

Dated

2020

(1) NORTH SOMERSET COUNCIL

(2) [CONSULTANT]

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FORM OF AGREEMENT FOR AN NEC4 PROFESSIONAL SERVICE  
CONTRACT

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Relating to: WINTERSTOKE ROAD BRIDGE

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**THIS DEED** is dated

**PARTIES**

- (1) NORTH SOMERSET COUNCIL at Town Hall, Walliscote Grove Road, Weston-super-Mare, BS23 1UJ (***Client***, which expression shall include its permitted successors in the exercise of its statutory functions, successors in title and permitted assignees)

**And**

- (2) [ ] incorporated and registered in England and Wales with company number [ ] whose registered office is at [ ](***Consultant***)

**BACKGROUND**

- (A) This Agreement has been entered into pursuant to a restricted tender process through the Official Journal of the European Union.
- (B) This Agreement relates to services to be undertaken by the *Consultant* for the *Client* in respect of the design of a new bridge at Winterstoke Road and the services required to develop works contract to design and construct the new bridge (subject to any variations in accordance with this contract) (the "**Project**").
- (C) The *Client* wishes to appoint the *Consultant* to Provide the Service in accordance with the terms of this Agreement.
- (D) The *Consultant* has agreed to Provide the Service in accordance with the terms of this Agreement.

**AGREED TERMS**

**1. INTERPRETATION**

Unless the context otherwise requires:

- (a) any term used with initial capital letters has the meaning given to it in the *conditions of contract*; and
- (b) any italicised term has the meaning given to it in the Contract Data.

**2. CONSULTANT'S RESPONSIBILITIES**

The *Consultant* will Provide the Service and will carry out its other duties in relation to the contract in accordance with the *conditions of contract* and other contract documents specified in clause 4 below.

**3. CLIENT'S RESPONSIBILITIES**

The *Client* will pay the *Consultant* for carrying out the *service* and will carry out its other duties in relation to the contract in accordance with the *conditions of contract* and other contract documents specified in clause 4 below.

#### 4. CONTRACT FOR THE SERVICE

The contract for the *service* comprises:

- (a) the *conditions of contract* in the form of the NEC4 Professional Service Contract Option C, June 2017 edition (including NEC4 January 2019 amendments), incorporating the following secondary Options
  - (a) X2 (Changes in the law),
  - (b) X4 (Ultimate holding company guarantee),
  - (c) X9 (Transfer of rights),
  - (d) X11 (Termination by the *Client*),
  - (e) X13 (Performance bond),
  - (f) Y(UK)2 (The Housing Grants, Construction and Regeneration Act 1996); and
  - (g) Y(UK)3 (The Contracts (Rights of Third Parties) Act 1999)
- (b) the Completed Contract Data at Annex 1,
- (c) the *additional conditions of contract* annexed to this Agreement at Annex 2,
- (d) the Scope at Annex 3,
- (e) the Activity Schedule at Annex 4,
- (f) the form of *Consultant's* Warranty at Annex 5,
- (g) the forms of Subcontractor Warranty at Parts A & B of Annex 6,
- (h) the form of performance bond at Annex 7,
- (i) the form of ultimate holding company guarantee at Annex 8,
- (j) the Accepted Programme at Annex 9,
- (k) the Social Value Outcomes Plan at Annex 10,
- (l) and this Agreement.

#### 5. CONTRACT DATA

A copy of the completed Contract Data is annexed to this Agreement at Annex 1.

#### 6. ADDITIONAL CONDITIONS OF CONTRACT

A copy of the *additional conditions of contract* is annexed to this Agreement at Annex 2.

#### 7. PRIORITY OF DOCUMENTS

- 7.1 The documents comprising this contract are mutually explanatory and are to be read as a whole.

7.2 Without prejudice to clause 7.1, if there is any ambiguity or inconsistency in or between the documents comprising this contract, the priority of the documents is in accordance with the following sequence:

- (a) this Agreement,
- (b) the completed Contract Data,
- (c) the *additional conditions of contract*,
- (d) the other *conditions of contract*,
- (e) the Scope and
- (f) any other document forming part of the contract.

## **8. PRIOR AGREEMENTS**

8.1 This Agreement is the complete and entire contract between the *Client* and the *Consultant* in relation to the *service* and supersedes any previous agreement between the Parties in relation to the *service*. Insofar as the *Consultant* has:

- (a) performed a part of its obligations under this Agreement; or
- (b) carried out any services or works in connection with the Project

before the date of this Agreement, the obligations and liabilities of the *Consultant* under this Agreement shall take effect in all respects as if the Agreement had been dated prior to the performance of that part of its obligations or the carrying out of those services or works by the *Consultant*.

8.2 The Parties are not bound by, or liable for, any statement, representation, promise, inducement or understanding made prior to the Contract Date which is not contained in this Agreement.

## **9. VARIATION**

9.1 The terms of this Agreement may only be varied by an express written agreement to that effect executed as a deed by the *Client* and the *Consultant*.

9.2 No waiver, estoppel, acceptance, or other ground on which the *Client* may be said to have lost its right to insist on its strict rights under this Agreement, shall have such effect unless expressly so executed as a variation to this Agreement as stated in clause 9.1.

## **10. JOINT AND SEVERAL LIABILITY (WHERE THE CONSULTANT IS A PARTNERSHIP)**

The *Consultant's* obligations are the joint and several obligations of all the partners of the *Consultant* whether or not they have executed this Agreement and the partners of the *Consultant* who have executed this Agreement jointly and severally warrant that in executing this deed they have the power to bind under seal all the partners of the *Consultant* jointly and severally.

This Agreement has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it.

**EXECUTED AS A DEED BY THE *CLIENT***

Namely: .....

by affixing hereto its common seal

in the presence of:-

..... [ ]

..... [ ]

**EXECUTED AS A DEED BY THE *CONSULTANT***

acting by a director and its secretary/two directors whose signatures are here subscribed

namely.....

[Signature]..... Director

and.....

[Signature]..... Director/Secretary

## Annex 1 Completed Contract Data

### Part one – Data provided by the *Client*

#### General

The *conditions of contract* are the core clauses and the clauses for main Option C and secondary Options X2, X4, X9, X11, X13, Y(UK)2, Y(UK)3 and Z of the NEC4 Professional Service Contract (June 2017), as supplemented and amended by the *additional conditions of contract*.

The *service* is:

- the production of a Preliminary Design,
- the production of a final scope for Stage 2 of the Project (i.e. the Scope for the nec4 engineering and construction contract for detailed design and construction),
- the production of an agreed target cost for Stage 2 of the Project (the “Stage 2 Target Cost”); and
- the provision of ancillary services (technical, commercial etc.) to bring about the above.

For the avoidance of doubt, the overall objective of the Project is the delivery of a replacement road over rail bridge at Winterstoke Road, within cost quality and programme targets.

The *Client* is

Name: **North Somerset Council**

Address for communications: Development and Environment  
Town Hall, Walliscote Grove Road, Weston-super-Mare, BS23  
1UJ

Address for electronic communications: jason.reading@n-somerset.gov.uk

The *Service Manager* is

Name: **[to be completed]**

Address for communications: **[to be completed]**

Address for electronic communications: **[to be completed]**

The Scope is in **Annex 3**.

The *language of the contract* is **English**.

The *law of the contract* is the law of **England and Wales**

The *period for reply* is **two (2)** weeks except that

The *period for reply* is **two (2)** weeks except as otherwise stated in the Scope or as otherwise agreed with the *Service Manager*

The *period for retention* is **twelve (12)** years following Completion or earlier termination.

