



Department
for Environment
Food & Rural Affairs

www.gov.uk/defra

Professional Services Contract: Functional Safety Assurance Services

Reference 23814

June 2018

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Section 1: Form of Agreement

THIS AGREEMENT is made on the 27 day of November 2018.

BETWEEN:

- (1) **THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS** of Nobel House, 17 Smith Square, London, SW1P 3JR, acting through the Department for Environment Food and Rural Affairs (DEFRA) and its executive agencies (the “**Employer**”);

AND

- (2) **ENGINEERING SAFETY CONSULTANTS LIMITED** registered in England and Wales under number **07006868** whose registered office is Tuition House, 27-37 St George’s Road, London, SW19 4EU (the “**Supplier**”)

WHEREAS:

- (A) The Employer has placed a contract notice 2018/S 225-515272 on 20 November 2018 in the Official Journal of the European Union to establish a five year term contract for the provision of function safety services in support of the construction and/or operation of various science estate built assets operated by the Employer.
- (B) On the basis of the Consultant’s task schedule and staff rates the Employer has invited the Consultant to enter into NEC3 Professional Services Contract (Option G Term Contract) (the contract) to provide the Services to the Authority (including DEFRA and its executive agencies).
- (C) This contract sets out the terms and conditions on which the Consultant will supply the Services to the Employer and its agencies and the procedure that the Employer and its agencies will use to order Services from the Supplier.
- (D) There is no obligation for the Employer and/or its agencies to place Task Orders with the Consultant under this contract. The Employer reserves the unconditional right to enter in to other contracts with third parties for Services within the scope of this contract.

NOW IT IS HEREBY AGREED as follows:

TERMS OF THIS AGREEMENT

1. The Employer appoints the Consultant as a supplier of Services in accordance with this Agreement on the terms set out in the NEC3 Professional Services Contract (April 2013) Option G (Term Contract) together with the Additions and Amendments to Conditions of this Contract – Option Z.
2. The Employer includes the Department for Environment, Food and Rural Affairs and its executive agencies.
3. **This Agreement comprises the following:**
 - Section 1 Parties, Recitals, Terms, and Signatures
 - Section 2 Terms and Conditions of Professional Services Contract - Contract Data Part 1 and Part 2
4. Execution of this Agreement is carried out in accordance with EU Directive 99/93 (Community framework for electronic signatures) and the Electronic Communications Act 2000. The Agreement is formed on the date on which both Parties communicate acceptance of its terms on the Employer's electronic contract management system ("**Bravo**").

Section 2: Terms and Conditions of NEC3 Professional Services Contract (Term Contract)

TERMS OF THIS AGREEMENT

1. The Authority appoints the Consultant as a Supplier of services in accordance with the terms set out in the NEC3 Professional Services Contract (April 2013) together with the Additions and Amendments to Conditions of this Agreement and the Additional Conditions of this Agreement – Option Z.

2. This Agreement comprises the following:

Section 2.2.1 Terms and Conditions of NEC3 Professional Services Contract Agreement - Contract Data Part 1 (Data Provided by the Employer) and Contract Data Part 2 (Data Provided by the Consultant)

Section 2.2.2 Additional Conditions

Section 2.2.1: Professional Services Contract – Contract Data Part 1 & Part 2

CONTRACT DATA

Part one – Data provided by the *Employer*

<p>Statements given in all contracts</p> <p>1 General</p>	<p>Completion of the data in full, according to the Options chosen, is essential to create a complete contract.</p> <p>The <i>conditions of contract</i> are the core clauses and the clauses for main Option G, dispute resolution Option w2 and secondary Options X10, X18 and Z1 to Z20 of the NEC3 Professional Services Contract April 2013.</p> <p>The <i>Employer</i> is Name: The Secretary of State for Environment, Food and Rural Affairs, acting through the Department for Environment Food and Rural Affairs (DEFRA) and its executive agencies Address: Nobel House, 17 Smith Square, London, SW1P 3JR</p> <p>The <i>Adjudicator</i> is Name . . . To be agreed Address</p> <p>The <i>services</i> are The provision of functional safety assurance services as required by the Scope and Task Orders.</p> <p>The <i>Scope</i> is in document reference 'General and Specific Scope'.</p> <p>The <i>language of this contract</i> is English.</p> <p>The <i>law of the contract</i> is the law of England and Wales.</p> <p>The <i>period for reply</i> is two (2) weeks.</p> <p>The <i>period for retention</i> is 6 years following Completion or earlier termination.</p> <p>The <i>Adjudicator nominating body</i> is The Institution of Civil Engineers.</p> <p>The <i>tribunal</i> is the Courts of England and Wales.</p> <p>The following matters will be included in the Risk Register. None</p>				
<p>2 The Parties' main responsibilities</p>	<p>The <i>Employer</i> provides access to the following persons, places and things</p> <table border="0" style="margin-left: 40px;"> <tr> <td style="padding-right: 20px;">access to</td> <td><i>access date</i></td> </tr> <tr> <td colspan="2">None.</td> </tr> </table>	access to	<i>access date</i>	None.	
access to	<i>access date</i>				
None.					
<p>3 Time</p>	<p>The <i>starting date</i> is 30 November 2018. The <i>Consultant</i> submits revised programmes at intervals no longer than four (4) weeks.</p>				
<p>4 Quality</p>	<p>The quality policy statement and quality plan are provided within four (4) weeks of the Contract Date. The <i>defects date</i> is fifty two (52) weeks after Completion of each Task Order</p>				
<p>5 Payment</p>	<p>The <i>assessment interval</i> is four (4) weeks The <i>currency of this contract</i> is Pound Sterling</p>				

