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CA 2016 Consultancy Agreement (Public Sector) 2016

2016 CONSULTANCY AGREEMENT

Consultancy Agreement (Public Sector) (CA)

Appropriate for use by Public Sector employers who are undertaking construction works and wish to engage a consultant (regardless of discipline) to carry out services in respect of such works.

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Agreement

This Agreement

is made the 5th April 2023

Between

The Client

The Commissioners of His Majesty's Revenue and Customs

of 1 Unity Square, Nottingham NG2 1AW

And

The Consultant

Mott Macdonald Limited

Place of incorporation: England and Wales

(Company No. 01243967)^[1]

whose registered office is at Mott Macdonald House, 8-10 Sydenham Road, Croydon, Surrey, CR0 2EE

[1] Where the Consultant 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 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 Client wishes to have the following construction project carried out^[2]:
a new regional centre
at
Pilgrim Quarter, Pilgrim Street, Newcastle upon Tyne ('the Project')
as more particularly described in the Client's Brief;

Second

for the purposes of the Project the Client has requested the Consultant to act in the capacity specified in the Contract Particulars and, for the fee specified in Annex A ('the Fee'), to provide the services set out in Annex B ('the Services'), which the Consultant has agreed to do on the terms of this Agreement;

Third

Supplemental Provisions 1 and 2 (Schedule 2) will only apply in the circumstances set out in Schedule 2;

[2] State nature and location of the intended project.

Articles

Now it is hereby agreed as follows

Article 1 **Consultant's obligations**

The Consultant shall perform the Services in accordance with the Conditions as modified by the Schedule of Amendments annexed hereto.

The Conditions and Schedules shall be construed as varied accordingly and if there is any discrepancy between the Conditions or the Schedules and the Schedule of Amendments the wording of the Schedule of Amendments shall prevail.

[the above amendments to Article 1 to be endorsed on / added to the printed conditions]

Article 2 **Payment**

The Client shall pay the Consultant in accordance with the Conditions.

Article 3 **Principal Designer**

The Principal Designer for the purposes of the CDM Regulations is^[3]

██████████

of

██

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

Article 4 **Adjudication**

If any dispute or difference arises under this Contract, either Party may refer it to adjudication in accordance with clause 12.2.

Article 5 **Arbitration**

Not applicable

Article 6 **Legal proceedings^[4]**

Subject to Article 4 and (where it applies) to Article 5, the English courts shall have jurisdiction over any dispute or difference between the Parties which arises out of or in connection with this Contract.

[3] Insert the name of the Principal Designer if appointed or, where appropriate, amend to state whom the Client intends to appoint.

[4] If it is intended, subject to the right of adjudication and exceptions stated in Article 5, that disputes or differences should be determined by arbitration and not by legal proceedings, the Contract Particulars **must** state that Article 5 and clauses 12.3 to 12.8 apply and the words "do not apply" **must** be deleted. If the Parties wish any dispute or difference to be determined by the courts of another jurisdiction the appropriate amendment should be made to Article 6 (see also clause 1.5 and paragraph 15 of Schedule 1).

Contract Particulars

Note: An asterisk * indicates where selection has been or should have been made.

Part 1: General

Second Recital

The Consultant is appointed as^[5]

Designer

Article 5

Arbitration

(If neither entry is deleted, Article 5 and clauses 12.3 to 12.8 will not apply. If disputes and differences are to be determined by arbitration and not by legal proceedings, it must be stated that Article 5 and clauses 12.3 to 12.8 apply.)^[6]

Article 5 and clauses 12.3 to 12.8 (Arbitration)

* do not apply

1.1

BIM Protocol

(Not applicable unless it is stated to apply, with the title, edition, date or other identifiers of the relevant documents stated, and the identified protocol is included in the Client's Brief.)

* applies as set out in the following document(s) included in the Client's Brief

[REDACTED]

Client's Brief

(State reference number and date or other identifier of the relevant document(s) in which this is set out.)^[7]

Extract from 'About the Procurement' attached

Client's Representative

(as at the date of this Agreement)

[REDACTED]

of

[REDACTED]

Consultant's Representative

(as at the date of this Agreement)

[REDACTED]

[5] Insert function within the Consultant Team.

[6] On factors to be taken into account by the Parties in considering whether disputes are to be determined by arbitration or by legal proceedings, see the Guidance Notes. See also footnote [4].

[7] If the relevant document or set of documents takes the form of an Annex to this Contract, it is sufficient to refer to that Annex.

of
[REDACTED]

Consultant Team
(other than the Consultant)

[Name]	[Function]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Cost Plan
(State reference number and date or other identifier of the document(s) in which this is set out.)^[7]

Key Personnel^[8]
(Names and functions)

* are as follows

[Name]	[Function]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Programme
(State reference number and date or other identifier of the current document(s) in which this is set out.)^[7]

Programme dates under the current Programme

- * the date
of commencement of the Services is

3 March 2023
- * the intended period for carrying out the Services is

to the end of RIBA Stage 7 of Cat B works

Project Team
(other than Consultant Team members)

[Name]	[Function]
[REDACTED]	[REDACTED]

Third Party Agreements

[Parties]	[Date]	[Subject]
[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]		
[REDACTED]		
[REDACTED]		

[8] See the Guidance Notes.

1.3

Interim agreements etc.

Details of any interim agreements etc. (or provisions of them) not superseded by this Agreement^[9]

Not applicable

1.5

Addresses for service of notices by the Parties

(If none is stated, the address in each case, subject to clause 1.5.3, shall be that shown at the commencement of the Agreement.)^[10]

Client

Consultant

██████████

██

████████████████

██

2.11.1Consultant's liability for any one claim (excluding liability for personal injury or death) is limited to
(If no limit is specified, liability is unlimited.)

£see clause 2.11.1.1 in the Schedule of Amendments

2.11.2Consultant's liability in respect of pollution or contamination damage (excluding liability for personal injury or death) is limited to
(If no limit is specified, liability is unlimited.)

██████████

3.2.3

Contract administration – site visits

Not applicable as the Consultant is not the Contract Administrator.

3.3.1.4.2

Limits of Consultant's authority

Maximum increase in overall Project cost is

(If no limit is specified, any increase requires Client approval.)

£

Maximum increase per item is

(If no limit is specified, any increase requires Client approval.)

£

[9] See the Guidance Notes.**[10]** As to service of notices etc. outside the United Kingdom, see the Guidance Notes.

8.1.1

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.)

Amount of indemnity required

* relates to claims or series of claims arising out of one event

(If no amount is stated, insurance under clause 8.1.1 shall not be required.)

and is

[REDACTED]

Sub-limits within the overall level of cover

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.)

* [REDACTED]

Cover for asbestos 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.)

* [REDACTED]

Cover for toxic mould claims

* [REDACTED]

8.1.2

Public Liability insurance

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

* is required with a cover level of

[REDACTED]

8.2.1

Professional Indemnity insurance – expiry of required period of insurance is

(If no period is selected, the expiry date shall be 6 years from the date of completion of the Services.)

[REDACTED]
[REDACTED]

8.2.2

Public Liability insurance – required period (if shorter than the period of the Consultant's engagement) is

the duration of the Consultant's engagement

10.2

Novation

Clause 10.2

(If neither entry is deleted, clause 10.2 will not apply.)

* does not apply

11.2

Suspension: Remobilisation – period for recommencement instructions (if other than 2 months) is

12.2

Adjudication^[11]

Nominating body – where no Adjudicator is named or where the named Adjudicator is unwilling or unable to act (whenever that is established)^[12]

(Where an Adjudicator is not named and a nominating body has not been selected, the nominating body shall be one of the bodies listed below selected by the Party requiring the reference to adjudication.)

* The Royal Institution of Chartered Surveyors

[11] The Parties should either name the Adjudicator and select the nominating body or, alternatively, select only the nominating body. The Adjudication Agreement (Adj) and the Adjudication Agreement (Named Adjudicator) (Adj/N) have been prepared by JCT for use when appointing an Adjudicator.

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

Part 2: Third Party Rights and Collateral Warranties

If such rights or warranties are required from the Consultant, complete the particulars below:

Identity of Beneficiaries

Name, category or description of beneficiary and interest in the Project ^{[13][14]}	Third Party Rights (TPR) or Collateral Warranty (CW) ^[13]
any tenant of the whole or any part of the Project	CW
any government department with an interest in the Project	CW

Paragraph 5.2 of Schedule 1 – Third Party Rights (Purchaser or Tenant)

Not applicable

Clause 10.3.2 – Collateral Warranties

Where any Beneficiaries are entitled to a Collateral Warranty, the form of warranty
(If no form is annexed or sufficiently identified – or if the further particulars required by the following entry are not given – the identified Beneficiaries shall only be entitled to Third Party Rights under clause 10.3.1.)

* is annexed to this Agreement

Collateral Warranties – Further particulars^[15]

(If insufficient particulars are given to complete the form, identified Beneficiaries are only entitled to Third Party Rights under clause 10.3.1.)

The further details required for completion of the form of Collateral Warranty are:

[Clause etc. number]

[]

[Entry]

[]

[13] The Client may only confer Third Party Rights on or require the grant of a Collateral Warranty to those persons who are sufficiently identified by name, category or description. If in relation to an identified Beneficiary it is not stated whether rights are to be granted as Third Party Rights or by Collateral Warranty they are granted as Third Party Rights and clause 10.3.1 applies.

[14] In the case of Beneficiaries identified by name, specify whether the Beneficiary is a Purchaser, Tenant or Funder and, in the case of Purchasers and Tenants, the part of the Project they have agreed to purchase or lease.

[15] As to completion of this entry, see the Guidance Notes.

Attestation

Note on Execution

This Agreement should be executed by both the Client and the Consultant either under hand or as a deed. As to factors relevant to that choice, see the Guidance Notes.

Execution under hand

If this Agreement is to be executed under hand, use the form set out on the following page. Each Party or his authorised representative should sign where indicated in the presence of a witness who should then sign and set out his name and address.

Execution as a Deed

If this Agreement is to be executed as a deed, each Party should use the relevant form marked 'Execution as a Deed' in accordance with the notes provided.

Other forms of Attestation

In cases where the forms of attestation set out are not appropriate, e.g. in the case of certain housing associations and partnerships or if a Party wishes an attorney to execute this Agreement on his behalf, the required form(s) may be inserted in the vacant space below and/or on the following pages for execution under hand or (in the case of the Client) as a deed, as appropriate.

Notes on Execution as a Deed

For the purposes of execution as a deed, two forms are provided for execution, one for the Client and the other for the Consultant.

Execution by the Client

In the case of a Local Authority Client it is anticipated that execution will be by affixation of the common seal in the presence of authorised officers.

Where a Local Authority or other Public Sector Client prefers to use any other recognised and authorised form for executing deeds, this can be inserted in the space below the printed form.

Execution by the Consultant

The form for the Consultant provides four methods of execution, **(A)** to **(D)**, for use as appropriate.

- 1 The full name of the Consultant (whether an individual, a company or other body) should be inserted where indicated at the commencement of the relevant form. This applies irrespective of the method used.
- 2 For public and private companies incorporated and registered under the Companies Acts, the three principal methods of execution as a deed are:
 - (A)** through signature by a Director and the Company Secretary or by two Directors;
 - (B)** by affixing its common seal in the presence of a Director and the *Company* Secretary or of two Directors or other duly authorised officers; or
 - (C)** signature by a single Director in the presence of a witness who attests the signature.

Methods **(A)** and **(C)** are available to public and private companies whether or not they have a common seal. Methods **(A)** and **(B)** are available to Limited Liability Partnerships. (Method **(C)** was introduced by section 44(2)(b) of the Companies Act 2006.)