The following matters will be included in the Early Warning Register

**Geotechnical risk**

**Ground investigation matters**

**Environmental matters**

**Nature of Site Information**

**Statutory Authority works/ programme**

**Existing Information as per Scope**

**Other matters as directed by the *Service Manager***

Early warning meetings are to be held at intervals no longer than **one month**, but in any event as directed by the *Service Manager*.

**2. The *Consultant's* main responsibilities** If the *Client* has identified work which is set to meet a stated *condition* by a *key date*

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

<i>condition</i> to be met	<i>key date</i>
----------------------------	-----------------

(1) N/A	N/A
---------	-----

**If Option C or E is used**

The *Consultant* prepares forecasts of the total Defined Cost plus Fee and *expenses* at intervals no longer than **four (4) weeks**.

**3. Time** The *starting date* is **[insert date]**



The *Client* provides access to the following persons, places and things

access	access date
--------	-------------

N/A	N/A
-----	-----

The *Consultant* submits revised programmes at intervals no longer than **four (4) weeks**.

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

The period after the Contract Date within which the *Consultant* is to submit a first programme for acceptance is **two (2) weeks**.

**4. Quality Management**

The period after the Contract Date within which the *Consultant* is to submit a quality policy statement and quality plan is **two (2) weeks**

The period between Completion of the whole of the *service* and the *defects date* is **fifty-two (52) weeks**.

**5. Payment**

The *currency of the contract* is **Pounds Sterling (£)**.

The *assessment interval* is **a calendar month**.

**If the *Client* states any expenses**

The *expenses* stated by the *Client* are

item	amount
<b>Mileage</b>	45p per mile (up to
<b>(All fuel types and engine</b>	10,000miles)
<b>sizes)</b>	25p per mile (over
	10,000miles)
<b>Subsistence</b>	Cannot be claimed
<b>Accommodation</b>	£80 per night

The *interest rate* is 5% per annum above the **base rate in force from time to time of the Bank of England**.

The *Consultant's share percentages* and the *share ranges* are

<i>share range</i>	<i>Consultant's share percentage</i>
<b>less than 80%</b>	<b>10%</b>
<b>from 80% to 90%</b>	<b>25%</b>
<b>from 90% to 120%</b>	<b>50%</b>
<b>greater than 120%</b>	<b>100%</b>

The *exchange rates* are those published in the Financial Times on the first working day of the month within which the relevant transaction takes place.

#### 6. Compensation events

If there are additional compensation events

**There are no additional compensation events**

#### 8. Liabilities and insurance

These are additional *Client's* liabilities

**There are no additional *Client* liabilities**

The minimum amount of cover and the periods for which the *Consultant* maintains insurance are

<b>Event</b>	<b>Minimum amount of cover</b>	<b>period following Completion of the whole of the service or termination</b>
The <i>Consultant's</i> failure to use the skill and care normally used by a competent and qualified professional consultant experienced in carrying out services similar to the <i>service</i> in relation to projects of a	<b>£20,000,000.00 (Twenty Million Pounds)</b> in respect of each claim, without limit to the number of claims.	<b>Twelve (12) years</b>

similar size, nature, value, scope, timescale and complexity to the Project		
Loss of or damage to property and liability for bodily injury to or death of a person (not an employee of the <i>Consultant</i> ) arising from or in connection with the <i>Consultant</i> Providing the Service	<b>£10,000,000.00</b> <b>(Ten Million</b> <b>Pounds)</b> in respect of each claim, without limit to the number of claims.	<b>Two (2) years</b>
Death of or bodily injury to employees of the <i>Consultant</i> arising out of and in the course of their employment in connection with the contract	<b>£10,000,000.00</b> <b>Ten Million</b> <b>Pounds)</b> in respect of each claim, without limit to the number of claims.	<b>Two (2) years</b>

**If the *Client* is to provide any of the insurances stated in the Insurance Table**

The *Client* provides these insurances from the Insurance Table

(1) Insurance against [                      ]  
Minimum amount of cover is [                      ]  
The deductibles are [                      ]

(2) Insurance against [                      ]  
Minimum amount of cover is [                      ]  
The deductibles are [                      ]

**If additional insurances are to be provided**

The *Client* provides these additional insurances

(1) Insurance against [                      ]  
Minimum amount of cover is [                      ]

The deductibles are [ ]

(2) Insurance against [ ]

Minimum amount of cover is [ ]

The deductibles are [ ]

The *Consultant* provides these additional insurances

(1) Insurance against [ ]

Minimum amount of cover is [ ]

The deductibles are [ ]

(2) Insurance against [ ]

Minimum amount of cover is [ ]

The deductibles are [ ]

The *Consultant's* total liability to the *Client* for all matters arising under or in connection with the contract, other than the excluded matters is limited to £20,000.00 (Twenty Million pounds).

**Resolving and avoiding disputes**

The *tribunal* is litigation

The *Senior Representatives* of the *Client* are :

Name (1) Alex Fear

Address for communications

Town Hall, Walliscote Grove Road, Weston-super-Mare, BS23 1UJ

Address for electronic communications  
alex.fear@n-somerset.gov.uk

Name (2) Jonathan Kirby

Address for communications

Town Hall, Walliscote Grove Road, Weston-super-Mare, BS23 1UJ

Address for electronic communications  
jonathan.kirby@n-somerset.gov.uk

The *Adjudicator nominating body* is

.....RICS .....

**Option X2 Changes in law** The *law of the project* is **the law of England and Wales**

**Option X4 Ultimate holding company guarantee** The form of ultimate holding company guarantee to be provided by the *Consultant* is **as set out in Annex 8**

**Option X13 Performance Bond** The amount of the performance bond is **10% of the Prices**.  
The form of performance bond to be provided by the *Consultant* is **as set out in Annex 7**.

**Option Y(UK)2 The Housing Grants, Construction and Regeneration Act 1996** If Option Y(UK)2 is used and the final date for payment is not fourteen days after the date on which payment becomes due:  
The period for payment is **twenty-one (21) days** after the date on which payment becomes due

**Option Y(UK)3 The Contracts (Rights of Third Parties) Act 1999** Term Beneficiary

**Option Z** The *additional conditions of contract* are **set out in Annex 2**.

## Part two – Data provided by the *Consultant*

### 1. General

The *Consultant* is

Name: **[to be completed]**

Address for communications: **[to be completed]**

Address for electronic communications: **[to be completed]**

The *fee percentage* is **[insert from tender]%**

The *key persons* are:

(1) Name: **[to be completed]**  
Job: **[to be completed]**  
Responsibilities: **[to be completed]**  
Qualifications: **[to be completed]**  
Experience: **[to be completed]**

(2) Name: **[to be completed]**  
Job: **[to be completed]**  
Responsibilities: **[to be completed]**  
Qualifications: **[to be completed]**  
Experience: **[to be completed]**

The following matters will be included in the Early Warning Register:  
**[insert details of any early warning matters which the *Consultant* requires to be included in the early warning register]**

### 2. The *Consultant's* main responsibilities

If the *Consultant* is to provide Scope

The Scope provided by the *Consultant* is in **Not Provided**

### 3. Time

If a programme is to be identified in the Contract Data

The programme identified in the Contract Data is in **Annex 9**

### 5. Payment

The *activity schedule* is in **Annex 4**.

The tendered total of the Prices is **[£insert from tender]**.

### Data for the Schedule of Cost Components (used only with Options C or E)

The *overhead percentages* for the cost of support people and office overhead are

Location	<i>overhead percentage</i>
<b>[insert from tender]</b>	<b>[insert from tender]%</b>
<b>[insert from tender]</b>	<b>[insert from tender]%</b>
<b>[insert from tender]</b>	<b>[insert from tender]%</b>

## **Annex 2      *additional conditions of contract***

The *additional conditions of contract* are part of this contract and are set out below:

### **PART A: Amendments to the *conditions of contract*:**

The *conditions of contract* are amended as set out below:

Delete clause 11.2(4) and replace as follows:

“11.2(4)      The Contract Date is the date of execution of the form of Agreement between the Parties to which these *additional conditions of contract* are appended or (if earlier) the date when the *Consultant* first begins to Provide the Service.”

