the Employer or any other person shall be subject to clause 2.8 and he shall not in any event be liable for any use for any purpose other than that for which that information was prepared.

Confidentiality and publicity

- 8.2** The Contractor shall during the continuance of the Project keep confidential and use or disclose only as necessary for the purposes of the Project any information supplied to him that relates to the Employer or the Project. That obligation shall not apply to any information that is in or comes into the public domain (other than as a result of the Contractor's breach) or prevent any disclosure required by law. The Employer's consent shall be required to any publication relating to the Project, but shall not be unreasonably withheld.

Transparency

- 8.3** Where the Employer is a Local or Public Authority or other body to whom the provisions of the Freedom of Information (Scotland) Act 2002 ('FOISA') apply, the Parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of FOISA, the content of this Agreement is not confidential. The Employer shall be responsible for determining in his absolute discretion whether any of the content of this Agreement is exempt from disclosure in accordance with the provisions of FOISA. Notwithstanding any other term of this Agreement:

- .1 the Contractor hereby consents to the Employer publishing any amendments to the standard form SBCC contract in their entirety, including changes to the standard form agreed from time to time, but in each case with any information which is exempt from disclosure in accordance with the provisions of FOISA redacted;
- .2 the Employer shall promptly inform the Contractor of any request for disclosure that he receives in relation to this Agreement.

Section 9

Assignment and Novation

Restrictions on assignment

- 9.1** Neither the Employer nor the Contractor shall without the written consent of the other assign this Agreement or any rights thereunder.

Novation

- 9.2** It is nevertheless agreed that:
- .1 where the Main Contract is a SBCC Design and Build Contract and this clause 9.2 applies in respect of the consultancy agreement or appointment for the Project of any member of the Consultant Team identified by name in the Particulars; or
 - .2 (in the case of any form of Main Contract) where this clause 9.2 applies in respect of a contract or order placed with any specialist or supplier identified by name in the Particulars, or one with whom it is otherwise agreed in writing by the Parties that a contract or order should be placed in advance of the Main Contract, and where the material terms of the contract or order and its intended novation under this clause 9.2 have been agreed by the Parties,

the Contractor, on or after execution and delivery of the Main Contract, shall promptly on notice from the Employer given in accordance with clause 1.4.2 enter into a novation agreement with such consultant, specialist or supplier substantially in the form (or appropriate form) of Novation Agreement specified in the Particulars or otherwise agreed.^[6]

[6] As to forms of Novation Agreement, see the Guidance Notes.

Section 10

Suspension by the Employer, Termination, Adjudication and the PC (Scotland) Regulations

Suspension by the Employer

10.1 The Employer may at any time on not less than 14 days' notice to the Contractor given in accordance with clause 1.4.2 require him to suspend performance of the whole or any part of the Pre-Construction Services. Following the issue of a notice under this clause 10.1, the Employer shall pay the Contractor in accordance with section 6:

- .1 any accrued instalments of the Fee and of any Additional Payment then unpaid;
- .2 a fair proportion of the next instalment in each case, having regard to the services performed (or to be performed to the effective date of suspension) since the last instalment fell due;
- .3 all Reimbursable Expenses accrued; and
- .4 any demobilisation costs properly and necessarily incurred by the Contractor in complying with the notice,

together with any VAT properly payable.

Remobilisation

10.2 The Employer may at any time within 6 months (or such other period as is specified in the Particulars) following the notice under clause 10.1 instruct the Contractor to recommence the performance of the suspended services. The Contractor shall comply with any such instruction as soon as reasonably practicable and the Employer shall pay the Contractor any remobilisation costs properly and necessarily incurred by him as a result.

Notification of costs

10.3 The Contractor shall:

- .1 promptly notify the Employer of the amount of any demobilisation and remobilisation costs which he intends to claim;
- .2 provide the Employer with such supporting documents as he may reasonably require to verify the amount claimed; and
- .3 use all reasonable endeavours to minimise those costs.

Extended suspension – termination by the Contractor

10.4 In the case of a suspension by the Employer of all or a substantial proportion of the Pre-Construction Services for any reason, where the Employer has not within the period referred to in clause 10.2 instructed the Contractor to recommence the performance of all or substantially all those services that remain to be performed, the Contractor, after giving to the Employer not less than 14 days' prior notice of his intention to do so, may give notice to the Employer terminating the Contractor's employment under this Agreement. Each notice under this clause 10.4 shall be given in accordance with clause 1.4.2 and, if notice of termination is given, clause 10.6 shall apply.

Termination at will or for default/insolvency or under regulation 73(1) of the PC (Scotland) Regulations

10.5

- .1 The Employer may at any time give the Contractor not less than 14 days' notice terminating his employment.
- .2 If either Party is insolvent, the other may give notice to that Party terminating the Contractor's employment with immediate effect.

