

# Client/Consultant MODEL SERVICES AGREEMENT

General Conditions

Fourth Edition 2006



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# General Conditions

## 1 General Provisions

### 1.1

#### Definitions

The following words and expressions shall have the meanings assigned to them except where the context otherwise requires:

- 1.1.1 “**Agreement**” means the Conditions of the Client/Consultant Model Services Agreement (General Conditions and Particular Conditions) together with Appendix 1 [*Scope of Services*], Appendix 2 [*Personnel, Equipment, Facilities and Services of Others to be Provided by the Client*], Appendix 3 [*Remuneration and Payment*], Appendix 4 [*Time Schedule for Services*], and any letters of offer and acceptance, or otherwise as specified in the Particular Conditions.
- 1.1.2 “**Project**” means the project named in the Particular Conditions for which the Services are to be provided.
- 1.1.3 “**Services**” means the services defined in Appendix 1 [*Scope of Services*] to be performed by the Consultant in accordance with the Agreement which comprise Normal Services, Additional Services and Exceptional Services.
- 1.1.4 “**Works**” means the permanent works (if any) to be executed (including the goods and equipment to be supplied to the Client) for the achievement of the Project.
- 1.1.5 “**Country**” means the country to which the Project (or most of it) relates.
- 1.1.6 “**Party**” and “**Parties**” means the Client and the Consultant and “**third party**” means any other person or entity as the context requires.
- 1.1.7 “**Client**” means the Party named in the Agreement, who employs the Consultant, and legal successors to the Client and permitted assignees.
- 1.1.8 “**Consultant**” means the professional firm or individual named in the Agreement, who is employed by the Client to perform the Services, and legal successors to the Consultant and permitted assignees.
- 1.1.9 “**FIDIC**” means the Fédération Internationale des Ingénieurs-Conseils, the international federation of consulting engineers.
- 1.1.10 “**Commencement Date**” means the date stated in the Particular Conditions.
- 1.1.11 “**Time for Completion**” means the time period stated for this purpose in the Particular Conditions.
- 1.1.12 “**day**” means a calendar day and “**year**” means 365 days.
- 1.1.13 “**written**” or “**in-writing**” mean hand-written, type-written, printed or

electronically made, and resulting in a permanent un-editable record.

1.1.14 **"Local Currency"** (LC) means the currency of the Country and **"Foreign Currency"** (FC) means any other currency.

1.1.15 **"Agreed Compensation"** means additional sums as defined in Appendix 3 [*Remuneration and Payment*] which are payable under the Agreement.

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## 1.2

### Interpretation

1.2.1 The marginal words and other headings in the Agreement shall not be taken into consideration in the interpretation of these Conditions.

1.2.2 The singular includes the plural, and vice-versa where the context requires.

1.2.3 The documents forming this Agreement are to be taken as mutually explanatory of one another. If there is a conflict between these documents, the last to be agreed shall prevail, unless otherwise specified in Part B of the Particular Conditions.

1.2.4 Words indicating one gender include all genders.

1.2.5 Provisions including the word "agree", "agreed" or "agreement" require the agreement to be recorded in writing, and signed by both Parties.

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## 1.3

### Communications

1.3.1 Whenever provision is made for the giving or issue of any notice, instruction or other communication by any person, unless otherwise specified such communication shall be written in the language stated in the Particular Conditions and shall not be unreasonably withheld or delayed.

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## 1.4

### Law and Language

1.4.1 The Particular Conditions state the language or languages of the Agreement, the ruling language and the law which is to govern the Agreement.

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## 1.5

### Change in Legislation

1.5.1 If after the date of the Agreement the cost or duration of the Services is altered as a result of changes in or additions to the laws or regulations in any country in which the services are required by the Client to be performed the agreed remuneration and time for completion shall be adjusted accordingly.

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## 1.6

### Assignments and Sub-Contracts

1.6.1 The Consultant shall not assign the benefits, other than money, from the Agreement without the written consent of the Client.

