



This document has changed from the published version. A comparison document must be provided.

PCSA/**SP** 2016
Pre-Construction Services Agreement
(**Specialist**) 2016

DRAFT

2016

PRE-CONSTRUCTION SERVICES AGREEMENT

Pre-Construction Services Agreement (Specialist) (PCSA/SP)

Appropriate:

- for the supply of pre-construction services by a specialist to either an employer or the actual or prospective main contractor on substantial and/or complex projects, prior to entry into a sub-contract for construction or installation work; and
- where the main contract is to be the JCT Standard Building Contract, Design and Build Contract, Major Project Construction Contract, Management Building Contract, Intermediate Building Contract or Intermediate Building Contract with contractor's design, 2016 Edition.

Can be used:

- whether or not the specialist is to be responsible for any design work;
- where the pre-construction services agreement is to be with the employer but the benefit of the specialist's tender may be assigned to the main contractor; and
- by both private and local authority employers.

Not suitable for use:

- between the employer and main contractor (for which the other version of the agreement, i.e. the JCT Pre-Construction Services Agreement (General Contractor) (PCSA) should be used);
- between the employer and a professional consultant (for which the JCT Consultancy Agreement (Public Sector) (CA) may in appropriate cases be used).

This contract document is created using JCT's online service. Changes or choices made by the contract creator mean that this document differs from the original JCT text. A comparison document, showing all the changes from the original JCT text, is available and must be provided with the contract by the contract creator to all parties to the contract under the terms and conditions of the use of this service. Please note that the finalised version of a contract document that has been output from this service includes the comparison document automatically. Reports of failure to observe the terms and conditions of the use of this service may result in this service being suspended.

This document has been produced electronically by Rapidocs software and is derived from the published printed version (March 2017). Its use is subject to the software licence agreement. Thomson Reuters and the Thomson Reuters Logo are trademarks of Thomson Reuters. Sweet & Maxwell ® is a registered trademark of Thomson Reuters (Professional) UK Limited.

For details of 2016 Edition changes, see the Guidance Notes and the Tracked Change Document.

www.jctltd.co.uk

Contents

Pre-Construction Services Agreement	1
Recitals	2
Section 1 Definitions and Interpretation	4
1.1 Definitions	
1.2 Headings, references to persons, legislation etc.	
1.3 Contracts (Rights of Third Parties) Act 1999	
1.4 Notices and other communications	
1.5 Applicable law	
Section 2 Specialist's General Obligations	6
2.1 Performing the Services	
2.2 Compliance with instructions	
2.3 Co-operation and supply of Information	
2.4 Specification of materials	
2.5 Joint Fire Code	
2.6 Sub-contracting	
2.7 Sub-Contract Tender	
2.8 Liability for design work	
Section 3 Purchaser's General Obligations	8
3.1 Supply of Purchaser information etc.	
3.2 Decisions, approvals and instructions	
3.3 Project Team – delay or default	
Section 4 Representatives and Specialist's Key Personnel	9
4.1 Purchaser's Representative	
4.2 Specialist's Representative and Specialist's Key Personnel – changes	
4.3 Removal and replacement of Specialist appointees	
Section 5 Additional Services, Fee Adjustment etc.	10
5.1 Additional Services	
5.2 Changes, delaying events etc.	
5.3 Notification by the Specialist	
5.4 Adjustment of Fee or additional payment and time	
Section 6 Payment	11
6.1 Amounts payable	
6.2 Specialist's payment applications	
6.3 Due date and final date for payment	
6.4 Payment – amount and notices	
6.5 Interest	
6.6 Specialist's right of suspension	
Section 7 Insurance	13
7.1 Professional Indemnity and Public Liability insurance	
7.2 Evidence of insurance	
7.3 Non-availability of Professional Indemnity insurance	
Section 8 Use of Specialist's Information, Confidentiality etc.	14
8.1 Use of the Specialist's Information	
8.2 Confidentiality and publicity	
8.3 Transparency	
Section 9 Assignment	15
9.1 Restrictions on assignment	
9.2 Benefit of Specialist's Tender	
Section 10 Suspension by the Purchaser, Termination, Adjudication and the PC Regulations	16

10.1	Suspension by the Purchaser
10.2	Remobilisation
10.3	Notification of costs
10.4	Extended suspension – termination by the Specialist
10.5	Termination at will or for default/insolvency
10.6	Consequences of termination
10.7	Adjudication
10.8	The Public Contracts Regulations 2015 – where the Purchaser is the Employer
10.9	The Public Contracts Regulations 2015 – where the Purchaser is the Main Contractor

The Particulars	19
------------------------	-----------

Attestation	22
--------------------	-----------

Annex A	Fee, Rates, Additional Payments and Reimbursable Expenses	23
----------------	--	-----------

Annex B	Pre-Construction Services	25
----------------	----------------------------------	-----------

Guidance Notes	27
-----------------------	-----------

Pre-Construction Services Agreement

This Agreement

is made the _____ 20_____

Between

The Purchaser

[_____]

(Company No. [_____])^[1]

of/whose registered office is at

[_____]

And

The Specialist

[_____]

(Company No. [_____])^[1]

of/whose registered office is at

[_____]

[1] Where the Purchaser or Specialist is neither a company incorporated under the Companies Acts nor a company registered under the laws of another country, delete the references to Company number and registered office. In the case of a company incorporated outside England and Wales, particulars of its place of incorporation should be inserted immediately before its Company number. As to execution by foreign companies and matters of jurisdiction, see the Guidance Notes.