- .3 If either Party ('the defaulting Party') commits a material breach of his obligations, the other Party may give notice to the defaulting Party specifying the breach and requiring its remedy. If the defaulting Party fails to comply with the notice within 7 days, the other Party may give notice to the defaulting Party terminating the Contractor's employment with immediate effect.
- .4 Where this Agreement is one to which regulation 73(1) of the PC (Scotland) Regulations applies and the circumstances set out in regulation 73(1)(a), 73(1)(b) or 73(1)(c) of those regulations apply, the Employer shall be entitled by notice to the Contractor to terminate the Contractor's employment.
- .5 Each notice referred to in this clause 10.5 shall be given in accordance with clause 1.4.2.

Consequences of termination

- 10.6** .1 Following the issue of a notice of termination under clause 10.4 or 10.5:
 - .1 the Parties shall consult and take all reasonable steps to bring the Pre-Construction Services to an orderly close; and
 - .2 the Contractor shall within 14 days deliver to the Employer copies of the Contractor's Information (including any material prepared prior to the date of termination and not previously delivered to the Employer), provided that in the case of termination under clause 10.4 or by the Employer under clause 10.5.4 (regulation 73(1)(a) or 73(1)(c)) or where the Contractor terminates under clause 10.5, the Contractor shall be obliged to do so only against the Employer's payment of any amount due under clause 10.6.2.
- .2 The amount due on termination from the Employer to the Contractor or (if a negative amount) from the Contractor to the Employer shall be the aggregate of:
 - .1 an appropriate proportion of the Fee, determined in accordance with Annex A, and of any Additional Payments;
 - .2 any Reimbursable Expenses; and
 - .3 (where the termination is not due to the Contractor's insolvency or material breach or under clause 10.5.4 (regulation 73(1)(b)) any demobilisation and other costs reasonably and properly incurred by the Contractor as a result of the termination,

less amounts previously paid to the Contractor and less (where the termination is due to the Contractor's insolvency or material breach or under clause 10.5.4 (regulation 73(1)(b)) any additional costs reasonably and properly incurred by the Employer in procuring the completion of the Pre-Construction Services by others, but together in each case with any VAT properly payable.
- .3 The final date for payment of the amount properly due on termination shall be 28 days from the date of submission of the Contractor's invoice or (where an amount is due to the Employer) the Employer's statement.
- .4 Except as set out in clause 10.6.2, neither Party shall be liable to the other for any loss of profit, loss of contracts, or any other losses, costs or expenses that arise out of the termination.
- .5 Termination of the Contractor's employment shall not affect the accrued rights or remedies of either Party.

Adjudication

- 10.7** If a dispute or difference arises under this Agreement which either Party wishes to refer to adjudication, the Scheme shall apply except that for the purposes of the Scheme the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Particulars.

The Procurement Reform (Scotland) Act 2014 and the Public Contracts (Scotland) Regulations 2015

10.8 Where the Employer is a Local or Public Authority and this Agreement is subject to the Procurement Act and the PC (Scotland) Regulations^[7]:

- .1 where section 15(5)(d) of the Procurement Act applies to this Agreement, the Contractor shall include in any sub-contract entered into by him suitable provisions to impose the requirements of section 15(5)(d);
- .2 the Contractor shall include in any sub-contract entered into by him provisions requiring the sub-contractor:
 - .1 to supply and notify to the Contractor the information required (as applicable) under regulations 71(3), and 71(5) of the PC (Scotland) Regulations; and
 - .2 to include in any sub-subcontract he in turn enters into provisions to the same effect as required under clause 10.8.2.1
- .3 .1 the Contractor shall include in any sub-contract entered into by him provisions that shall entitle him to terminate the sub-contractor's employment where there are grounds for excluding the sub-contractor under regulation 58; and
 - .2 in the event the Employer requires the Contractor to terminate a sub-contractor's employment pursuant to regulation 71(9) of the PC (Scotland) Regulations the Contractor shall take the appropriate steps to terminate that employment and where required by the Employer under regulation 71(10) and 71(11) of those regulations shall, or in circumstances where there is no such requirement may, appoint a replacement sub-contractor.

Tender Only

[7] For an explanatory summary of those provisions in the Procurement Act and the PC (Scotland) Regulations that are reflected in this Agreement, see the Measured Term Contract Guide for use in Scotland. Provisions relating to the Procurement Act and PC (Scotland) Regulations are set out in section 8 (Termination) of this Agreement The SBCC Short Form of Contract for use in Scotland (Short Sub) meets the requirements of Supplemental Provision 8.

2.1 Cost Plan

2.1 Employer's Requirements

2.1 Programme

2.1 Project Team

<i>[Name]</i>	<i>[Function]</i>

2.1 Third Party Agreements

<i>[Parties]</i>	<i>[Date]</i>	<i>[Subject]</i>

2.1.2 Contractor's Key Personnel

[Name]

[Function]

2.1.2 Contractor's Representative
(as at the date of this Agreement)

Insurances

Clause etc.

Subject

7.1.1 Professional Indemnity insurance – level of cover
(If an alternative is not selected the amount shall be the aggregate amount for any one period of insurance. A period of insurance for these purposes shall be one year unless otherwise stated.)

(If no amount is stated, insurance under clause 7.1.1 shall not be required.)

Amount of indemnity required
* relates to claims or series of claims arising out of one event/
* is the aggregate amount for any one period of insurance

and is

£ _____

7.1.1 Professional Indemnity insurance – cover for pollution and contamination claims
(If no amount is stated, such cover shall not be required; unless otherwise stated, the required limit of indemnity is an annual aggregate amount.)