Add the following words to clause 11.2(5), after the words "this contract or any other contract with the *Client*":

"or committing or engaging in extortion, fraud, deception, collusion, cartels, abuse of power, embezzlement, trading in influence, money-laundering or any similar activity including, without limitation, any activity, practice or conduct which would or could constitute an offence under the Bribery Act 2010 whether in connection with the *service* or otherwise."

Delete the words "applicable law" in clause 11.2(6) and replace with:

"Applicable Law"

In clause 11.2(8), add the following before the full stop at the end of the clause:

“, excluding the Defined Cost of

- correcting Defects (where the cost is not a Disallowed Cost) and
- work undertaken in order to correct a failure of the *service* to meet the functional and performance requirements specified in the Scope”.

Delete Clause 11.2 (10) and replace with:

“Others are people or organisations who are not the *Client*, the *Service Manager*, the *Supervisor*, the *Adjudicator*, Statutory Authorities, the *Consultant* or any employee, Subcontractor or supplier of the *Consultant*.”

Delete clause 11.2(18) (definition of “Disallowed Cost”) and replace with the following:

- “(18)            Disallowed Cost is cost which the *Service Manager* decides
- is not justified by the *Consultant's* accounts and records,
  - should not have been paid to a Subcontractor or supplier in accordance with its contract,

- was incurred only because the *Consultant* did not
  - follow an acceptance or procurement procedure stated in the Scope,
  - comply with a procedure set out in its quality plan,
  - give an early warning which this contract required it to give, or
  - give notification to the *Service Manager* of the preparation for and conduct of an adjudication or proceedings of a tribunal between the *Consultant* and a Subcontractor or supplier

and the cost of

- correcting Defects after Completion,
- correcting Defects caused by the *Consultant* not complying with a constraint on how it is to Provide the Service stated in the Scope,
- correcting Defects caused by the *Consultant* not exercising the skill and care normally used by a competent and qualified professional consultant experienced in carrying out services similar to the service in relation to projects of a similar size, nature, value, scope, timescale and complexity to the Project,
- correcting Defects caused by the *Consultant's* failure to comply with a procedure set out in its quality plan,
- correcting Defects which the *Consultant* has previously corrected,
- resources not used to Provide the Service (after allowing for reasonable availability and utilisation),
- preparation for and conduct of an adjudication or proceedings of the *tribunal* between the Parties.”

Add a new clause 11.2(24) as follows:

- “11.2(24) Applicable Law is any statute, statutory instrument, regulation, directive, rule, judgement, order, decision, recommendation or statutory guidance made under any statute or directive having the force of law which affects the service or the Project or the performance of all or any of the 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, including without limitation any statutory provisions and any decision,



notice, direction, instruction, permission or award of a Competent Authority."

Add a new clause 11.2(25) as follows:

"11.2(25) Competent Authority is any legal person, regulator, statutory authority or statutory undertaker, and/or any court of law or tribunal in each case having authority under Applicable Law."

Add a new clause 11.2(26) as follows:

"11.2(26) Confirmation of Notice to Proceed is the notice issued by the *Client* to the *Consultant* to proceed with Stage 2"

Add a new clause 11.2(27) as follows:

"11.2(27) Consents are any and all consents, licences, authorisations, permits, permissions, registrations, filings, exemptions, approvals and the like required from Others in order for the *Consultant* to Provide the Service in accordance with this contract including, without limitation (a) planning permissions, (b) building regulation approval and (c) the method statements, plans and strategy included or referred to in the Scope (and a "Consent" is any one of them)."

Add a new clause 11.2(28) as follows:

"11.2(28) Consultant's Assumption is an assumption made by the *Consultant* to substantiate his Initial Target Cost."

Add a new clause 11.2(29) as follows:

"11.2(29) Funder means a person, firm, company or entity having legal capacity that has provided, or is to provide, finance in connection with the whole or any part of the Project, or in connection with the site of the Project, whether acting on its own account, as agent for a syndicate of other parties or otherwise"

Add a new clause 11.2(30) as follows:

"11.2(30) Initial Target Cost is the Stage 2 budget submitted as part of the *Consultant's* tender submission and revised in accordance with this contract"

Add a new clause 11.2(31) as follows:

"11.2(31) Initial Target Cost Build Up is the information provided by the *Consultant* in their completed Activity Schedule provided by the *Consultant* as part of their tender. "

Add a new clause 11.2(32) as follows:

"11.2(32) Mandatory Assumption is an assumption made by the *Client* unless changed in accordance with this contract".

Add a new clause 11.2(33) as follows:

"11.2(33) Prevention Event means one of the exceptional events or circumstances listed below provided always that such event or circumstance (a) occurs within the United Kingdom; (b) is beyond the affected Party's control; (c) could not reasonably have been provided against, avoided or overcome by the affected Party; and (d) is not substantially attributable to the affected Party:

- war, invasion, act of foreign enemies;
- rebellion, terrorism, revolution, insurrection, military or usurped power or civil war;
- radiation or radio activity;
- natural catastrophe such as earthquake, hurricane, typhoon or volcanic activity;
- strikes, riots and civil commotion not confined to the employees, servants or agents of the *Consultant* and/or any Subcontractor: or
- the pandemic known as coronavirus (SARS-CoV-2) and the associated coronavirus disease known as COVID -19 (and such other variants of the same pandemic) .

Add a new clause 11.2(34) as follows:

"11.2(34) Stage 1 means the performance of the *service* in accordance with this contract"

Add a new clause 11.2(35) as follows:

"11.2(35) Stage 2 means the detailed design and construction of the new bridge"

Add a new clause 11.2(36) as follows:

"11.2(36) Stage 2 Target Cost is the Initial Target Cost amended in accordance with this contract."

Add a new clause 11.2(37) as follows:

"11.2(37) Statutory Authorities means British Telecommunications, Wales and West Utilities and Bristol Water plc and any other statutory authority, undertaker or person who has a statutory right or a right pursuant to a licence granted under any statute to place or maintain any apparatus (including any pipe conduit sewer drain or tunnel) on under or over the Site or to inspect adjust repair alter renew reposition or remove such apparatus.

Add a new clause 11.2(38) as follows:

"11.2(38) Target Adjustment Event is a change to the Initial Target Cost."

Add a new clause 11.2(39) as follows:

"11.2(39) Third Party means any person, firm, company or entity which is a party to the Third Party Agreements referred to in clause Z15."

Delete clause 12.1 and replace as follows:

"12.1 In this contract, except where the context shows otherwise:

- words in the singular also mean in the plural and the other way round,

- words in the masculine also mean in the feminine and neuter and the other way round,
- references to a document include any revision made to it in accordance with this contract,
- references to a statute or 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 includes corresponding legislation in any other relevant part of the United Kingdom and any code of practice made under it and
- references to a standard include any current relevant standard that replaces it."

Insert the word ", instruction" in clause 13.7, after "A notification"

Insert a new clause 13.10 as follows:

"13.10 If the *Consultant* does not reply to a communication from the *Service Manager* within the *period for reply* the *Client* may charge the *Consultant* for any direct costs, losses or expenses that the *Client* reasonably incurs by reason of the *Consultant's* failure to respond within the *period for reply*. The *Client* may set off or deduct such amounts from the amount due to the *Consultant* at the next assessment date."

Delete clause 14.1 and replace as follows:

"14.1 The Parties agree that no:

- (a) communication from the *Service Manager*;
- (b) acceptance by the *Service Manager* of a communication from the *Consultant* or the *Consultant's* work;
- (c) inspection, test or acceptance by the *Client*

changes the *Consultant's* liability under this contract (including the *Consultant's* responsibility to Provide the Service, and its liability for Defects and its design)."