Recitals

Whereas

First

the Purchaser is the Employer/the intended Main Contractor^[2] for the purposes of

[]

at

[] ('the Project')

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

Second

for the purposes of the Project the Specialist has submitted to the Purchaser a tender/an initial proposal document^[2]

dated [], entitled/reference^[2]

[]

for

[]^[3] ('the Specialist's Initial Proposal');

Third

for the purposes of this Agreement, the pre-construction period ('the Pre-Construction Period') ends/is scheduled to end^[2] on [] and construction work on the Project ('the Construction Phase') is scheduled to commence on [], with an estimated duration of [] weeks;

Fourth

on the basis of the Specialist's Initial Proposal, the Purchaser has requested the Specialist, for the fee specified or calculated in accordance with Annex A ('the Fee'), to provide during the Pre-Construction Period the pre-construction services listed in Annex B and, where clause 2.7.1 applies, to submit to the Purchaser/to the intended Main Contractor^[2] a second stage/definitive^[2] Tender by the date and in conformity with the requirements (the 'Specialist Tender Requirements') identified in the Particulars by reference to that clause;

Fifth

The Principal Designer for the purposes of the CDM Regulations is^[4]

[2] Delete as appropriate.

[3] Specify the relevant work package(s) or nature of the specialist work.

[4] Insert the name of the Principal Designer in the Fifth Recital and that of the Principal Contractor in the Sixth Recital if appointed or, where appropriate, amend to state whom the Employer intends to appoint.

[]

of

[]

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

Sixth

The Principal Contractor for the purposes of the CDM Regulations is^[4]

[]

of

[]

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

DRAFT

Where the Purchaser is or becomes the Main Contractor he may be the appointed Principal Contractor.

Under the CDM Regulations 2015, regardless of whether or not a project is notifiable, there is a requirement for the Employer to appoint a principal designer and a principal contractor in all cases where there is more than one contractor, or if it is reasonably foreseeable that more than one contractor will be working on a project at any time. The appointments must be made as soon as is practicable, and, in any event, before the construction phase begins. For these purposes, the term 'contractor' is broadly defined by the regulations and treats the Main Contractor's sub-contractors as separate contractors.

Now it is hereby agreed as follows

Section 1 Definitions and Interpretation

1.1 Definitions

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

Additional Payments: see **clause 6.1.3**.

Additional Services: see **clause 5.1**.

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

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

Employer: the person procuring the Project who is either the Purchaser (as referred to in the **First Recital**) or as identified in the **Particulars** (against the reference to **clause 1.1**).

Information: all information, including designs, drawings, specifications, programmes, schedules and other material supplied or to be supplied by either Party or by any member of the Project Team for the purposes of the Pre-Construction Services, whether in hard copy form or stored in any electronic or other medium.

Interest Rate: a rate 5% per annum above the official bank rate of the Bank of England current at the date that a payment due under this Agreement becomes overdue.

Joint Fire Code: the Joint Code of Practice on the Protection from Fire of Construction Sites and Buildings Undergoing Renovation, published by Construction Industry Publications Ltd and the Fire Protection Association, as amended/revised from time to time.

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

Party: the Purchaser or the Specialist.

PC Regulations: the Public Contracts Regulations 2015.

Pre-Construction Services: the services listed in **Annex B** and any Additional Services instructed under **clause 5.1**.

Programme: the document identified as such in the **Particulars** (against the reference to **clause 2.1**), as amended/revised from time to time.

Project Team: the Parties and the other persons listed in the **Particulars** (against the reference to **clause 2.1**).

Purchaser's Representative: the person identified as such in the **Particulars** (against the reference to **clause 4.1**) or such other person as the Purchaser shall nominate and notify to the Specialist.

Purchaser's Requirements: the document identified as such in the **Particulars** (against the reference to **clause 2.1**).

Reimbursable Expenses: see **Annex A**.

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

Specialist's Information: Information supplied or to be supplied by the Specialist under this Agreement whether under the BIM Protocol or otherwise.

Specialist's Key Personnel: the persons identified as such in the **Particulars** (against the reference to **clause 2.1.2**) or any replacements appointed in accordance with **clause 4.2.2**.

Specialist's Project Staff: the Specialist's Representative, the Specialist's Key Personnel and his other staff engaged on the Project, as identified in **paragraph 3 of Annex A**.

Specialist's Representative: the person identified as such in the **Particulars** (against the reference to **clause 2.1.2**) or any replacement appointed in accordance with **clause 4.2.2**.

Statutory Requirements: any statute, statutory instrument, regulation, rule or order made under any statute or directive having the force of law which affects the Project or performance of any obligations under this Agreement and any regulation or bye-law of any local authority or statutory undertaker which has any jurisdiction with regard to the Project or with whose systems the Project is to be connected.

Sub-Contract: a sub-contract with the Specialist, in the form specified in the Specialist Tender Requirements or such other form as the Specialist agrees, for the performance of all or some of the work packages to which the Pre-Construction Services relate.

VAT: Value Added Tax.

1.2 Headings, references to persons, legislation etc.

1.2.1 Nothing in the documents identified in the **Particulars** shall override or modify the other provisions of this Agreement.

1.2.2 In this Agreement, unless the context otherwise requires:

1.2.2.1 the headings, notes and footnotes are included for convenience only and shall not affect the interpretation of this Agreement;

1.2.2.2 the singular includes the plural and vice versa;

1.2.2.3 a gender includes any other gender;

1.2.2.4 a reference to a 'person' includes any individual, firm, partnership, company and any other body corporate;

1.2.2.5 a reference to a statute, statutory instrument or other subordinate legislation ('legislation') is to such legislation as amended and in force from time to time, including any legislation which re-enacts or consolidates it, with or without modification, and including corresponding legislation in any other relevant part of the United Kingdom; and

1.2.2.6 references to documents shall, where there is a BIM Protocol or other protocol relating to the supply of documents or information under this Agreement, be deemed to include information in a form or medium conforming to that protocol.

1.3 Contracts (Rights of Third Parties) Act 1999

Save as mentioned in clause 9.2, nothing in this Agreement confers or is intended to confer any right to enforce any of its terms on any person who is not a party to it.

1.4 Notices and other communications

1.4.1 Any notice or instruction under this Agreement shall be in writing.

1.4.2 Any notice required to be given in accordance with this clause 1.4.2 shall be delivered by hand or sent by Recorded Signed for or Special Delivery post, in which case it shall be deemed to be given on delivery.