- 3 Where method **(A)** is being used in the case of a company, delete the inappropriate words and insert in the spaces indicated the names of the two Directors, or of the Director and the Company Secretary, who are to sign. Where this method is being used in the case of a Limited Liability Partnership (LLP), insert after the words "**(A)** acting by" the words "two members", delete the remainder of that line and substitute "Member" for the references to "Director" and "Company Secretary/Director".
- 4 If method **(B)** (affixing the common seal) is adopted in the case of companies where either or both the authorised officers attesting its affixation are not themselves a Director or the *Company* Secretary, their respective office(s) should be substituted for the reference(s) to Director and/or to *Company* Secretary/Director. (In the case of execution by bodies that are not companies or LLPs, the reference to "*Company*" under the second signature should be deleted where appropriate.) In the case of execution by LLPs, the word "Member" should be substituted for the references to "Director" and "*Company* Secretary/Director" in the same way as for method **(A)**.
- 5 Method **(C)** (execution by a single Director) has been introduced primarily, but not exclusively, for 'single officer' companies. The Director should sign where indicated in the presence of a witness who should then sign and set out his name and address.
- 6 Where the Consultant is an individual, he should use method **(D)** and sign where indicated in the presence of a witness who should then sign and set out his name and address.

Execution as a Deed

Executed as a Deed by the Client

namely The Commissioners of His Majesty's Revenue and Customs

acting by two Authorised Signatories

DocuSigned by:

Execution as a Deed

Executed as a Deed by the Consultant

namely ¹ Mott Macdonald Limited

(A) acting by a Director and the Company Secretary/two Directors of the company ^{2,3}

DocuSigned by:
(Print name of signatory)

48C4AFB2FC944F9...

Signature

and

DocuSigned by:
(Print name of signatory)

9A437AA5F27945C...

Signature

Note: The numbers on this page refer to the numbered paragraphs in the Notes on Execution as a Deed.

Conditions

Section 1 Definitions and Interpretation

Definitions

1.1 Definitions

Unless the context otherwise requires, the following words and phrases, where they appear in capitalised form in the Agreement or these Conditions, shall have the meanings stated or referred to below:

Acceleration Quotation: see **clause 6.4**.

Additional Payments: see **clause 7.1.4**.

Additional Services: see **clause 6.2**.

Adjudicator: an individual appointed under **clause 12.2** as the Adjudicator.

Agreement: the Agreement to which these Conditions are annexed, including its Recitals, Articles and Contract Particulars.

Arbitrator: an individual appointed under **clause 12.4** as the Arbitrator.

Article: an article in the **Agreement**.

Beneficiary: a Purchaser, Tenant or Funder in whom Third Party Rights may be vested or to whom a Collateral Warranty is agreed to be granted under **clause 10.3**.

BIM Protocol: (where applicable) the document identified as such in the **Contract Particulars** (against the reference to **clause 1.1**).

Building Contract: the main contract(s) for the construction of the Project.

CDM Regulations: the Construction (Design and Management) Regulations 2015.

Change: see **clause 6.3**.

Client's Brief: the document identified as such in the **Contract Particulars** (against the reference to **clause 1.1**), as amended from time to time in accordance with the Client's instructions.

Client's Representative: the person named as such in the **Contract Particulars** (against the reference to **clause 1.1**) or any replacement appointed by the Client from time to time.

Conditions: the clauses set out in sections 1 to 12 of these Conditions, together with and including the Schedules hereto.

Consultant's Design Information: Design Information required to be supplied by the Consultant under this Contract whether under the BIM Protocol or otherwise.

Consultant's Representative: the person named as such in the **Contract Particulars** (against the reference to **clause 1.1**) or any replacement appointed in accordance with **clause 5.2**.

Consultant Team: the Consultant and the persons named as such in the **Contract Particulars** (against the reference to **clause 1.1**) or otherwise notified to the Consultant.

Contract: the agreement between the Client and the Consultant relating to the provision of the Services, comprising the Agreement, these Conditions and the other documents referred to in the

Contract Particulars.

Contract Administrator: the person appointed as such for the Building Contract.

Contract Particulars: the particulars in the Agreement and there described as such, including the entries made by the Parties.

Contractor: the person named as main contractor in the Building Contract.

Cost Plan: the plan identified as such in the **Contract Particulars** (against the reference to **clause 1.1**), as amended/revised from time to time.

Design Information: designs, drawings, specifications, programmes, schedules and other material 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.

Fee: see **Annex A**.

Funder: a person named or identified as such in or by **Part 2 of the Contract Particulars** who agrees to provide finance for the Project.

Incentive Payment: see **Annex A**.

Information Release Schedule: the schedule referred to as such in (or its equivalent for the purposes of) the Building Contract.

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 Contract 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.

Key Personnel: the persons listed or referred to as such in or by the **Contract Particulars** (against the reference to **clause 1.1**) or their replacements appointed under **clause 5.2**.

Lead Consultant/Lead Designer: the persons identified as such in the Consultant Team or any replacement notified by the Client.

Local or Public Authority: a body that is a 'contracting authority' as defined by the PC Regulations.

Omission: see **clause 4.5**.

Optional Services: the Services (if any) listed as such in **Annex A**.

Parties: the Client and the Consultant together.

Party: either the Client or the Consultant.

Pay Less Notice: see **clause 7.7.1**.

PC Regulations: the Public Contracts Regulations 2015.

Programme: the document identified as such in the **Contract Particulars** (against the reference to **clause 1.1**), as amended/revised from time to time.

Project Team: the Consultant Team, the Contractor (or prospective Contractor) where selected and such specialists as the Client or Lead Consultant shall nominate from time to time.

Purchaser: a person named or identified as such in or by **Part 2 of the Contract Particulars** who agrees to purchase all or part of the Project.

Recitals: the recitals in the **Agreement**.

Reimbursable Expenses: see **Annex A**.

Scheme: Part 1 of the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998.

Services: the services listed in **Annex B** that are to be performed by the Consultant (including such

of the Optional Services as the Client requires from time to time) and any Additional Services agreed or instructed in accordance with this Contract, subject in each case to any Changes.

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 Contract 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, or is to be, connected.

Tenant: a person named or identified as such in or by **Part 2 of the Contract Particulars** who agrees to acquire a leasehold interest in all or part of the Project.

Third Party Agreement: any agreement or licence between the Client 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 Consultant (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 **Contract Particulars** (by reference to **clause 1.1**).

Third Party Rights: the rights set out in Schedule 1 vested in a Beneficiary under **clause 10.3.1**.

VAT: Value Added Tax.

Interpretation

1.2 Headings, references to persons, legislation etc.

In the Agreement and these Conditions, unless the context otherwise requires:

- 1.2.1 the headings, notes and footnotes are included for convenience only and shall not affect the interpretation of this Contract;
- 1.2.2 the singular includes the plural and vice versa;
- 1.2.3 a gender includes any other gender;
- 1.2.4 a reference to a 'person' includes any individual, firm, partnership, company and any other body corporate;
- 1.2.5 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 including corresponding legislation in any other relevant part of the United Kingdom; and
- 1.2.6 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.

1.3 Scope of the Contract

Save as otherwise stated in the Contract Particulars (by reference to this clause), nothing contained in any document referred to in this Contract shall override or modify the Agreement or these Conditions and it is intended that this Contract should govern all the Services and their performance, whether carried out before or after the date of the Agreement, and shall unless otherwise stated supersede in their entirety and with retrospective effect any interim agreement, letter of intent and/or other arrangement on the basis of which the Services may have commenced.

1.4 Contracts (Rights of Third Parties) Act 1999

Other than such rights of any Purchasers, Tenants and/or Funder as take effect pursuant to clause 10.3.1, nothing in this Contract confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it.

1.5 Notices and other communications

- 1.5.1 Any notice or instruction under this Contract shall be in writing.
- 1.5.2 Any notice required to be given in accordance with this clause 1.5.2 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.

1.5.3 Any other communications and documents to be supplied may or (where so required) shall be sent or transmitted by the means (electronic or otherwise) and in such format as the Parties have agreed or may from time to time agree in writing. In default of an agreed procedure they may be sent by the means in clause 1.5.2 or any other effectual means.

1.5.4 The Parties' addresses for delivery of notices shall be those stated in the Contract Particulars or subsequently notified to the other Party.

1.6 **Applicable law**

This Contract shall be governed by and construed in accordance with the law of England.^[16]

[16] Where the Parties do not wish the law applicable to this Contract to be the law of England appropriate amendments should be made.

Section 2 Consultant's General Obligations

2.1 Performing the Services

The Consultant shall perform the Services in accordance with the Client's Brief, exercising the level of skill, care and diligence reasonably to be expected of a consultant holding himself out as competent to take on the performance of the Services and experienced in projects of similar size, scope and complexity, and shall carry them out in a manner that complies with the Statutory Requirements and is consistent with the Cost Plan, the Programme and any Third Party Agreements.^[17]

2.2 Compliance with instructions

In performing the Services the Consultant shall comply with all lawful instructions from the Client (or from the Lead Consultant, Contract Administrator or other designated member of the Consultant Team on behalf of the Client) as to matters within the scope of the Project and the Consultant's competence, subject only to clause 6.5.

2.3 Co-operation and supply of Design Information

The Consultant shall liaise and co-operate fully with the other members of the Project Team, both directly and through Consultant Team and Project Team meetings, and in accordance both with any applicable Framework Agreement and with such procedures as the Client or Lead Consultant may establish from time to time. In particular (but without limitation) the Consultant shall:

- 2.3.1 supply in accordance with the Programme and/or Information Release Schedule all the Consultant's Design Information required as part of the Services, together with any other information reasonably requested by the Client or Project Team;
- 2.3.2 notify other members of the Project Team in due time of any requirements that the Consultant may have for Design Information from any of them that is not provided for in the Programme or Information Release Schedule;
- 2.3.3 promptly notify the Client and, where applicable, the Lead Consultant of any inconsistency or divergence (actual or prospective) of which he becomes aware in relation to the Client's Brief, the Cost Plan, the Programme and/or any Third Party Agreements and of any delay or impediment in performing the Services;
- 2.3.4 promptly notify those to whom the Consultant has supplied Consultant's Design 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 Design Information if he becomes aware of inaccuracies or inconsistencies in the items received.

2.4 Specification of materials

Unless required by this Contract or otherwise authorised in writing by the Client or Lead Consultant, the Consultant will not select, or permit the selection 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 Contract.

2.5 Joint Fire Code

Insofar as the Services concern matters within the Joint Fire Code, the Consultant shall observe its provisions.

2.6 Consultant's Representative and Key Personnel – roles and availability

The Consultant shall ensure that, unless otherwise agreed with the Client, Key Personnel shall fulfil their identified roles in relation to the Services and that they and the Consultant's Representative (or competent deputies) are at all reasonable times available for communication and consultation with the

[17] By its assumption that the consultant is 'experienced in projects of similar size, scope and complexity' clause 2.1 may impose a duty of care higher than might otherwise arise. If that standard is not appropriate, the clause should be revised accordingly.

Client and Project Team. Instructions given to the Consultant's Representative shall be deemed to have been issued to the Consultant.

2.7 Sub-contracting

The Consultant shall not sub-contract the performance of any of the Services without the Client's prior consent. The Consultant shall remain fully responsible for any work sub-contracted.

2.8 Records and time charge estimates

2.8.1 The Consultant shall keep full accounting records in accordance with any accounting requirements and procedures specified in paragraph 8.2 of Annex A and shall on reasonable prior notice make any such records available for inspection by or on behalf of the Client during normal business hours.

2.8.2 To the extent that the Consultant is entitled to time-based charges (whether as part of the Fee or otherwise) or Reimbursable Expenses, he shall prior to each work stage agreed as part of the Programme give the Client a budgetary estimate (or updated estimate) for the time-based charges and, where material, any Reimbursable Expenses for that work stage.