8 Indemnity, insurance and liability

The *interest rate* is 2 % per annum (not less than 2) above the base rate of The Bank of England
 The amounts of insurance and the periods for which the *Consultant* maintains insurance are

event	cover	period following Completion of the services or termination
failure of the <i>Consultant</i> to use the skill and care normally used by professionals providing services similar to the <i>services</i>	£5m in respect of each claim, without limit to the number of claims	6 years
death of or bodily injury to a person (not an employee of the <i>Consultant</i>) or loss of or damage to property resulting from an action or failure to take action by the <i>Consultant</i>	£5m in respect of each claim, without limit to the number of claims	6 years
death of or bodily injury to employees of the <i>Consultant</i> arising out of and in the course of their employment in connection with this contract	£5m in respect of each claim, without limit to the number of claims	6 years

The *Employer* provides the following insurances

None.....

The *Consultant's* total liability to the *Employer* for all matters arising under or in connection with this contract, other than the excluded matters, is limited to £5m

Optional statements

If the *Employer* has decided the *completion date* for the whole of the *services*

The *completion date* for the whole of the *services* is 1st October 2023.

If no programme is identified in part two of the Contract Data

The *Consultant* is to submit a first programme for acceptance within weeks of the Contract Date.

If the *Employer* has identified work which is to meet a stated *condition* by a *key date*

The *key dates* and *conditions* to be met are

<i>condition</i> to be met	<i>key date</i>
1. None.....
2.....
3.....

If the period in which payments are made is not three weeks and Y(UK)2 is not used

The period within which payments are made is

If Y(UK)2 is used and the final date for payment is not 14 days after the date when payment is due

The period for payment is four (4) weeks

If the *Employer* states any *expenses*

The *expenses* stated by the *Employer* are

item	amount
.None.....

If Option C, E or G is used

The *Consultant* prepares forecasts of the total Time Charge and *expenses* at intervals no longer than 4 weeks.

The *exchange rates* are those published in
on (date).

.....
.....

If Option X10 is used

The *Employer's Agent* is

Name

.....

Address

.....

The authority of the *Employer's Agent* is

.....

.....

.....

If Option X18 is used

The *Consultant's* liability to the *Employer* for the *Employer's* indirect or consequential loss is limited to the amount stated in the Contract

The *Consultant's* liability to the *Employer* for Defects that are not found un *defects date* is limited to the amount stated in the Contract Data.

The *Consultant* is not liable to the *Employer* for a matter unless it is notified to the *Consultant* before the *end of liability date*.

If Option Y(UK)1 is used and the *Employer* is to pay any charges made and is paid any interest paid by the *project bank*

The *Employer* is to pay any charges made and is paid any interest paid by the *project bank*.

If Option Y(UK)3 is used

term

person or organisation

.....

.....

.....

.....

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.....

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.....

If Option Z is used

The *additional conditions of contract* are Z1 to Z20

Section 2.2.2: Additional Conditions

Z1 The Public Contract Regulations 2015

- 1.1 The Employer may terminate the Consultant's obligation to Provide the Services if any of the provisions of paragraph 73(1) of The Public Contracts Regulations 2015 apply.

If the Employer terminates under the provisions of paragraph 73(1)(b) of the Public Contracts Regulations 2015 as a result of information not disclosed by the Consultant at the Contract Date, the procedures and amounts due on termination are the same as for a default by the Consultant.

If the Employer otherwise terminates under the provisions of paragraph 73(1) of the Public Contracts Regulations 2015, the procedures and amounts due on termination are the same as if the Employer no longer requires the services.

