**CONSULTANCY AGREEMENT (CONSULTANT WORKER OPERATING THROUGH A PERSONAL SERVICE COMPANY) WITH IR35/OFF-PAYROLL WORKING RULES DRAFTING NOTES**

**GENERAL DRAFTING NOTES**

**Using this template**

* This template consultancy agreement has been drafted to cover the engagement of an individual consultant who is providing their services via a personal service company (PSC).
* The template has been drafted for use by private sector clients engaging the services of an individual working through a PSC post 6 April 2021 (i.e. operating under the updated IR35 tax regime (see below for further details)). The template also assumes that the parties are resident in the UK and the services are also being provided in the UK.
* Essentially, the template is drafted on the basis that the relationship between the individual consultant (working through its PSC) and the client is one of self-employment which is ‘outside’ of the IR35 tax regime. However, it is important to note that the drafting of the agreement will not guarantee that the IR35 tax regime does not apply, if the underlying substance of the engagement does not reflect self-employment in reality. For further details on the application of the IR35 tax regime, and related drafting notes, please see the relevant sections below.
* This template is not suitable for use with other types of intermediary, for example, an individual, a partnership or a managed service company (‘MSC’). A MSC, unlike a PSC, does not usually have a consultant who is exercising control over the business. Instead MSCs are controlled by scheme providers (often companies set up by employment businesses) and the individual consultants supplying the services have no part in the management or financial control of the MSC. MSCs are outside the scope of this template.
* The template is also not suitable for use where a client contracts directly with an individual consultant (who is not operating through a PSC intermediary). In this situation, please refer to the ‘Consultancy (individual self-employed contractor) agreement with drafting notes’ template. Nor is it suitable for use as a commercial agreement where the client contracts with an agency who supplies the client with the services of an individual consultant (who is operating via a PSC intermediary).
* If the individual consultant operating through its PSC could be a ‘commercial agent’ (i.e. with ‘continuing authority’ to negotiate or conclude the sale or purchase of goods on behalf of another person in accordance with the Commercial Agents (Council Directive) Regulations 1993) this template will not be suitable.
* Some of the provisions included in this template which relate to specialist areas (e.g. intellectual property, data protection and confidential information) or risks (e.g. Bribery Act or tax evasion and the Criminal Finances Act 2017) have been drafted in very basic terms. If these are key areas of interest for the client or the PSC, it is important to obtain specific advice and customise these areas to the parties’ precise requirements.

**IR35 and the ‘off-payroll’ working rules**

* Where an individual consultant provides services to a client via a PSC there is a risk that the individual could be deemed an employee for tax purposes under HMRC’s IR35 tax rules.
* IR35 tax rules were introduced in 2000 to target tax avoidance by workers who claim to be self-employed, providing their services through an appropriate intermediary (usually a PSC) but who are, in reality, deemed employees of their client. If, but for the existence of the PSC, a worker would have been a deemed employee for tax purposes, IR35 required the PSC to operate PAYE payroll and deduct income tax and employee’s National Insurance Contributions (NICs) as well as paying employer’s NICs on the fees received for the worker’s services.
* Changes to IR35 and the ‘off-payroll working rules’, which sit over and above IR35 (together, the ‘IR35 tax regime’), came into force on 6 April 2021 (having been delayed for a year due to the Covid-19 pandemic). The new rules shift the responsibility for determining the employment status of a worker operating through a PSC to clients in the private sector (unless a small business exemption applies). A similar change already took place in the public sector, when the off-payroll working rules were first introduced in 2017.
* In cases where the client falls within a small business exemption, the PSC will continue to be responsible for determining the worker’s employment status for tax purposes and declaring this to HMRC. In cases of ‘deemed employment’, the PSC will also be responsible for deducting tax and NICs from the worker’s fees and paying these to HMRC.
* This template contains wording which makes it suitable for use by medium and large company clients (the relevant clauses will be highlighted in the drafting notes) as well as those that fall within the small business exemption.