1.4.3 Any other communications may be sent by such other means as the Parties shall agree from time to time.

1.5 Applicable law

This Agreement shall be governed by and construed in accordance with the law of England.^[5]

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

Section 2 Specialist's General Obligations

2.1 Performing the Services

The Specialist shall perform the Pre-Construction Services in accordance with the Purchaser's Requirements, the Statutory Requirements and the Programme. In performing those services the Specialist shall:

- 2.1.1 exercise the level of skill, care and diligence reasonably to be expected of a specialist contractor experienced in the types of work to which the Pre-Construction Services relate for projects of a size, scope and complexity similar to that of the Project;
- 2.1.2 ensure that, unless otherwise agreed with the Purchaser, the Specialist's Key Personnel shall fulfil their identified roles and that they and the Specialist's Representative (or competent deputies) are at all reasonable times available for communication and consultation with the Purchaser and relevant members of the Project Team; and
- 2.1.3 duly consult with members of his supply chain and, at the Purchaser's request, endeavour so far as practicable to ensure the attendance at relevant Project meetings of those suppliers whose attendance is necessary or desirable.

2.2 Compliance with instructions

The Specialist shall comply with the Purchaser's reasonable instructions as to all matters within the scope of the Pre-Construction Services and the Specialist's competence. For these purposes:

- 2.2.1 instructions given to the Specialist's Representative shall be deemed to have been issued to the Specialist;
- 2.2.2 if the Specialist considers that, irrespective of any additional time or financial adjustment under section 5, an instruction would compromise or materially and adversely affect the Project, performance of the Pre-Construction Services or compliance with the Statutory Requirements, he shall notify the Purchaser in writing and the Parties shall promptly meet with a view to immediate resolution of the matter, consulting as necessary with other relevant members of the Project Team.

2.3 Co-operation and supply of Information

The Specialist shall liaise and duly co-operate with the Purchaser and such members of the Project Team as the Purchaser may reasonably direct, both directly and through Project Team meetings, and in accordance both with the identified terms of any applicable framework agreements and with such procedures as the Purchaser may establish from time to time. In particular (but without limitation) the Specialist shall:

- 2.3.1 supply in accordance with the Programme all the Specialist's Information required as part of the Pre-Construction Services, together with any other Information reasonably requested by the Purchaser or Project Team;
- 2.3.2 notify other members of the Project Team in due time of any requirements that the Specialist may have for Information from them;
- 2.3.3 promptly notify the Purchaser of any inconsistency or divergence (actual or prospective) of which he becomes aware in relation to the Purchaser's Requirements or other Information that the Specialist receives and of any delay or impediment in performing the Pre-Construction Services; and
- 2.3.4 promptly notify the Purchaser of any changes to the Specialist's Information, and of any inaccuracies or inconsistencies in it of which he becomes aware, together with any necessary corrections.

2.4 Specification of materials

Unless required by this Agreement or otherwise authorised in writing by the Purchaser, the Specialist will not select or recommend the use of materials for the Project other than in accordance with the

guidelines contained in the edition of 'Good Practice in the Selection of Construction Materials' (British Council for Offices) current at the date of this Agreement.

2.5 Joint Fire Code

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

2.6 Sub-contracting

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

2.7 Sub-Contract Tender

2.7.1 Where the Particulars state that this clause 2.7.1 applies, the Specialist shall duly prepare and submit his second stage or definitive Tender in accordance with the Specialist Tender Requirements and (unless otherwise agreed) within the time specified in the Particulars.

2.7.2 The Purchaser is under no obligation to accept any such Tender and, unless the Parties otherwise agree in writing, no binding contract in respect of the Construction Phase of the Project shall come into existence unless and until a Sub-Contract is entered into.

2.8 Liability for design work^[6]

Where the Pre-Construction Services include design work, the Specialist shall unless otherwise specifically provided in Annex B have no liability of any kind to the Purchaser under this Agreement for that design work, whether in contract, negligence, breach of duty or otherwise (other than any personal injury or death arising from that work):

2.8.1 (where the Purchaser is or becomes the Main Contractor) unless and until a Sub-Contract is entered into by the Parties; or

2.8.2 (where the Purchaser is the Employer) unless and until notice is given to the Specialist under the Sub-Contract requiring him to execute and deliver a Collateral Warranty SCWa/E

upon which the Specialist's obligations and liability in respect of design work relating to work comprised in the Sub-Contract shall be the same as if it were design work undertaken by him under the Sub-Contract and shall be subject to any relevant exclusions or limitations of liability contained in that contract.

[6] See the Guidance Notes.

Section 3 Purchaser's General Obligations

3.1 Supply of Purchaser information etc.

The Purchaser shall in relation to the Pre-Construction Services duly comply with applicable CDM Regulations and provide the Specialist with such information in his possession or control as is relevant to the Pre-Construction Services and compliance with the Statutory Requirements, that information to be supplied in accordance with the Programme or promptly upon the Specialist's reasonable request. In addition the Purchaser shall promptly notify the Specialist of:

3.1.1 additions to or other changes in the Project Team; and

3.1.2 any necessary updates or corrections to any information supplied under this clause 3.1.

3.2 Decisions, approvals and instructions

Decisions, approvals and instructions reasonably required by the Specialist shall be made or given by the Purchaser within a reasonable time of the Specialist's request.

3.3 Project Team – delay or default

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

Section 4 Representatives and Specialist's Key Personnel

4.1 Purchaser's Representative

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

4.2 Specialist's Representative and Specialist's Key Personnel – changes

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

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

4.3 Removal and replacement of Specialist appointees

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

Section 5 Additional Services, Fee Adjustment etc.

5.1 Additional Services

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

5.2 Changes, delaying events etc.

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

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

5.3 Notification by the Specialist

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

5.4 Adjustment of Fee or additional payment and time

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

Section 6 Payment

6.1 Amounts payable

The Purchaser shall in accordance with Annex A and the following provisions of this section pay the Specialist:

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

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

6.2 Specialist's payment applications

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

6.3 Due date and final date for payment

- 6.3.1 The due date for payment of any amount payable under section 6 shall be the application date or stage/milestone or, if later, the date of receipt of the Specialist's payment application by the Purchaser.
- 6.3.2 The final date for payment shall be 14 days from the due date.