- 1.2 The Consultant notifies the Employer of the name, contact details and legal representatives of each subconsultant before appointing the subconsultant. The Consultant does not appoint a subconsultant if there are compulsory grounds for excluding the subconsultant under regulation 57 of the Public Contracts Regulations 2015.

- 1.3 The Employer makes payment to the Consultant under the contract no later than 30 days after receipt of a valid and undisputed invoice, unless the contract requires the Employer to make earlier payment to the Consultant.

- 1.4 The Consultant includes in any subcontract awarded by him provisions requiring that
- payment due to the subconsultant under the subcontract is made no later than 30 days after receipt of a valid and undisputed invoice, unless this contract requires the Consultant to make earlier payment to the subconsultant or supplier,
 - invoices for payment submitted by the subconsultant or supplier are considered and verified by the Consultant in a timely fashion,
 - undue delay in considering and verifying invoices is not sufficient justification for failing to regard an invoice as valid and undisputed and
 - any contract awarded by the subconsultant or supplier for work included in this contract includes provisions to the

Z2 Definitions

- 2.1 Others are people or organisations who are not the Employer, the Adjudicator, the Consultant or any employee, sub-consultant or supplier of the Consultant.
- 2.2 In this contract, except where the context shows otherwise, words in the singular also mean in the plural and the other way round and words in the masculine also mean in the feminine and neuter.

2.3 In the event of any discrepancy, ambiguity or conflict between the Amendments and any other contract document or condition, the terms of the Amendments prevail.

Z3 The Law

3.1 References to "this contract" mean the contract between the Employer and the Consultant including the documents listed as forming the contract in the Form of Agreement and this Agreement.

3.2 References in this contract to "applicable law" are deemed to include Statutory Requirements and include:

- that law as from time to time amended, re-enacted or substituted and
- any orders, rules, regulations, schemes, warrants, bye-laws, directives or codes of practice raised under any such law.

The Consultant complies with the applicable law. Laws are regarded as applicable to the Consultant where they impose duties, obligations or restrictions on the Employer, and the Consultant performs his obligations under this contract in compliance with such duties, obligations and restrictions as if such laws imposed such duties, obligations and restrictions on the Consultant.

3.3 Failure by the Employer to exercise his rights under this contract does not constitute waiver of those rights nor any of them nor does any such failure relieve the Consultant from any of his obligations under this contract. The waiver in one instance of any right, condition or requirement does not constitute a continuing or general waiver of that or any other right, condition or requirement.

3.4 If any provision of this contract is held by any court or competent authority to be void or unenforceable in whole or in part, the other provisions of this contract and the remainder of the affected provisions shall continue to be valid.

3.5 No approvals, comments, instructions, consents or advice or indication of satisfaction given by or from the Employer, nor any enquiry or inspection which the Employer makes or has carried out for its benefit or on its behalf at any time, operates to reduce, extinguish, exclude, limit or modify the Consultant's obligation to fulfil its duties and obligations under this contract unless it is in writing from the Employer, refers to this contract and clearly identifies the duty or obligation and the extent to which such duty or obligation is to be reduced, extinguished, excluded, limited or modified.

Z4 Communication

4.1 The Employer and the Consultant comply with the communications requirements in the Services Information.

- 4.2 A notification which this contract requires is communicated separately from other communications.
- Z5 The Employers Authority and Delegation** 5.1 The Employers Agent (to be notified to the Consultant on the Start Date) is for relevant purposes the “specified person” as defined in section 110A(6) of the Act.
- Z6 Early Warning** 6.1 Delete Clause 14.1 and insert:
- “The Consultant and the Employer give an early warning by notifying the other as soon as either becomes aware of any matter which could
- increase the total of the Prices,
 - delay Completion,
 - impair the usefulness of the *services* to the *Employer*,
 - adversely affect the work or services of Others, or
 - adversely affect the Employer (including by increasing the monies payable by the Employer to Others engaged on the Science Estate).
- In the notification the Consultant and the Employer state whether the early warning must be dealt with immediately or can wait until the next scheduled risk reduction meeting.
- The Consultant may give an early warning by notifying the Employer of any other matter which could increase his total cost. The Employer enters early warning matters in the Risk Register. Early warning of a matter for which a compensation event has previously been notified is not required.”
- Z7 Ambiguities and Inconsistencies** 7.1 The Employer or the Consultant notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The Employer gives an instruction resolving the ambiguity or inconsistency.
- Z8 Illegal and Impossible Requirements** 8.1 The Consultant notifies the Employer as soon as he considers that the Services Information requires him to do anything which is illegal or impossible. If the Employer agrees, he gives an instruction to change the Services Information appropriately.
- Z9 Providing the Services** 9.1 These conditions of contract and the warranties and undertakings in them are deemed to apply to all services performed by the Consultant both before and after the *starting date*.