**Medium and large company clients’ obligations under IR35 tax regime from 6 April 2021**

* In summary, the new rules under the IR35 tax regime, which came into force on 6 April 2021, require medium and large sized companies in the private sector (click [here](https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10006) for details of how size is determined) who are ‘the client’ in receipt of a worker’s services to:
* determine, using reasonable care, the employment status for tax purposes of every worker who is working through a PSC (click [here](https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm10003) for details of appropriate PSCs and other intermediaries). This needs to be done on a ‘contract by contract’ basis, for each contractual engagement in respect of the worker as some contracts may fall within the new rules and others may not;
* produce an employment status determination statement (SDS) setting out the worker’s employment status for tax purposes (giving the reasons for the status conclusion) and pass a copy to the worker and, where applicable, any agency or other organisation that the client contracts with to supply the worker’s services;
* keep detailed records of the worker’s SDS, including the reasons for the determination and fees paid;
* establish a process for dealing with disagreements in relation to the worker’s SDS;
* confirm the size of the client if asked by the worker or any agency or other organisation that the client contracts with to supply the worker’s services; and
* in cases where the client is the ‘deemed employer’ of the worker (see below), the client takes responsibility for the operation of PAYE payroll to deduct and pay tax and NICs to HMRC (including, where relevant, payments of the apprenticeship levy).
* If working practices or contractual arrangements change in relation to the worker and its PSC, the client must check the rules to see if the worker’s SDS is still accurate or if it needs to be updated and re-issued.

**IR35 tax regime drafting notes**

* The starting point, in terms of the drafting in this template, is that the employment status of the individual consultant for tax purposes is not one of ‘deemed employment’ and the engagement is ‘outside’ of the IR35 tax regime. Usually, the client and the PSC have a common interest in ensuring that the consultancy agreement accurately reflects self-employment status, given the tax efficiency involved for both parties and, from the client’s perspective, the lack of employment related liabilities.
* Where appropriate, the template provides wording to cover a change in circumstances where the engagement falls ‘inside’ the IR35 tax regime because there is a deemed employment relationship between the parties for tax purposes. For example, see clause 3.1 (deductions from fees for tax and NICs).
* Regardless of whether the engagement falls inside or outside of the IR35 tax regime, this template is drafted on the basis that the individual consultant is neither an employee nor a worker of its client for employment law purposes. (By way of background, note that a worker will not have all the benefits that are afforded to employees but they do benefit from some statutory employment protections e.g. statutory holiday and national minimum wage.) Since this template is drafted on the basis that the engagement falls outside of the IR35 tax regime and the individual consultant is not an employee or worker of the client, it does not include provisions that would suggest employee or worker status – for example, provisions making deductions of student loan repayments, or automatically enrolling the individual consultant into the client’s pension scheme, or providing other employment rights such as statutory holiday pay or notice periods. However, keep in mind that some rights and protections will extend to individual consultants even if they are not employees or workers e.g. discrimination laws.
* HMRC is responsible for determining questions of employment status in relation to tax. The employment tribunals (or courts) determine employment status in relation to employment law. It is possible for an individual to be an employee for employment law purposes but treated by HMRC as self-employed and taxed accordingly (or vice versa). However, the tests are similar and clients should be aware that if an engagement is assessed as ‘deemed employment’ for tax purposes, it could indicate that a finding of employment (or, potentially, worker) status under employment law is likely too.
* The focus of this template’s drafting notes is not to outline the general commercial considerations for clients who wish to use an individual consultant working through a PSC. Instead, the drafting notes are designed to highlight the key provisions which could indicate deemed employment or self-employed status of the individual consultant for tax purposes.
* There is no single test to be applied when determining employment status for tax purposes. HMRC takes a similar approach to employment tribunals by considering various factors (e.g. personal service, mutuality of obligation and control). Many of these factors are highlighted so that they can be taken into account when considering the drafting options in this template. However, the notes that we have provided should not be read as commenting on the impact these factors may have regarding employment status for employment law purposes.
* HMRC’s online tool [Check employment status for tax (or ‘CEST’)](https://www.gov.uk/guidance/check-employment-status-for-tax) can be used as an aid to making employment status decisions for tax purposes. If the answers provided to CEST are accurate, and in line with HMRC guidance, HMRC have stated that they will stand by the outcome, provided this outcome is followed. Where relevant, the drafting notes in this template take into account the important indicators of employment status for tax purposes under CEST.
* Always keep in mind when considering drafting notes in this template (along with any comments regarding indicators of employed or self-employed status under CEST) that they are not offering drafting ‘choices’. When the template is customised, it must reflect the genuine relationship between the parties. HMRC will look at the reality and substance of the relationship and not just the legal terms, labels or the structure of the agreement that are used when settling questions of employment status for tax purposes.
* If you would like further support regarding the drafting and customising of this template agreement, more strategic advice regarding the IR35 tax regime, determining a worker’s employment status, or generally managing your contractor and consultancy relationships please contact us:

**Call: 0808 168 5874**

**Email:** [**enquiries@makeuk.org**](mailto:enquiries@makeuk.org)

**www.makeuk.org/HR-services**

**CONSULTANCY AGREEMENT (CONSULTANT WORKER OPERATING THROUGH A PERSONAL SERVICE COMPANY) WITH IR35/OFF-PAYROLL WORKING RULES DRAFTING NOTES**

(LETTERHEAD)

[*This agreement has been drafted on the basis that the Client has finalised the terms of the agreement and addressed this letter to the Consultant Company. Alternatively, the Consultant Company could provide a copy of its own terms as a starting point for the agreement. A procurement department could also negotiate the terms of the agreement rather than HR. These steps can prolong negotiations and result in a ‘battle of the terms’. However, they can also help to demonstrate an arms-length relationship, indicative of a commercial agreement rather than an employment relationship with the Individual Consultant who is providing their consultancy services via the Consultant Company*.]

[INSERT CONSULTANT COMPANY NAME],

[INSERT CONSULTANT COMPANY ADDRESS] [DATE]

[*The addressee should be the Consultant Company. The name inserted in the ‘Dear’ salutation below can be the Individual Consultant’s name (or, possibly, another person’s name) in their capacity as a representative (e.g. Managing Director) of the Consultant Company. To avoid any direct relationship which might suggest that he/she is, in fact, an employee or worker of the Client, the Individual Consultant should not be a party to the agreement*. *There may be some circumstances where the Client would want the Individual Consultant to enter into a side letter, giving direct undertakings to the Client (e.g. in relation to confidentiality, intellectual property, or data protection). A side letter would provide greater protection to the Client than the indirect undertakings included in this agreement. However, if HMRC were to audit the consultancy relationship, any side letter would need to be provided and there is a risk that this direct relationship between the Client and the Individual Consultant could be construed as evidence of a deemed employment relationship for tax purposes.*]

Dear [INSERT NAME OF CONSULTANT COMPANY REPRESENTATIVE]

**Consultancy agreement**

We are writing to confirm the terms of our agreement concerning the provision of consultancy services described in [Annex [A]] (**‘the Services’**) by [INSERT CONSULTANT COMPANY NAME & NUMBER (xxxxx)] whose registered office is [INSERT CONSULTANT COMPANY ADDRESS] (**‘the** **Consultant Company’**) to [INSERT CLIENT COMPANY NAME & NUMBER (xxxxx)] whose registered office is [INSERT CLIENT COMPANY ADDRESS] (**‘the** Client’).

[*Include details of the Services in Annex A (sometimes referred to as a ‘Statement of Work’) which should, ideally, demonstrate that the Consultant Company is providing a supply of services (e.g. setting up a new IT system) and not a supply of labour (e.g. maternity cover for an IT worker). A genuine supply of services will fall outside of the IR35 tax regime. Bear in mind that the Services Annex must reflect what actually happens in practice. If HMRC find that the actual intended relationship is more akin to employment, it will ignore the wording of the agreement.*]

# term of engagement

The Consultant Company shall provide the Services to the Client from [INSERT DATE] on the terms of this agreement (**‘the Engagement’**) unless and until this agreement is terminated [by either party giving to the other not less than [2 weeks’] prior written notice] OR [upon completion of [INSERT DETAILS OF DELIVERABLES/PROJECT/MILESTONE] as specified in the Services] or as otherwise provided in this agreement.