6.4 Payment – amount and notices

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

6.5 Interest

If the Purchaser fails to pay a sum, or any part of it, due to the Specialist under this Agreement by its

final date for payment, the Purchaser shall, in addition to any unpaid amount that should properly have been paid, pay the Specialist simple interest on that amount at the Interest Rate for the period from the final date for payment until payment is made. Any such unpaid amount and any interest under this clause 6.5 shall be recoverable as a debt.

6.6 Specialist's right of suspension

- 6.6.1 If the Purchaser fails to pay a sum payable to the Specialist in accordance with clause 6.4 (together with any VAT properly chargeable in respect of that payment) by the final date for payment and the failure continues for 7 days after the Specialist has given notice to the Purchaser of his intention to suspend the performance of the Pre-Construction Services and the grounds for such suspension, the Specialist, without affecting his other rights and remedies, may suspend performance of any or all of those obligations until payment is made in full. Where payment is made in full the Specialist shall notify the Purchaser of the resumption of those services.
- 6.6.2 Where the Specialist exercises his right of suspension under clause 6.6.1, he shall be entitled to a reasonable amount in respect of costs and expenses reasonably incurred by him as a result of exercising the right.
- 6.6.3 Applications in respect of any such costs and expenses shall be made to the Purchaser's Representative and the Specialist shall with his application or on request submit such details of them as are reasonably necessary for ascertaining the amount in question.

Section 7 Insurance

7.1 Professional Indemnity and Public Liability insurance

Where stated as required in the Particulars, the Specialist shall during the Pre-Construction Period maintain with reputable insurers that have a place of business in the United Kingdom:

- 7.1.1 Professional Indemnity insurance with limits of indemnity of the types and in amounts not less than those stated in the Particulars; and
- 7.1.2 Public Liability insurance in respect of death and personal injury and injury or damage to property in a sum not less than the amount stated in the Particulars for any one occurrence or series of occurrences arising out of one event,

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

7.2 Evidence of insurance

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

7.3 Non-availability of Professional Indemnity insurance

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

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

8.1 Use of the Specialist's Information

- 8.1.1 Unless otherwise agreed in writing in relation to any specific items, all rights including (without limitation) copyright in the Specialist's Information shall remain vested in the Specialist.
- 8.1.2 Subject to all monies due and payable under this Agreement to the Specialist having been paid, the Specialist grants to the Purchaser an irrevocable royalty-free licence to copy and use the Specialist's Information and to reproduce that information for the execution and completion of the Project and the subsequent maintenance, letting, occupation, management, sale, advertisement, alteration, refurbishment, reinstatement and repair of it.
- 8.1.3 The licence referred to in clause 8.1.2:
- 8.1.3.1 shall enable the Purchaser to copy and use the Specialist's Information for an extension of the Project, but not to reproduce any designs comprised in that information for any such extension;
 - 8.1.3.2 includes the right to grant sub-licences; and
 - 8.1.3.3 shall continue in force notwithstanding the expiry or termination of the Specialist's employment under this Agreement.
- 8.1.4 The Specialist's liability for the consequences of any use of the Specialist's Information by the Purchaser or any other person shall be subject to clause 2.8 and he shall not in any event be liable for any use for any purpose other than that for which that information was prepared.

8.2 Confidentiality and publicity

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

8.3 Transparency

Where the Purchaser is the Employer and is a Local or Public Authority or other body to whom the provisions of the Freedom of Information Act 2000 ('FOIA') apply, the Parties acknowledge that, except for any information which is exempt from disclosure in accordance with the provisions of FOIA, the content of this Agreement is not confidential. The Purchaser shall be responsible for determining in his absolute discretion whether any of the content of this Agreement is exempt from disclosure in accordance with the provisions of FOIA. Notwithstanding any other term of this Agreement:

- 8.3.1 the Specialist hereby consents to the Purchaser publishing any amendments to the standard form JCT contract in their entirety, including changes to the standard form agreed from time to time, but in each case with any information which is exempt from disclosure in accordance with the provisions of FOIA redacted;
- 8.3.2 the Purchaser shall promptly inform the Specialist of any request for disclosure that he receives in relation to this Agreement.

Section 9 Assignment

9.1 Restrictions on assignment

Save for any assignment under clause 9.2, neither the Purchaser nor the Specialist shall without the written consent of the other assign this Agreement or any rights thereunder.

9.2 Benefit of Specialist's Tender

Where the Purchaser is the Employer, then, unless otherwise stated, the benefit of any Tender by the Specialist under clause 2.7.1 shall enure to, or may be assigned to, and shall be enforceable by, the selected Main Contractor for the Project.

DRAFT

Section 10 Suspension by the Purchaser, Termination, Adjudication and the PC Regulations

10.1 Suspension by the Purchaser

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

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

together with any VAT properly payable.

10.2 Remobilisation

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

10.3 Notification of costs

The Specialist shall:

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

10.4 Extended suspension – termination by the Specialist

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

10.5 Termination at will or for default/insolvency

- 10.5.1 The Purchaser may at any time give the Specialist not less than 14 days' notice terminating his employment.
- 10.5.2 If either Party is insolvent, the other may give notice to that Party terminating the Specialist's employment with immediate effect.
- 10.5.3 If either Party ('the defaulting Party') commits a material breach of his obligations, the other Party may give notice to the defaulting Party specifying the breach and requiring its remedy. If the defaulting Party fails to comply with the notice within 7 days, the other Party

may give notice to the defaulting Party terminating the Specialist's employment with immediate effect.