1.6.2 Neither the Client nor the Consultant shall assign obligations under the Agreement without the written consent of the other Party.

1.6.3 The Consultant shall not initiate or terminate any sub-contract for performance of all or part of the Services without the written consent of the Client.

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## 1.7

### Copyright

1.7.1 The Consultant retains the design rights and other intellectual property rights and copyright of all documents prepared by him. The Client shall be entitled to use them or copy them only for the Project and the purpose for

which they are intended, and need not obtain the Consultant's permission to copy for such use.

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## 1.8

<b>Notices</b>	1.8.1	Notices to be served under the Agreement shall be in non-electronic written forms and will take effect from receipt at the addresses stated in the Particular Conditions. Delivery can be by hand or facsimile message against a written confirmation of receipt or by registered letter or by telex subsequently confirmed by letter.
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## 1.9

<b>Publication</b>	1.9.1	Unless otherwise specified in the Particular Conditions, the Consultant, either alone or jointly with others, can publish material relating to the Services. Publication shall be subject to approval of the Client if it is within two years of completion or termination of the Services.
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## 1.10

<b>Corruption and Fraud</b>	1.10.1	In the performance of obligations under this Agreement, the Consultant and his agents and employees shall comply with all applicable laws, rules, regulations and orders of any applicable jurisdiction, including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Consultant hereby represents, warrants and covenants that he will neither receive nor offer, pay or promise to pay either directly or indirectly, anything of value to a "public official" (as defined below) in connection with any business opportunities which are the subject of this Agreement. Furthermore, the Consultant shall notify the Client immediately in writing with full particulars in the event that the Consultant receives a request from any public official requesting illicit payments.
	1.10.2	A public official is: <ul style="list-style-type: none"><li>(a) any official or employee of any government agency or government-owned or controlled enterprise;</li><li>(b) any person performing a public function;</li><li>(c) any official or employee of a public international organization, such as The World Bank;</li><li>(d) any candidate for political office; or</li><li>(e) any political party or an official of a political party.</li></ul>

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# 2

## The Client

<b>2.1 Information</b>	2.1.1	In order not to delay the Consultant in the performance of the Services, the Client shall within a reasonable time give to the Consultant free of cost all information which may pertain to the Services which the Client is able to obtain.
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## 2.2

<b>Decisions</b>	2.2.1	On all matters properly referred to him in writing by the Consultant the Client shall give his decision in writing within a reasonable time so as not to delay the Services.
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## 2.3

<b>Assistance</b>	2.3.1	In the Country and in respect of the Consultant, his personnel and dependants, as the case may be, the Client shall do all in his power to assist in:
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- (a) the provision of documents necessary for entry, residency, working and exit;
- (b) providing unobstructed access wherever it is required for the Services;
- (c) import, export and customs clearance of personal effects and of goods required for the Services;
- (d) their repatriation in emergencies;
- (e) the provision of the authority necessary to permit the import of foreign currency by the Consultant for the Services and by his personnel for their personal use and to permit the export of money earned in the performance of the Services; and
- (f) providing access to other organisations for collection of information which is to be obtained by the Consultant.

2.4

**Client's Financial Arrangements**

2.4.1 The Client shall submit, within 28 days after receiving any request from the Consultant, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Client to pay the Consultant's fees in accordance with Appendix 3 [*Remuneration and Payment*]. If the Client intends to make any material change to his financial arrangements, the Client shall give notice to the Consultant with detailed particulars.

2.5

**Equipment and Facilities**

2.5.1 The Client shall make available, free of cost, to the Consultant for the purpose of the Services the equipment and facilities described in Appendix 2 [*Personnel, Equipment, Facilities and Services of Others to be Provided by the Client*].

2.6

**Supply of Client's Personnel**

2.6.1 In consultation with the Consultant, the Client shall at his own cost arrange for the selection and provision of personnel in his employment to the Consultant in accordance with Appendix 2 [*Personnel, Equipment, Facilities and Services of Others to be Provided by the Client*]. In connection with the provision of the Services such personnel shall take instructions only from the Consultant.