Add as a new bullet points to clause 15.1:

- "• require change to the Accepted Programme"
- "• Increase or decrease in the forecast total of the Prices for Stage 2"
- change the forecast of Defined Cost"

Add at the end of the first sentence of clause 16.1:

"or between the documents which form part of this contract and Consents or Applicable Law".

Add the following sentence at the end of clause 17.1:

"The *Consultant* warrants that in entering into this contract it has not:

- communicated to any person other than the *Client*, or a person duly authorised by the *Client*, the amount or approximate amount of the tender or

submission, or proposed tender or submission, leading to this contract except where the disclosure, in confidence, of the approximate amount of the tender or submission was necessary to obtain insurance premium quotations required for the preparation of the tender or submission; or

- entered into any agreement or arrangement with any person, or requested of any person, that it or they shall refrain from tendering or competing, that it or they shall withdraw any tender or submission once offered or that it or they will vary the amount of any tender or submission to be submitted.”

Delete clause 18.1 and replace with the following:

- “18.1 If a Prevention Event occurs, the *Service Manager* gives an instruction to the *Consultant* stating how it is to deal with it and such instruction does not result in an increase in any of the Prices or any other amounts due to the *Consultant* under or in connection with this contract.”

Add the following words to the end of clause 20.1:

“and in compliance with Consents and Applicable Law.”

Delete clause 20.2 and replace as follows:

- “20.2 The *Consultant’s* obligation is to use the skill and care normally used by a competent and qualified professional consultant experienced in carrying out services similar to the *service* in relation to projects of a similar size, nature, value, scope, timescale and complexity to the Project.”

Delete clause 20.3 and replace as follows:

- “20.3 Where and to the extent that the *Consultant* is responsible for the specification of work, goods or materials or for the inspection of work as a part of the *service*, the *Consultant* does not specify or authorise for use or permit to be used in the Project any goods, products, materials, substance or building practices which:
- (a) are prohibited by this contract;
  - (b) are generally known within the construction industry at the time of use to be deleterious or hazardous to the health and safety of occupants of the Project or to the durability and stability of the Project in the particular circumstances in which such goods, products, materials, substances, building practices or techniques are used and having regard to the British Property Federation/British Council for Offices report Good Practice in the Selection of Construction Materials (as may be reviewed or amended from time to time); and/or
  - (c) do not comply with relevant British Standard Specifications (or their European Union equivalent) and Codes of Practice and good building practice current at the time of use and/or
  - (d) do not comply with any publications of the Building Research Establishment related to the specification of products or materials.

The *Consultant* shall inform the *Client* immediately if the *Consultant* becomes aware whilst performing the *service* that any of the items referred to in this clause 20.3 have been specified for use or used.”

In clause 21.2 after “arranges” insert:

"at no cost to the *Client*".

Add new clause 21.3:

"21.3 The *Consultant* agrees that it will, at all materials times, have and maintain appropriate skilled and experienced human resources adequate for the provision of the *service* and, when requested by the *Service Manager*, shall provide evidence that such resource is in place and is being effectively deployed in providing the *service*. Such evidence shall be provided within the *period for reply*."

Amend Clause 22.1 as follows:

Delete “Others” and insert “Statutory Authorities and Others”

In the second bullet point of clause 22.3, add the words "the Statutory Authorities or" after the words "an additional amount to"

Delete clause 23.2 and replace as follows:

"23.2 The *Consultant* submits the name of each proposed Subcontractor to the *Service Manager* for acceptance. A reason for not accepting the Subcontractor is that the appointment will not allow the *Consultant* to Provide the Service, or the *Client* is concerned (on reasonable grounds) about

- the financial standing or expertise or experience or insurance cover of the proposed Subcontractor, or
- the *Client* requires a collateral warranty and the Subcontractor is unable to provide a collateral warranty to the *Client* in a form which is acceptable to the *Client*.

The *Consultant* does not appoint a proposed Subcontractor until the *Service Manager* has accepted such Subcontractor and, to the extent that these *conditions of contract* require, accepted the subcontract documents."

Delete the following bullet point in clause 23.3:

- "• the proposed subcontract is an NEC contract which has not been amended other than in accordance with the *additional conditions of contract* or"

Add the following bullet points before the last bullet point in clause 23.3:

- they do not represent best value or open market or competitively tendered prices or
- they are inconsistent with the requirements of this contract
- they limit rights under any collateral warranty or third party rights to be provided by the Subcontractor to a greater extent than the rights under this contract in relation to the relevant subcontracted service"

Add the following new clause 23.4

"23.4 Unless otherwise agreed with the *Service Manager*, the *Consultant* ensures that every Subcontractor is appointed on subcontract terms which are consistent in all material respects with the terms of this contract and which pass down all relevant obligations under this contract to the Subcontractor including (but not limited to) the following

- Main responsibilities
- Time
- Quality Management
- Payment
- Compensation Events
- Rights to Material
- Liabilities and Insurance
- Termination

in each case with the necessary changes applicable to the Subcontractor (e.g. by reason of the lesser scope of the Subcontractor's works)."

Amend Clause 24.1 as follows:

Delete "Others" and insert "Statutory Authorities and Others"

Amend Clause 24.2 as follows:

Delete "Others" and insert "Statutory Authorities and Others"

Add a new clause 24.4 as follows:

"24.4 The *Consultant* complies with any rules, regulations, policies and procedures (including health and safety policies and quality assurance procedures) issued by the *Client*."

Add a new clause 24.5 as follows:

"24.4 For the avoidance of doubt, clause 24.2 does not apply if the Subcontractor was approved by the *Client* during the tender process that resulted in the selection of the *Consultant*."

Delete clause 25.1 and replace as follows:

"25.1 The *Consultant* shall not assign this contract without the written consent of the *Client*. The *Client* may assign or transfer its rights under this contract to any third party without the consent of the *Consultant* being required."

Delete clause 26.1 and replace as follows:

"26.1 The Parties do not disclose information obtained in connection with this contract or the Project except

- where expressly permitted under this contract,
- with the written agreement of the other Party,
- as necessary to carry out their duties under the contract,
- to the extent necessary to comply with Applicable Law or the requirements of any Competent Authority or
- to a Party's professional advisers or auditors."

Add the following words to the end of clause 30.1:

"The *Consultant* proceeds regularly and diligently to Provide the Service in accordance with this contract and uses all reasonable endeavours to prevent or reduce any delay in the progress of the *service*"

Add the following additional bullet point to clause 31.3:

- "it is more onerous on the *Client* or Others"

Insert at the end of clause 40.1 before the full stop:

"and

- complies with the relevant parts of BS EN ISO 9001, BS EN ISO 14001, OHSAS 18001 or equivalent,
- incorporates appropriate sector quality schemes for the *service*, and
- has third party certification from an approved accreditation body or is operating in preparing for accreditation within six (6) months of the Contract Date"

In clause 40.2 delete the words "is that it does not allow the *Consultant* to Provide the Service" from the first paragraph and replace with:

"is that it:

- does not allow the *Consultant* to Provide the Service and/or it does not represent a realistic approach for the *service*;
- is inadequately prepared or is not practicable; or
- does not comply with the requirements of clause 40.1."

Insert a new sentence at the end of the second paragraph of clause 40.2:

"The *Consultant* complies with the accepted quality plan."

Add a new clause 40.4

"40.4 Any Subcontractor appointed by the *Consultant* operates a quality system enabling it to comply with the *Consultant's* quality management system."

Add a new clause 43 as follows:

"43 Nothing in clauses 40 to 42 affect any other right or remedy under the contract or at law, including the *Client's* right to claim damages for a Defect as a breach of contract."

