



**RAMSAY MCMICHAEL CONSULTING LTD**

**TERMS AND CONDITIONS OF APPOINTMENT**

**1. Definitions**

- 1.1 'Consultant' means RAMSAY MCMICHAEL CONSULTING LTD and its legal successors. 'Client' means the person, firm, company or organisation for whom the Consultant is performing the Services. 'Agreement' means the contract referred to in Clause 2. 'Services' means the services to be performed by the Consultant in accordance with the proposal from the Consultant. 'Project' means the project or works for which the Client has commissioned the Services.

**2. General**

Unless and until a formal agreement is entered into, the Client's acceptance of the proposal for Services from the Consultant or a request for some or all the Services to be performed by the Consultant, shall constitute a binding contract between the Client and the Consultant which contract will be subject to any terms and conditions contained or referred to in the aforementioned proposal and these terms and conditions. In the event of any conflict, the terms and conditions in the proposal shall prevail over these terms and conditions. The Agreement so formed shall supersede all previous understandings, commitments or agreements whether written or oral between the Client and the Consultant relating to the subject matter hereof. No person or entity shall have any rights in relation to this Agreement, whether as third parties or otherwise, save the parties to this Agreement. Should any term or condition of this Agreement be held to be unenforceable then such term or condition shall be disregarded and the remaining terms and conditions shall remain in full force and effect.

**3. The Consultant's Obligations**

- 3.1 The consultant shall perform the services with reasonable skill, care and diligence, but:
- no liability shall attach to the consultant in respect of the services except such liability as ought to be covered by the professional indemnity insurance referred to in the Appointment Agreement for the Consultants Services;
  - such liability shall be limited to the sum specified in the Appointment Agreement for Services and in accordance with 14.3; where during the course of building works the consultant makes periodic visits to site to monitor the contractor's workmanship and progress, to check the use of materials, the works' conformity to specification and to report generally on the progress and quality of the works, the consultant shall not be required to make exhaustive or continuous inspections. Liability for the works shall be limited to omissions or errors reasonably discoverable by the consultant undertaking periodic inspections of the site. Where frequent or constant inspection is necessary or required, a resident consultant, clerk of works or resident engineer should be appointed by the client to supervise the day-to-day administration of the project;
  - it is agreed that the purpose of such inspections is the provision of information, rather than for the purpose of giving any approval to the project as a whole;
  - where the Client directly appoints a specialist consultant or contractor or a works contractor, the consultant shall not be liable for any loss, injury or damage incurred through the default of the specialist or other contractor. The consultant shall be responsible for the direction and integration of the specialist's services or contractor's works only where expressly required as a part of the services.
- 3.2 The client, not the consultant, shall satisfy him or herself as to the adequacy of the Professional Indemnity Insurance (PII) of other specialists and consultants referred to.
- 3.3 The client shall be responsible for obtaining and satisfying him or herself of the adequacy of warranties from other specialists and consultants.
- 3.4 The consultant shall not, without the consent or authority of the client, give to the main, or any other contractor, supplier or person, any instruction the necessary effect of which would be to materially vary the works, or increase the cost of, or time taken to complete, the works.
- 3.5 The consultant shall promptly inform the client in writing of the likely effect of anything relating to the consultant's scope of work as defined herein which the consultant believes would materially vary the works, increase the cost of, or time taken to complete, the works.
- 3.6 To the extent that we are engaged as project manager, contract administrator or employer's agent and that the Services include issuing certificates or statements in relation to payments to the building contractor and/or statements or certificates in relation to practical completion or completion of making good, we shall (a) be entitled to rely and act upon the advice of your consultants (both before and after any novation of such consultants' respective appointments); and (b) have no design responsibility and shall not be liable for the adequacy or fitness for purpose of any design, for the approval of any drawings prepared or to be prepared by or on your behalf or for the quality of the project to which the Services relate (the "Project"). We shall not be held responsible for any construction means or methods under or in connection with the Appointment.