10.5.4 Each notice referred to in this clause 10.5 shall be given in accordance with clause 1.4.2.

10.6 Consequences of termination

10.6.1 Following the issue of a notice of termination under clause 10.4 or 10.5:

10.6.1.1 the Parties shall consult and take all reasonable steps to bring the Pre-Construction Services to an orderly close; and

10.6.1.2 the Specialist shall within 14 days deliver to the Purchaser copies of the Specialist's Information (including any material prepared prior to the date of termination and not previously delivered to the Purchaser), provided that in the case of termination under clause 10.4 or where the Specialist terminates under clause 10.5, the Specialist shall be obliged to do so only against the Purchaser's payment of any amount due under clause 10.6.2.

10.6.2 The amount due on termination from the Purchaser to the Specialist or (if a negative amount) from the Specialist to the Purchaser shall be the aggregate of:

10.6.2.1 an appropriate proportion of the Fee, determined in accordance with Annex A, and of any Additional Payments;

10.6.2.2 any Reimbursable Expenses; and

10.6.2.3 (where the termination is not due to the Specialist's insolvency or material breach) any demobilisation and other costs reasonably and properly incurred by the Specialist as a result of the termination,

less amounts previously paid to the Specialist and less (where the termination is due to the Specialist's insolvency or material breach) any additional costs reasonably and properly incurred by the Purchaser in procuring the completion of the Pre-Construction Services by others, but together in each case with any VAT properly payable.

10.6.3 The final date for payment of the amount properly due on termination shall be 28 days from the date of submission of the Specialist's invoice or (where an amount is due to the Purchaser) the Purchaser's statement.

10.6.4 Except as set out in clause 10.6.2, neither Party shall be liable to the other for any loss of profit, loss of contracts, or any other losses, costs or expenses that arise out of the termination.

10.6.5 Termination of the Specialist's employment shall not affect the accrued rights or remedies of either Party.

10.7 Adjudication

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

10.8 The Public Contracts Regulations 2015^[7] – where the Purchaser is the Employer

Where the Purchaser is the Employer and is a Local or Public Authority and this Agreement is subject to the PC Regulations the following provisions shall apply:

10.8.1 where regulation 113 applies to this Agreement, the Specialist shall include in any sub-contract entered into by him suitable provisions to impose the requirements of regulation 113(2)(c)(i) and (ii);

10.8.2 the Specialist shall include in any sub-contract entered into by him provisions requiring the sub-contractor:

10.8.2.1 to supply and notify to the Specialist the information required (as applicable)

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

under regulations 71(3), 71(4) and 71(5); and

10.8.2.2 to include in any sub-subcontract he in turn enters into with any sub-subcontractor provisions to the same effect as required under clause 10.8.2.1;

10.8.3 where regulation 73(1) applies to this Agreement, the Purchaser shall be entitled by notice to the Specialist to terminate the Specialist's employment where any of the grounds set out in that regulation apply. Upon termination under this clause 10.8.3, the provisions of clause 10.6 shall apply except that for those purposes termination under regulation 73(1)(b) shall be treated in the same way as a termination due to the Specialist's material breach;

10.8.4

10.8.4.1 the Specialist shall include in any sub-contract entered into by him provisions that shall entitle him to terminate the sub-contractor's employment where there are grounds for excluding the sub-contractor under regulation 57;

10.8.4.2 in the event the Purchaser requires the Specialist to terminate a sub-contractor's employment pursuant to regulation 71(9) the Specialist shall take the appropriate steps to terminate that employment and where required by the Purchaser under regulation 71(9) shall, or in circumstances where there is no such requirement may, appoint a replacement sub-contractor.

10.9 The Public Contracts Regulations 2015^[7] – where the Purchaser is the Main Contractor

Where the Employer is a Local or Public Authority, the Purchaser is engaged as Main Contractor^[8] and the Main Contract is subject to the PC Regulations, the following provisions shall apply:

10.9.1 where the Main Contract is subject to the provisions of regulation 113 of the PC Regulations, the Specialist shall include in any contract entered into by him for work included in this Agreement suitable provisions to impose the requirements of regulation 113(2)(c)(ii);

10.9.2 the Purchaser shall be entitled to terminate the Specialist's employment by notice to the Specialist if there are grounds for excluding the Specialist under regulation 57; upon termination under this clause 10.9.2, the provisions of clause 10.6 shall apply and for those purposes termination under this clause 10.9.2 shall be treated in the same way as a termination due to the Specialist's material breach;

10.9.3 where the Specialist's engagement is terminated upon termination of the Purchaser's employment under the Main Contract on any of the grounds set out in regulation 73(1), clause 10.6 shall apply except that the proviso set out in clause 10.6.1.2 shall only apply in the case of a termination under regulation 73(1)(b);

10.9.4 the Specialist shall supply and notify to the Purchaser the information required (as applicable) under regulations 71(3), 71(4) and 71(5) and shall include in any sub-subcontract entered into by him requirements to the same effect as required under this clause 10.9.4.

[8] In those cases where the Purchaser is the prospective Main Contractor, appropriate legal advice should be taken.

The Particulars

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

Documents and Listings

The following terms used in the Agreement refer to (or are defined by) the following documents and listings (as altered and updated from time to time in accordance with this Agreement). *(Where the relevant document(s) or listing(s) form an Annex to this Agreement insert a reference to that Annex; in other cases, give the document title, reference number and date or other identifier (or, where convenient and practicable, insert details here).)*

First Recital

Project
(detailed description)

[]

Main Contract
(type, conditions, amendments and other details of the proposed contract)

[]

Second Recital

Specialist's initial tender or proposals

[]

1.1

BIM Protocol

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

* applies as set out in the following document(s) included in the Purchaser's Requirements

[]

* does not apply

Employer
(To be completed where the Employer is not the Purchaser)

[]

2.1

Purchaser's Requirements

[]

Programme

[]

Project Team

[Name]

[Function]

[]

[]

2.1.2

Specialist's Key Personnel

[Name]

[Function]

[]

[]

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

[]

2.7.1

Clause 2.7.1

(If neither entry is deleted but the Specialist Tender Requirements are properly identified, clause 2.7.1 shall apply.)