Insert a new clause 50.10 as follows:

"50.10 In assessing the amount due, the *Service Manager* is entitled to retain the whole of the Price for Service Provided to Date until the *Consultant*:

- has signed this contract

- submits to the *Service Manager* policies and certificates for the insurances required by this contract
- provides the *Client* with any ultimate holding company guarantee][parent company guarantee required by this contract, duly executed
- provides the *Client* with any performance bond required by this contract, duly executed"

Insert a new clause 51.6 as follows:

- "51.6 Subject to Y2.3, the *Client* may deduct from any money due to the *Consultant*
- any sum due to the *Client* from the *Consultant*, and
  - any amount which the *Consultant* is liable to pay to the *Client* (whether liquidated or otherwise) arising under this contract."

In clause 60.1(12), delete "An event" and insert:

"A Prevention Event".

In clause 60.1(13) insert the words:

"following an instruction of the *Services Manager* to do so, it having been agreed or determined that the *Consultant* was not responsible for the defect"

In clause 60.1 (15) insert the following wording before the full stop:

"PROVIDED always that the quotation for the proposed instruction was not requested as a result of any change initiated or proposed by the *Consultant*, including (but not limited to) any change initiated or proposed in accordance with clause 35 (Acceleration) and/or clause 42 (Accepting Defects)."

Add a new sub-clause 60.1(17)

"The *Service Manager* instructs the *Consultant* to prepare a quotation for a Target Adjustment Event".

Add a new clause 60.1A as follows:

- "60.1A If the *Consultant* believes that the issue of any instruction or information by the *Service Manager* (not expressed to be a change in the Scope) constitutes or will give rise to a compensation event, the *Consultant* must, (save in circumstances of emergency) as soon as reasonably practicable and in any case before acting on the instruction or other information, notify the *Service Manager* of the *Consultant's* belief by raising an early warning and allow the *Service Manager* time to consider the impact of the instruction or other information in relation to the *Consultant's* notice."

Amend the final paragraph of clause 61.3 to read as follows:

"If the *Consultant* does not notify a compensation event within eight weeks of becoming aware that the event has happened, the Prices, the Completion Date and Key Dates are not changed."

In clause 61.4 delete the first bullet point after the words "If the event" and replace as follows:



- “arises by reason of any act, omission, breach or default of the *Consultant*, any Subcontractor or supplier, or any other person for whom the *Consultant* is responsible”

Insert a new clause 63.1A as follows:

"63.1 A Notwithstanding clauses 63.1, 63.2, 63.3, 63.4 and 63.6, the Prices are not adjusted for any compensation event referred to in clause 60.1(12). The right of the *Consultant* to a change to the Completion Date and/or the Key Dates (assessed in accordance with clause 63.5) is the *Consultant's* only right in respect of a compensation event referred to in clause 60.1(12)."

Add a new clause 63.14 as follows:

"63.14 Where a compensation event or its effect is in part attributable to the *Consultant's* fault (including any fault on the part of any Subcontractor other person for whom the *Consultant* is responsible), the Prices, the Completion Date and Key Dates are not changed to the extent attributable to the *Consultant's* fault."

Insert the following wording in clause 65.2 after the words "The quotation is assessed as a compensation event":

"(provided always that the quotation for the proposed instruction was not requested as a result of any change initiated or proposed by the *Consultant*, including (but not limited to) any change initiated or proposed by the *Consultant* in accordance with clause 35 (Acceleration))"

Delete clause 70.1 and replace as follows:

"70.1 The *Client* has the right to use the materials prepared by or on behalf of the *Consultant* for any purpose relating to the *service* and/or the Project. The *Consultant* obtains from a Subcontractor equivalent rights to use material prepared by a Subcontractor."

Add the following words to the start of clause 70.2

"The copyright in all documents prepared by the *Client* is and remains the property of the *Client*."

Delete clause 70.3 and replace as follows:

"70.3 The *Consultant* indemnifies the *Client* in respect of all costs, claims, damages, proceedings and expenses arising out of any breach of any such copyright by any of the *Consultant*, its assignees or Subcontractors appointed in relation to the *service*."

Delete the second bullet point in clause 81.1 and replace with:

- "Costs incurred by the *Client* which arise from a failure by the *Consultant* to use the skill and care normally used by a competent and qualified professional consultant experienced in carrying out services similar to the *service* in relation to projects of a similar size, nature, value, scope, timescale and complexity to the Project."

Add the following new bullet point in clause 81.1:

- "fraud or fraudulent misrepresentation"

Insert at the end of clause 84.2:

"The *Consultant* does not knowingly do or omit to do anything whereby the insurance policies for the time being in force become void or voidable."

Add a fifth bullet point in clause 87.1:

- any liabilities arising due to breach of the Third Party Agreements

Add a new clause 91.9 as follows:

"91.9 Any termination of the *Consultant's* engagement under this contract is without prejudice to the Parties' rights and remedies accrued up to the date of termination, which shall survive such termination."

Add new clause 92.3 as follows:

"92.3 Upon termination of this contract (howsoever terminated) the *Consultant*:

- promptly takes all necessary steps to stop performance of the *service* in an orderly manner and with reasonable speed and economy and
- delivers to the *Client* all documents belonging to the *Client* that shall for the time being be under the control of the *Consultant* or any Subcontractor and
- gives to the *Client* all hard copy and electronic data (including material prepared by any Subcontractor) prepared by or on behalf of the *Consultant* under this contract. The *Client* has the right to use such material for completion of the *service* and/or the Project."

Delete the wording of A2 in clause 93.2 and replace with:

"A2 A deduction of any loss or costs incurred by the *Client* as a result of such termination including the additional cost to the *Client* of completing the whole of the *service* and after termination the *Client* shall not be obliged to make any further payment until the full extent of loss or costs can be fully ascertained and in the event that such loss or cost exceeds the amount otherwise payable to the *Consultant* in accordance with this contract, without prejudice to any other right or remedy of the *Client*, the *Client* may recover such excess from the *Consultant* as a debt."

#### **Option X4: Ultimate Holding Company Guarantee**

Amend Option X4.1 by deleting the words "in the form set out in the Scope" and substituting:

"in the form specified in the Contract Data"

Insert the following words into Option X4.2 at the end of the first sentence before the full stop:

"at its sole discretion"

**Option X13: Performance Bond**

Amend Option X13.1 by deleting the words "in the form set out in the Scope" and substituting:

"in the form specified in the Contract Data"

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## **PART B: additional conditions of contract:**

The *conditions of contract* are supplemented by the following additional conditions of contract as set out below:

### **Z1 Initial Target Cost and Stage 2 Target Cost**

- Z1.1** Within four weeks of the starting date the *Consultant* shall submit to the *Service Manager* confirmation of the Initial Target Cost for Stage 2 (which shall be based on that submitted with the *Consultant's* submitted tender).
- Z1.2** The *Consultant* shall provide the *Service Manager* with unfettered access to all information, quotations, assumptions and documents prepared by the *Consultant* during the tender period and after award of the contract used to establish the Initial Target Cost for Stage 2.
- Z1.3** The *Service Manager* shall either accept or reject the Initial Target Cost for Stage 2 within two weeks of receipt from the *Consultant*. In the event the Initial Target Cost for Stage 2 is rejected by the *Service Manager*, the *Client* may immediately terminate this contract (R23) and to proceed to contract with the second placed tenderer that submitted a tender for the Project pursuant to the OJEU notice set out in Recital A to this contract. The termination procedure is P1 and P2 and the amount due is A1 (as set out in clauses 92 and 93).
- Z1.4** The *Consultant* shall comply with the procedure for amendments to the Initial Target Cost contained in the Scope and this contract.