2.6.2 The personnel to be supplied by the Client, and any future replacements that may be necessary, shall be subject to the acceptance of the Consultant; such acceptance shall not be unreasonably withheld.

2.6.3 If the Client cannot supply Client's personnel for which he is responsible and it is agreed to be necessary for the satisfactory performance of the Services, the Consultant shall arrange for such supply as an Additional Service.

2.7

**Client's Representative**

2.7.1 The Client shall designate an official or individual to be his representative for the administration of the Agreement.

2.8

**Services of Others**

2.8.1 The Client shall at his cost arrange for the provision of services from others as described in Appendix 2 [*Personnel, Equipment, Facilities and Services of Others to be Provided by the Client*], and the Consultant shall co-operate with the suppliers of such services but shall not be responsible for them or their performance.

2.9

**Payment for Services**

2.9.1 The Client shall pay the Consultant for the Services in accordance with Section 5 of this Agreement.

# 3 The Consultant

<b>3.1</b>		
<b>Scope of Services</b>	3.1.1	The Consultant shall perform the Services as stated in Appendix 1 [ <i>Scope of Services</i> ].
<b>3.2</b>		
<b>Normal, Additional and Exceptional Services</b>	3.2.1	Normal and Additional Services are those described as such in Appendix 1 [ <i>Scope of Services</i> ].
	3.2.2	Exceptional Services are those which are not Normal or Additional Services but which are necessarily performed by the Consultant in accordance with Clause 4.8.
<b>3.3</b>		
<b>Duty of Care and Exercise of Authority</b>	3.3.1	Notwithstanding anything else in this Agreement or any legal requirement of the Country or any other jurisdiction (including, for the avoidance of doubt, the jurisdiction of the place of establishment of the Consultant), the Consultant shall have no other responsibility than to exercise reasonable skill, care and diligence in the performance of his obligations under the Agreement.
	3.3.2	Where the Services include the exercise of powers or performance of duties authorised or required by the terms of a contract between the Client and any third party, the Consultant may:
		<ul style="list-style-type: none"><li>(a) have due regard to the third party contract provided that the details of such powers and duties are acceptable to him and agreed in writing where they are not described in Appendix 1 [<i>Scope of Services</i>];</li><li>(b) if authorised to certify, determine or exercise discretion to do so fairly between the Client and third party not as an arbitrator but as an independent professional exercising his judgement with reasonable skill, care and diligence; and</li><li>(c) if so authorised vary the obligations of any third party, subject to obtaining the prior approval of the Client to any variation which can have an important effect on costs or quality or time (except in any emergency when the Consultant shall inform the Client as soon as practicable).</li></ul>
<b>3.4</b>		
<b>Client's Property</b>	3.4.1	Anything supplied by or paid for by the Client for the use of the Consultant shall be the property of the Client and where practicable shall be so marked.
<b>3.5</b>		
<b>Supply of Personnel</b>	3.5.1	The personnel who are proposed by the Consultant to work in the Country shall be subject to acceptance by the Client with regard to their qualifications and experience; such acceptance shall not be unreasonably withheld.
<b>3.6</b>		
<b>Representatives</b>	3.6.1	For the administration of the Agreement the Consultant shall designate an official or individual to be his representative.
	3.6.2	If required by the Client, the Consultant shall designate an individual to liaise with the Client's representative in the Country.



- 3.7 **Changes in Personnel**
- 3.7.1 If it is necessary to replace any of the personnel provided by the Consultant, the Consultant shall arrange for replacement by a person of comparable competence as soon as reasonably possible.
- 3.7.2 The cost of such replacement shall be borne by the Consultant except where the replacement is requested by the Client, and in such case:
- (a) the request shall be in writing stating the reasons for it; and
  - (b) the Client shall bear the cost of replacement unless it is agreed that misconduct or inability to perform satisfactorily is accepted as the reason for the replacement by the Consultant.