- * applies
- * does not apply

Specialist Tender Requirements

(Identify the Instructions to Tenderers and/or other relevant document(s), including the proposed form of Sub-Contract.)

[]

Where clause 2.7.1 applies, the last date for submission of the Tender is

[]

or such other date as the Parties agree

4.1

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

[]

Insurances

7.1.1

Professional Indemnity insurance – level of cover

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

Amount of indemnity required

- * relates to claims or series of claims arising out of one event
- * is the aggregate amount for any one period of insurance

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

and is

£[]

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

* is required, with a sub-limit of indemnity of

£[]

* is not required

7.1.2

Public Liability insurance

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

* is required, with a limit of indemnity of

£[]

* is not required

Suspension

10.2

Period

(if other than 6 months)

[]

Adjudication

10.7

Adjudication^[9]

The Adjudicator is []

Nominating body – where no Adjudicator is named or where the named Adjudicator is unwilling or unable to act (whenever that is established)^[10]

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

- * Royal Institute of British Architects
- * The Royal Institution of Chartered Surveyors
- * constructionadjudicators.com^[11]
- * Chartered Institute of Arbitrators

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

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

[11] constructionadjudicators.com is a trading name of Contractors Legal Grp Ltd.

Attestation

Execution under hand^[12]

As witness

the hands of the Parties
or their duly authorised representatives

Signed by or on behalf of
the Purchaser

in the presence of:

witness' signature

witness' name

witness' address

Signed by or on behalf of
the Specialist

in the presence of:

witness' signature

witness' name

witness' address

[12] This Agreement for the reasons given in the Guidance Notes only provides for execution under hand.

Annex A Fee, Rates, Additional Payments and Reimbursable Expenses

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

1 The Fee

- * The Fee is the fixed sum of £[_____]
- * The Fee comprises the fixed sum of £[_____] together with
[_____]
- * The Fee is to be calculated as follows:
[_____]

Additional terms relating to the amount or calculation of the Fee

[_____]

2 Payment of Fee etc.

The Fee shall become due and payable in accordance with section 6 at the following dates or stages/ milestones and in the following amounts or percentages^[13]:

*[Application date or
stage/milestone at which due]*

[Percentage of Fee or amount]

[_____]

[_____]

3 Specialist's Project Staff – Applicable rates

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

£[_____] based on the Specialist's Project Staff of

[No.]

[Person(s)/Grade]

[Rate per hour/day]

[_____]

[_____]

£[_____] per [_____]

4 Additional Services

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

[_____]

5 Reimbursable Expenses

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

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

[Type]

[Maximum amount/rate]

[]

[]

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

6 Supporting documents

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

[Charge/Expenditure]

[Documentation]

[]

[]

7 VAT

All amounts and rates shown above are exclusive of VAT.

DRAFT

Annex B Pre-Construction Services^[14]

Programme preparation

Construction advice (including value engineering/buildability advice)^[15]

Cost advice

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

[15] The JCT envisages that the heading 'Construction advice' will include a contribution by the Specialist to development of the Construction Phase Plan so that it incorporates best industry safety practices in the relevant field.

Specialist design development

Specialist procurement services

DRAFT

Guidance Notes

Introduction

- 1 This Agreement, the Specialist (PCSA/SP) version of the JCT Pre-Construction Services Agreement, is designed to cover the interim appointment of a Specialist to provide pre-construction services either direct to the Employer or to the Main Contractor on substantial and/or complex projects where the Specialist is to be paid for the provision of those services independently of amounts payable to him under any resultant sub-contract.
- 2 It complements the JCT Pre-Construction Services Agreement (General Contractor) (PCSA) which is designed for use between the Employer and the intended Main Contractor, primarily (but not exclusively) in the context of a two-stage tender process.
- 3 This Agreement is published as a separate version since this category of agreement should be as simple as reasonably practicable; a combination in a single document of the differing options relevant to services from main contractors and those from specialist sub-contractors would appear inevitably to result in inappropriate length and complexity.
- 4 The Specialist's involvement and advice during the pre-construction period, as to (inter alia) specialist design elements and related programme, cost plan, buildability and specialist procurement aspects is generally valuable and often essential, particularly in Design and Build procurement. It is in the pre-construction period, not during the construction phase, that the Purchaser, assisted by the Contractor and relevant Specialists, is able to derive the greatest benefits from value engineering exercises.
- 5 Reflecting the advisory position of the Specialist during the pre-construction period, the Agreement is drafted on a basis similar to that of construction consultancy agreements.
- 6 This Agreement is designed for use on projects where it is intended to use as the main contract the JCT Standard Building Contract, Design and Build Contract, Major Project Construction Contract, Management Building Contract or either version (IC or ICD) of the Intermediate Building Contract 2016 and also to use their related sub-contracts. (In the case of Trade Contracts under the JCT Construction Management documentation, the other version (PCSA) should be used, since each Trade Contractor contracts directly with the Employer.) Where the Specialist undertakes design work on projects where the Standard Building Contract (SBC) or the Intermediate Building Contract with contractor's design (ICD) is being used, the Sub-Contract should of course be the 'with sub-contractor's design' version.
- 7 The payment provisions in this Agreement comply with the requirements of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009 ('the Construction Act').

Specific Provisions

Recitals

- 8 In this Agreement the term Purchaser is used for both Employer and Main Contractor clients of the Specialist. The First Recital requires the Purchaser to identify his capacity followed by the insertion of a brief description of the Project, with any detailed descriptive document(s) identified in the Particulars.
- 9 The Second Recital is intended to identify the document from the Specialist, generally a first stage tender or initial proposal document that is intended to form the basis of the Specialist's second stage Tender or, where a further tender round is considered unnecessary, the basis for negotiating the Sub-Contract itself. The Third Recital sets out a provisional timetable for the end of the Pre-Construction Period and commencement of the Construction Phase. The Fourth Recital then introduces Annex A (the Fee) and Annex B (the Pre-Construction Services), both of which the Parties must complete, and refers to the (optional) requirement that the Specialist is to submit a second stage or definitive Tender in accordance with the Specialist Tender Requirements, which should be identified in the Particulars for clause 2.7.1 (see the comments on that clause at paragraph 21). Where the Purchaser is the Employer, the Tender should generally be directed to the intended Main Contractor as well as to the

Employer (see the comment below at paragraph 38). The Fifth and Sixth Recitals relate to the CDM Regulations.