* is required, with a sub-limit of indemnity of
£ _____/

* is not required

7.1.2 Public Liability insurance
(If neither entry is deleted or cover level is not stated, such insurance is not required.)

* is required, with a limit of indemnity of
£ _____/

* is not required

Novation

Clause etc.

Subject

9.2.1

Consultant Team members to whom clause 9.2 applies

[Name]

[Date of Appointment/Consultancy Agreement]

9.2.2

Sub-Contractors/Suppliers to whom clause 9.2 applies

[Name]

[Particulars of (Sub-)Contract/Order]

9.2 (hanging paragraph)

Where clause 9.2 applies, the form(s) of Novation Agreement and additional terms (if any) applicable to such novation(s)^[8] (Identify the form(s) and terms or the document(s) in which these are set out.)

* are/
* are set out in

Suspension

Clause etc.

Subject

10.2

Period (if other than 6 months)

[8] Where the relevant form(s) are included as an Annex to this Agreement (as is recommended), it is sufficient to refer to that Annex.

Adjudication

Clause etc.

Subject

10.7

Adjudication^[9]

The Adjudicator is _____

Nominating body – where no Adjudicator is named or where the named Adjudicator is unwilling or unable to act (whenever that is established)^[10]
(Where an Adjudicator is not named and a nominating body has not been selected, the nominating body shall be one of the bodies listed opposite selected by the Party requiring the reference to adjudication.)

- * Royal Incorporation of Architects in Scotland
- * The Royal Institution of Chartered Surveyors in Scotland
- * Scottish Building Federation

In witness whereof^[11] these presents consisting of this and the [] preceding pages, together with Annex A and B (under declaration that the insertion of the names and addresses of the said Parties, the insertions of details into the Recitals, Articles and Contract Particulars, the alteration to clauses [] and the deletion of clauses [] and [.....]^[12] which are initialled by the Parties were made prior to the subscription of this Agreement by the Parties) are subscribed as follows:

They are subscribed [for and on behalf of]^[13] [by]^[14] the said Employer by

_____ (sign)

_____ (print name in full)^[15]

_____ (position/authority)^[15]

at ^[16] _____ on ^[17] _____

Which subscription is witnessed by

witness signature

[18]

witness name

[19]

witness address

^[9] The Parties should either name the Adjudicator and select the nominating body or, alternatively, select only the nominating body.

^[10] Delete all but one of the nominating bodies asterisked.

^[11] See the Guidance Notes.

^[12] Insert details of any other alterations or deletions.

^[13] Delete when subscription by party signing on own behalf.

^[14] Delete when subscription on behalf of party.

^[15] Enter full name of person subscribing including middle names; where signing on behalf of a party, capacity of person signing should be added after signature (where on behalf of a company 'director' or 'company secretary', a partnership 'partner', and an LLP 'member' of said party); where any other form of execution is being considered, or where party is any other corporate body, legal advice should be sought.

^[16] Enter location of place of signing.

^[17] Enter date of signing.

^[18] Enter full name of witness including middle names.

^[19] Enter address of witness.

They are subscribed [for and on behalf of]^[13] [by]^[14] the said Contractor by

_____ (sign)

_____ (print name in full)^[15]

_____ (position/authority)^[15]

at ^[16] _____ on ^[17] _____

Which subscription is witnessed by

_____ witness signature

_____ ^[18]
witness name

_____ ^[19]
witness address

Tender only

Annex A

This is Annex A to the foregoing Agreement referred to in and forming part of the Pre Construction Services Agreement for use in Scotland (General Contractor)

Fee, Rates, Additional Payments and Reimbursable Expenses

*Note: An asterisk * indicates text that is to be deleted as appropriate.*

The Fee

1 * The Fee is the fixed sum of £ _____/

* The Fee comprises the fixed sum of £ _____ together with

_____ /

* The Fee is to be calculated as follows:

Additional terms relating to the amount or calculation of the Fee

Payment of Fee etc.

2 The Fee shall become due and payable in accordance with section 6 at the following dates or stages/milestones and in the following amounts or percentages^[20]:

[Application date or stage/milestone at which due] [Percentage of Fee or amount]

_____	_____
_____	_____
_____	_____

[20] If the dates or stages/milestones are not specified sufficiently clearly, the Scheme will apply.

Contractor's Project Staff – Applicable rates

- 3 The * daily/weekly all-in rate for any necessary extension of Pre-Construction Services work (and for the purposes of any apportionment under clause 10.6.2.1) is

£ _____ based on the Contractor's Project Staff of

<i>[No.]</i>	<i>[Person(s)/Grade]</i>	<i>[Rate per hour/day]</i>
_____	_____	£ _____ per _____
_____	_____	£ _____ per _____
_____	_____	£ _____ per _____
_____	_____	£ _____ per _____
_____	_____	£ _____ per _____
_____	_____	£ _____ per _____
_____	_____	£ _____ per _____

Additional Services

- 4 The rates specified above shall apply (so far as properly applicable) for the purposes of any Additional Services instructed (or events or causes within clause 5.2) * subject to the following:

Reimbursable Expenses

- 5 Subject to their being properly and necessarily incurred for the purposes of the Project, the following expenses/disbursements of the Contractor shall be reimbursable by the Employer up to any maximum amount or rate specified below or as otherwise agreed in writing from time to time:

<i>[Type]</i>	<i>[Maximum amount/rate]</i>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Save as otherwise agreed in writing, all other expenses and disbursements shall be deemed to be included in the Fee.