Z10 Working with the Employer and Others

10.1 The Employer co-operates with Others in obtaining and providing information which they need in connection with the services. He co-operates with Others and shares the working areas with them as stated in the Services Information.

The Employer and the Consultant provide services and other things as stated in the Service Information. Any cost incurred by the Employer as a result of the Consultant not providing the services and other things which he is to provide is assessed by the Employer and paid by the Consultant.

Z11 Other responsibilities

11.1 The Consultant obtains approval of his design from Others where necessary. The Consultant's responsibility includes obtaining:

In relation to Licences which it is the Employer's responsibility to obtain, the Consultant (without taking the risk that such Licences are not obtained, save to the extent that this is caused by the Consultant's failure to provide support required by this contract and/or the Services Information)

- provides such support as the Services Information states the Consultant is to provide to the Employer in applying for and obtaining such Licences and
- provides such other support as the Employer reasonably requires, not entailing excessive cost to the Consultant (or if entailing such cost, provided the same is reimbursed by the Employer).

The Consultant ensures that the works comply with all Licences and laws.

Z12 CDM Obligations

12.1 For the purposes of the CDM Regulations

The Consultant performs all the functions and duties of a Designer as defined in the CDM Regulations, to the extent that the CDM Regulations apply to the Consultant's duties under this contract.

Z13 Limitation of the Consultants liability to reasonable skill and care

13.1 Delete Clause 21.2 and insert:

"The Consultant warrants to the Employer that in Providing the Services it exercises in the provision of the *services* all the reasonable skill and care as is to be expected of a properly qualified and competent consultant experienced in carrying out services such as its duties under this contract in relation to services of a similar scope, size, nature, timescale and complexity and on a similar site or at a similar location to the Employer's site."

The Consultant warrants and undertakes to the Employer that it uses the reasonable skill and care to see that the Scope when complete complies with any relevant performance specification or requirement including those referred to in the Consultant's design and complies with all Statutory Requirements including any conditions attached to any planning permission."

- Z14 Limitation of Liability**
- 14.1** The Consultants total liability to the Employer for all matters arising under or in connection with this contract, other than the excluded matters, is limited to the amount stated in the Contract Data and applies in contract, tort or delict and otherwise to the extent allowed under the law of the contract.
- The excluded matters are amounts payable by the Consultant as stated in this contract for
- loss of or damage to the Employer's property,
 - delay damages as stated in the Contract Data,
 - any liability arising for death or bodily injury,
 - any liability arising for losses caused by fraudulent acts or acts of a criminal nature, or
 - any liability for losses against which the Consultant is entitled to an indemnity under any policy or insurance.
- Z15 Access to and use of the site**
- 15.1** Subject to the provisions of the Service Information regarding access, the Employer allows access to and use of each part of the *site* to the Consultant which is necessary for the services included in this contract.
- The Employer does not guarantee uninterrupted or exclusive access to or use of the *site* or any working area and access is limited in accordance with this contract.
- Z16 Acceleration**
- 16.1** The Employer may instruct the Consultant to submit a quotation for an acceleration to achieve Completion before the Completion Date. A quotation for acceleration comprises proposed changes to the Prices or forecast of the total Defined Cost and a revised programme showing the earlier Completion Date. The Consultant submits details of his assessment with each quotation.
- The Consultant submits a quotation or gives his reasons for not doing so within the period for reply.
- When the Employer accepts a quotation for acceleration, he changes the Prices and the Completion Date accordingly and accepts the revised programme. If the Employer does not accept a quotation for acceleration, or does not accept the Consultant's reasons for not submitting a quotation, the Employer may issue an instruction to the Consultant to accelerate and the Consultant proceeds to accelerate in accordance with that instruction and the Employer makes his own assessment of the compensation event.
- Z17 Payment**
- 17.1** If any parent company guarantee required by this contract is not procured by the Consultant and delivered to the Employer within four weeks of the *starting date*, one quarter of the Price for Work Done to Date is retained in assessments of the amount due and is not payable to the Consultant until such documents have been delivered.