Section 1 – Definitions and Interpretation

- 10 In keeping with the aim of brevity, section 1 defines only those terms not defined earlier in the Agreement. Several of the defined terms are common to the JCT range as a whole, including in this edition new terms relating to BIM and the CDM Regulations. In relation to BIM, there is a new entry in the Particulars against clause 1.1. If a BIM Protocol is to apply this must be stated and the identified protocol included in the Purchaser's Requirements.
- 11 Those terms that are not already familiar are mostly self-explanatory. Of those that are less familiar, the term Additional Payment relates to payment for Additional Services (or for any other events or causes within clause 5.2) that is not effected by means of an adjustment of the Fee (where, for example, a one-off payment is more appropriate than payment phased over the remainder of the Pre-Construction Period). The listing of 'Specialist's Project Staff' in Annex A is intended to assist in distinguishing between, on the one hand, those instructions from the Purchaser which he can reasonably expect to be dealt with in the ordinary course by the Specialist's existing Project Staff within the agreed Fee and, on the other, those instructions that can properly be said to be for additional work not covered by the original Fee.
- 12 The Interpretation provisions of PCSA 2016 contain two straightforward changes, both of which relate to BIM, i.e.:
- first, clause 1.2.1 deals with precedence of documents, and in this regard any BIM Protocol stated to apply is one of the documents identified in the Particulars but some model protocols claim in the case of conflict to override the Agreement and other contract documents; JCT considers that its contracts give sufficient latitude to BIM Protocols so that a conflict should not arise; in any event, it also considers that unqualified overriding provisions of this type are not appropriate in such protocols;
 - secondly, with a view to avoiding any 'form over substance' argument, clause 1.2.2.6 reflects the fact that, under BIM, designs and information supplied to or by the Contractor may not take the same name or form as their hardcopy equivalent, albeit they clearly serve the same function.
- 13 For the Construction Phase of projects where the Architect/Contract Administrator acts as certifier, e.g. those under Standard Building Contract or Intermediate Building Contract 2016, the JCT discourages appointment of the Architect/Contract Administrator as Purchaser's Representative. However, in the case of this Agreement where the Purchaser is the Employer, since payment is on an application basis and there is no independent certifier role, there is no necessary conflict in the Architect or other Lead Consultant acting also as Purchaser's Representative during the Pre-Construction Period. It may often assist co-ordination if he does so.

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

Pre-Construction Services

- 14 The principal obligation of the Specialist is to provide the Pre-Construction Services, as listed by the Parties in Annex B which, for the purposes of that listing, contains an indicative division into five sections (Programme preparation, Construction advice, Cost advice, Specialist design development and Specialist procurement services).
- 15 It is not reasonably practicable to give standard detailed listings of the services that the Specialist is expected to supply because they will vary according to the nature of the project. A substantial proportion of Purchasers of either kind will already have listings appropriate for Annex B and such listings should also be readily available to Employers from the Consultant Team.
- 16 The JCT envisages that construction advice will include assistance with development of the Construction Phase Plan in a manner that incorporates best industry safety practices applicable in the Specialist's field.

Performance of Services

- 17 The provisions of clauses 2.1 to 2.6, governing performance of the Pre-Construction Services, are all substantially in standard JCT terms, as to compliance with the Purchaser's Requirements and applicable legislation (clause 2.1), level of skill and care (clause 2.1.1), compliance with instructions (clause 2.2), the supply of information (clause 2.3, which also includes an express duty of co-operation), deleterious materials (clause 2.4), Fire Code (clause 2.5) and the requirement for consent to sub-contracting (clause 2.6).

- 18 Clauses 2.1 and 2.3 make reference to compliance with other documents which may or may not be included within the Purchaser's Requirements, namely the Programme and (so far as their terms are identified) any applicable Framework Agreements. Copies of the Programme (or relevant extracts) and of the relevant terms of any Framework Agreement to which the Specialist is not party should be supplied to him with the Purchaser's Requirements.
- 19 Under clause 2.1.2, unless otherwise agreed, the Specialist is required to ensure that his Key Personnel fulfil the roles that have been agreed and are readily accessible to the Purchaser and Consultant Team. Clause 2.1.3 provides for involvement of the Specialist's supply chain.
- 20 Clause 2.2 provides for compliance with instructions but at clause 2.2.2 also provides for immediate consultation if the Specialist has objections to an instruction on grounds of a material and adverse effect on the Project, as distinct from matters relating principally to time or money, which are dealt with in section 5.
- 21 Clause 2.7.1, if it applies, makes provision for the Specialist to submit a second stage or definitive Tender, in accordance with the Specialist Tender Requirements referred to in the Fourth Recital and identified by the Particulars for that clause. The Particulars should state whether or not clause 2.7.1 is to apply and, if so, the requirements need to be properly documented and identified in the Particulars. Clause 2.7.2 makes it clear that the Purchaser is not bound to accept that tender.
- 22 Clause 2.8 provides that, apart from personal injury and unless otherwise provided in Annex B, the Specialist has no liability to the Purchaser in respect of any design work under the Pre-Construction Services Agreement unless and until a Sub-Contract is entered into, when any such work relating to the Sub-Contract is placed on the same footing as any design work under the Sub-Contract itself (limitation period apart, perhaps). If Annex B expressly provides for design liability independently of the Sub-Contract, the Specialist should check that the level of skill and care and extent of liability are reasonable. Where the Purchaser is the Employer and would not in the normal way be party to a Sub-Contract with the Specialist, he should nevertheless ensure that the Sub-Contract is in a form that includes appropriate provisions for Sub-Contractor's design responsibility (as mentioned in paragraph 6 above) and that also provides for the grant to the Employer of a Warranty SCWa/E.
- 23 The right of an Employer Purchaser to a Collateral Warranty on notice from the Main Contractor is intended only as a safety net; as a practical matter it is preferable that the Employer Purchaser obtains the Collateral Warranty on or before completion of the Specialist's Pre-Construction Services.