Supporting documents

- 6 Each application that includes any of the following types of charge or expenditure should be accompanied by the following documents:

[Charge/Expenditure]

[Documentation]

VAT

- 7 All amounts and rates shown above are exclusive of VAT.

Tender only

Annex B

This is Annex B to the foregoing Agreement referred to in and forming part of the Pre Construction Services Agreement for use in Scotland (General Contractor)

Pre-Construction Services^[21]

Programme preparation

**Construction advice
(including value engineering/buildability advice)^[22]**

Tender only

Cost advice

[21] Each Project has its own individual requirements, which generally require to be specified in considerable detail, and the listings are therefore a matter for the Parties and the Consultant Team. The five headings given above indicate merely a convenient (and commonly used) division of those requirements into the principal categories that may form a useful framework for the detailed requirements.

[22] The SBCC envisages that the heading 'Construction advice' will also include development of the Construction Phase Plan in a manner that incorporates best industry safety practices and, in relation to 'Procurement and specialist design development services', that both CDM and other Health and Safety matters will be dealt with thoroughly in the tender documentation for specialist sub-contractors.

Procurement and specialist design development services^[22]

**Establishment of management and communication systems for the Construction Phase
(including external links)**

Tender only

Guidance Notes

Introduction

- 1 This Agreement, the General Contractor (PCSA/Scot) version of the SBCC Pre-Construction Services Agreement, is designed to cover the interim appointment of a contractor and the provision by him of pre-construction services where procurement is based on a two-stage tender process.
- 2 The appointment follows first stage tenders and covers the period leading up to the Contractor's submission of a definitive, second stage tender and entry into the Main Contract for the construction phase.
- 3 This Agreement envisages first stage tenders being made on the basis of designs by the Consultant Team that are only partially developed and that, during his appointment for the pre-construction period, the selected Contractor will assist with final development of the design and of specialist tender documents and with the arrangements necessary to obtain sub-contract tenders for the Contractor's second stage bid. The latter bid is to be made in accordance with costing parameters that are generally established by the initial tender documents.
- 4 The Contractor's involvement and advice during the pre-construction period, as to (inter alia) programme, cost plans, buildability and specialist procurement as well as the final design and preparations for the construction phase, is generally valuable and often essential, particularly in Design and Build procurement. It is in the pre-construction period, not during the construction phase, that the Employer, assisted by the Contractor and relevant specialists, is able to derive the greatest benefits from value engineering exercises.
- 5 Reflecting the advisory position of the Contractor during the pre-construction period, the Agreement is drafted on a basis similar to that of construction consultancy agreements.
- 6 This Agreement is designed for use between the Employer and the prospective Contractor in cases where it is necessary for a main contractor to establish and maintain a substantial team of his own to work with the Consultant Team during the pre-construction period. It is intended for use in connection with the 2016 Editions of the SBCC Standard Building Contract, Design and Build Contract, the Minor Works Contract or the Minor Works with Design Contract.
- 7 It is not intended for use between the Employer (or main contractor) and specialist sub-contractors; pre-construction arrangements with specialists (by either the Employer or the Contractor) are catered for by the other version of the agreement, namely the SBCC Pre-Construction Services Agreement (Specialist) (PCSA/SP/Scot). These agreements are by their nature intended to be simple and the insertion here of even a modest selection of the necessary alternatives for arrangements with specialists would result in too lengthy and complex a document.
- 8 The payment provisions in this Agreement comply with the requirements of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 ('the Construction Act').

Specific Provisions

Recitals

- 9 The First Recital requires the insertion of a brief description of the Project, with the detailed descriptive document(s) identified in the Particulars. The detailed description is important because it defines the scope of instructions that can be given to the Contractor as to matters that are (or should be) within his competence.
- 10 The Second Recital identifies the Employer's Agent, who it is envisaged will have full authority to act on the Employer's behalf in the Pre-Construction Period. Any notice to the Employer that the Contractor sends to the Employer's Agent is duly given if sent by the appropriate means, but under clause 4.1 the Employer may in other respects limit the agent's authority by written notice to the Contractor.

- 11 For the Construction Phase of projects where the Architect/Contract Administrator acts as certifier, e.g. those under the 2016 Edition of the Standard Building Contract, the Minor Works Contract or the Minor Works with Design Contract, the SBCC discourages appointment of the Architect/Contract Administrator as Employer's Agent. During the Pre-Construction Period, however, where payment is on an application basis and there is no independent certifier role, there is no necessary conflict in the Architect or other Lead Consultant acting also as Employer's Agent. It may often assist co-ordination if he does so.
- 12 The Third and Fourth Recitals relate to the CDM Regulations. The Fifth Recital refers to the Contractor's first stage tender or initial proposal document(s) intended to form the basis of the Contractor's Second Stage Tender; the reference to initial proposal document(s) is intended to include any existing Framework or similar agreement that in effect serves as a tender for these purposes. The Fifth Recital also refers to Annex A (the Fee) and Annex B (the Pre-Construction Services), which the parties must complete; the Sixth Recital sets out a provisional timetable for the end of the Pre-Construction Period and commencement of the Construction Phase.

