

## **APPENDIX 4.13      STANDARD SPECIAL CONDITIONS OF EMPLOYMENT : CONFLICT OF INTEREST AND DEBARRING**

1.            This Appendix describes the requirements and procedures promulgated originally in ETWB TCW No. 18/2005 in respect of the conflict of interest and debarring. The relevant paragraphs from the original circular and updated by Appendix 4.1 of the Guidelines for the Implementation of the New Policy on Selection, Appointment and Management of Consultants under the purview of the Engineering and Associated Consultants Selection Board Revision No. 2 (October 2020) are basically subsumed hereunder.

### Background

2.            Requirements on the avoidance of conflicts of interest for officers and firms involved in Government procurement were originally set out in Financial Circular No. 9/2003. This circular was cancelled in January 2005, and the latest requirements are now stipulated in Chapter IA of Stores and Procurement Regulations (SPR). SPR 192 requires that procuring departments should include in the consultancy agreement a clause to oblige the selected consulting firm to report on situations which may give rise to conflict of interest and a clause to debar the selected consultants from participating in any subsequent exercise for the procurement of any goods and/or services arising out of or which was the very subject of the consultancy.

3.            To achieve consistency, a standard Special Conditions of Employment (SCE) clause is prepared for use in consultancy agreements.

### Policy

4.            The SCE at Annex A shall be incorporated into all consultancy agreements.

5.            Departments shall check that declarations forms (sample attached) submitted by consultants have been properly completed, and signed by an authorized person of the consultants whose specimen signature has been deposited with the Director's Representative. Nevertheless, checking of the arrangements between the consultants and their employees, agents, sub-consultants, and advisers is not normally required, unless irregularities are found or reported.

**Special Conditions of Employment Clause**  
**Conflict of Interest and Debarring**

SCE [ ] Clause 46 of the General Conditions of Employment is deleted and replaced by the following:

- (A) On appointment and during the term of this Agreement and for [ ]<sup>1</sup> months thereafter, the Consultants must declare any interest if it is considered to be in actual, apparent, potential or perceived conflict with the Services, including any interest or association the Consultants, their associated companies, their associates or associated persons or any of their sub-consultants may have with any contractors, suppliers, specialist contractors or sub-contractors. The Consultants shall during the term of this Agreement and for [ ] months thereafter forthwith notify the Employer in writing and keep the Employer notified of all or any facts which may reasonably be considered to give rise to a situation where the financial or other interest of the Consultants, their associated companies, their associates or associated persons or any of their sub-consultants, conflict or compete, or may conflict or compete, with the Consultants' duties to the Employer under this Agreement.

For purpose of this Clause 46 of the General Conditions of Employment, the "term of this Agreement" shall mean the period from appointment of the Consultants until completion of the Agreement, i.e. upon issue of the letter of completion of Agreement by the Employer.

- (B) The Consultants shall not, and shall ensure that any of their associated companies, their associates or associated persons or any of their sub-consultants shall not, during the term of this Agreement and for [ ] months thereafter, undertake any services, tasks or jobs or do anything whatsoever for or on behalf of any third party (other than in

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<sup>1</sup> The duration of the restraint should be filled in by the procuring department taking into account the specific nature of the Services involved and the legitimate interests that the Government has to protect.

the proper performance of this Agreement), which touches, concerns or affects the Services or which may reasonably be seen to touch, concern or affect the Services, except with the prior written approval of the Director's Representative which approval shall not be unreasonably withheld.

- (C) Without prejudice to the generality of sub-clause (B), the Consultants shall not (whether on their own or through their associated companies, associates or associated persons or in joint venture with others), and shall ensure that any of their sub-consultants shall not,
- (i) undertake or compete for the role of a contractor or supplier or otherwise be involved as a shareholder of the contractor or supplier, in a subsequent procurement of any services and/or goods arising out of or relating to this Agreement;
  - (ii) undertake any services for a contractor (including acting as a sub-contractor) or supplier in respect of a contract between that contractor or supplier and the Employer for which the Consultants are providing a service arising out of or relating to this Agreement ;
  - (iii) undertake any services for, including without limitation provision of advice to, a bidder bidding for a contract arising out of or relating to this Agreement,

except with the prior written approval of the Employer.