2.9 Limitations on Consultant's obligations

In performing his obligations under this Contract and subject to clause 2.10, the Consultant:

2.9.1 shall be entitled to assume the accuracy (in accordance with its terms) of any Design Information supplied to him by the Client or by any member of the Consultant Team unless, as part of the Services or by an instruction, he is expressly required to investigate matters in that Design Information which are within the scope of his competence;

2.9.2 gives no warranty as to work or services provided by any person other than the Consultant and his sub-contractors; and

2.9.3 shall not be liable for any failure or delay to the extent he is prevented from performing any of the Services by any event or cause that is beyond his control.

2.10 Exceptions to clause 2.9

Nothing in clause 2.9.1 or 2.9.2 shall affect or modify any obligation or duty of the Consultant:

2.10.1 to warn, whether under clause 2.3.3, clause 2.3.4 or otherwise;

2.10.2 (where he is the Lead Designer) under clause 3.1.1;

2.10.3 (where he is the Lead Consultant but not Lead Designer) under clause 3.1.2; or

2.10.4 (where he is the Contract Administrator) under clause 3.2.3.

2.11 Limitations of Consultant's liability^[18]

2.11.1 Where the Contract Particulars specify or refer to any limitation in relation to this clause 2.11.1, then, notwithstanding any other provision of this Contract, the Consultant's aggregate liability for any and all claims arising under or in connection with this Contract (whether in contract, in tort, for breach of statutory duty or otherwise but excluding liability for personal injury or death) shall be limited in the manner and to the amount stated.

2.11.2 Where the Contract Particulars specify or refer to any limitation in relation to this clause 2.11.2, the Consultant's liability to the Client in respect of pollution or contamination damage (excluding liability for personal injury or death) shall be limited in the manner and to the amount stated.

[18] See the Guidance Notes.

Section 3 Lead Consultants and Contract Administration

3.1 Design – Lead Designer and Lead Consultant

- 3.1.1 Where the Consultant is Lead Designer, he shall, in addition to design work which he himself is to perform under this Contract, co-ordinate and integrate design work for the Project and (subject to any necessary authority or approval of the Client under clause 3.3) promptly issue or, where appropriate, request the issue by or on behalf of the Client of all instructions reasonably necessary for the purpose of integrating that design work.
- 3.1.2 Where the Consultant is Lead Consultant but not Lead Designer, he shall exercise the level of skill, care and diligence required by clause 2.1 to monitor that such design co-ordination and integration are carried out.

3.2 Contract Administrator's duties and discretions

Where the Consultant is the Contract Administrator, he shall:

- 3.2.1 exercise his powers, duties and discretions fairly, impartially and as required by the Building Contract and nothing in clause 3.3.1 shall in any way be deemed to affect, prevent or inhibit the exercise of those powers, duties and discretions;
- 3.2.2 issue the Design Information and other information required to be provided by him in accordance with the Information Release Schedule or at such other times as the Contractor may reasonably require, having regard to the progress of the Project, except to the extent that the Consultant is prevented from doing so by any event or cause that is beyond his control;
- 3.2.3 make regular site visits to inspect the progress and quality of the works being carried out as part of the Project and to check their conformity with the Building Contract at such intervals and in accordance with such other requirements as are set out or referred to in the Contract Particulars.

3.3 Limits of authority

- 3.3.1 Notwithstanding appointment as Lead Consultant, Lead Designer and/or Contract Administrator, subject to clause 3.2.1 in the case of the Contract Administrator and save as otherwise expressly stated in this Contract, no Consultant shall have authority without the Client's prior approval to:
- 3.3.1.1 approve (or otherwise) any designs or any specification or selection of materials for the Project by any person, or the quality and standards of materials and workmanship to be comprised in it;
- 3.3.1.2 vary any agreed design or specification of work or materials or their quality or quantity;
- 3.3.1.3 progress from a work stage specified in Annex B to the next work stage;
- 3.3.1.4 issue any instruction or any notice under the Building Contract which would:
- 3.3.1.4.1 delay the completion of the Project; or
- 3.3.1.4.2 increase the cost of the Project or any item forming part of it by more than the respective amount(s) stated in the Contract Particulars;
- 3.3.1.5 terminate the Building Contract, or the Contractor's employment under it, or the appointment or engagement of any member of the Project Team, agree any amendment to the terms of such agreements or waive compliance by the Contractor or any of the Project Team with their respective obligations under them; or
- 3.3.1.6 enter into any contractual or other commitment on behalf of the Client.

- 3.3.2 In the event of an emergency on the site, the Lead Consultant or Contract Administrator shall nevertheless have authority to issue any instruction reasonably required to prevent danger to persons or damage to the Project or any other property, but shall promptly notify the Client of any such instruction and its likely time and cost implications.

Section 4 Client's General Obligations

4.1 Supply of Client information

The Client shall provide the Consultant with such information in his possession or control as is reasonably necessary, or likely to be useful, for the purposes of providing the Services and/or compliance with the Statutory Requirements. That information shall be supplied in accordance with the Programme or (where not expressly included in the Programme) promptly upon the Consultant's reasonable request.

4.2 Consultant Team appointments

Where at the date of execution of this Contract any appointments remain to be made to the Consultant Team, the Client shall use all reasonable endeavours to make those appointments promptly and within the times envisaged by, or necessary for the purposes of, the Programme and compliance with the Statutory Requirements.

4.3 Notification of appointments etc.

The Client or Lead Consultant on his behalf shall promptly notify the Consultant of:

- 4.3.1 additions to or other changes in the Project Team and/or the services to be provided by members of it;
- 4.3.2 the appointment of the (or each) Contractor, together with relevant details of the Building Contract with him;
- 4.3.3 any novations to the Contractor of appointments or contracts with the Project Team; and
- 4.3.4 any necessary corrections to any information supplied under clause 4.1.

4.4 Decisions, approvals and instructions

Decisions, approvals and instructions reasonably required by the Consultant shall be made or given by the Client, or by the Lead Consultant or Contract Administrator or other designated member of the Consultant Team on his behalf, within a reasonable time of the Consultant's request.

4.5 Omissions

No instruction shall be given for the omission of any of the Services (an 'Omission') with a view to their performance by any other person unless either:

- 4.5.1 the Consultant is in material breach of his obligations and such reallocation is reasonably necessary to ensure the proper carrying out of those Services and/or the progress of the Project in accordance with the Programme; or
- 4.5.2 the Consultant recommends reallocation to a specialist or another consultant.

Where clause 4.5.1 or 4.5.2 applies, then, unless it is agreed that the Consultant shall procure the work in question by sub-contracting it to that specialist or consultant, there shall be a fair and reasonable adjustment to the Fee (and, if appropriate, to the instalments specified in Annex A) to be agreed between the Parties or, in default of such agreement, assessed by the Client.

4.6 Contingent payments – information and assessment

Where any condition attaching to a payment to the Consultant under this Contract relates to an event or matter that is not or may not be within the immediate knowledge of the Consultant, the Client shall promptly notify the Consultant of the occurrence of the event or fulfilment of the condition and, where an assessment of the payment is required, shall procure that that assessment is carried out promptly.

4.7 Project Team – delay or default

If the Consultant is at any time materially delayed or hindered in performing the Services by any delay or default on the part of any other member of the Project Team and notifies the Client and/or the Lead

Consultant with relevant particulars, the Client shall exercise his powers to ensure, as far as is reasonably practicable, that the delay or default is promptly corrected.

Section 5 Representatives and Key Personnel

5.1 Client's Representative

The Client's Representative shall be the authorised recipient for all notices to and other communications with the Client under this Contract and, subject only to such limits on his authority as are from time to time notified to the Consultant in accordance with clause 1.5.2, shall otherwise have full power and authority to represent the Client. If at the date of this Contract no appointment has been made to the post, or if at any time the appointee ceases to hold the post, the Client shall promptly appoint or replace the Client's Representative and notify the Consultant accordingly.

5.2 Consultant's Representative and Key Personnel – changes

5.2.1 The Consultant shall not remove the Consultant's Representative or any of the Key Personnel from their post or replace such person without the Client's prior approval of the removal or of the replacement appointee. Where practicable, the Consultant shall arrange an appropriate handover period. The Client shall not unreasonably withhold or delay any such approval.

5.2.2 If for any reason the Consultant's Representative or any of the Key Personnel ceases to hold their post, the Consultant shall, subject to such approval, promptly appoint a replacement.

5.3 Client's right to require removal

After consultation with the Consultant, the Client may require the removal of the Consultant's Representative or any of the Key Personnel or of any other person engaged in performing the Services if, in the Client's reasonable opinion, their performance or conduct is or has been unsatisfactory.

Section 6 Further Services, Changes and Fee Adjustments

6.1 Optional Services

The Consultant shall perform any Optional Services that the Client instructs and shall be entitled to charge for such services on the basis set out in Annex A. The Consultant shall promptly notify the Client if at any time he considers such services necessary or desirable for the purposes of the Project.

6.2 Additional Services

In addition to the Optional Services, the Client may instruct the Consultant to perform services which are additional to or represent an alteration in the Services as then specified (including changes to the definitive design) ('Additional Services') to the extent that they are within the scope of the Project and the Consultant's competence. The Consultant shall promptly notify the Client of any Additional Service that he at any time considers necessary or desirable.

6.3 Changes

The Fee and/or other amounts payable to the Consultant under this Contract shall be adjusted for additional work and for any additional costs that the Consultant incurs as a result of any of the following (a 'Change'):

- 6.3.1 instructions for any Additional Services;
- 6.3.2 instructions for any Omissions;
- 6.3.3 instructions (or changes in the Client's Brief, Cost Plan or Programme) that require or necessitate any other material change in any of the Services or in the sequence or timing for performing any of them; and
- 6.3.4 any event or cause related to the Project that is beyond the Consultant's control and materially alters, prolongs or disrupts the performance of the Services, including any default on the part of the Client, the Contractor or any other member of the Project Team.

6.4 Notification by the Consultant

Where the Consultant wishes to claim an adjustment of the Fee and/or any other additional payment or reimbursement in respect of any Additional Services or other Change, he shall promptly and before implementing the relevant instruction notify the Client to that effect upon receipt of the instruction, resolution of any objection under clause 6.5 or the occurrence of the relevant event or cause (as the case may be). Such notification shall include, or as soon as practicable be followed by:

- 6.4.1 (in the case of any instructions for Additional Services that are within clause 6.3.3) an estimate of the required time and cost involved that is consistent, in the terms of cost, with any rates set out in Annex A that are properly applicable;
- 6.4.2 (in the case of any Omissions) the amount of any costs and expenses already reasonably and properly incurred or reasonably, properly and unavoidably committed to; and
- 6.4.3 (in the case of any event or occurrence within clause 6.3.4) an estimate of the amount of any loss and/or expense and of any delay arising from it.

Where additional time is required for performance of any of the Services and the Client so requests, the Consultant shall also promptly give a quotation for accelerating or resequencing the Services or part of them with a view (so far as is reasonably practicable) to offsetting the actual or potential delay (an 'Acceleration Quotation') and, where the instruction, event or occurrence affects or is likely to affect the Contractor and/or any other member of the Project Team, the Consultant shall immediately liaise with them so as to enable the Lead Consultant to report to the Client upon the additional time and cost implications for the Project.

6.5 Consultant's right of objection

If the Consultant considers that, irrespective of any extension of time or financial adjustment, an instruction for a Change would compromise or materially and adversely affect the Project, the

performance of the Services or compliance with the Statutory Requirements, and he makes a reasonable written objection to the Client, the Consultant shall not be obliged to comply for so long as the objection remains unresolved. In the event of such an objection, the Parties shall promptly meet and consult as necessary with other relevant members of the Project Team with a view to immediate resolution of the matter. Time for compliance with clause 6.4 shall be adjusted accordingly.