Section 1 – Definitions and Interpretation

- 13 In keeping with the aim of brevity, section 1 defines only those terms not defined earlier in the Agreement. Several of the defined terms are common to the SBCC range as a whole, including in this edition new terms relating to BIM and the CDM Regulations. In relation to BIM, there is a new entry in the Particulars against clause 1.1. If a BIM Protocol is to apply this must be stated and the identified protocol included in the Employer's Requirements.
- 14 Those terms that are not already familiar are mostly self-explanatory. Of those that are less familiar, the term Additional Payment relates to payment for Additional Services (or for any other events or causes within clause 5.2) that is not effected by means of an adjustment of the Fee (where, for example, a one-off payment is more appropriate than payment phased over the remainder of the Pre-Construction Period). The listing of 'Contractor's Project Staff' in Annex A is intended to assist in distinguishing between, on the one hand, those instructions from the Employer which he can reasonably expect to be dealt with in the ordinary course by the Contractor's existing Project Staff within the agreed Fee and, on the other, those instructions that can properly be said to be for additional work not covered by the original Fee.
- 15 The Interpretation provisions of PCSA/Scot 2016 contain two straightforward changes, both of which relate to BIM, i.e.:
- first, clause 1.2.1 deals with precedence of documents, and in this regard any BIM Protocol stated to apply is one of the documents identified in the Particulars but some model protocols claim in the case of conflict to override the Agreement and other contract documents; SBCC considers that its contracts give sufficient latitude to BIM Protocols so that a conflict should not arise; in any event, it also considers that unqualified overriding provisions of this type are not appropriate in such protocols;
 - secondly, with a view to avoiding any 'form over substance' argument, clause 1.2.2.6 reflects the fact that, under BIM, designs and information supplied to or by the Contractor may not take the same name or form as their hardcopy equivalent, albeit they clearly serve the same function.

Section 2 – Contractor's General Obligations (and Annex B)

Pre-Construction Services

- 16 The principal obligation of the Contractor is to provide the Pre-Construction Services, as listed by the Parties in Annex B which, for the purposes of that listing, contains an indicative division into five sections (Programme preparation, Construction advice, Cost advice, Procurement and specialist design development services, and Establishment of management and communication systems).
- 17 It is not reasonably practicable in this Agreement to give standard detailed listings of the services that the Contractor is expected to supply, first because they will vary according to the nature of the project and, secondly, because the Contractor's role and relationship with the other members of the Project Team will differ materially as between Design and Build projects on the one hand (under the Design and Build Contract) and those procured under the direction of a Contract Administrator (i.e. under the Standard Building Contract, the Minor Works Contract or the Minor Works with Design Contract) on the other. A substantial proportion of Employers already have listings appropriate for Annex B and such listings should also be readily available from the Consultant Team.
- 18 The SBCC envisages that construction advice will include development of the Construction Phase Plan in a manner that incorporates best industry safety practices and that both CDM and other Health

and Safety matters will be dealt with thoroughly in tender documentation for specialist sub-contractors.

Performance of Services

- 19 The provisions of clauses 2.1 to 2.6, governing performance of the Pre-Construction Services, are all substantially in standard SBCC terms, as to compliance with the Employer's Requirements and applicable legislation (clause 2.1), level of skill and care (clause 2.1.1), compliance with instructions (clause 2.2), the supply of information (clause 2.3, which also includes an express duty of co-operation), deleterious materials (clause 2.4), Fire Code (clause 2.5) and the requirement for consent to sub-contracting (clause 2.6).
- 20 Clauses 2.1 and 2.3 make reference to compliance with other documents which may or may not be included within the Employer's Requirements, namely the Cost Plan (which will no doubt alter and develop during the Pre-Construction Period) and Third Party Agreements, a term which covers agreements relating to the site and its use and agreements relating to the requirements of prospective purchasers and tenants. It is envisaged that the listing of those agreements will be fixed at the outset; any further agreements affecting performance of the Pre-Construction Services that the Employer enters into during the Pre-Construction Period may of course be dealt with under section 5.
- 21 Under clause 2.1.2, unless otherwise agreed, the Contractor is required to ensure that his Key Personnel fulfil the roles that have been agreed and are readily accessible to the Employer and Consultant Team. Clause 2.1.3 provides for involvement of the Contractor's supply chain.
- 22 Clause 2.2 provides for compliance with instructions, but at clause 2.2.2 also provides for immediate consultation if the Contractor has objections to an instruction on grounds of a material and adverse effect on the Project, as distinct from matters relating principally to time or money, which are dealt with in section 5.
- 23 Clause 2.7 makes provision for the Contractor's Second Stage Tender, as envisaged by the Sixth Recital, though clause 2.7.2 makes it clear that the Employer is not bound to accept that tender. Clause 2.8 conversely provides that, personal injury apart and unless otherwise stated in Annex B, the Contractor has no liability to the Employer in respect of any design work under the Pre-Construction Services Agreement unless and until the Parties enter into the Main Contract, when any such work is placed on the same footing as design work under the Main Contract. If Annex B expressly provides for design liability independently of the Main Contract, the Contractor should check that the required level of skill and care and extent of liability are reasonable.