## 4 Commencement, Completion, Variation and Termination

- 4.1 **Agreement Effective**
- 4.1.1 The Agreement is effective from the date of receipt by the Consultant of the Client's letter of acceptance of the Consultant's proposal or the date of the latest signature necessary to complete the formal Agreement, if any, whichever is the later.
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- 4.2 **Commencement and Completion**
- 4.2.1 The Services shall be commenced on the Commencement Date, shall proceed in accordance with the Time Schedule in Appendix 4 [*Time Schedule for Services*], and shall be completed within the Time for Completion, subject to extensions in accordance with the Agreement.
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- 4.3 **Variations**
- 4.3.1 The Agreement can be varied on application by either Party by written agreement of the Parties.
- 4.3.2 If requested by the Client in writing, the Consultant shall submit proposals for varying the Services. The preparation and submission of such proposals shall be an Additional Service.
- 4.3.3 The Consultant shall not be required to commence the varied Services until such time as the Client has given his written approval of the fees associated with the varied Services.
- 
- 4.4 **Delays**
- 4.4.1 If the Services are impeded or delayed by the Client or his contractors so as to increase the scope, cost or duration of the Services:
- (a) the Consultant shall inform the Client of the circumstances and probable effects;
  - (b) the increase in scope and/or costs shall be regarded as Additional Services; and
  - (c) the time for completion of the Services shall be increased accordingly.
- 
- 4.5 **Changed Circumstances**
- 4.5.1 If circumstances arise for which neither the Client nor the Consultant is responsible and which make it irresponsible or impossible for the Consultant to perform in whole or in part the Services in accordance with the Agreement he shall promptly dispatch a notice to the Client.

- 4.5.2 In these circumstances:
- (a) if certain Services have to be suspended, the time for their completion shall be extended until the circumstances no longer apply plus a reasonable period not exceeding 42 days for resumption of them; and
  - (b) if the speed of performing certain Services has to be reduced, the time for their completion shall be extended as may be made necessary by the circumstances.

**4.6**

**Abandonment, Suspension or Termination**

- 4.6.1 The Client may suspend all or part of the Services or terminate the Agreement by giving at least 56 days' notice to the Consultant, and the Consultant shall immediately make arrangements to stop the Services and minimise expenditure.
- 4.6.2 If the Consultant is, without good reason, not discharging his obligations the Client may inform the Consultant by notice stating the grounds for the notice. If a satisfactory response is not received within 21 days the Client may by a further notice terminate the Agreement provided that such further notice is given within 35 days of the Client's former notice.
- 4.6.3 After giving at least 14 days' notice to the Client, the Consultant may, by a further notice of at least 42 days, terminate the Agreement, or at his discretion, without prejudice to the right to terminate, may suspend or continue suspension of performance of the whole or part of the Services:
- (a) when 28 days after the due date for payment of an invoice he has not received payment of that part of it which has not by that time been contested in writing; or
  - (b) when Services have been suspended under either Clause 4.5 or Clause 4.6.1 and the period of suspension has exceeded 182 days.

**4.7**

**Corruption and Fraud**

- 4.7.1 If it is shown that the Consultant is in breach of Clause 1.10 and notwithstanding any penalties or other sanctions to which the Consultant may be subject under the law of the Country, or in other jurisdictions, the Client will be entitled to terminate the Agreement in accordance with Clause 4.6.2 and the Consultant shall be deemed to have breached Clause 3.3.1.

**4.8**

**Exceptional Services**

- 4.8.1 Upon the occurrence of circumstances described in Clause 4.5 or abandonment or suspension or resumption of Services or upon termination of the Agreement otherwise than under the provisions of Clause 4.6.2 any necessary work or expense by the Consultant extra to the Normal and Additional Services shall be regarded as Exceptional Services.
- 4.8.2 The performance of Exceptional Services shall entitle the Consultant to extra time necessary for their performance and to payment for performing them.