[*Under the first option in square brackets, the agreement continues until either party terminates by giving a specific period of written notice (or as otherwise provided in the agreement e.g. paragraph 9 (Termination)). However, bear in mind that this is a factor which HMRC can consider is more indicative of an employment relationship. As an alternative, the agreement could provide for termination on completion of the Services including a specified assignment, ‘milestone’ or defined deliverables. This approach is more in keeping with a supply of services (although it is not conclusive). It will require careful drafting and specification in the Services Annex to avoid any ambiguity. See also paragraph 2.2 (Duties) and paragraph 3 (Fees and Expenses) which may also need to be amended if this deliverables-based approach is adopted. However, if this is not appropriate, consider varying the amount of notice required, and requiring the Consultant Company to give more notice than the Client or, ideally, provide for the possibility of immediate termination by the Client. Again, if this is not commercially viable, be cautious about providing too long a period of notice. In one case, HMRC found that even a right to four weeks’ notice was more consistent with employment than self-employment. It is not advisable to include a payment in lieu of notice clause or garden leave provision, as these are also inconsistent with self-employment.*]

# Duties

## The Consultant Company shall make the individual named in [the Purchase Order (see Annex [B])] (**‘the Individual Consultant’**) available to the Client to provide the Services during the Engagement and on the terms of this agreement with due care, skill and ability.

## [*The Consultant Company and the Individual Consultant should have freedom over how they complete their work. Excessive direction and supervision from the Client (or, conversely, too much flexibility over the types of tasks that the Client can ask the Consultant Company and Individual Consultant to carry out) will suggest that there is an employment relationship. Also, bear in mind that certain managerial duties such as responsibility for hiring, dismissing, conducting appraisals or taking pay decisions in respect of employees of the Client can be indicative of employment status when using HMRC’s online CEST tool. Details of the Services should ideally be set out in the Annex as a project or series of projects with deliverables. This should not resemble a job description or list of individual duties. Although referred to in this paragraph, the Individual Consultant is only named in the Purchase Order Annex, rather than the body of the agreement, to support the intention that the Consultant Company is running a business. Similarly, there is no reference to a fixed Client site as the sole location for the performance of the Services in the body of the agreement as this could point towards an employment relationship. The Purchase Order Annex can include details of a project or client location if relevant to the task, rather than a fixed place of work.*]

## The Consultant Company shall and (where relevant) shall procure that the Individual Consultant shall use its best endeavours to promote the interests of the Client and [[unless the Individual Consultant is prevented by ill health or injury,] shall devote at least [xx] [days/hours] in each calendar month to providing the Services to the Client (together with such additional time as may be required for their proper performance).] OR [ensure that [INSERT DETAILS OF DELIVERABLES/ASSIGNMENT] conform[s] to the Client’s requirements and [is/are] completed within the relevant deadlines, as specified in the Services.]

## [*The first drafting option in this paragraph does not specify start and finish times or the days the Individual Consultant is required to work. Exercising that level of control over how the Individual Consultant carries out the Services would point towards employment. Ideally, if there is an unqualified right to use a Substitute in clause 2.4, you should delete the optional wording/qualification regarding ill health or injury. See also clause 2.3 below regarding no continued payment of the fee during any period where the Services are not delivered, including where that is due to sickness, as this could appear to be a form of ‘sick pay’ – a benefit which would ordinarily only apply to employees of the Client and not self-employed consultants. This is the reason why there is no reference to holiday or annual leave as those entitlements are indicative of employment. Also be aware that the inclusion of any entitlement to these types of paid for corporate benefits can increase the likelihood of the HMRC CEST tool producing an ‘Off-payroll working rules (IR35) apply’ result. An alternative option has been provided in case the Client wishes to depart from a time-based approach to performance of the Services and focus instead on the achievement of deliverables to be set out in the Services Annex. This is preferable in terms of reducing the risk of the engagement being ‘inside’ the IR35 tax regime. However, it is not conclusive of self-employment or a business-to-business relationship. If this approach is adopted, it is very important to define the project or deliverables carefully, including the timetable and any relevant deadlines (and consequences if these are not met) in the Services Annex. If this approach is preferred, the wording in paragraph 3 (Fees) will also need to be amended and you should consider whether paragraph 1 (Term of Engagement) should be amended too*.]

## [If the Individual Consultant is unable to provide the Services due to illness or injury, the Consultant Company shall notify the Client as soon as reasonably practicable.] No fee will be payable in accordance with paragraph [3] for any period where the Services are not provided.