In the event that the Consultants have advised on the preparation of the tender, including tender specifications and tender assessment, the Consultants undertake that under no circumstances will they bid, participate or be financially involved in that or related tender exercise.

The Consultants shall take all necessary steps to ensure that under no circumstances will their associated companies, associates, associated persons and sub-consultants participate or be financially involved in

the tender exercise referred to in the preceding sub-paragraphs.

- (D) The Consultants shall render their advice or recommendations pursuant to this Agreement to the Employer on an impartial basis without giving favour to any particular product, services or equipment in which the Consultants have a commercial interest, including but not limited to those who engaged the Consultants in consulting services related to private works. The Consultants shall notify the Employer immediately and in writing and keep the Employer notified of any actual, apparent, potential or perceived conflict they or their associated companies, associates or associated persons or any of their sub-consultants may have in, or any association or connection they or the aforesaid persons may have with, any of the services, products or equipment proposed or recommended by the Consultants under this Agreement or any of third party with whom the Consultants have a commercial interest. The Consultants shall obtain from each and every one of their directors, employees, agents and sub-consultants who are involved in this Agreement a binding undertaking to observe this sub-clause.
  
- (E) The Consultants shall require their directors, employees, agents and sub-consultants who are involved in this Agreement to declare in writing to the Consultants and keep the Consultants informed regularly of any actual, apparent, potential or perceived conflict between their personal/ financial interests and their duties in connection with this Agreement, including all or any facts which may reasonably be considered to give rise to a situation which the financial interests of such persons, conflict or compete, or may conflict or compete, with the Consultants' duties to the Employer under this Agreement. In the event that such conflict is disclosed in a declaration, the Consultants shall forthwith take such reasonable measures as are necessary to mitigate as far as possible or remove the conflict so disclosed.
  
- (F) The Consultants shall prohibit their directors and employees who are involved in this Agreement from engaging in any work or employment other than in the performance of this Agreement, with or without remuneration, which could give rise to any actual, apparent, potential

or perceived conflict between their personal/financial interests and their duties in connection with this Agreement. The Consultants shall require their agents and sub-consultants to impose similar restriction on their directors and employees by way of a contractual provision.

(G) The Consultants shall take all necessary measures (including by way of contractual provisions where appropriate) to ensure that their directors, employees, agents and sub-consultants who are involved in this Agreement are aware of the provisions under the aforesaid sub-clauses (B) to (F). Where the Consultants have obtained the written approval of the Director's Representative to appoint sub-consultants to undertake any part of the Services, the Consultants shall take all necessary steps to procure and ensure that the same covenants as in this Special Conditions of Employment Clause, *mutatis mutandis*, are imposed on the sub-consultants and shall take all necessary steps to enforce such covenants.

(H) In this Special Conditions of Employment Clause,

“associated company” or “associated companies” in relation to the Consultants means

any company which is the holding company or subsidiary company or sister company of the Consultants. A “sister company” means a company which belongs to the same holding company as the Consultants’.

“associate” or “associates” in relation to the Consultants means

(i) any partner of the Consultants; or

(ii) any company one or more of whose directors is in common with one or more of the directors of the Consultants.

“associate person” or “associated persons” in relation to the Consultant means

- (i) any person who has control, directly or indirectly, over the Consultants; or
- (ii) any person who is controlled, directly or indirectly, by the Consultants; or
- (iii) any person who is controlled by, or has control over, a person at (i) or (ii) above.

“control” in relation to another person means holding office as a director or the power of a person to secure

- (i) by means of the holding of shares or interests or the possession of voting power in or in relation to that or any other person; or
- (ii) by virtue of powers conferred by any constitution, memorandum or articles of association, partnership, agreement or arrangement (whether legally enforceable or not) affecting that or any other persons;

that the affairs of the first-mentioned person are conducted in accordance with the wishes of that other person.