Chartered Building Surveyors - Project Managers - Consulting Civil & Structural Engineers

Ramsay McMichael Consulting Limited

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- 3.7 If clause 9.1 applies, you shall procure that the appointment of each of your other consultants includes an obligation on such other consultants to confirm to us in a timely fashion (so as not to delay or disrupt the performance of the Services) that the Project has been carried out in accordance with the employer's requirements and/or the building contract and completed in accordance with all necessary approvals. Notwithstanding such confirmation being given to us by your other consultants, we shall not issue a statement of practical completion or a statement of making good defects under a building contract when patent defects are present.
- 4. Payment for the Consultant's Services**
- 4.1 The consultant shall be entitled to submit a fee invoice:
- monthly, or at the conclusion of agreed service stages, whichever is the more frequent;
  - at suspension or termination of the services;
  - when work proves to be abortive, in respect of that work;
  - at conclusion of the services.
- 4.2 Payments invoiced shall be calculated by reference to:
- agreed hourly or unit rates;
  - agreed service stage payments or lump sums; or
  - a fair proportion of agreed service stage payments or lump sums.
- 4.3 The client shall pay the consultant for the performance of the services the fees and charges in such instalments as are set out in the Appointment Agreement for Services. All fees and charges under the Agreement are exclusive of Value Added Tax (VAT) which if due shall be paid concurrently in addition. The "due date for payment" shall be 7 (seven) days (see clause 15.3 below) after the date of the submission of the invoice. The consultant when submitting his or her invoice shall on each invoice confirm the basis on which the stated amount is calculated.
- 4.4 The "final date for payment" shall be 21 (twenty-one) days after the due date for payment, and payment shall be made no later than the final date for payment.
- 4.5 The client must, not later than 5 (five) days after the due date for payment, give to the consultant written notice stating the amount which the client proposes to pay and the basis on which that amount is calculated. Where no such notice is given the amount to be paid is that stated in the invoice.
- 4.6 Where the client intends to withhold payment of any amount either stated in the consultant's invoice or in a written notice given by the client under clause 2.5 above, the client must give written notice to the consultant not later than 5 (five) days before the final date for payment, stating the amount to be withheld and the grounds for withholding payment.
- 4.7 Any amounts due to the consultant under this Agreement which remain unpaid by the client after the final date for payment shall bear interest at a rate of 5% (five per cent) above the base rate, in force from time to time at the bank holding the consultant's current account, calculated from the date for final payment or from the date 7 (seven) days after publication of an adjudication settlement, whichever is the later.
- 4.8 In the event that the client is in default over payment of amounts at the final date for payment and no notice of intention to withhold payment from such amount has been given under clause 2.6 above, the consultant may suspend performance of any or all of the services. This right is subjected to the consultant first giving the client not less than 7 (seven) days' written notice of such intention and stating the grounds for suspension. The right to suspend performance shall cease when the client makes payment of the amount due. Any such period of suspension shall be disregarded for the purpose of contractual time limits previously agreed for the completion of the services. Such suspension shall not be treated as a suspension under clause 5 below.
- 4.9 The specified fees do not include, and the consultant shall be entitled to reimbursement of expenditure comprising:
- fees, other charges and disbursements of any main or other contractor, supplier, clerk of works, other consultant, professional or consultant engaged with the prior written consent of the client whether directly or as agent for the client, and whether or not working under the direction or supervision of the consultant;
  - the reasonable cost of producing or reproducing documents, drawings, maps, photographic and other records and presentation materials;
  - reasonable travel and hotel expenses (including mileage for car travel);
  - unit charges (but not standing charges) for communications by telephone, telex, facsimile transmission, post, messenger, etc;
  - fees and advertising costs in connection with applications for local government consents such as planning permission and building regulation consent;
  - any other fees or expenses which the client has authorised the consultant in writing to incur.
- 4.10 Unless expressly agreed to the contrary the specified fees do not include, and the consultant shall be entitled to payment at the specified hourly rate for, any work arising out of or in connection with:
- preparing maintenance manuals or other documents (drawings, maps, photographic and other records, models and presentation materials);
  - varied instructions resulting in additional or abortive work;
  - defects in materials or in the work of others;
  - reinstatement of damaged work;
  - determination of a main or other contractor's employment under a building contract and the appointment of new (main or other) contractors;
  - overrun of a contract administered by the consultant where such overrun is beyond the consultant's control;
  - Investigating, negotiating and agreeing loss and expense claims.