Section 3 – Employer's General Obligations etc.

- 24 Apart from the obligation to maintain an Employer's Agent (clause 4.1) and payment obligations, which are dealt with in sections 5 and 6, the Employer's obligations are limited to complying with applicable CDM Regulations and supplying the necessary information in his control (clause 3.1), making decisions promptly on request (clause 3.2) and exercising his powers to ensure that members of the Project Team do not prevent due and timely performance of the Pre-Construction Services (clause 3.3).

Section 4 – Representatives and Contractor's Key Personnel

- 25 Under clause 4.1 the Employer is required to maintain an Employer's Agent during the Pre-Construction Period. The Contractor for his part is under an obligation to have a Contractor's Representative and not to make any voluntary changes in that appointment or in Key Personnel without the Employer's consent (clause 4.2), but the Employer has a right under clause 4.3 to require their removal for unsatisfactory performance. Where replacement is necessary, the Employer's prior approval of the proposed appointee is required.

Section 5 – Additional Services, Fee Adjustment

- 26 Under clause 5.1, the Employer can instruct alterations and additions to the Pre-Construction Services that are within the Project's scope and the Contractor's competence.
- 27 If the altered or additional services cannot reasonably be expected to be carried out by the Contractor's agreed levels of Project Staff in the ordinary course during the Pre-Construction Period or if there is material alteration, delay, prolongation or disruption to the Contractor as a result of a Project-related event or cause beyond his control, he is entitled to additional payment for it (clause 5.2) provided he notifies the Employer in accordance with clause 5.3. Any additional time requirements should be notified as well as costs; both are fairly to be assessed under clause 5.5.

Section 6 – Payment (and Annex A)

- 28 The provisions of section 6 follow the standard SBCC payment provisions closely, with clause 6.1 providing for payment of the Fee and Reimbursable Expenses (each to be specified in, or calculated in accordance with, Annex A) together with any Additional Payments in accordance with section 5 and the VAT properly chargeable.
- 29 Clause 6.2 provides for applications by the Contractor at specified dates or stages, with such documentary evidence as is either specified in Annex A or reasonably required by the Employer. The final date for payment (clause 6.3) has been reduced in line with other SBCC 2016 contracts and is now 14 days from the respective due date. Those provisions are then followed by standard provisions as to payment and pay less notices (clause 6.4), interest on unpaid amounts (clause 6.5) and the Contractor's right of suspension (clause 6.6). It will be noted that in default of notice by the Employer in accordance with clause 6.4.1 or 6.4.3, the Contractor is statutorily entitled to payment of the amount he has applied for. In clause 6.6, the Contractor's right of suspension for non-payment reflects the statutory right for him to recover his reasonable costs and expenses arising from such suspension.
- 30 Paragraph 1 of Annex A requires the insertion there of the amount (or basic amount) of the Fee and/or the method of calculation (if or to the extent that it is not a fixed sum), together with details of any other terms that affect that amount or calculation. The dates/stages/milestones for payment should then be set out in paragraph 2. It is important that these terms should be set out clearly. Paragraph 3 of the Annex specifies the Contractor's Project Staff requirement (which may of course vary over the period) and enables the Parties to specify hourly, daily or weekly rates for valuing additional work, subject to any further terms that the Parties specify in paragraph 4.
- 31 As respects paragraph 5, it is desirable that the categories of Reimbursable Expenses be listed and that an appropriate limit be put on the overall amount and/or the rate at which such items are reimbursable.
- 32 Paragraph 6 is not exhaustive, since the Employer has a residual right to call for reasonable evidence of time charges and other payments and disbursements by the Contractor, but it is also desirable that there should be agreement in advance on the documentation generally required to support the Contractor's payment applications in this regard.
- 33 As indicated in paragraph 7, all amounts and rates shown in the Annex are exclusive of VAT.

Section 7 – Insurance

- 34 If so stated in the Particulars, the Contractor is required to maintain Professional Indemnity ('PI') and Public Liability insurances in the amounts specified in the Particulars and on request to produce appropriate evidence of such insurances. The obligation to maintain PI insurance is subject to the usual proviso as to continuing availability at commercially reasonable rates, but is not related solely to design work. In the SBCC's view PI cover is desirable where (as here) the Contractor is providing professional or similar advisory services.
- 35 In relation to PI cover, it will be noted that, while the Particulars continue to provide a separate optional limit for pollution and contamination claims, there is no longer provision for asbestos or toxic mould cover as cover for those items is very limited and not readily available to Contractors in their own right. If pollution or contamination cover is required and is only available to the Contractor on a limited exposure basis (e.g. sudden and unforeseen events), this should be disclosed pre-contract to the Employer and recorded in the Particulars.
- 36 This Agreement is not intended to cover preliminary asbestos removal work, which can only be undertaken by licensed specialists: they should have access to the insurance schemes specifically set up for their industry and, while their insurance needs to be checked, it is in any event recommended that any such work should be dealt with by a separate agreement.