“director” means any person occupying the position of director by whatever name called and without limitation a de facto or shadow director.

- (I) The Consultants shall submit a signed declaration in the form prescribed in Appendix [ ] to these Special Conditions of Employment (with only such amendments thereto as may previously have been agreed in writing by the Employer) to confirm compliance with the provisions as stated in the above sub-clauses when demand is made for payment under this Agreement at a frequency, which shall not be more frequent than once per month, as specified by the Director’s Representative. If the Consultants fail to submit the declaration as required, the Employer shall be entitled to withhold payment until such

declaration is submitted and the Consultants shall not be entitled to interest in that period.”

**Sample Declaration Form by Consultants**  
**on their compliance with the conflict of interest avoidance**  
**and debarring requirements**  
**(to be attached to the payment application submitted by the Consultants)**

To: Director's Representative

Agreement No.: .....  
Title: .....

In accordance with SCE Clause [ ], we confirm and declare that we have complied with the provisions stated therein. We further confirm and declare that we have taken action to ensure that our associated companies, associates or associated persons, sub-consultants, employees and agents are aware of the provisions therein stipulated including the following:

- (a) our associated companies, associates or associated persons or any of our sub-consultants shall not, during the term of this Agreement and for [ ] months thereafter, undertake any services, tasks or jobs or do anything whatsoever for or on behalf of third party (other than in the proper performance of this Agreement), which touches, concerns or affects the Services or which may reasonably be seen to touch, concern or affect the Services, except with the prior written approval of the Director's Representative;
- (b) our associated companies, associates or associated persons, and any of our sub-consultants shall not,
  - (i) undertake or compete for the role of a contractor or supplier or otherwise be involved as a shareholder of the contractor or supplier, in a subsequent procurement of any services and/or goods arising out of or relating to this Agreement;
  - (ii) undertake any services for a contractor (including acting as a sub-contractor) or supplier in respect of a contract between that contractor or supplier and the Employer for which we are providing a service arising out of or relating to this Agreement;
  - (iii) undertake any services for, including without limitation provision of advice to, a bidder bidding for a contract arising out of or relating to this Agreement,



except with the prior written approval of the Employer;

- (c) we are under an obligation to render advice or recommendations pursuant to this Agreement to the Employer on an impartial basis without giving favour to any particular product, services or equipment in which we have a commercial interest or to any third party with whom we have a commercial interest, including but not limited to those who engaged us in consulting services related to private works. We also have an obligation to notify the Employer immediately and in writing and keep the Employer notified of any actual, apparent, potential or perceived conflict we or our associated companies, associates or associated persons or any of our sub-consultants may have in, or any association or connection we or the aforesaid persons may have with, any of the services, products or equipment proposed or recommended by us under this Agreement or any of third party with whom we have a commercial interest. Each and every one of our directors, employees, agents and sub-consultants who are involved in this Agreement have given a binding undertaking to observe the aforesaid;
- (d) our directors, employees, agents and sub-consultants who are involved in the Agreement are required to declare in writing to us and keep us informed regularly any actual, apparent, or potential or perceived conflict between their personal/financial interests and their duties in connection with this Agreement, including all or any facts which may reasonably be considered to give rise to a situation which the financial interests of such persons, conflict or compete, or may conflict or compete, with our duties to the Employer under this Agreement. In the event that such conflict is disclosed in a declaration, we are under an obligation to forthwith take such reasonable measures as are necessary to mitigate as far as possible or remove the conflict so disclosed; and
- (e) our directors and employees who are involved in the Agreement are prohibited from engaging in any work or employment other than in the performance of this Agreement, with or without remuneration, which could create or potentially give rise to any actual, apparent, potential or perceived conflict between their personal/financial interests and their duties in connection with the Agreement. Our agents and sub-consultants are required to impose similar restriction on their directors and employees by way of a contractual provision.

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(Name of the Consultants) .....

(Name of the Signatory) .....

(Position of the Signatory) .....

(Date) .....