- 4.11 On written demand by the client, the consultant shall provide as appropriate:
- time sheets where the fee is based on time charges;
  - original receipts or other appropriate evidence of expenses or disbursement.
- 4.12 Where the consultant's fees are expressed as a percentage of total construction costs, that total shall include:
- adjustments consequent upon variations and fluctuations;
  - expenditure of provisional, prime cost sums, or contingencies;
  - value of materials, labour or services provided by the client free of charge; but shall exclude the value of any loss and expense claims.
- 4.13 All fees are exclusive of VAT.
- 4.14 The consultant shall notify the client in writing as soon as it becomes reasonably apparent that any work additional to the subject of the Agreement will be required.
- 4.15 Where the consultant is involved in additional work because of:
- changes in the scope of works; and/or
  - changes in the programme of the works; and/or
  - changes instructed to the services; and/or
  - the commencement of adjudication, arbitration or litigation, the client shall pay to the consultant additional fees calculated (unless otherwise agreed) on the time charge basis set out in the Appointment Agreement.
- 4.16 Any interest earned where client's money is held will be retained in full by the consultant unless a signed statement is received from the client to state otherwise.
- 4.17 The Client shall pay the Consultant for the Services in accordance with the proposal and this Agreement. If the Consultant performs any additional services or if the Services are delayed or disrupted for reasons beyond the reasonable control of the Consultant then the Consultant shall be entitled to such additional fees as are fair and reasonable in the circumstances. The Consultant may render an invoice at monthly intervals for services properly performed. The agreed invoice, or in the event of a dispute the undisputed element, shall be paid within 21 days of receipt of the invoice by the Client (the final date for payment).
- 4.18 The Client shall not withhold any payment of any sum or part of a sum due to the Consultant under the Agreement by reason of claims or alleged claims against the Consultant unless the amount to be withheld has been agreed between the Client and the Consultant as due to the Client or such sum arises from an award in adjudication, arbitration or litigation in favour of the Client and arises under or in connection with the Agreement. Save as aforesaid all rights of set off at common law, in equity or otherwise which the Client may otherwise be entitled to exercise are hereby expressly excluded.
- 5. Professional Indemnity Insurance (PII)**
- 5.1 The consultant is required to comply with the regulations of The Royal Institution of Chartered Surveyors in respect of the maintenance of Professional Indemnity Insurance. He or she shall use reasonable endeavours to take out and maintain such Professional Indemnity Insurance above RICS limits, provided that it is available at commercially reasonable rates, as defined by reference to an amount and for a period in the Appointment Agreement.
- 6. Communications between the Client and the Consultant**
- 6.1 If the client's representative has ceased for any reason to act as such, the client shall promptly inform the consultant in writing of the identity of the new representative.
- 6.2 All the client's instructions to the consultant with regard to the services (including those to vary, add to or suspend the services) shall be given to the consultant in writing, or, if given orally, confirmed in writing within 7 (seven) days.
- 6.3 The client shall promptly convey to the consultant any decision or information held by the client necessary for the proper performance of the services.
- 6.4 Any formal notice shall be deemed to have been duly given if mailed by registered post to the representative at the address specified in the Appointment Agreement for Services.
- 7. Confidentiality**
- 7.1 We shall both treat the details of the Appointment and any written or oral information about the Services (including any know-how, techniques or processes used in the course of carrying out the Services) as private and confidential and neither of us shall publish or disclose any details thereof to any third party unless prior written consent has been given by the other. This duty of confidentiality shall not apply to information which the receiving party can show by reasonable documentary proof (a) to have been in the public domain at the time of receipt by the receiving party; or (b) to have been lawfully known by the receiving party prior to its receipt; or (c) to have been disclosed to the receiving party without restriction by a third party; or (d) to have become known to the public through no fault of the receiving party after receipt thereof; or (e) is required to be disclosed pursuant to applicable laws or a legally binding order of any competent judicial, governmental or regulatory body. Before disclosure pursuant to clause 5(e), the disclosing party will (to the extent permitted by law) inform the receiving party of the circumstances and the details of the information to be disclosed at the earliest possible opportunity.



## **8. Suspension and Termination**

- 8.1 The client may suspend performance by the consultant of all or any of the services by giving 7 (seven) days' notice to the consultant. If the services have been suspended for a period of more than 12 (twelve) months, either party may terminate the Agreement by giving written notice to that effect.
- 8.2 The client may terminate the appointment of the consultant under this Agreement by giving 7 (seven) days' written notice to the consultant.
- 8.3 Where the services have been suspended by the client and the Agreement has not been terminated, the client may, by giving reasonable notice to the consultant, require the consultant to resume the performance of the services.
- 8.4 If the client materially breaches their obligations under this Agreement, the consultant may serve on the client a notice specifying the breach and requiring its remedy within 28 (twenty-eight) days, and if the client thereafter fails to remedy that breach within that period, the consultant may terminate this Agreement given written notice to the client.
- 8.5 If either party:
- commits an act of bankruptcy or has a receiving or administrative order made against it; and/or
  - goes into liquidation; and/or
  - becomes insolvent; and/or
  - makes any arrangements with its creditors; the other may suspend performance of the services or may terminate the appointment by giving written notice.
- 8.6 These rights are in addition to those granted to the consultant under clause 2 above.