Section 8 – Use of Contractor's Information, Confidentiality etc.

- 37 The section comprises the standard SBCC licence for the Employer to use the Contractor's design work (clause 8.1) and an undertaking by the Contractor to keep confidential information that relates to the Employer or the Project (clause 8.2). Employer's consent to related publications is not to be unreasonably withheld; this is appropriate in a large majority of cases, but it will be recognised that there are Employers who need to limit or preclude publicity regarding their construction activities. Clause 8.3, if it applies, deals with the authorising of disclosures by public sector employers in accordance with the Freedom of Information (Scotland) Act 2002.

Section 9 – Assignment and Novation

- 38 Clause 9.1 contains the standard SBCC restriction on assignment.
- 39 Where the Main Contract is a SBCC Design and Build Contract 2016, clause 9.2 provides for the novation, upon entry into the Main Contract, of the agreements/appointments of Consultant Team members identified in the Particulars and, whichever form of Main Contract is used, it provides for novation of contracts or orders with specialists and suppliers who are either identified in the Particulars or in relation to whom it is otherwise agreed by the Parties that there should be a novation under clause 9.2. The clause and Particulars envisage that there may be different forms of novation agreement for consultants on the one hand and for specialists/suppliers on the other.
- 40 The SBCC itself does not at present publish forms of novation agreement.
- 41 However, novations, though commonplace, are not entirely straightforward. The Contractor will need to review the agreements and appointments to be novated and each party may need advice before agreeing to enter into novations. The Employer needs to ensure that his obligations will be discharged but that he will remain entitled to any necessary warranties in respect of past services; the Contractor will wish to ensure that he has the necessary representations, warranties and/or undertakings as to performance prior to the novation, free of any unreasonable limitations and 'no loss' arguments, and that, save as provided for in the Main Contract price, amounts owing or accrued to the consultant, specialist or supplier are discharged on or before the novation. The consultant or specialist for his part may also be concerned to preserve any 'net contribution' protection that might otherwise disappear on novation.

Section 10 – Suspension by the Employer, Termination, Adjudication and the PC (Scotland) Regulations

- 42 In this edition, along with other contracts in the SBCC 2016 range, provisions have been included to reflect the sub-contracting regulation, regulation 71, of the PC (Scotland) Regulations. Under regulation 71, there is an obligation on the contracting authority to require the main contractor to provide basic information on his sub-contractors and to update this information. Also, the contracting authority can insist on the removal of a sub-contractor where there are grounds for exclusion of that sub-contractor under regulation 58. Paragraphs 8.2 and 8.3 of Supplemental Provision 8 provide specific contractual powers to the Employer and impose obligations on the Contractor to reflect relevant aspects of regulation 71. There is also at paragraph 8.1 a specific provision dealing with the prompt payment provisions of section 15(5)(d) of the Procurement Act to allow for these to be passed down the supply chain. (Reference should always be made to the wording of the regulations themselves and if there is any doubt as to the applicability of the Procurement Act and the PC (Scotland) Regulations generally or a specific provision, appropriate legal advice should be taken.)
- 43 In keeping with the preliminary nature of the Agreement, the Employer has the right at any time to suspend the Pre-Construction Services or part of them (clause 10.1) or to terminate the Contractor's employment at will (clause 10.5.1), in each case on not less than 14 days' notice.
- 44 In the case of suspension, the Employer has the right under clause 10.2 to instruct the Contractor to remobilise but, if the period of suspension exceeds the relevant period (6 months or such other period as is specified in the Particulars) and such instruction has not been given, the Contractor, after giving a warning notice, may himself terminate his employment.
- 45 In common with SBCC contracts generally, each Party has the right to terminate that employment in the case of the insolvency or unremedied default of the other (clauses 10.5.2 and 10.5.3). In the case of default a warning notice is required.
- 46 In the case of suspension by the Employer, there is provision for payment up to the date of suspension, plus reasonable demobilisation costs (clauses 10.1.1 to 10.1.4), with clause 10.2 making provision for remobilisation costs and for the notification of costs either way.
- 47 In the case of termination, clause 10.6.1 makes provision for consultation and delivery of documents and clause 10.6.2 for the financial consequences of termination. The latter are essentially limited to costs and expenses incurred by the Contractor, less, in the case of termination for the Contractor's insolvency or default, the additional cost to the Employer in procuring completion of the Pre-Construction Services. No other loss or damage, e.g. loss of profits, is payable as a result of termination (clause 10.6.4).
- 48 Suspension, warning and termination notices each require to be given by the means set out in clause 1.4.2. In relation to disputes and in line with SBCC contracts generally, clause 10.7 incorporates into

the Agreement the Adjudication provisions of the Scheme for Construction Contracts (Scotland) Regulations 1998 as amended..