6.6 Adjustment of Fee, other payments and time

Where following notification by the Consultant under clause 6.4 the Client confirms his instruction for a Change within clauses 6.3.1 to 6.3.3 or the Consultant is able to demonstrate loss and/or expense and/or delay arising from an event or cause within clause 6.3.4:

- 6.6.1 in the case of Additional Services or any matter within clause 6.3.3 or 6.3.4, the addition to the Fee, Reimbursable Expenses and/or any 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 Client, based upon the net additional time spent by the Consultant in performing them;
- 6.6.2 in the case of an Omission, the reduction in (or amount offset against any increase in) any payment and, in a case falling within clause 6.3.4, the amount of any loss and/or expense payable to the Consultant shall in default of agreement between the Parties be fairly valued by or on behalf of the Client, taking account (in the case of an Omission instructed other than in the circumstances mentioned in clauses 4.5.1 and 4.5.2) of such costs and expenses as are referred to in clause 6.4.2;
- 6.6.3 where an Acceleration Quotation has been given, the Consultant shall be under no obligation to accelerate or resequence performance of the Services unless and until the quotation is accepted or the Parties otherwise agree, but in each other case a fair adjustment of time shall where relevant be made;
- 6.6.4 in making any valuation pursuant to this clause 6.6, the Client or valuer shall be entitled to make reasonable adjustments to the timing of any related payment or instalment that has not then fallen due; and
- 6.6.5 where a Change or adjustment of the Fee or any other amount payable under this Contract affects the criteria for, or achievability of any Incentive Payment to which the Consultant may be entitled, then, save in the case of any default on the part of the Consultant, a fair and reasonable adjustment shall be made.

6.7 Adjustment for default

If as a result of a default by the Consultant the Client incurs a liability to another member of the Consultant Team or to any contractor or specialist, the Consultant shall allow, and the Client, without affecting his other rights or remedies, shall be entitled to adjust the Fee or other payment to reflect, any amounts reasonably and properly paid by the Client on that account.

Section 7 Payment

7.1 Amounts payable

The Client shall pay the Consultant:

- 7.1.1 the Fee;
- 7.1.2 Reimbursable Expenses;
- 7.1.3 any Incentive Payments payable; and
- 7.1.4 any amounts payable pursuant to section 6 that are not included by way of adjustment of any other amount ('Additional Payments')

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

7.2 Fee – instalments

The Fee shall be payable by instalments at the invoice dates or stages/milestones respectively specified in Annex A ('the specified dates'). The due date for payment in each case shall be the specified date or (if later) the date of submission of the Consultant's invoice.

7.3 Reimbursable Expenses and Additional Payments

Reimbursable Expenses and (unless otherwise agreed) any Additional Payment, or instalment of it, may be included in an invoice for an instalment of the Fee following the period in which such expenses were paid or incurred or to which the Additional Payment or instalment relates. Each such amount shall become due upon the same date as the Fee instalment.

7.4 Incentive Payments

The due date for any Incentive Payment shall be the date upon which it becomes payable in accordance with the conditions attaching to it, as set out or referred to in Annex A, or (if later) the date of submission of the Consultant's invoice.

7.5 Invoices

Each invoice shall state the sum that the Consultant considers due to him at the due date, together with VAT, shall show the basis on which that sum has been calculated and shall be accompanied by such documents, vouchers and receipts as are specified in paragraph 8.1 of Annex A or are otherwise reasonably required by the Client.

7.6 Final date for payment

In each case the final date for payment of any amount payable under clauses 7.1 to 7.4 shall be 14 days from the due date.

7.7 Payment – amount and notices

- 7.7.1 If the Client intends to pay less than the sum stated as due from him in the Consultant's invoice, he shall not later than 5 days before the final date for payment give notice to the Consultant of that intention (a 'Pay Less Notice') specifying the sum the Client considers to be due to the Consultant at the date the notice is given 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.
- 7.7.2 Unless a Pay Less Notice is given, the Client shall pay the sum specified in the invoice.
- 7.7.3 A Pay Less Notice may be given on behalf of the Client by the Client's Representative or by any other person who the Client notifies the Consultant as being authorised to do so. It is immaterial to the requirement for the giving of such notice that the amount the Client then considers to be due may be zero.

7.8 Interest

If the Client fails to pay a sum, or any part of it, due to the Consultant under this Contract by its final date for payment, the Client shall, in addition to any unpaid amount that should properly have been paid, pay the Consultant 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 7.8 shall be recoverable as a debt. Acceptance of a payment of interest under this clause 7.8 shall not be construed as a waiver of the Consultant's right to proper payment of the principal amount due, to suspend performance under clause 7.9 or to terminate his engagement under clause 11.5.

7.9 Consultant's right of suspension

- 7.9.1 If the Client fails to pay the Consultant the invoiced sum or, if a Pay Less Notice is given, the amount specified in that notice (together with any VAT properly chargeable in respect of such sum or amount) by the final date for payment and the failure continues for 7 days after the Consultant has given notice to the Client of his intention to suspend the performance of the Services and the grounds for such suspension, the Consultant, 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 Consultant shall notify the Client of the resumption of the Services.
- 7.9.2 Where the Consultant exercises his right of suspension under clause 7.9.1, 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.
- 7.9.3 Applications in respect of any such costs and expenses shall be made to the Client and the Consultant shall with his application or on request submit such details of them as are reasonably necessary for ascertaining the amount in question.

Section 8 Insurance

8.1 Professional Indemnity and Public Liability insurance

The Consultant shall maintain with reputable insurers that have a place of business in the United Kingdom:

- 8.1.1 Professional Indemnity insurance with limits of indemnity of the types and in amounts not less than those stated in the Contract Particulars; and
- 8.1.2 if the Contract Particulars state that it is required, 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 Contract 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.

8.2 Period of insurance

- 8.2.1 Subject to the proviso in clause 8.1, Professional Indemnity insurance shall be maintained from the date of this Contract until the expiry of the period stated in the Contract Particulars; that obligation shall not be affected by the expiry or termination of the Consultant's engagement.
- 8.2.2 Unless a shorter period is stated in the Contract Particulars, Public Liability insurance (where required) shall be maintained for the duration of the Consultant's engagement.

8.3 Evidence of insurance

The Consultant shall on reasonable notice send to the Client such documentary evidence as the Client may reasonably require that such insurances have been effected and/or are being maintained.

8.4 Non-availability of Professional Indemnity insurance

If Professional Indemnity insurance as at renewal has ceased to be available at commercially reasonable rates, the Consultant shall promptly notify the Client in order that they may discuss the means of best protecting their respective positions.

Section 9 Use of Consultant's Design Information, Confidentiality etc.

9.1 Use of the Consultant's Design Information

- 9.1.1 Unless otherwise agreed in writing in relation to any specific items, all rights including (without limitation) copyright in the Consultant's Design Information shall remain vested in the Consultant.
- 9.1.2 Subject to clause 9.1.4 and to all sums due and payable under this Contract to the Consultant having been paid, the Consultant grants to the Client an irrevocable royalty-free licence to copy and use the Consultant's Design Information and to reproduce the designs and content of that Design Information for any purpose relating to the Project including (without limitation) its construction, completion, maintenance, letting, sale, promotion, advertisement, reinstatement, alteration, refurbishment and repair.
- 9.1.3 The licence referred to in clause 9.1.2:
- 9.1.3.1 shall enable the Client to copy and use the Consultant's Design Information for an extension of the Project, but (unless terms for such use are stated in paragraph 9 of Annex A) not to reproduce any designs contained in that Design Information for any such extension;
- 9.1.3.2 includes the right to grant sub-licences; and
- 9.1.3.3 shall continue in force notwithstanding the expiry or termination of the Consultant's engagement.
- 9.1.4 Where the design work to be performed by the Consultant:
- 9.1.4.1 is not a scheme design or detail design work; or
- 9.1.4.2 is a scheme design or detail design work but the Consultant's engagement is terminated by the Client under clause 11.5.1 prior to completion of that design or design work,
- the reproduction of any such design or design work in the execution of the Project or any part of it shall be subject to such payment and other terms as are fair and reasonable in all the circumstances.
- 9.1.5 The Consultant shall not be liable for the consequences of any use of the Consultant's Design Information by the Client or any other person for any purpose other than that for which it was prepared.

9.2 Confidentiality and publicity

- 9.2.1 During the Consultant's engagement and for a period of 6 years after its expiry or termination:
- 9.2.1.1 the Consultant shall keep all Project-specific information confidential; and
- 9.2.1.2 each Party shall keep confidential all information supplied to him regarding the business and affairs of the other Party that is of a confidential nature.
- 9.2.2 The undertakings in clause 9.2.1 shall not apply to the extent that:
- 9.2.2.1 the information supplied is known to the recipient Party independently and without restriction;
- 9.2.2.2 the information supplied is in, or comes into, the public domain other than through wrongful use or disclosure by that Party;
- 9.2.2.3 the disclosure or use by that Party is reasonably necessary for the proper performance of the Services or this Contract or to enforce any rights under this Contract; or

9.2.2.4 that Party is required by law to disclose it.

9.2.3 The Client's consent shall be required to any publicity or publication relating to the Project but shall not be unreasonably delayed or withheld.^[19]

9.2.4 Where the Client is a Local or Public Authority or other body of the type mentioned in Supplemental Provision 1, his obligations of confidentiality shall be subject to that Supplemental Provision.

[19] See the Guidance Notes.

Section 10 Assignment, Novation, Third Party Rights and Collateral Warranties

10.1 Restrictions on assignment

Subject to clause 10.2, where it is stated to apply, neither the Client nor the Consultant shall without the consent of the other assign this Contract or any rights thereunder.

10.2 Novation^[20]

Where the Building Contract is a design and build contract and the Contract Particulars state that this clause 10.2 applies, the Consultant shall, within 28 days of the Client's request notified in accordance with clause 1.5.1, execute and deliver to the Client a novation agreement with the Contractor in the form identified in the Contract Particulars or such other form as the Client may reasonably require. With effect from the date of that novation agreement references to the Client in this Contract shall (unless the context otherwise requires) be construed as references to the Contractor but, save as expressly provided by the form of novation, any then subsisting variations to the Services and other obligations of the Parties shall continue to apply and the rights and obligations of the Consultant in respect of the Project shall otherwise remain unchanged.

10.3 Third Party Rights and Collateral Warranties

10.3.1 Where Part 2 of the Contract Particulars provides that a Beneficiary is entitled to Third Party Rights under this Contract, the rights set out in Schedule 1 shall vest in that Beneficiary on the date of receipt by the Consultant of the Client's notice to that effect, given in accordance with clause 1.5.2 and stating the name of the Beneficiary, his address for communications and the nature of his interest in the Project.

10.3.2 Where Part 2 of the Contract Particulars provides that a Beneficiary is entitled to a Collateral Warranty from the Consultant, identifies the relevant form and gives the details required to complete it, the Consultant, within 14 days of receipt of notice from the Client given in accordance with clause 1.5.2, identifying the Beneficiary and nature of his interest in the Project and accompanied by the form of warranty identified in the Contract Particulars, shall execute the Warranty and deliver it to the Beneficiary or as the Client directs.

10.3.3 Where this Contract is executed as a deed, any collateral warranty shall be executed as a deed; where this Contract is executed under hand, any such warranty may be executed under hand.

10.3.4 Where Third Party Rights have vested in any Purchaser or Tenant, the Client and the Consultant shall not be entitled without the consent of that Purchaser or Tenant Beneficiary to amend or vary the express provisions of this clause 10.3.4 or, as they affect the Beneficiary, those of Schedule 1 but, subject thereto, the rights of the Client and/or the Consultant:

10.3.4.1 to terminate the Consultant's engagement under this Contract, or to agree to rescind this Contract itself;

10.3.4.2 to agree to amend or otherwise vary or to waive any terms of this Contract;

10.3.4.3 to agree to settle any dispute or other matter arising out of or in connection with this Contract, in each case in or on such terms as they shall in their absolute discretion think fit,

shall not be subject to the consent of any Purchaser or Tenant Beneficiary.