## **9. Consequences of Suspension and Termination**

- 9.1 If performance of the services has been suspended under clause 2 or clause 5 above, or the Agreement has been terminated pursuant to the provisions of clause 5 above:
- (a) the client shall pay the consultant any instalments of the fees due to the consultant up to the date of suspension or termination together with a fair and reasonable proportion of the next following instalment commensurate with the services performed by the consultant.
- (b) unless the Agreement has been terminated by the client because of a material breach by the consultant, the client shall pay the consultant within 28 (twenty-eight) days of written demand the consequential costs necessarily incurred as a result of the suspension or termination.
- 9.2 Termination of the Agreement shall be without prejudice to the rights and remedies of the parties.

## **10. Complaints**

- 10.1 In the event that the client has a complaint in respect of the performance of the consultant's services under this Agreement, without prejudice to any other remedy available under the Agreement, he or she shall be entitled to have access to the complaints handling procedure maintained by the consultant, written copies of which should be available on request from the consultant.
- 10.2 Arrangements for complaints or redress if something goes wrong, is regulated by the Royal Institution of Chartered Consultants (RICS).

## **11. Copyright**

- 11.1 Unless otherwise agreed in writing, the consultant shall retain copyright in and ownership of, all specifications, or other documents, drawings, maps, photographic and other records, models and presentation materials prepared by the consultant.
- 11.2 The consultant may publish or join in publishing any description or illustration of the works with the prior consent of the client.

## **12. Waiver**

- 12.1 No acquiescence in a breach shown by either the client or the consultant shall prevent the other subsequently insisting upon his or her rights and remedies under this Agreement.

## **13. Disputes**

- 13.1 If a dispute arises out of this Agreement, the client and the consultant shall attempt to reach a settlement in good faith. The internal complaints procedure mentioned in clause 9.0 should facilitate this.
- 13.2 If the dispute is not thus resolved, either the client or the consultant may at any time give notice to the other that he or she wishes to refer the dispute to an adjudicator, provided the contract is in writing. The person who is to act as the adjudicator shall be agreed between the client and consultant within 28 (twenty-eight) days of such notice having been given or, failing agreement at the end of that period, be a person appointed by the President or Vice-President of the Chartered Institute of Arbitrators (or in Scotland, the Chairman or Vice-Chairman of the Chartered Institution of Arbitrators (Scottish Branch)) within 5 (five) days of such notice having been given. The referring party shall refer the dispute in writing to the adjudicator with 7 (seven) days of such notice having been given.
- 13.3 The adjudication shall be conducted in accordance with the Construction Industry Council Model Adjudication Procedures (subject to amendments if the adjudication is in Scotland - see clause 4.3 on p.8) current at the time of entering into this Agreement. Clause 30 of the Construction Industry Council Model Adjudication Procedures shall be amended to add the following sentence:



“No party shall be entitled to raise any right of set-off, counterclaim and/or abatement in connection with any enforcement proceedings”.

13.4 The adjudicator shall act impartially and may take the initiative in ascertaining the facts and the law.

#### **14. Liability**

14.1 The liability of the consultant shall be limited to such sum as it would be just and equitable for the consultant to pay having regard to the extent of the responsibility of the consultant for the loss or damage suffered, on the basis that all other consultants, the contractor and any subcontractors who have a liability shall be deemed to have provided contractual undertakings to the client on terms no less onerous than those applying in the case of this Agreement. They shall be deemed to have paid to the client such sums as it would be just and equitable for them to pay having regard to the extent of their responsibility for such loss or damage.

14.2 The liability of the consultant shall be limited to the amount of the Professional Indemnity Insurance required by virtue of clause 3.1 above.

14.3 Notwithstanding any other term to the contrary in the Agreement or any related document including any other contract in connection with the Project which the Consultant is a party to and whether the cause of action for any claim arises under or in connection with the Agreement or any other contract as aforesaid in contract or in tort, in negligence or for breach of statutory duty or otherwise the Consultant shall have no liability to the Client or to any such other party to such other contracts as aforesaid in respect of any claim for loss or damage arising from acts of war or terrorism or arising from any incidence of toxic mould or asbestos but otherwise in relation to any and all causes of action as aforesaid the total liability of the Consultant in the aggregate for all claims shall not exceed £250,000 or limited to a sum equivalent to ten (10) times the fee payable under the Agreement, whichever is less, or such other sum as may be expressly stated (the “Limit of Liability”) in the Consultant’s proposal, and further but without prejudice to the aforesaid limit of liability any such liability of the Consultant shall be limited to such sum or sums as it would be just and equitable for the Consultant to pay having regard to the Consultant’s responsibility for the same and on the basis that all other parties appointed or to be appointed by the Client to perform related services in connection with the Project shall be deemed to have provided undertakings on terms no less onerous than this Agreement and shall be deemed to have paid to the Client such contribution as it would be just and equitable for them to pay having regard to their responsibility for any loss or damage and providing that it shall be deemed that such parties have not limited or excluded their liability to the Client for such loss or damage in any way which may be prejudicial to the Consultant’s liability under this clause. Nothing in this clause shall operate to exclude or limit the Consultant’s liability for death or personal injury.