- 17.2 In addition to any other rights of the Employer whether at law or equity under this contract, whenever
- under this contract or any other contract between the Employer and the Consultant any sum of money is recoverable from or payable by the Consultant or
 - any Losses are reasonably and properly owed to, or incurred by, the Employer under or arising out of this contract or any other contract between the Employer and the Consultant
- the same may be set-off and/or deducted from any sum then due or which at any time thereafter may become due to the Consultant under this contract.
- 17.3 Not later than five days after receipt of the payment certificate the Consultant delivers to the Employer a VAT invoice in the amount of the certificate with a copy of the certificate attached. The Consultant issues a corrected VAT invoice, where required, within five days of receipt of a Pay Less Notice.
- 17.4 If the amount to be paid to the Consultant is less than the amount to be paid by or retained from the Consultant, the difference is recoverable from the Consultant as a debt due on demand.

**Z18 Parent
Company Guarantee**

- 18.1 If a parent company owns the Consultant, the Consultant gives to the Employer a guarantee by the parent company of the Consultant's performance in the form set out in the Service Information. If the guarantee was not given by the *starting date*, it is given to the Employer within four weeks of the *starting date*.

Z19 Delay Damages

- 19.1 The Consultant pays delay damages at the rate stated in the Contract Data from the Completion Date for each day until the date of Completion certified by the Employer.

If the Completion Date is changed to a later date after delay damages have been paid, the Employer repays the overpayment of damages with interest. Interest is assessed from the date of payment to the date of repayment and the date of repayment is an assessment date.

Z20 Data Protection

20.1 The Consultant is instructed to comply with the requirements of the new Data Protection Legislation, which comprises the EU General Data Protection Regulations (GDPR). This requires the Consultant to:

- 1). Review The GDRP Schedule of Data Processing (Schedule of Processing, Personal Data and Data Subjects); and
- 2). Confirm that the 'Data Protection' requirements are in place for the Consultants management of 'personal data'.

The Consultant is required to only process Personal Data as stipulated in The GDRP Schedule of Data Processing (Processing, Personal Data and Data Subjects), or unless otherwise required by law. The Consultant is required to review The GDRP Schedule of Data Processing to ensure that it includes all personal data processed in connection with the obligations under this contract, and if necessary the Consultant updates the schedule. The Consultant issues this schedule 'for acceptance' within the period for reply; if additional time is required the Consultant is to notify the Employer at the earliest opportunity. Should the Employer consider that the additional personal data notified by the Consultant is to be included in The GDRP Schedule of Data Processing, the Employer will notify their acceptance, and in doing so determine that the Consultant is authorised to process the personal data detailed within the submitted schedule. For the avoidance of doubt, the Consultant is not entitled to determine the authorised data subjects, personal data or processing under this contract.

The Consultant is also required to confirm that it has the appropriate technical and organisational measures to comply with the GDPR, and specifically The GDRP Schedule of Data Processing. The Consultant should therefore notify the Employer that either it has appropriate measures in place to achieve compliance, or alternatively that it is anticipating achieving compliance by a specified date.

If the Consultant is unaware of how the GDPR applies to the information under this contract, the UK Information Commissioner's website contains relevant guidance, or alternatively you may wish to obtain advice from a data protection specialist or legal advisor.

The Employer considers that any costs associated with complying with the GDPR are attributable to conducting business in the EU and not specific to the supply of works or services to Defra, and accordingly it is expected that this instruction does not give rise to a Compensation Event.

GDRP Schedule of Data Processing

1. The Consultant shall comply with any further written instructions with respect to processing by the Employer.
2. Any such further instructions shall be incorporated in to this Schedule.

Description	Details
Subject matter of the processing	The Consultant processes data only as required to provide the Services in accordance with the conditions of contract, including Contract Data Part 1 and Part 2.
Duration of the processing	The Consultant processes the data as required to provide the Services or any additional services or services required under the terms of this contract until the later of Completion, the Defects Date, or the end of a warranty period to which the processing of the personal data relates. Where personal data is required for more than one purpose under the terms of the contract, it is retained until the later of the Completion, Defects Date or end of a warranty period.
Nature and purposes of the processing	The nature and purpose of the processing is limited to the Consultants retention or replacement of professionally competent Key People or sub-consultants where this contract requires the Employer to provide an acceptance of a Key People or sub-consultant.
Type of personal data	The types of personal data processed under this contract is limited to name, role description, qualifications (academic achievements and professional accreditations) and experience.
Categories of personal data	The Consultant is not permitted to retain any special categories of personal data as defined under the GDPR.
Plan for the return and destruction of the data once the processing is complete UNLESS requirement under union or member state law to preserve that type of data	The Consultant processes the data until the date detailed above (duration of the processing) where after the Consultant immediately destroys the personal data.