10.3.5 Where Third Party Rights have been vested in a Funder pursuant to clause 10.3.1:

10.3.5.1 no amendment or variation shall be made to the express terms of this clause 10.3 or, as they affect the Funder, those of Schedule 1, without the prior written

[20] As to forms of novation agreement, see the Guidance Notes.

consent of the Funder; and

10.3.5.2 neither the Client nor the Consultant shall agree to rescind this Contract, and the rights of the Consultant to terminate his engagement under it or to treat it as repudiated shall in all respects be subject to the provisions of paragraph 9 of Schedule 1

but, subject thereto, unless and until the Funder gives notice under paragraph 8 of Schedule 1, the Consultant shall remain free without the consent of the Funder to agree with the Client to amend or otherwise vary or to waive any term of this Contract and to settle any dispute or other matter arising out of or in connection with it, in each case in such terms as they think fit, without any requirement that the Consultant obtain the consent of the Funder.

10.3.6 The Client acknowledges that the Consultant is entitled to rely on any notice given by a Funder under paragraph 8 of Schedule 1 as conclusive evidence of the right of the Funder to give such notice and that acceptance of the instructions of the Funder or Funder's nominee following such notice shall not constitute a breach of the Consultant's obligations under this Contract.

Section 11 Suspension by the Client and Termination

11.1 Suspension by the Client

The Client may at any time on not less than 14 days' notice to the Consultant given in accordance with clause 1.5.2 require him to suspend performance of the whole or any part of the Services. Following the issue of a notice under this clause 11.1, the Client shall pay the Consultant in accordance with section 7:

- 11.1.1 any accrued instalments of the Fee and of any Additional Payment then unpaid;
- 11.1.2 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;
- 11.1.3 all Reimbursable Expenses accrued; and
- 11.1.4 any demobilisation costs properly and necessarily incurred by the Consultant in complying with the notice,

together with any VAT properly payable.

11.2 Remobilisation

The Client may at any time within 2 months (or such other period as is specified in the Contract Particulars) following the notice under clause 11.1 instruct the Consultant to recommence the performance of the suspended Services. The Consultant shall comply with any such instruction as soon as reasonably practicable and the Client shall pay the Consultant any remobilisation costs properly and necessarily incurred by him as a result.

11.3 Notification of costs

The Consultant shall:

- 11.3.1 notify the Client promptly of the amount of any demobilisation and remobilisation costs which he intends to claim;
- 11.3.2 provide to the Client such supporting documents as the Client may reasonably require to verify the amount claimed; and
- 11.3.3 use all reasonable endeavours to minimise those costs.

11.4 Extended suspension

In the case of a suspension by the Client of the whole or a substantial proportion of the Services for any reason, where the Client has not within the period referred to in clause 11.2 instructed the Consultant to recommence the performance of all or substantially all the Services that remain to be performed, the Consultant, after giving to the Client not less than 14 days' prior notice of his intention to do so, may give notice to the Client terminating the Consultant's engagement. Each notice under this clause 11.4 shall be given in accordance with clause 1.5.2 and, if notice of termination is given, clause 11.6 shall apply.

11.5 Termination

- 11.5.1 The Client may at any time give the Consultant not less than 14 days' notice terminating his engagement.
- 11.5.2 If either Party is insolvent, the other may give notice to that Party terminating the Consultant's engagement with immediate effect.
- 11.5.3 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 14 days, the other Party may give notice to the defaulting Party terminating the Consultant's engagement with

immediate effect.

- 11.5.4 Where this Contract is one to which regulation 73(1) of the PC Regulations applies and the circumstances set out in regulation 73(1)(a), 73(1)(b) or 73(1)(c) of those regulations apply, the Client shall be entitled by notice to the Consultant to terminate the Consultant's engagement.
- 11.5.5 Notice of termination of the Consultant's engagement shall not be given unreasonably or vexatiously.
- 11.5.6 Each notice referred to in clauses 11.4 and 11.5 shall be given in accordance with clause 1.5.2.

11.6 Consequences of termination

- 11.6.1 Following the issue of a notice of termination under clause 11.4 or 11.5:
 - 11.6.1.1 the Parties shall consult and take all reasonable steps to bring the Services to an orderly close within the period of notice (or, if the termination takes immediate effect, within 14 days thereafter); and
 - 11.6.1.2 the Consultant shall deliver to the Client within 14 days copies of the Consultant's Design Information (including any information prepared prior to the date of termination and not previously provided to the Client), provided that in the case of termination under clause 11.4 or by the Client under clause 11.5.4 (regulation 73(1)(a) or 73(1)(c)) or where the Consultant terminates under clause 11.5, the Consultant shall be obliged to do so only against the Client's payment of any amount due under clause 11.6.2.
- 11.6.2 The amount due on termination from the Client to the Consultant or (if a negative amount) from the Consultant to the Client shall be the aggregate of:
 - 11.6.2.1 an amount determined in accordance with Annex A (after making any appropriate apportionments);
 - 11.6.2.2 any Reimbursable Expenses;
 - 11.6.2.3 (where the termination is not due to the Consultant's insolvency or material breach or under clause 11.5.4 (regulation 73(1)(b))) any demobilisation and other costs reasonably and properly incurred by the Consultant as a result of the termination; and
 - 11.6.2.4 (where the Consultant terminates his engagement under clause 11.5.2 or 11.5.3) any other direct loss and/or damage caused to the Consultant by the termination,

less amounts previously paid to the Consultant and less (where the termination is due to the Consultant's insolvency or material breach or under clause 11.5.4 (regulation 73(1)(b))) any additional costs reasonably and properly incurred by the Client in procuring the completion of the Services by others, but together in each case with any VAT properly payable.
- 11.6.3 The amount due on termination shall be calculated and invoiced within 2 months of the date of termination by the Party giving notice of it and the final date for payment shall be 14 days from the date of submission of the invoice. With respect to the invoice the provisions of clause 7.7 (or its converse) shall apply.
- 11.6.4 Where the Client terminates the Consultant's engagement under clause 11.5.1, the Client shall not be liable to the Consultant for any loss of profit, loss of contracts or other losses or, except as set out in clauses 11.6.2.1 to 11.6.2.3, any costs or expenses that arise out of the termination.
- 11.6.5 Termination of the Consultant's engagement shall not affect any accrued rights or remedies of either Party.

Section 12 Settlement of Disputes

Mediation

12.1 Mediation

Subject to Article 4, if a dispute or difference arises under this Contract which cannot be resolved by direct negotiations, each Party shall give serious consideration to any request by the other to refer the matter to mediation.

Adjudication

12.2 Adjudication

If a dispute or difference arises under this Contract 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 Contract Particulars.

Arbitration

12.3 Not applicable

12.4 Not applicable

12.5 Not applicable

12.6 Not applicable

12.7 Not applicable

12.8 Not applicable

Schedules

Schedule 1 Third Party Rights

(Clause 10.3.1)

- 1 The Consultant warrants to each Beneficiary in whom rights under this Schedule are vested by notice under clause 10.3.1 that he has complied and will comply with his obligations under this Contract.
- 2 The rights vested in each Beneficiary shall come into effect upon such notice being given or, in the case of a Purchaser or Tenant, the date of practical completion of the Project, if later.
- 3 In the event of any breach of the warranty in paragraph 1, the Consultant's liability to the Beneficiary shall be limited to that proportion of the losses arising which it would be just and equitable to require the Consultant to pay having regard to the extent of the Consultant's responsibility for those losses on the basis that:

- 3.1 each other member of the Consultant Team has given contractual warranties and undertakings or conferred third party rights on the Beneficiary as regards the performance of his services in connection with the Project that are no less onerous than those of the Consultant and that there are no exclusions or limitations on liability as between any such Consultant and the Client;
- 3.2 the Contractor has provided contractual undertakings or conferred third party rights on the Beneficiary in respect of his obligations under the Building Contract (excluding for the purposes of this paragraph 3 any work or services sub-contracted to the Consultant, through novation or otherwise) and that there are no exclusions or limitations of liability affecting the Building Contract;
- 3.3 the other members of the Consultant Team and the Contractor have each paid to the Beneficiary such proportion of the Beneficiary's losses as it would be just and equitable for them to pay having regard to their responsibility for those losses.

(Reference to exclusions and limitations shall for the purposes of this paragraph 3 include joint or composite insurance arrangements having a similar effect.)

- 4 The Consultant shall be entitled in any action or proceedings by a Beneficiary to rely on any term in this Contract and to raise the equivalent rights in defence of liability as it would have against the Client under this Contract.
- 5 In the case of a Purchaser or Tenant Beneficiary, the losses for which the Consultant shall be liable in the case of a breach of his warranty under paragraph 1 of this Schedule, but subject to paragraphs 2, 3 and 4, are:
 - 5.1 the reasonable costs of repair, renewal and/or reinstatement of any part or parts of the Project to the extent that they result from the breach and that the Purchaser or Tenant incurs such costs or becomes liable for them, either directly or by way of financial contribution; and
 - 5.2 (if Part 2 of the Contract Particulars state that this paragraph 5.2 applies and specify a maximum liability) any other losses incurred by the Purchaser

up to that maximum liability.

If by the Contract Particulars paragraph 5.2 is stated or deemed not to apply, the Consultant shall not be liable for any losses incurred by the Purchaser or Tenant other than the costs referred to in paragraph 5.1, and, whether or not that paragraph applies, the Consultant shall have no liability to the Purchaser or Tenant for any delay in the performance of the Services.

- 6 No Purchaser or Tenant Beneficiary shall have authority to issue any instruction or direction to the Consultant in relation to this Contract, nor shall any Funder have such authority unless and until the

Funder has given notice under paragraph 8.

- 7** In the case of each Beneficiary, the Consultant:
- 7.1 grants an irrevocable royalty-free licence to use the Consultant's Design Information in the same terms as is agreed to be granted to the Client by clause 9.1.2, but subject to clauses 9.1.3 to 9.1.5 and limited in the case of a Purchaser or Tenant of part only of the Project to such of that Design Information as relates to the part acquired or leased; and
 - 7.2 undertakes on request to produce evidence that Professional Indemnity insurance is being maintained in accordance with section 8 and, in the circumstances mentioned in clause 8.4, promptly to notify and discuss protective measures with the Beneficiary.
- 8** If so required by a Funder by written notice given to the Consultant at any time during the Consultant's engagement under this Contract, the Consultant shall, subject to the conditions in paragraph 10, accept the instructions and directions of the Funder in respect of the Project to the exclusion of the Client.
- 9** The Consultant shall not exercise any right to terminate his engagement under this Contract or to accept a repudiation of it by the Client without having first given to the Funder not less than 14 days' written notice that the Consultant has the right to terminate or accept repudiation, accompanied by copies of any related notices to the Client (whether of any specified default, suspension or otherwise) previously given by the Consultant. If prior to the expiry of the period of notice to the Funder, the Funder gives notice to the Consultant under paragraph 8 and complies with the conditions in paragraph 10, the Consultant shall not exercise the right to terminate or accept repudiation and this Contract shall continue as if the right had not arisen.
- 10** The conditions referred to in paragraphs 8 and 9 are that the Funder shall in writing to the Consultant accept liability for all amounts due to the Consultant but unpaid at the date of the Funder's notice under paragraph 8 and for performance of the Client's other obligations under this Contract, including payment of all amounts subsequently becoming due to the Consultant. As from such acceptance, without affecting any accrued liability of the Consultant to the Client for any breach of this Contract, the Consultant's obligations and liability under this Contract shall be to the Funder in place of the Client; the Funder shall be entitled to delegate or assign to a nominee the right to give instructions or directions and/or to perform any other functions of the Client under this Contract but shall remain liable as principal obligor and not merely as surety for all amounts due or become due to the Consultant under this Contract.
- 11** The Consultant shall have no liability to the Funder in respect of any delay in performing the Services unless and until the Funder gives notice under paragraph 8 and acceptance in accordance with paragraph 10, and shall not be liable for any amount paid to or deducted by the Client on account of any delay.
- 12** The rights of a Beneficiary contained in this Schedule may be assigned without the consent of the Consultant by the Beneficiary, by way of absolute legal assignment, to another person (P1) and by P1, by way of absolute legal assignment, to another person (P2). In such cases the assignment shall only be effective upon written notice of it being given to the Consultant. No further or other assignment of these rights will be permitted and in particular P2 shall not be entitled to assign these rights.
- 13** Unless otherwise agreed between the Consultant and the Beneficiary, any notice to be given under this Schedule shall be sent by the means specified in clause 1.5.2.
- 14** No action or proceedings for any breach of the rights contained in this Schedule shall be commenced against the Consultant after the expiry of the relevant period from the date of completion of the Services. For the purposes of this paragraph, the relevant period shall be:
- 14.1 where this Contract is executed under hand, 6 years; and
 - 14.2 where this Contract is executed as a deed, 12 years.
- 15**
- 15.1 This Schedule shall be governed by and construed in accordance with the law of England and subject to paragraph 14.2 the English courts shall have jurisdiction over any dispute or difference between the Consultant and the Beneficiary which arises out of or in connection with this Schedule.
 - 15.2 Where a Funder gives notice under paragraph 8, any dispute or difference which shall arise between the Consultant and the Funder (or its nominee) shall be subject to the provisions

of Article 4 and (where they apply) Article 5 and clauses 12.3 to 12.8.