### **Z2 Target Adjustment Events**

The following are Target Adjustment Events.

- The *Service Manager* gives an instruction changing the Scope for works to be undertaken in Stage 2 except:
  - changes that merely represent development, refinement and fine tuning of the draft Stage 2 Scope published at tender and do not have a material effect on the Prices, the Completion Date and the quality of the *service*.
- In the event that the *Consultant* proposes an alternative design to the deck design included in the Scope and such an alternative is approved by the *Service Manager*
- The *Client's* assumption that access to the bridge abutments and train lines will be provided through adjacent land (Persimmon Homes), together with an area for site welfare and compound is incorrect.
- The *Client's* assumption that all excavated material is assumed to be unacceptable for re-use into the works is incorrect. This material is deemed to be inert (not contaminated) for the purposes of disposal off site to a licence tip. For the avoidance of doubt the cost of disposing of some contaminated material has been included within the Contractor's Construction Risk amount.
- The *Consultant* is assumed to have taken into account all information in the Scope, the Activity Schedule, the tender documents, the information visible

from a visual inspection of the Site, all information shared by the *Client* at tender, and other information which an experienced design and build contractor could reasonably be expected to have or to obtain at tender. In the event the *Consultant* encounters physical conditions which are within the Site and an experienced design and build contractor would have judged at the Contract Date to have such a small chance of occurring that it would be unreasonable to have allowed for them, then the *Service Manager* shall assess if a Target Adjustment Event has occurred. For the avoidance of doubt only the difference between the physical conditions encountered and those for which it would have been reasonable to have allowed is taken into account in assessing a Target Adjustment Event.

- The *Services Manager* notifies a correction to an assumption which he has stated about a Target Adjustment Event.
- Detailed design that was to be undertaken in Stage 2 is introduced by the *Service Manager* into Stage 1 of the Project,
- The cost of the Statutory Authorities Attendance Work at C4 stage (detailed design and estimate). Attendance work is defined in Stage 2 as “*the Contractor shall be responsible for carrying out excavation/ backfilling trenches and installing service duct routes for the statutory authorities’ works*”
- Demolition of the existing bridge cannot be undertaken within a 48hr abnormal weekend possession, with such inability being demonstrated to the satisfaction of the *Service Manager*.
- The following pile lengths are demonstrated by the *Consultant* to the *Service Manager* (and to the satisfaction of the *Service Manager*) to be inadequate for the Stage 2 works:
  - 750mm diameter piles : 15meter (south abutment)
  - 900mm diameter piles : 20meter (north contiguous pile wall)
  - Steel sheet piles : 4meters
- Piles are indicated on the drawings under the foundations of the temporary bridges. It is assumed these piles will be approximately 500mm diameter and 7.5 metres in length. On removal of the temporary bridges the foundations will be removed but with the piles left in place. The cost of the piles have been included within the Contractor’s Construction Risk amount.
- The following weight factor for the purposes of calculating the steel reinforcement within structural concrete is demonstrated by the *Consultant* to the *Service Manager* (and to the satisfaction of the *Service Manager*) to be inadequate for the works: 140kg/m<sup>3</sup>
- Structural steel members are assumed by the *Client* to be protected by grit blast and paint and not fabricated from weathered steel and this assumption is incorrect.
- The *Client* has assumed that the existing surface course of the road either side of the bridge will be replaced up to the limit of the side road / access junctions (although he proposed bridge deck is to maintain the existing road level) and the same assumption to kerbing and this assumption is incorrect.
- The centres of the structural steel cross beams have been assumed by the *Client* to be at 1.750 metre centres; identical to that of the web stiffeners spacing on the main beams and the assumption is incorrect.

- The *Client* has assumed that for the temporary diversion of utility services and re-establishment into their permanent location, this will be undertaken by the statutory authorities and this assumption is incorrect. The *Consultant* will only be responsible for excavation/backing service trenches or installing service duct routes in the Stage 2 building contract.
- The *Client* has assumed that all works to the south abutment will be classed as Network Rail green zone working, once track side vortex fencing is installed and this assumption is incorrect
- It is assumed by the *Client* that Network Rail will grant possessions, (including abnormals) to enable the works to be planned in an efficient and productive manner and this assumption is incorrect. It has therefore been assumed construction will be a continuous operation with no shutdown periods, other than national holiday periods.

### **Z3 Notifying Target Adjustment Events**

**Z3.1** For Target Adjustment Events which arise from the *Service Manager* giving an instruction, the *Service Manager* notifies the *Consultant* of the Target Adjustment Event at the time of giving the instruction. The *Service Manager* also instructs the *Consultant* to submit a quotation.

**Z3.2** The *Service Manager* may instruct the *Consultant* to submit quotations for a proposed instruction.

**Z3.3** The *Consultant* notifies the *Service Manager* of an event which has happened or which he expects to happen as an Target Adjustment Event if

- The *Consultant* believes the event is an Target Adjustment Event and
- The *Service Manager* has not notified the event to the *Consultant*.

If the *Consultant* does not notify a Target Adjustment Event within four weeks of becoming aware of the event, he is not entitled to a change to the Initial Target Cost unless the event arises from the *Service Manager* giving an instruction, changes an earlier decision or corrects an assumption.

**Z3.4** If the *Service Manager* decides that an event notified by the *Consultant* is not a Target Adjustment Event the *Service Manager* notifies the *Consultant* of his decision, giving reasons why the Initial Target Cost is not to be adjusted.

**Z3.5** If the *Service Manager* decides that the event is a Target Adjustment Event the *Service Manager* notifies the *Consultant* and instructs him to submit quotations.

**Z3.6** If the *Service Manager* decides that the effects of a Target Adjustment Event are too uncertain to be evaluated reasonably, the *Service Manager* states assumptions about the event in his instruction to submit a quotation.

### **Z4 Quotations of Target Adjustment Events**

**Z4.1** The *Consultant* submits quotations within three weeks of being instructed to do so by the *Service Manager*. The *Service Manager* replies within two weeks of the submission. The *Service Manager's* reply is:

- an instruction to submit a revised quotation,
- an acceptance of a quotation,
- a notification that a proposed instruction will not be given or
  - a notification that he will be making his own assessment.

**Z4.2** The *Service Manager* instructs the *Consultant* to submit a revised quotation only after explaining their reasons for doing so to the *Consultant*. The *Consultant* submits the revised quotation within three weeks of being instructed to do so.

**Z4.3** The *Service Manager* extends the time allowed for

- the *Consultant* to submit quotations for a Target Adjustment Event and
- the *Service Manager* to reply to a quotation.

## **Z5 Assessing Target Adjustment Events**

**Z5.1** The changes to the Initial Target Cost are assessed as changes to the quantities or rates included in the Initial Target Cost Build Up, or new items to be included in the Initial Target Cost Build Up.

If the Effect of a Target Adjustment Event is to reduce the Initial Target Cost, the Initial Target Cost is reduced accordingly

## **Z6 Service Manager's Assessments**

**Z6.1** The *Service Manager* assesses a Target Adjustment Event

- if the *Consultant* has not submitted the required quotation within the time allowed or
- if the *Service Manager* decides that the *Consultant* has not assessed if the Target Adjustment Event correctly and does not instruct the *Consultant* to submit a revised quotation.

**Z6.2** The *Service Manager* notifies the *Consultant* of his assessment of a Target Adjustment Event and gives him details of it within three weeks. The period starts when the need for a *Service Manager's* assessment becomes apparent.

## **Z7 Implementation of Target Adjustment Events**

An Target Adjustment Event is implemented when

- the *Service Manager* notifies his acceptance of the *Consultant's* quotation,
- the *Service Manager* notifies the *Consultant* of his own assessment.