**4.9**

**Rights and Liabilities of Parties**

- 4.9.1 Termination of the Agreement shall not prejudice or affect the accrued rights or claims and liabilities of the Parties.
- 4.9.2 After termination of the Agreement, the provisions of Clause 6.3 shall remain in force.

# 5 Payment

## 5.1

### Payment to the Consultant

- 5.1.1 The Client shall pay the Consultant for Normal Services in accordance with the Conditions and with the details stated in Appendix 3 [*Remuneration and Payment*], and shall pay for Additional Services at rates and prices which are given in or based on those in Appendix 3 [*Remuneration and Payment*] so far as they are applicable but otherwise as are agreed in accordance with Clause 4.3.
- 5.1.2 Unless otherwise agreed in writing the Client shall pay the Consultant in respect of Exceptional Services:
- (a) as for Additional Services for extra time spent by the Consultant's personnel in the performance of the Services; and
  - (b) the net cost of all other extra expense incurred by the Consultant.
- 5.1.3 Where the Client has required the Consultant to appoint selected consultants as the Consultant's sub-consultants, fees owed to those sub-consultants shall be due to the Consultant in addition to the Consultant's own fees.

## 5.2

### Time for Payment

- 5.2.1 Amounts due to the Consultant shall be paid within 28 days of the Consultant's invoice unless otherwise stated in the Particular Conditions.
- 5.2.2 If the Consultant does not receive payment within the time stated in Clause 5.2.1 he shall be paid Agreed Compensation at the rate defined in the Particular Conditions compounded daily on the sum overdue and in its currency reckoned from the due date for payment of the invoice. Such Agreed Compensation shall not affect the rights of the Consultant stated in Clause 4.6.3.
- 5.2.3 The Client shall not withhold payment of any fee properly due to the Consultant without giving the Consultant a notice of his intention to withhold payment, with reasons, no later than four days prior to the date on which the fee payment becomes due. If no such notice of an intention to withhold payment is given then the Consultant shall have an enforceable contractual right to such payment.

## 5.3

### Currencies of Payment

- 5.3.1 The currencies applicable to the Agreement are those stated in Appendix 3 [*Remuneration and Payment*].
- 5.3.2 If at the date of the Agreement or during the performance of the Services the conditions in the Country are such as may, contrary to the Agreement,
- (a) prevent or delay the transfer abroad of Local or Foreign Currency payments received by the Consultant in the Country; or
  - (b) restrict the availability or use of Foreign Currency in the Country; or
  - (c) impose taxes or differential rates of exchange for the transfer from abroad of Foreign Currency into the Country by the Consultant for Local Currency expenditure and subsequent re-transfer abroad of Local Currency up to the same amount such as to inhibit the Consultant in the performance of the Services or to result in financial disadvantage to him;

then the Client warrants that such circumstances shall be deemed to justify the application of Clause 4.5 if alternative financial arrangements are not made to the satisfaction of the Consultant.

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## 5.4

### Third Party Charges on the Consultant

- 5.4.1 Except where specified in the Particular Conditions or Appendix 3 [*Remuneration and Payment*]:
- (a) the Client shall whenever possible arrange that exemption is granted to the Consultant and those of his personnel who are not normally resident in the Country from any payments required by the Government or authorised third parties in the Country which arise from this Agreement in respect of:
    - (i) their remuneration
    - (ii) their imported goods other than food and drink
    - (iii) goods imported for the Services
    - (iv) documents;
  - (b) whenever the Client is unsuccessful in arranging such exemption he shall reimburse the Consultant for such payments properly made;
  - (c) provided that the goods when no longer required for the purpose of the Services and not the property of the Client:
    - (i) shall not be disposed of in the Country without the Client's approval;
    - (ii) shall not be exported without payment to the Client of any refund or rebate recoverable and received from the Government or authorised third parties.