Schedule 2 Supplemental Provisions

(Third Recital)

Supplemental Provision 1 applies where the Client is a Local or Public Authority or other body of the type mentioned in that provision; Supplemental Provision 2 applies where the Client is a Local or Public Authority and this Contract is subject to the PC Regulations.

Transparency

- 1 Where the Client is a Local or Public Authority or other body to whom the provisions of the Freedom of Information Act 2000 ('FOIA') apply, the Parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of FOIA, the content of this Contract is not confidential. The Client shall be responsible for determining in his absolute discretion whether any of the content of this Contract is exempt from disclosure in accordance with the provisions of FOIA. Notwithstanding any other term of this Contract:
 - 1.1 the Consultant hereby consents to the Client publishing any amendments to the standard form JCT 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 FOIA redacted;
 - 1.2 the Client shall promptly inform the Consultant of any request for disclosure that he receives in relation to this Contract.

The Public Contracts Regulations 2015

- 2 Where the Client is a Local or Public Authority and this Contract is subject to the PC Regulations^[21]:
 - 2.1 where regulation 113 of the PC Regulations applies to this Contract, the Consultant shall include in any sub-contract entered into by him suitable provisions to impose the requirements of regulation 113(2)(c)(i) and (ii);
 - 2.2 the Consultant shall include in any sub-contract entered into by him provisions requiring the sub-consultant:
 - 2.2.1 to supply and notify to the Consultant the information required (as applicable) under regulations 71(3), 71(4) and 71(5) of the PC Regulations; and
 - 2.2.2 to include in any sub-subcontract he in turn enters into provisions to the same effect as required under paragraph 2.2.1 of Supplemental Provision 2;
 - 2.3
 - 2.3.1 the Consultant shall include in any sub-contract entered into by him provisions that shall entitle him to terminate the sub-consultant's engagement where there are grounds for excluding the sub-consultant under regulation 57;
 - 2.3.2 in the event the Client requires the Consultant to terminate a sub-consultant's engagement pursuant to regulation 71(9) the Consultant shall take the appropriate steps to terminate that engagement and where required by the Client under regulation 71(9) shall, or in circumstances where there is no such requirement may, appoint a replacement sub-consultant.

[21] An explanatory summary of those provisions in the PC Regulations that are reflected in this Contract is contained in the Guidance Notes.

Annex A Fee and Other Payments

Note: An asterisk * indicates where selection has been or should have been made.

1 The Fee

1.1 The Fee is:

* refer to Annex A, Section 1 in the Schedule of Amendments

1.2 'Total Construction Cost' means for these purposes the amount payable to the Contractor under the Building Contract for the Project excluding:

- any fees for design work by the Contractor or his sub-contractors^[22]
- any direct loss and/or expense payable to the Contractor, and
- VAT

and with no deduction for any liquidated damages payable or deductible or for any deductions under the Building Contract in respect of incorrect setting out, defects allowed to remain and the like.

2 Payment of Fee etc.

The Fee shall be payable in accordance with section 7 in the following amounts or percentages^[23]:

*[Invoice date or stage/
milestone]*

[Percentage of Fee or amount]

Dates and durations within "Annex A" as attached to the Schedule of Amendments are indicative for CAT B and will be confirmed and agreed at the outset of each stage

3 Incentive Payments^[24]

Not applicable

4 Optional Services

The following comprise the Optional Services which, where required, shall be for the following amounts or calculated and charged on the following basis:

[Optional Service]

[Amount/basis of calculation]

Refer to Annex A, section 3 in the Schedule of Amendments

[22] If the Fee is in whole or part to be calculated as a percentage of Total Construction Cost but the design fee element is unlikely to be readily identifiable, it may be more convenient to delete this line and make the appropriate adjustment when agreeing the percentage.

[23] If the dates or stages/milestones are not specified sufficiently clearly, the Scheme for Construction Contracts (under the Housing Grants, Construction and Regeneration Act 1996) will apply.

[24] To be completed where the Consultant is entitled to any incentive payment(s), subject to fulfilment of the conditions, either as part of a wider Project incentive scheme or as an individual incentive that is more readily dealt with separately and not as an element of the Fee. The entry for these particulars may conveniently refer to a separate scheme document; where full details are to be included here, the entry should describe the basis and amount(s)/percentage payment(s), the conditions for payment and the dates/times at which payments are scheduled to be ascertained and made.

5 Applicable rates

Refer to Annex A, section 3 in the Schedule of Amendments

6 Additional Services

The rates specified above shall apply (so far as properly applicable) for the purposes of any Additional Services instructed or other Changes within clause 6.3 *subject to the following:

[_____]

7 Reimbursable Expenses

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

[Type]

[Maximum amount/rate]

[REDACTED]
[REDACTED]

[REDACTED]

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

8 Supporting documents and accounting records

8.1 Each invoice that includes any of the following types of charge or expenditure should be accompanied by the following documents:

[Charge/Expenditure]

[Documentation]

[REDACTED]

8.2 The accounting requirements and procedures referred to in clause 2.8 (if any) are as follows:

HMRC Requirements in Schedule 3 in the Schedule of Amendments

9 Consultant's designs – additional usage

The terms upon which the Consultant is prepared to license such use of his designs as is mentioned in clause 9.1.3 are as follows:

10 VAT

All amounts and rates shown above are exclusive of VAT.

Annex B The Services^[25]

Annex B to the Schedule of Amendments

[25] Each Project is likely to have its own individual requirements for each member of the Consultant Team and the listing for this Annex is therefore a matter for the Client and the relevant member(s) of the Consultant Team.

Guidance Notes

Introduction

General

The JCT Consultancy Agreement is for Public Sector employers undertaking projects of a size or complexity that involve the appointment of a team of consultants. It is not intended for use on private sector projects.

It includes options that are designed to make it appropriate for each member of the consultant team, whatever their discipline and whether their respective appointments are for a limited period or for the duration of the project.

It can nevertheless be used for procurements that involve only a single or a limited number of consultants. With only two exceptions it is suitable for use in projects that are based on any JCT main contract and, since it provides an option for novation of the appointment to the main contractor, can be used in projects under the JCT Major Project Construction Contract or JCT Design and Build Contract. The two exceptions are the JCT - Constructing Excellence Contract, which itself is designed to act also as a form of consultant appointment at any level, and the JCT Homeowner Contract, which in the HO/C (with consultant) version has its own form of consultant appointment (HO/CA).^[26]

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').

Underlying principles

The JCT Consultancy Agreement is predicated on a professional duty of care on the part of the Consultant (clause 2.1) that should be generally acceptable to both consultant and employer on Public Sector projects. The Agreement seeks at clause 2.9 to set reasonable limits to the 'pro-activity' that some might otherwise seek to imply as part of the Consultant's obligations; that is balanced by the requirements for co-operative working with both the Consultant Team and the wider Project Team and a duty to warn on the part of the Consultant in relation to those teams as well as to the Client (clauses 2.3, 2.9 and 2.10).

In terms of liability to the Client, there is no net contribution provision but there are the provisions for caps on liability referred to below and also the obligations of the Client under clause 4.7. Third party rights are subject to net contribution.

The Consultant's duties to consult expressly extend to financial aspects of the Agreement, requiring prompt prior notification of any increase in payment required for additional services instructed (or as loss and expense for prevention or unavoidable delay), as well as notification of any additional time required (clause 6.4). That is coupled with a requirement for proper estimates from the Consultant and for review, prior to each work stage, of any prospective time charges or expenses for that work stage (clause 2.8).

The Client retains close control over material matters, including the authority levels of the Lead and other Consultants (section 3) but, at the same time, the Contract offers flexibility in relation to delegation and in relation to structuring of the fee and other payments (Annex A and clauses 6.6.4 and 6.6.5), with options for capping the Consultant's liability (clause 2.11), novation and the grant of third party rights or collateral warranties (section 10). The Client also has the right to suspend or terminate at will on 14 days' notice (section 11).

Annex A (Fee) requires completion by the Parties and Annex B (Services) requires the Parties to list the Services. JCT has considered whether a basic and adjustable listing should be provided in Annex B but has concluded that, in addition to those published by various bodies:

- many Clients and almost all Lead Consultants already have appropriate services lists for the

[26] The Agreement is not intended to cover the provision of pre-construction services by a prospective Contractor who in a two stage tendering process is included in the Project Team following the initial tender round. For that purpose the JCT recommends use of its Pre-Construction Services Agreement (General Contractor) (PCSA).

various Consultant disciplines, and

- a further listing by JCT, which would almost certainly require adjustment to accord with the particular circumstances, would probably complicate, rather than simplify, the practical process of agreeing the list.

The framing of the Annexes is nevertheless of central importance since the proper operation both of Annex A and of the Agreement as a whole may depend upon the adequacy of Annex B. Annex B requires a conventional framework of work stages that apply across each relevant discipline which not only lists aims and deliverables at each stage but adequately defines Consultants' functions and responsibilities (including responsibility to monitor the work of others) and the scope of their respective services (including the general and/or specific advice that may be required at each stage). Amendments or additions for individual Consultants in respect of their Services must be compatible with those for others.

Agreement

Recitals

The First Recital requires the insertion of only a brief description of the Project: the detailed description is intended to be given by the Client's Brief. The Second Recital refers to the description of the Consultant's role, which forms the first entry to be made in the Contract Particulars; it also refers to the two key documents which the Parties are required to agree, namely Annex A (Fee), for which a reasonably flexible framework is provided, and Annex B (Services) where, for reasons given above, the listing is a matter for the Parties, in conjunction with the Lead Consultant and other consultants where appropriate. The Third Recital has been added in CA 2016 to refer to new Supplemental Provisions 1 and 2 as set out in Schedule 2 (these provisions are commented on below in the context of the Conditions to which they relate).

Articles

The Articles follow the same general format as JCT main contracts, so far as that format is applicable; identification of members of the Consultant Team, other than the Consultant himself, is left to the fifth entry against clause 1.1 in the Contract Particulars. Reflecting the statutory requirement for the appointment of a Principal Designer under the CDM Regulations (though he will also be a member of the Consultant Team), there is provision for identifying him at Article 3, but not the Principal Contractor, since the latter will not generally be appointed prior to formation of the Consultant Team, or its core. Article 5 retains the option of agreeing in advance that arbitration should be the final means of dispute resolution (subject to the two exceptions on questions of law set out in clause 12.7 of the Conditions).