Section 3 – Purchaser's General Obligations etc.

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

Section 4 – Representatives and Specialist's Key Personnel

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

Section 5 – Additional Services, Fee Adjustment

- 26 Under clause 5.1, the Purchaser can instruct alterations and additions to the Pre-Construction Services that are within the Project's scope and the Specialist's competence.
- 27 If the altered or additional services cannot reasonably be expected to be carried out by the Specialist's agreed levels of Project Staff in the ordinary course during the Pre-Construction Period or if there is material alteration, delay, prolongation or disruption to the Specialist as a result of a Project-related event or cause beyond his control, he is entitled to additional payment for it (clause 5.2) provided he notifies the Purchaser in accordance with clause 5.3. Any additional time requirements should be notified as well as costs; both are fairly to be assessed under clause 5.4.

Section 6 – Payment (and Annex A)

- 28 The provisions of section 6 follow the standard JCT payment provisions closely, with clause 6.1

providing for payment of the Fee and Reimbursable Expenses (each to be specified in, or calculated in accordance with, Annex A) together with any Additional Payments in accordance with section 5 and the VAT properly chargeable.

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

Section 7 – Insurance

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

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

- 37 The section comprises the standard JCT licence for the Purchaser to use the Specialist's design work (clause 8.1) and an undertaking by the Specialist to keep confidential information that relates to the Purchaser or the Project (clause 8.2). Purchaser's consent to related publications is not to be unreasonably withheld; this is appropriate in a large majority of cases, but it will be recognised that there are Purchasers who need to limit or preclude publicity regarding their construction activities. Clause 8.3, if it applies, deals with the authorising of disclosures by public sector employers in accordance with the Freedom of Information Act 2000.

Section 9 – Assignment

- 38 Clause 9.1 contains the standard JCT restriction on assignment without consent, subject to the exception in clause 9.2. That exception is for assignment by the Employer Purchaser to the Main

Contractor of the benefit of a Tender by the Specialist under clause 2.7.1. (The tender may of course be directed to the Main Contractor in any event and, by virtue of the exception in clause 1.3, the Main Contractor's rights in this regard may also come into being as third party rights.)

Section 10 – Suspension by the Purchaser, Termination, Adjudication and the PC Regulations

- 39** Provisions reflecting relevant aspects of the Public Contracts Regulations 2015 ('the PC Regulations') have been included in section 10 (clauses 10.8 and 10.9). Clause 10.8 will apply where the Purchaser is the Employer and is a Local or Public Authority and the Agreement is subject to the PC Regulations and clause 10.9 where the Employer is a body as previously described, the Purchaser is engaged as Main Contractor and the Main Contract is subject to the PC Regulations. The provisions of clause 10.9 are not designed for cases where the Purchaser is the intended Main Contractor and the Main Contract has not been entered into; in those cases appropriate legal advice should be taken. For a summary of those provisions from the regulations reflected in clauses 10.8 and 10.9, please go to www.jctttd.co.uk. (Reference should always be made to the wording of the regulations themselves and if there is any doubt as to the applicability of the PC Regulations generally or any specific provision, appropriate legal advice should be taken.)
- 40** In keeping with the preliminary nature of the Agreement, the Purchaser has the right at any time to suspend the Pre-Construction Services or part of them (clause 10.1) or to terminate the Specialist's employment at will (clause 10.5.1), in each case on not less than 14 days' notice.
- 41** In the case of suspension, the Purchaser has the right under clause 10.2 to instruct the Specialist to remobilise but, if the period of suspension exceeds the relevant period (6 months or such other period as is specified in the Particulars) and such instruction has not been given, the Specialist, after giving a warning notice, may himself terminate his employment.
- 42** In common with JCT contracts generally, each Party has the right to terminate that employment in the case of the insolvency or unremedied default of the other (clauses 10.5.2 and 10.5.3). In the case of default a warning notice is required.
- 43** In the case of suspension by the Purchaser, there is provision for payment up to the date of suspension, plus reasonable demobilisation costs (clauses 10.1.1 to 10.1.4), with clause 10.2 making provision for remobilisation costs and for the notification of costs either way.
- 44** In the case of termination, clause 10.6.1 makes provision for consultation and delivery of documents and clause 10.6.2 for the financial consequences of termination. The latter are essentially limited to costs and expenses incurred by the Specialist, less, in the case of termination for the Specialist's insolvency or default, the additional cost to the Purchaser in procuring completion of the Pre-Construction Services. No other loss or damage, e.g. loss of profits, is payable as a result of termination (clause 10.6.4).
- 45** Suspension, warning and termination notices each require to be given by the means set out in clause 1.4.2. In relation to disputes and in line with JCT contracts generally, clause 10.7 incorporates into the Agreement the Adjudication provisions of the Scheme for Construction Contracts.

Attestation – Execution under hand

- 46** The Pre-Construction Services Agreement is a relatively simple short-term agreement and therefore the form provides for execution under hand only and not for execution as a deed.
- 47** The rationale for execution as a deed is the longer limitation period of 12 years, as opposed to the 6 year period for agreements executed under hand, desirable where there is a possibility of latent defects in construction work or design remaining undetected for a substantial period. Here it is anticipated that during the Pre-Construction Period the Specialist will not be undertaking any material construction operations and that, in most cases, design work will only be at general arrangement level.
- 48** Any prefabrication, advance ordering or detailed design agreement is best dealt with by a separate agreement or order.



All parties must rely exclusively upon their own skill and judgment or upon those of their advisers when using this document and neither Thomson Reuters (Professional) UK Limited nor its associated companies assume any liability to any user or any third party in connection with such use.

DRAFT

SWEET & MAXWELL