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## 5.5

### Disputed Invoices

- 5.5.1 If any item or part of an item in an invoice submitted by the Consultant is contested by the Client, the Client shall give a notice of his intention to withhold payment with reasons and shall not delay payment on the remainder of the invoice. Clause 5.2.2 shall apply to all contested amounts which are finally determined to have been payable to the Consultant.

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## 5.6

### Independent Audit

- 5.6.1 The Consultant shall maintain up-to-date records which clearly identify relevant time and expense and shall make these available to the Client on reasonable request.
- 5.6.2 Except where the Agreement provides for lump sum payments, not later than 12 months after the completion or termination of the Services, the Client can, at notice of not less than seven days, require that a reputable firm of accountants nominated by him audit any amount claimed by the Consultant. The audit shall be conducted by attending during normal working hours at the office where the records are kept.

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# 6 Liabilities

## 6.1 Liability and Compensation between the Parties

- 6.1.1 The Consultant shall only be liable to pay compensation to the Client arising out of or in connection with the Agreement if a breach of Clause 3.3.1 is established against him.

- 6.1.2 The Client shall be liable to the Consultant if a breach of his duty to the Consultant is established against the Client.
- 6.1.3 If it is considered that either Party is liable to the other, compensation shall be payable only on the following terms:
- (a) such compensation shall be limited to the amount of reasonably foreseeable loss and damage suffered as a result of such breach, but not otherwise;
  - (b) in any event, the amount of such compensation shall be limited to the amount specified in Clause 6.3.1;
  - (c) if either Party is considered to be liable jointly with third parties to the other, the proportion of compensation payable by that Party shall be limited to that proportion of liability which is attributable to his breach.

**6.2**

**Duration of Liability**

- 6.2.1 Notwithstanding anything else in this Agreement or any legal requirement of the Country or any other jurisdiction (including, for the avoidance of doubt, the jurisdiction of the place of establishment of the Consultant), neither the Client nor the Consultant shall be considered liable for any loss or damage resulting from any occurrence unless a claim is formally made on him before the expiry of the relevant period stated in the Particular Conditions.

**6.3**

**Limit of Compensation**

- 6.3.1 The maximum amount of compensation payable by either Party to the other in respect of liability under Clause 6.1 is limited to the amount stated in the Particular Conditions. This limit is without prejudice to any Agreed Compensation specified under Clause 5.2.2 or otherwise imposed by the Agreement.
- 6.3.2 Each Party agrees to waive all claims against the other in so far as the aggregate of compensation which might otherwise be payable exceeds the maximum amount payable.
- 6.3.3 If either Party makes a claim for compensation against the other Party and this is not established the claimant shall fully reimburse the other for his costs incurred as a result of the claim.

**6.4**

**Indemnity**

- 6.4.1 So far as the law governing this Agreement permits, the Client shall indemnify the Consultant against the adverse effects of all claims including claims by third parties which arise out of or in connection with the Agreement including any made after the expiry of the period of liability referred to in Clause 6.2, except insofar as they are covered by the insurances arranged under the terms of Clause 7.1.

**6.5**

**Exceptions**

- 6.5.1 Clauses 6.3 and 6.4 do not apply to claims arising:
- (a) from deliberate default, fraud, fraudulent misrepresentation or reckless misconduct, or
  - (b) otherwise than in connection with the performance of obligations under the Agreement.

# 7 Insurance

## 7.1

### Insurance for Liability and Indemnity

- 7.1.1 At the written request of the Client the Consultant shall make reasonable efforts to:
- (a) insure against his liability under Clause 6.1; or
  - (b) increase his insurance against liability under Clause 6.1 over that for which he was insured at the date of the Client's first invitation to him for a proposal for the Services; and
  - (c) insure against public/third party liability; or
  - (d) increase his insurance against public/third party liability over that for which he was insured at the date of the Client's first invitation to him for a proposal for the Services; and
  - (e) insure or increase any other insurance required by the Client.
- 7.1.2 The cost of the insurances arising under this Clause 7.1 known at the time of appointment shall be deemed to be incorporated into the Consultant's fees.
- 7.1.3 Any increase or variation in such insurances arising under this Clause 7.1 after the appointment has been agreed shall be at the expense of the Client.