Contract Particulars

Following the description of the Consultant's role referred to above and the entry to be made where arbitration is the chosen method of final dispute resolution, the Contract Particulars entries for clause 1.1 cover the principal listings over and above Annex A and Annex B and the list of beneficiaries entitled to Third Party Rights or Collateral Warranties which is set out in or by Part 2 of the particulars. In this 2016 edition, there is a new entry in relation to BIM; if a BIM Protocol is to apply, this must be stated and the identified protocol included in the Client's Brief.

Clause 1.3 has been framed with a view to all the services provided by a Consultant for the Project being governed solely by a single Consultancy Agreement, whenever they are performed and whenever the Agreement is executed. It is however recognised that this may not be practical in cases where special, detailed terms have been agreed for the performance of particular preliminary services; the Contract Particulars entry for clause 1.3 has therefore been inserted to allow preservation of those special terms.

Clause 1.5.2 provides specified methods of service for several of the most important types of notices under the Contract, namely those relating to suspension of the Project, default and termination and those relating to novations and the grant of third party rights/collateral warranties.

Attention is drawn to the caps on the Consultant's liability that may be agreed for the two entries relating to clause 2.11: the first is an overall cap on liability, a matter of some importance in view of the position on net contribution, and the second, which relates to pollution and contamination, should generally be considered in conjunction with the entries for clause 8.1.1. The printed entries for clauses 2.11.1 and 2.11.2 relate to financial limits: any other limitations on liability should also be identified there, either directly or by reference to identified documents. Attention is also drawn to the entry for

clause 3.2.3, enabling the Parties to record in detail the inspection duties of the Consultant where his role requires.

The entries for clause 3.3.1.4 that relate to the limits of authority have been inserted for the purpose of recording such levels as may have been agreed prior to execution of the Agreement. If none have then been agreed, the matter can still be dealt with as necessary by subsequent written authority from the Client.

The two entries for clause 8.1.1 (Professional Indemnity insurance) differ from the standard JCT format, with the inclusion of asbestos and toxic mould cover. Asbestos and toxic mould covers are not generally commercially available to Contractors but cover is more commonly available to Consultants for these risks. However, such additional cover should only be required in those cases where it might be relevant.

In relation to Part 2 of the Contract Particulars, the JCT itself does not at present publish forms of Collateral Warranty for Consultants. It will be noted that, to be effectual, any requirement for Collateral Warranties rather than Third Party Rights requires not only identification of the relevant form but also the particulars necessary to complete that form in each case.

Attestation

General

The attestation provisions are in the standard JCT layout, with separate forms for execution under hand and execution as a deed. Different attestation provisions are still required under the law of Scotland (for which the Scottish Building Contract Committee Limited issues appropriate documentation); other clauses may also be needed in the case of certain housing associations, partnerships and, as discussed below, foreign companies.

Execution under hand or as a deed

The primary factor governing the decision to execute the Contract under hand or as a deed is whether the limitation period for instituting proceedings is to be 6 years, as in the case of execution under hand, or 12 years, where the Contract is executed as a deed. The mode of execution of the Contract will also determine the mode of execution of collateral warranties (clause 10.3.3) and (for both third party rights and collateral warranties) the limitation period that applies to them.

Foreign companies

An increasing number of foreign companies involved in development and construction now themselves carry on business in the United Kingdom, rather than operating here through UK subsidiaries.

Under existing Companies legislation (the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 (SI2009/1917)), a foreign company can execute deeds either:

- by affixing its common seal or any manner of execution permitted under the laws of its place of incorporation; or
- by expressing the document to be executed by the company under the signature of persons authorised to sign on its behalf in accordance with its domestic law.

Many foreign companies do not have a seal and the authority of relevant signatories needs to be checked but if there is any doubt, professional advice should be obtained.

To avoid complications as respects the service of claims or notices outside the jurisdiction, consideration should also be given to inserting an obligation on the foreign company for the duration of the Contract to maintain an agent for service within England and Wales or within Scotland or Northern Ireland, as appropriate.

Conditions

Section 1 – Definitions and Interpretation

Most of the terms defined or referred to in clause 1.1 are standard to the JCT suite as a whole, or at least to a material segment of it, and the meaning of most of them will be self-evident. 'Additional Payment' covers payments for Optional and Additional Services or for other Changes where the

additional amount takes a form other than adjustment of the Fee. 'Third Party Agreement' covers the wide variety of agreements and arrangements with others that may affect the way that the Consultant's Services are to be carried out but, unlike certain other definitions, is limited to agreements and arrangements listed at the outset; where the Consultant Team needs to take account of later agreements and arrangements of that type, appropriate instructions should be given and the matter treated as a Change under section 6.

The provisions in the Interpretation sub-section will be familiar to JCT users, except for clause 1.3, which, as mentioned in relation to the Contract Particulars, is intended, so far as is practicable, to bring the performance of the Consultant's Services on the Project within the umbrella of a single agreement.

In CA 2016 there are straightforward changes with new clause 1.2.6 and in clause 1.3, both of which relate to BIM, i.e.:

- first, with a view to avoiding any 'form over substance' argument, clause 1.2.6 reflects the fact that, under BIM, designs and information supplied to or by the Consultant may not take the same name or form as their hardcopy equivalent, albeit they clearly serve the same function
- secondly, in terms of clause 1.3 and precedence of documents, any BIM Protocol stated to apply is a document as referred to in the Contract but some model protocols claim in the case of conflict they override the Agreement and other contract documents; JCT 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.

Section 2 – Consultant's General Obligations

Clauses 2.1 to 2.7, governing performance of the Services, are generally in standard JCT form.

Clause 2.1 sets out the duty of skill and care expected of the Consultant in carrying out the Client's Brief and the requirements for performance both in accordance with the Statutory Requirements and in a manner consistent with the other main documents, i.e. the Cost Plan, Programme and any Third Party Agreements.

The duty of care imposed on the Consultant is the level of skill and care reasonably to be expected of a consultant "experienced in projects of similar size, scope and complexity". The Consultant will generally have that experience and have given details of it at the pre-qualification stage. There may be circumstances in which it is appropriate to qualify or modify the duty and the clause in particular respects, but professional consultants will in any event be aware of their duty under relevant Codes of Practice and discuss with the Client in advance any matters arising in that regard.

Clause 2.2 sets out the general duty to comply with the Client's instructions or those given on his behalf. The latter will generally be given by or through the Lead Consultant in the pre-construction period and by the Contract Administrator thereafter, but the Contract recognises that there may be limited delegation to others in the initial stages, for example to the Lead Designer on certain design integration issues where he is not the overall Lead Consultant (see clause 3.1).

Clause 2.3 sets out the Consultant's duty to co-operate with the Client and Project Team as a whole, updating them as necessary and giving warning both of any delay and of any errors or inconsistencies in documentation, in a manner that is consistent with any Framework Agreement that there may be and with such procedures as may be established to govern the workings of the Consultant and Project Teams.

Clauses 2.4 and 2.5 add requirements for compliance with the British Council for Offices guidelines on the selection of materials and with the Fire Code, if relevant to the Services.

Clauses 2.6 and 2.7 and the (clause 1.1) Contract Particulars relating to the Consultant's Representative and Key Personnel, which are reinforced by clauses 5.2 and 5.3, are intended to ensure, so far as is practicable, that the personnel that the Consultant uses on the Project are those that the Client has approved.

In relation to clause 2.7, it will be noted that the Client has an absolute discretion on the issue of sub-contracting (i.e. the appointment of sub-consultants); when there is, or may be, a need for this in the course of what may be a lengthy appointment, Client's approval, at least in principle, should be sought in advance of entry into the Agreement. Supplemental Provision 2 (Schedule 2), which will only apply where the Client is a Local or Public Authority and the Contract is subject to the Public Contracts Regulations 2015 ('the PC Regulations'), is also relevant to the issue of sub-contracting. For a summary of those provisions from the regulations reflected in Supplemental Provision 2, please go to www.jctltd.co.uk. (Reference should always be made to the wording of the regulations themselves and

if there is any doubt as to the applicability of the PC Regulations generally or any specific provision, appropriate legal advice should be taken.)

Clause 2.8 requires the Consultant to keep accounting records in accordance with Annex A (paragraph 8) and, consistently with the general approach in clause 2.3, requires him regularly, prior to each work stage, to provide or update budgetary estimates for time-charges and expenses for which he can claim reimbursement.

Clauses 2.9 to 2.11 are concerned with limitation. Clause 2.9 is intended to make clear that the Consultant is not obliged to check material supplied by the Client or the work of other Consultants, unless specifically required to do so, nor to warrant work or services by persons not under his control. Equally he is not liable for failures or delay arising from matters outside his control. However, where his role is such that he should be required to monitor particular matters, these can and should be specified in Annex B or an instruction. Clause 2.10 also makes clear that each Consultant's general duty to warn remains, including (but not limited to) the specific matters referred to in clause 2.3 (e.g. actual or prospective delays, errors and inconsistencies in designs or related information) and does not affect the performance of certain specific duties of the Lead Designer, Lead Consultant and Contract Administrator under clauses 3.1 and 3.2.

Clause 2.11 provides two limitation options: first, the option of an overall cap on the Consultant's liability under the Contract (leaving aside any liability for death or personal injury) and, secondly, the option of a limitation on liability for pollution or contamination damage. Any overall cap should be considered in the light of the position on net contribution and both options should also be considered in conjunction with the Professional Indemnity cover position. As indicated in the notes relating to the Contract Particulars, any limitations over and above the financial limits should also be identified in those particulars.

The JCT considers that the Agreement represents a fair balance of risk. However, if it is felt appropriate to alter or adjust that balance in any particular case by inclusion of a net contribution clause, that can readily be done, based on the text of paragraph 3 of Schedule 1 (Third Party Rights), substituting 'breach of the Consultant's obligations under this Contract' for 'breach of the warranty in paragraph 1' and 'Client' for 'Beneficiary'.

Section 3 – Lead Consultants and Contract Administration (and Annex B)

Section 3 follows up section 2 by making specific provisions regarding aspects of the roles of the Lead Consultant, Contract Administrator and Lead Designer ('the lead consultants', though all three roles may be vested in the same Consultant).

Clause 3.1.1 sets out the Lead Designer's responsibility for design co-ordination/integration and, so far as he is able, for ensuring that appropriate instructions are given in that regard; clause 3.1.2 differentiates between that and the role of the Lead Consultant where he is not also the Lead Designer.

Clause 3.2, mirroring the Building Contract, states the Contract Administrator's obligations with regard to the exercise of his powers generally, the supply of Design Information during the construction phase and to make site visits. Clause 3.2.1 is in effect an express saving provision in relation to the independent exercise of powers, duties and discretions on which the Building Contract is predicated.

The saving provision is important also in the context of clause 3.3.1.4.2 since clause 3.3.1, subject to the other (clause 3.3.2) exception for emergency site action, expressly limits the lead consultants' authority (and that of the Consultant Team generally) to commitments and/or spending levels that are expressly stated in the Contract or which otherwise have the Client's prior approval.

The framing of Annex B, the overall schedule of Services for the Project, is initially a matter for the Client and Lead Consultant, together with other consultants as appropriate. As indicated in the Introduction, there are several base models and many variants in existence. In JCT's view, and in order to iron out possible inconsistencies at the earliest possible stage, it is advantageous if the schedule takes the form of a composite document showing clearly the roles and responsibilities of each of the principal members of the Consultant Team, rather than one limited to the specific services required under the particular Consultancy Agreement. In relation to the issues of approval and authority referred to above, it is important that it should show clearly the various stages of the timetable, including the points at which Client approval is to be sought, and also, to the extent not incorporated in the schedule, that detailed procedures and authorised expenditure levels etc. consistent with the schedule should be established at the earliest opportunity.