## **Z8 Stage 2 Target Cost**

**Z8.1** The *Consultant* shall submit the final Stage 2 Target Cost to the *Service Manager* and all the required documentation in accordance with the requirements of this contract. The Stage 2 Target Cost shall be amended by the *Consultant* to take account of inflation in accordance with the mechanism set out in the Scope.

**Z8.2** If the *Client* wishes to instruct the *Consultant* to proceed to, and undertake Stage 2 the *Client* shall issue to the *Consultant* a Confirmation Notice to Proceed signed on behalf of the *Client*. Following the Issue of a Confirmation Notice to Proceed; and execution of the Stage 2 building contract. The *Consultant* shall carry out the Stage 2 works in accordance with the Stage 2 building contract.

**Z8.3** The *Client* may in its sole discretion decide not to require the Contractor to undertake Stage 2. Save for the payment of any amounts due to the *Consultant* for properly completed services in accordance with this contract, the *Consultant* shall not be entitled to any payment or to claim any additional costs or losses whatsoever

(including, but not limited to loss of profit ) from the *Client* as a result of any decision not to proceed to Stage 2, any failure by the *Client* to enter into the Stage 2 building contract ; or any delay between the completion of Stage 1 and the issue of the Confirmation Notice to Proceed.

## **Z9 Building Information Requirements**

**Z9.1** The Building Information Requirements (BIM) obligations and requirements are set out in the Scope.

## **Z10 Key Performance Indicators**

**Z10.1** The Key Performance Requirements (KPI) obligations and requirements are set out in the Scope.

## **Z11 Confidentiality and Freedom of Information Act Definitions**

In this clause Z11, the following defined terms shall bear the following meanings:

**“Code of Practice”** means any code of practice or guidance issued under or in connection with the FOIA and the EIR by the relevant governmental or statutory body and as the same may be amended, updated or replaced from time to time;

**“Confidential Information”** means information, data and material of any nature which either Party may receive or obtain in connection with the operation of the contract and:

the release of which is likely to prejudice the commercial interests of the *Client* or the *Consultant* respectively; or

which is a trade secret;

**“EIR”** means the Environmental Information Regulations 2004; and

**“FOIA”** means the Freedom of Information Act 2000.

**Z11.1** In respect of any Confidential Information it may receive from the other Party (the “Discloser”) and subject always to the remainder of this clause, each Party (the “Recipient”) undertakes to keep secret and strictly confidential and shall not disclose any such Confidential Information to any third party without the Discloser's prior written consent provided that:

- the Recipient shall not be prevented from using any general knowledge, experience or skills which were in its possession prior to the commencement of the contract;
- the provisions of this clause shall not apply to any Confidential Information which:
  - is in or enters the public domain other than by breach of the contract or other act or omissions of the Recipient;
  - is obtained by a third party who is lawfully authorised to disclose it;
  - is authorised for release by the prior written consent of the Discloser; or
  - the disclosure of which is required to ensure the compliance of the *Client* with the FOIA and the EIR and/or any applicable Codes of Practice.



- Z11.2** Nothing in this clause shall prevent the Recipient from disclosing Confidential Information where it is required to do so by judicial administrative, governmental or regulatory process in connection with any action, suit, proceedings or claim or otherwise by applicable law or, where the *Consultant* is the Recipient, to the *Consultant's* immediate or ultimate holding company provided that the *Consultant* procures that such holding company complies with this clause as if any reference to the *Consultant* in this clause were a reference to such holding company.
- Z11.3** The *Consultant* acknowledges that the *Client* is subject to the FOIA and the EIR. The *Consultant* notes and acknowledges the FOIA and the EIR and the applicable Codes of Practice. The *Consultant* will act (and will provide reasonable assistance to the *Client* to enable it to act) in accordance with the FOIA and the EIR and the Codes of Practice to the extent that they apply to the *Consultant's* performance under the contract.
- Z11.4** The *Consultant* agrees that:
- without prejudice to the generality of clause Z11.1 the provisions of this clause are subject to the respective obligations and commitments of the *Client* under the FOIA and the EIR and the Codes of Practice;
  - the decision on whether any exemption applies to a request for disclosure of information is a decision solely for the *Client*.
  - where the *Client* is managing a request as referred to in clause Z11.5 the *Consultant* shall co-operate with the *Client* and shall respond within five (5) working days of any request by the *Client* for assistance in determining how to respond to a request for disclosure.
- Z11.5** The *Client* will consult the *Consultant* in relation to any request for disclosure of the *Consultant's* Confidential Information in accordance with the Codes of Practice.
- Z12 Information provided by the *Client***
- Z12.1** The *Consultant* acknowledges that the *Client* does not warrant or give any representation on the accuracy or completeness of any data or information provided to the *Consultant* by the *Client*. The *Consultant* must rely on its own enquiries and carry out such further investigation or surveys as it considers appropriate.
- Z13 Partnering**
- Z13.1** No partnering agreement which the Parties may enter into (with or without other parties) in connection with the service is intended to create legally enforceable rights or obligations between the Parties or to affect the terms of this contract.
- Z14 Collateral Warranties**
- Z14.1** The *Consultant* when requested by the *Client* is required to procure and deliver a *Consultant* warranty in favour of any Funder or Third Party substantially in the form contained at Annex 5.
- Z14.3** The *Consultant* when requested by the *Client* is required to procure and deliver a Subcontractor Warranty in favour of the *Client* in substantially the same form contained in Part A of Annex 6 and in favour of a Funder and the Third Party substantially in the same form contained in Part B of Annex 6. A warranty will be required from any Subcontractor with a material design responsibility. A certified copy of the subcontract shall also be provided to the *Client*.

**Z14.4** If the *Consultant* defaults in the execution or the delivery of any of the documents required under clause Z14, in addition to any other right which the *Client* may have, the *Client* may suspend payment of any sum due to the *Consultant* under this contract until the *Consultant* has remedied its default.

**Z15 Third Party Agreements**

**Z15.1** Copies of the whole or parts of the following agreements:

MoD Agreement<sup>1</sup>

Network Rail Basic Asset Protection Agreement ("BAPA Agreement")

Network Rail Two Party Overbridge Agreement ("Overbridge Agreement")

(excluding matters related to price and payment) have been or will be provided to the *Consultant* and such agreements or parts are referred to in this clause Z15 as "the Third Party Agreements".

**Z15.2** The *Consultant* shall carry out the *service* in conformity with the *Client's* obligations under the Third Party Agreements and discharge all of the *Client's* obligations (so far as applicable to the service) set out in the Third Party Agreements.

**Z15.3** The *Consultant* undertakes to the *Client* that he has performed and shall continue to perform his obligations under this Contract in such manner and at such times so that no act, omission or default of the *Consultant* or any Subcontractor shall constitute, cause or contribute to any breach by the *Client* of any of its obligations under the Third Party Agreements.

**Z15.4** The *Consultant* shall indemnify the *Client* and keep the *Client* indemnified against all costs, claims, damages, demands, losses, expenses, liabilities or proceedings of whatever kind and howsoever arising from or in connection with (whether directly or indirectly) from breach of the Third Party Agreements due to the *Consultant*.

**Z15.5** Without prejudice to the generality of the above, in relation to the BAPA Agreement, the *Consultant* is to discharge the obligations of the *Client* as set out in clauses 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 25, 26, 27, 28 of the BAPA Agreement.

**Z15.6** The *Consultant* acknowledges the obligation under the BAPA Agreement to Provide the Service in accordance with all Applicable Law in relation to equality legislation and Network Rail's equality, diversity and inclusion policy, which can be viewed at [www.networkrail.co.uk](http://www.networkrail.co.uk).

**Z15.8** The *Consultant* acknowledges that Network Rail may be required under freedom of information legislation to respond to request for information and the freedom of information and confidentiality requirements at clauses 48, 49, 50 and 51 of the BAPA Agreement.