Signing

- 49 The Requirements of Writing (Scotland) Act 1995 which came into force on 1st August 1995 applies to all relevant documents subscribed after that date. If the Parties are in any doubt about any of the points below, or any other matter relating to how to complete a testing clause or sign a contract document, legal advice should always be sought.

PLEASE READ THE FOLLOWING VERY CAREFULLY BEFORE SIGNING

- 49.1 In order to minimise the risk of challenge to the validity and authenticity of the signing and to obtain the benefits of registration under the Law of Scotland, it is a legal requirement that PCSA/Scot 2016 be executed by one of the methods explained below.
- 49.2 The PCSA/Scot 2016 includes a pro forma testing clause.
- 49.3 The method of signing and the contents of the testing clause will depend upon whether the Party is a Limited Liability Company, a Local Authority, an Individual or a Sole Trader, a Limited Liability Partnership or a Partnership. The pro forma does not provide for signing by Local Authorities.
- 49.4 The signatures of all Parties must be in the presence of one witness who must also sign opposite the signature(s) of the Party being witnessed.
- 49.5 Where a Party is a Local Authority the examples should be read before deciding which testing clause is applicable to the Parties signing.
- 49.6 In the case of Local Authorities, when the signing method using the Seal is employed, their Seal need only be affixed where the Parties sign the testing clause.
- 49.7 PCSA/Scot 2016 consists of the Agreement comprising Recitals, Particulars, Conditions, which are incorporated by reference and Annexes A and B. The Agreement should be signed after the Particulars in accordance with the detailed instructions.
- 49.8 It is essential that if the Parties are in any doubt whatsoever as to how they should complete the testing clause or sign a Contract Document, they should seek legal advice.

COMPANY

49.9 SIGNING

PCSA/Scot 2016 should be signed by one Director or the Company Secretary or an Authorised Person. In all cases PCSA/Scot 2016 must also be signed by a witness whose full name and address is stated in the testing clause. If PCSA/Scot 2016 is signed by an Authorised Person evidence of such authority would require to be produced and should therefore be readily available.

LOCAL AUTHORITY (Regional, District or Islands Council)

49.10 SIGNING

PCSA/Scot 2016 should be signed by the proper officer of the Local Authority and also by a witness, whose full name and address should appear in the testing clause. Alternatively, PCSA/Scot 2016 can be signed by the proper officer of the Local Authority and sealed with the Common Seal of the Local Authority.

49.11 TESTING CLAUSES

Signature by Proper Officer with Seal

IN WITNESS WHEREOF these presents consisting of this and the [] preceding pages, together with the Conditions and Annex A and B (under declaration that the insertion of the names and addresses of the said Parties, the insertions of details into the Recitals, and Particulars, the alterations to clauses[] and the deletion of clauses[] and [note any other alterations or deletions] which are initialled by the Parties were made prior to the subscription of this Agreement by the Parties) are subscribed as follows:-

They are signed for and on behalf of the above named [Employer/Contractor etc.] by [] its [e.g. Regional Estates Surveyor], and sealed with its Common

Seal at [] on the [] day of [] Two
Thousand and [] and signed [Continue with appropriate testing clause of
the other party]

LOCAL AUTHORITY SEAL

Signature by Proper Officer and One Witness

They are signed for and on behalf of the above named [Employer/Contractor etc.] by
[] its [e.g. Regional Estates Surveyor], at [] on the
[] day of [] Two Thousand and []
before this witness [] of [] and signed [Continue with
appropriate Testing Clause of the other party]

INDIVIDUAL/SOLE TRADER

49.12 SIGNING

An individual or sole trader should sign his usual signature in the presence of one witness
who must also sign and whose full name and address must appear in the testing clause.

LIMITED LIABILITY PARTNERSHIP

49.13 SIGNING

PCSA/Scot 2016 should be signed by one member of the limited liability partnership. The
document must also be signed by a witness whose full name and address must appear
in the testing clause.

PARTNERSHIP

49.14 SIGNING

PCSA/Scot 2016 should be signed by the Firm name being adhibited by one of the
partners or by a person authorised to sign on its behalf who should sign on behalf of the
partnership either by adhibiting the Firm name or his own name. In all cases the signature
must be in the presence of one witness who must also sign and whose full name and
address must appear in the testing clause. A party to PCSA/Scot 2016 cannot be a
witness, therefore partners of the Firm cannot act as witnesses. Your Partnership
Agreement may provide for an alternative method of execution.

ANNEXATIONS

49.15 If any annexations are required they should be annexed in whole or in part and referred
to in the Agreement and in the testing clause and such annexation should be identified
on its face as an annexation to the Agreement. As noted at paragraph 49.8, if there is
any doubt as to completion of the testing clause, the Parties should seek legal advice.

50 It is anticipated that the Contractor will not be undertaking any material construction work and that,
in most cases, the Pre-Construction Services performed by the Contractor will generally be of the
types indicated in Annex B, i.e. will not include a substantial element of design work. Design work
performed during the period will normally fall to the Consultant Team and/or specialist contractors
who at that stage are generally employed separately by the Employer.

51 Any prefabrication, advance ordering or detailed design agreement is best dealt with by a separate
agreement or order.