Section 4 – Client's General Obligations

Leaving aside appointment of the Client's Representative (identified in the Contract Particulars or to

be appointed under clause 5.1) and the Client's payment obligations (which are dealt with in sections 6 and 7), the Client's principal obligations are:

- to supply the information he has that is reasonably necessary for performance of the Services or compliance with the Statutory Requirements (which include CDM Regulations and Health and Safety legislation generally) (clause 4.1);
- to make any necessary appointments to the Consultant Team (clause 4.2);
- to notify the Consultant of relevant appointments and transactions (including authorisation of any Consultant other than the Lead Consultant/Contract Administrator to give instructions on the Client's behalf) (clause 4.3);
- to give the Consultant any necessary information regarding any contingent payments (clause 4.6); and
- if there is a default by any other member of the Consultant Team that delays the Consultant, to take corrective action (clause 4.7).

The clause 4.5 restriction on the giving of instructions for omissions from the Services essentially and expressly reflects general construction law.

Section 5 – Representatives and Key Personnel

For administrative convenience, the Contract requires each Party to appoint and maintain a representative to act as the main point of contact for the other (clauses 5.1 and 5.2). The further clause 5.2 requirement, for the Client's approval to any change of the Consultant's Representative or Key Personnel that the Consultant may wish to initiate, underpins the provisions of clause 2.6 regarding their availability; the Client's right under clause 5.3 to require removal for unsatisfactory performance or conduct is standard in JCT contracts that contain Key Personnel provisions.

Section 6 – Further Services, Changes and Fee Adjustments

By clause 6.1 the Consultant agrees to perform any Optional Services listed in Annex A (paragraph 4) that the Client instructs. (Paragraph 4 envisages that these services will be of a fairly standard nature and that the amount or basis of charging will be agreed in advance.) By clause 6.2 the Client may instruct Additional Services, i.e. those which are additional to or otherwise alter the Services as then specified, subject to the general restriction on instructions to matters within the scope of the Project and the Consultant's competence. (In each case the Consultant, for his part, is to notify the Client if he thinks an Optional or Additional Service is necessary.)

Clause 6.3 provides for adjustment of the Fee or other amounts payable in the case of instructions for Additional Services, Omissions or other Changes, with clause 6.4 requiring the Consultant promptly to notify the Client to that effect and to give the relevant cost and time estimates. If requested, the Consultant is also to provide an Acceleration Quotation. Under clause 6.5, the Consultant has a right of reasonable objection if he considers that, independently of time or money, the relevant instruction would adversely affect the Project, in which event there is to be prompt consultation between the Parties and with other relevant Project Team members.

Clause 6.6 provides that if the instruction is then confirmed or where Changes give rise to loss, expense or delay, fair adjustments are to be made both in terms of payment and time.

Clause 6.7 provides for a corresponding adjustment in favour of the Client if as a result of any default by the Consultant the Client incurs a liability to another consultant, the contractor and/or any specialist.

Section 7 – Payment (and Annex A)

The provisions of section 7 closely follow the standard JCT payment provisions, with clause 7.1 providing for payment of the Fee, Reimbursable Expenses and any Incentive Payments (each to be specified in, or calculated in accordance with, Annex A) together with any Additional Payments in accordance with section 6 and the VAT properly chargeable.

Clauses 7.2 to 7.6 provide for the Consultant to invoice amounts becoming payable at specified dates or stages, with such documentary evidence as is either specified in Annex A or reasonably required by the Client. Clause 7.6 has been revised (in line with other JCT 2016 contracts) and the final date for payment of any amount payable under clauses 7.1 to 7.4 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 7.7), interest on unpaid amounts (clause 7.8) and the Consultant's right of suspension (clause

7.9). The Consultant's right of suspension for non-payment reflects the statutory right for him to recover his reasonable costs and expenses arising from such suspension.

Annex A requires the insertion of the amount (or basic amount) of the Fee and/or the method of calculation, if or to the extent that it is other than a fixed sum or percentage of Total Construction Cost (as defined in paragraph 1.2 of that Annex). The dates/stages/milestones for payment are then for insertion in paragraph 2 of the Annex.

Paragraphs 3 and 4 require particulars of any Incentive Payments (and their method of calculation) and of the types and amounts, or basis for calculating the amounts, payable for Optional Services. It is envisaged that Incentive Payments will usually be linked to KPIs and/or payable either on practical completion of the Project or on successful completion of a work stage.

Paragraph 5 specifies the Consultant's Project Staff manning levels and enables the Parties to specify a daily or weekly rate for extended services from particular categories of Project Staff and, where appropriate, gives a basis for the valuation of any Additional Services, subject to any additional factors that the Parties specify in paragraph 6.

In terms of paragraph 7 of Annex A, it is highly desirable that the categories of Reimbursable Expenses be listed and it may be appropriate that a limit be put on the overall amount and/or the rate at which certain items are reimbursable.

Paragraph 8 of Annex A is not exhaustive, since the Client has a residual right to call for reasonable evidence of time charges and other payments and disbursements by the Consultant, but it is desirable that there should be prior agreement on the documentation generally required to support the Consultant's invoices.

Paragraph 9 of the Annex will be relevant only where there is design work by the Consultant which the Client may wish to reproduce in three-dimensional form in any subsequent extension of the Project.

As indicated in paragraph 10, all amounts and rates shown in the Annex are exclusive of VAT.

Section 8 – Insurance

The Consultant is required to maintain Professional Indemnity ('PI') and, if the Contract Particulars state that it is required, Public Liability insurance in the respective amounts specified in those particulars and on request to produce appropriate evidence of those insurances. The obligation to maintain PI insurance is subject to the usual proviso as to continuing availability at commercially reasonable rates; it will also be noted that the Contract Particulars provide for separate optional covers for pollution and contamination, asbestos and toxic mould claims, all within the general cover. These recognise that cover for pollution and contamination claims and asbestos claims is generally available only in an aggregate annual amount and not (as under the policy generally) for an amount per claim or series of claims arising out of a single event. Certain of those risks may not be relevant in every case and, as stated in relation to the Contract Particulars, cover should not be required when it is clearly not relevant.

Section 9 – Use of Consultant's Design Information, Confidentiality etc.

The section comprises at clause 9.1.2 the usual licence for the Client to use the Consultant's design work, subject to certain provisos, and at clause 9.2 an undertaking by the Consultant to treat Project-specific information as confidential coupled with cross-undertakings between the Parties in relation to confidential business information.

The basis of clause 9.1 is the same as that in JCT construction contracts and collateral warranties where the contractor has full or partial design responsibilities: the clause adds to that an optional provision at clause 9.1.3.1 for specifying (in paragraph 9 of Annex A) the terms for reproduction of the Consultant's designs in any extension to the Project (which as regards artistic designs are otherwise not covered by the licence). In clause 9.1.4, it is also made clear that the licence is not intended to cover such reproduction where the architect or the designer has either not been employed to do a scheme design or detailed design work or, if he has been, where his employment is terminated under the Client's termination at will powers in clause 11.5.1 before the design or design work has been completed. Where there is any likelihood of any such situation arising, each Party should consider taking professional advice as to the best approach, if he has not already done so.

In relation to confidentiality and clause 9.2, it will be noted that the Client's consent to publicity and publications relating to the Project is not to be unreasonably withheld; this is appropriate in a large majority of cases, but it will also be recognised that there are Clients who need to limit or preclude publicity regarding their construction activities. Supplemental Provision 1 (Schedule 2), if it applies, deals with the authorising of disclosures by public sector clients in accordance with the Freedom of

Information Act 2000.

Section 10 – Assignment, Novation, Third Party Rights and Collateral Warranties

Clause 10.1 contains the standard JCT restriction on assignment.

Where the Building Contract is a JCT Design and Build Contract or Major Project Construction Contract and the Contract Particulars state that clause 10.2 applies, clause 10.2 provides that the Client may require that the Agreement be novated from the Client to the Contractor by a novation agreement in such form as is identified in the Contract Particulars, to be executed by the Consultant within 28 days of the Client's request made in accordance with clause 1.5.2.

The JCT itself does not at present publish forms of novation agreement but several forms are available.

However, novations, though commonplace, are not entirely straightforward and each party may need advice before agreeing to enter into one. The Client, for example, will wish to ensure that his obligations to the Consultant are discharged but that he remains entitled to any necessary warranties in respect of past services; the latter is important because under most JCT main contracts, statutory compliance apart, the Client will remain liable for any inadequacy in his requirements. The Contractor for his part 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 any 'no loss' arguments, and that, save as provided for in the Building Contract price, amounts owing or accrued to the Consultant, are discharged on or before the novation. The Consultant will wish to ensure that amounts then owed are paid up and may also be concerned to ensure that the novation, if it thereafter involves liabilities to both Client and Contractor, does not deprive him of any limitations or protection that he would otherwise have.

The Third Party Rights for Purchasers/Tenants and for Funders are set out in Schedule 1. In the interests of brevity the two sets of rights have been consolidated but in each case they remain in the same terms.

In relation to Collateral Warranties, as indicated in relation to Part 2 of the Contract Particulars, the JCT itself has not at present published forms of Collateral Warranty for Consultants. The Contract Particulars for clause 10.3.3 therefore require not only identification of the agreed form of warranty but also the details needed to complete it in each case, failing which any identified beneficiary will be entitled to a Third Party Right in lieu.

Section 11 – Suspension by the Client and Termination

The Client has the right at any time to suspend the Services or part of these (clause 11.1) or to terminate the Consultant's employment at will (clause 11.5.1), in each case on not less than 14 days' notice.

In the case of suspension, he has the right under clause 11.2 to instruct the Consultant to remobilise but, if the period of suspension exceeds the relevant period (2 months or such other period as is specified in the Contract Particulars) and such instruction has not been given, the Consultant, after giving a warning notice, may himself terminate his employment.

In common with JCT contracts generally, each Party has the right to terminate that employment in the case of the insolvency or unremedied default of the other (clauses 11.5.2 and 11.5.3). In the case of default a warning notice is required.

In the case of suspension by the Client, there is provision for payment up to the date of suspension, plus reasonable demobilisation costs (clauses 11.1.1 to 11.1.4), with clause 11.2 making provision for remobilisation costs and for the notification of costs either way.

In the case of termination, clause 11.6.1 makes provision for consultation and delivery of documents and clause 11.6.2 for the financial consequences of termination. The latter are essentially limited to costs and expenses incurred by the Consultant, less, in the case of termination for the Consultant's insolvency or default, the additional cost to the Client in procuring completion of the Services.

Suspension, warning and termination notices each require to be given by the means set out in clause 1.5.2.

In CA 2016 the section includes some new termination grounds to reflect regulation 73(1) of the PC Regulations, where those regulations apply.

Regulation 73(1) of the PC Regulations requires a contracting authority to have the right to terminate

the Contract where:

- there has been a substantial modification to the Contract which would have required a new procurement procedure (regulation 73(1)(a)); or
- at the time of Contract award one of the mandatory grounds for exclusion applied and the contractor (in the case of CA, Consultant) should have been excluded from the procurement procedure (regulation 73(1)(b)); or
- the Contract should not have been awarded to the contractor (in the case of CA, Consultant) in view of a serious infringement of the obligations under the Treaties and the Public Contracts Directive as declared by the ECJ (regulation 73(1)(c)).

These termination rights will be implied into the Contract where the relevant regulations apply and are not expressly provided for, but the JCT has chosen to deal with them in the Contract itself (clause 11.5.4) to provide greater legal clarity and to allow for the consequences of termination to be specified. Termination under regulation 73(1)(b) is dealt with in the same way as a material breach by the Consultant and termination under regulations 73(1)(a) and (c) on a neutral basis (clause 11.6).

Section 12 – Settlement of Disputes

The provisions are substantially the same as those in other JCT contracts and clause 12.2 incorporates into the Agreement the Adjudication provisions of the Scheme for Construction Contracts.^[27]

[27] i.e. those set out in Part I of the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998.



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