14.4 The Client shall indemnify and keep indemnified the Consultant from and against all claims, demands, proceedings, damages, costs and expenses arising out of or in connection with this Agreement or the Project arising from acts of terrorism or arising otherwise in excess of the liability of the Consultant under this Agreement or which may be made in respect of events occurring after the expiry of the period of liability stated in this Agreement.

14.5 No action or proceedings under or in connection with this Agreement shall be commenced against the Consultant after the expiry of six years from completion of the Services.

14.6 The Consultant at its discretion may issue warranties to third parties but subject always to a condition that the aggregate liability of the Consultant arising across all warranties and this Agreement shall not exceed the total liability stated in this clause

#### **15. Notice**

15.1 Any notice to be given under this Agreement shall be in writing and delivered by hand or sent by recorded delivery post to the party at the address shown in the Agreement or to such an address as the other party may have specified from time to time by written notice to the other.

15.2 Such notice shall be deemed to have been received on the day of delivery if delivered by hand and otherwise on the next working day.

15.3 Where under this Agreement an act is required to be completed within a specified period of days after or from a specified date, the period shall begin immediately after that date. Where the period would include a day which is Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday, that day shall be excluded.

#### **16. Consultants and legal advice - Client guide**

16.1 Consultants may advise on which form of contract is suitable, but they cannot advise as to whether the 1996 HGCR Act will or will not apply.

16.2 The client should therefore employ a solicitor to advise on this issue. The consultant will at the written request of the client employ a solicitor to address and advise on this issue. If the client does so request, then the consultant will be under no liability in relation to any advice obtained. As for other professionals, the client should employ and brief the solicitor themselves rather than the consultant doing so, and should bear the costs of instructing the solicitor.

16.3 If the client does not obtain advice from a solicitor it is agreed that no liability will attach to the consultant for any loss and damage howsoever suffered by the client arising out of, under, or in connection with the application, or non-application of the HGCR Act of 1996.

#### **17. Hazardous Materials**

17.1 Unless included in the Services, the consultant is not responsible for advising on matters which wholly, partly, directly or indirectly arise out of or result from asbestos (including without limitation the costs of testing for, monitoring, abatement, mitigation, removal, remediation or disposal of any asbestos or product or waste that contains asbestos) or pollution and contamination (including without limitation by naturally occurring or man-made substances, forces or organisms or any combination of them whether permanent or transitory and however occurring) or any fungus or spore or any substance, vapour or gas produced by or arising out of any fungus or spore (herein called "asbestos, toxic mould and pollution and contamination matters") and the consultants liability if any under or in connection with the Appointment whether in contract, delict (including negligence), breach of statutory duty or otherwise for any claim which may arise out of or in connection with asbestos, toxic mould and pollution and contamination matters is excluded.



17.2 Any hazardous substances or waste arising from the Services shall not be held, handled, transported or disposed of by the consultant, and such hazardous substances or waste shall remain your property and responsibility. In no circumstances shall we acquire title to any hazardous substances or waste. The client shall be responsible for the keeping, handling, transporting or disposal of all hazardous substances or waste and associated costs. You shall be liable to us, and shall indemnify and hold us harmless, in respect of all claims brought or asserted by any person, including, but not limited to relevant authorities as a result of keeping, handling, transporting or disposal of hazardous substances or waste in connection with the Services.

**18. Compliance with the Laws**

18.1 If at any time a dispute arises under the Appointment which cannot be settled amicably between us, either of us may refer the dispute to adjudication in accordance with the Construction Industry Council ("CIC") Model Adjudication Procedure current at the date the dispute arises. Both of us shall agree a sole adjudicator or failing such agreement, the CIC will nominate a sole adjudicator. The adjudication shall be conducted in English under the laws of Scotland. The Appointment shall be governed by and construed in accordance with the laws of Scotland.

18.2 The Appointment represents the entire agreement and understanding between us relating to the subject matter of the Appointment. You acknowledge that you have had an opportunity to negotiate the terms and conditions of the Appointment prior to the commencement of the Services.

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