## 7.2

### Insurance of Client's Property

- 7.2.1 At the written request of the Client the Consultant shall make reasonable efforts to insure on terms acceptable to the Client:
- (a) against loss or damage to the property of the Client supplied or paid for under Clause 2.5; and/or
  - (b) against liabilities arising out of the use of such property.
- 7.2.2 The cost of the insurances arising under this Clause 7.2 known at the time of appointment shall be deemed to be incorporated into the Consultant's fees.
- 7.2.3 Any increase or variation in such insurances arising under this Clause 7.2 after the appointment has been agreed shall be at the expense of the Client.

# 8 Disputes and Arbitration

## 8.1

### Amicable Dispute Resolution

- 8.1.1 If any dispute arises out of or in connection with this Agreement, representatives of the Parties with authority to settle the dispute will, within 14 days of a written request from one Party to the other, meet in a good faith effort to resolve the dispute. If the dispute is not resolved at that meeting, the Parties will attempt to settle it by mediation in accordance with Clause 8.2.

## 8.2

### Mediation

- 8.2.1 Unless otherwise agreed between the Parties or stated in the Particular Conditions, the Parties shall attempt to agree upon a neutral mediator from a panel list held by the independent mediation centre named in the Particular Conditions. Should the Parties be unable to agree within 14 days of a notice from one Party to the other requesting mediation then either Party may request that a mediator be appointed by the President of FIDIC.

The appointment by the President shall be binding on the Parties unless they agree to another named mediator at any time.

- 8.2.2 When the mediator has been appointed on his terms and conditions of engagement, either Party can initiate the mediation by giving the other Party a notice in writing requesting a start to the mediation. The mediation will start not later than 21 days after the date of the notice.
- 8.2.3 The mediation shall be conducted in accordance with the procedures required by the appointed mediator unless stipulated otherwise in the Particular Conditions. If the procedures are stated in the Particular Conditions, then the appointed mediator shall be required to follow those procedures but shall at any time be able to propose to the Parties for their joint approval any alternative procedures.
- 8.2.4 All negotiations or discussions carried out in the mediation shall be conducted in confidence and are not to be referred to in any concurrent or subsequent proceedings, unless they conclude with a written legally binding agreement. If the Parties accept the mediator's recommendations, or otherwise reach agreement on the resolution of the dispute, such agreement shall be recorded in writing and, once signed by the designated representatives, shall be binding on the Parties.
- 8.2.5 If no agreement is reached, either Party may invite the mediator to provide to both Parties a non-binding opinion in writing on the dispute. Such opinion shall not be used in evidence in any concurrent or subsequent proceedings, without the prior written consent of both Parties.
- 8.2.6 The Parties will bear their own costs of preparing and submitting evidence to the mediator. The costs of the mediation and of the mediator's services shall be borne equally between the Parties unless otherwise agreed and recorded in accordance with Clause 8.2.3.
- 8.2.7 No Party may commence an arbitration of any dispute relating to this Agreement until it has attempted to settle the dispute with the other Party by mediation and either the mediation has terminated or the other Party has failed to participate in the mediation, provided, however, that either Party may commence arbitration if the dispute has not been settled within 90 days of the giving of the notice under Clause 8.2.2.

### 8.3

#### Arbitration

- 8.3.1 If the mediation fails then the Parties will attempt jointly to make a written record of those matters (if any) relating to the dispute which have been agreed to by them, for submission in any later arbitration. The mediator's role will cease, at the latest, upon the commencement of any arbitration. The mediator will not be available to appear as a witness in the arbitration, nor to provide any additional evidence obtained during the mediation.
- 8.3.2 Unless stated otherwise in the Particular Conditions, any arbitration arising out of or in connection with this Agreement shall be undertaken under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

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