**Z15.9** The *Consultant* acknowledges that the right to all materials at clause 70.1 of this Agreement includes the ability to issue a licence to Network Rail in accordance with clause 52 of the BAPA Agreement

**Z15.7** Without prejudice to the generality of the above, in relation to the Overbridge Agreement, the *Consultant* is to advance and discharge the obligations of the *Client* as set out in clauses 2.2.1 and 2.2.2 of the Overbridge Agreement during Stage 1.

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<sup>1</sup> MoD agreement to be supplied

**Z16      Slavery and Trafficking and Anti - Bribery**

**Z16.1**      The *Consultant* shall comply with all Applicable Law pertaining to anti-slavery and human trafficking from time to time in force including but not limited to the Modern Slavery Act 2015. The *Client* is committed to ensuring that within its own supply chain there is no trafficked, bonded, child, forced or compulsory labour or servitude.

**Z16.2**      The *Consultant* shall comply with all Applicable Law in relation to a Corrupt Act including the Bribery Act 2010.

**Z17      Social Value Outcomes Plan<sup>2</sup>.**

**Z17.1**

**Z18      Disclosure of Information**

The *Consultant* shall not without the consent in the writing of the *Client* disclose particulars of the contract to any person or publish or permit to be furnished or published in the press or on radio, television, screen or any other medium any information with regard to the *Client's* business to any person save in so far as may be necessary for the due performance of or compliance with the contract and shall preserve strict confidence with regard to any information of a confidential or secret nature received from the *Service Manager* or from the *Client*.

**Z19      Partial Invalidity**

If at any time any one or more of the provisions in the contract is or becomes invalid, illegal or otherwise unenforceable in any respect under any law or regulation, the validity, legality and enforceability of the remaining provisions of the contract shall not be in any way affected or impaired.

**Z20      Audit**

**Z20.1**      The *Consultant* agrees that it shall share cost information relating to this contract with the *Client* and/or its authorised representative(s) on an open book basis.

**Z20.2**      Subject to any applicable statutory requirements the *Consultant* agrees that the *Client* and/or its authorised representative(s) shall at reasonable times be entitled to audit any records and any arrangements, agreements or processes that the *Consultant* has in place or puts into place as the result of this contract, including auditing:

**Z20.2.1**      environmental procedures (certified to BS EN ISO 14000 or equivalent approved) and quality systems of the *Consultant* (certified to BS EN ISO 9001 equivalent approved);

**Z20.2.2**      health and safety procedures;

**Z20.2.3**      any *Consultant* records to ensure compliance with the pricing arrangements in this contract;

**Z20.2.4**      any *Consultant* records to monitor compliance with technical, health, safety and procedural requirements;

**Z20.2.5**      to ensure compliance with quality requirements of the *Client*;

**Z20.2.6**      arrangements and agreements within the *Consultant's* supply chain including cost information and records relating to payments claimed in respect of the *Consultant's* Subcontractor and suppliers;

**Z20.2.7**      compliance with requirements of the law and this contract relating to the prevention of fraud, bribery and corruption;

**Z20.2.8**      compliance with requirements of this contract in relation to maintenance and storage of data; and

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<sup>2</sup> Contractual obligation to deliver on social value outcome plan will be inserted.

**Z20.2.9** the *Consultant's* design process.

**Z20.3** Where the *Client* requests that the *Consultant* provides information or otherwise permits access to information in accordance with this contract the *Consultant* shall:

**Z20.3.1** comply with such request and shall not unreasonably withhold or delay such information or access; and

**Z20.3.2** provide such access and information in a manner and format and at a location reasonably requested by the *Client*.

**Z20.4** Without prejudice to any other right the *Client* may possess, if any material non-compliance with this contract is discovered (the cost impact of which exceeds the cost of the audit) as a result of the audit the *Consultant* shall:

**Z20.4.1** pay the costs, losses or expenses incurred by the *Client* in carrying out the audit, any repeat of the audit and/or initiating enhanced audit procedures reasonably required by the *Client* in consequence of such non-compliance; and

**Z20.4.2** make changes to the relevant arrangements, agreements or processes to avoid future compliance issues occurring.

**Z20.5** The costs incurred by the *Consultant* in complying with any such requirements shall be borne by the *Consultant*.

## **Z21 Fair Payment**

**Z21.1** The *Consultant* assesses the amount due to a Subcontractor without taking into account the amount certified by the *Service Manager*.

The *Consultant* includes in its contract with each Subcontractor

- (1) a period for payment of no more than 19 days after the due date in the main contract
- (2) a provision requiring the Subcontractor to include a period for payment in its Sub-subcontracts of no more than 23 days after the due date in the main contract, and
- (3) a provision requiring the Subcontractor to assess the amount due to its Subsubcontractor without taking into account the amount paid by the *Consultant*

**Z21.2** The *Consultant* notifies non-compliance with the timescales for payment through the Efficiency and Reform Group Supplier Feedback Service. The *Consultant* includes this provision in each subcontract, and requires Subcontractor to include the same provision in each sub-subcontract.

## **Z22 Failure to Enforce Contract**

Failure at any time by the *Client* or the *Service Manager* to enforce the provisions of the contract or to require performance by the *Consultant* of any of the provisions of the contract shall not be construed as a waiver of any such provision or of any other provision and shall not in any way vitiate or invalidate the contract or any part thereof nor effect the right of the *Client* or the *Service Manager* to enforce any provision of the contract.

## **Z23 Gratuities**

Neither the *Consultant* nor any employee engaged or employed (either directly or by any Subcontractor) in the execution, construction, completion and maintenance of

the *Services* shall solicit or accept any gratuity, reward or charge in respect of any part of the *Services* other than bona fide charges approved by the *Client*.

**Z24 Remedies Cumulative**

The rights and benefits conferred upon the *Client* by the contract are in addition to any other rights and remedies he may have against the *Client* including, without prejudice to the generality of the foregoing, any remedies in common law.

**Z25 North Somerset Council as regulatory authority**

North Somerset Council's role as a regulatory authority and as *Client* under the contract is separate and distinct. Actions taken in one capacity are deemed not to be taken in the other.

Where statutory consents must be obtained from North Somerset Council in its capacity as a regulatory authority, the *Consultant* is responsible for obtaining these and paying fees. North Somerset Council's acceptance of a tender and the *Client's* instructing or varying work does not constitute statutory approval or consent.

An action by North Somerset Council as a regulatory authority is not in its capacity as *Client* and is not a compensation event.

**Z26 Assignment**

The *Client* may assign the benefit of the Agreement to any successor body exercising its function.

**Z27 Statutory Authorities**

The *Consultant's* obligations and requirements for the service to be provided in relation to the Statutory Authorities are set out in the Scope.

**Z28 Network Rail**

The *Consultant* shall comply with the "Special Requirements in Relation to Network Rail" as set out in the Scope. Compliance with these Special Requirements shall not relieve the *Consultant* of any of his obligations and liabilities under the contract and fulfilment of such other obligations and liabilities shall not relieve him of his responsibility to comply with such Special Requirements.

**Z29 Principal Contractor, Principal Designer and Designer**

**Z29.1** The *Client* appoints the *Consultant* to act as principal contractor, principal designer and designer for the purposes of the Construction (Design and Management) Regulations 2015 ("CDM Regulations") and any replacement or amendment of those Regulations. The *Consultant* shall perform all the functions and obligations required to be performed by the principal contractor, principal designer and designer under the CDM Regulations.

**Annex 3      Scope**

**[INSERT]**

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**Annex 6      Form of Subcontractor Warranty**

**Part A: Subcontractor Warranty to *Client***

**Part B: Subcontractor Warranty to Funder and Third Party**

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