## [*There is no reference to the Client’s employee absence notification procedures (or sick pay) as this would not support the general intention that there is no relationship of employment between the Client and the Individual Consultant. Ideally, if there is an unqualified right to use a Substitute in clause 2.4, you should delete the optional wording/qualification regarding ill health or injury.* ]

## [The Consultant Company may [subject to the prior written approval of the Client (which must not be unreasonably withheld or delayed)] appoint a suitably qualified substitute (**‘the Substitute’**) to perform the Services instead of the Individual Consultant. The Consultant Company will continue to invoice the Client for the Services, in accordance with paragraph [3] and the Consultant Company will be responsible for the remuneration of the Substitute.]

## [*Make UK recommends giving this clause the utmost consideration and careful assessment.* *An unqualified right for the Consultant Company to use a substitute (for which it bears the cost of remuneration) can be a strong indicator of self-employed status (particularly when using HMRC’s online CEST tool). Bear in mind that the clause must be genuine and ‘active’. For example, exercise caution if substitution has never actually taken place as the clause may then be perceived as a sham. Realistically, many clients will not want to agree to an unfettered right of substitution. It is possible to include a limited power of substitution. However, there is a danger that this could lead to the conclusion that the Individual Consultant is not really self-employed, particularly if the Client has an absolute and unqualified discretion to withhold its consent to the use of a Substitute. The proviso that consent must not be unreasonably withheld or delayed may support the assertion that the discretion is not absolute but there is no guarantee that this is sufficient. If restrictions on the power of substitution are due to the Client’s security concerns, it is worth ensuring that there is a clear audit trail of the reasons for these concerns to help to justify the restrictions on substitution (although it is not a given that this will prevent a finding of employment status). Careful consideration should be given to apportionment of liabilities when using a Substitute and also how the relationship between the Substitute and the Consultant is documented.*].

## The Consultant Company shall and (where relevant) shall procure that the Individual Consultant shall comply with the Client’s policies on [health and safety, professional standards or codes of conduct, anti-harassment and bullying, social media, use of information and communication systems, dress code, smoking and substance misuse and [INSERT OTHER RELEVANT POLICIES]]

## [*The Client may want the Consultant Company and the Individual Consultant to comply with some of its policies and procedures which are normally applicable to its employees. While this can be appropriate for some policies (e.g. anti-harassment and bullying) you should review policies and procedures carefully and ensure that only those that are strictly relevant are included. For example, is there any need to include a no smoking policy or dress code if the Individual Consultant will be working remotely? It is important to avoid any involvement or integration of the Individual Consultant into the Client’s structure and employee culture that is not essential for the delivery of the Services, as this will point towards employment status. Provision of a uniform or other equipment (and requiring compliance with related Client policies), for example, could result in HMRC arguing that the Individual Consultant is a disguised employee. However, allowances may be made in some circumstances, for example, where security and/or health and safety measures prohibit a contractor from using their own equipment (e.g. a personal laptop or tablet device).*]

## The Consultant Company shall, and (where relevant) shall procure that the Individual Consultant shall, promptly provide the Client with any assistance or information that it may reasonably require in connection with the provision of the Services.

## Neither the Consultant Company nor the Individual Consultant shall have any authority (and shall not hold itself out as having authority) to bind the Client or incur any expenditure in the Client’s name or on its behalf unless the Client has specifically permitted this in writing.

## The Consultant Company shall, and (where relevant) shall procure that the Individual Consultant shall comply with the Client’s anti-corruption and bribery policy and procedures and the Bribery Act 2010. Failure to do so may result in the immediate termination of the Engagement.

## [*If the Client fails to prevent bribery by their associated persons (which can include the Consultant Company or Individual Consultant) it may be guilty of an offence under the Bribery Act 2010 (BA 2010), unless it can show that there are adequate procedures in place which are designed to prevent such conduct. This clause is only suitable where there is an extremely low risk of bribery. It will require amendment if there is a higher risk in the Engagement.*]

## The Consultant Company shall not, and (where relevant) shall procure that the Individual Consultant shall not, engage in any activity which would constitute tax evasion under the Criminal Finances Act 2017. Any third party requests to facilitate such activity must be reported promptly by the Consultant Company to the Client. Failure to comply with this requirement may result in the immediate termination of the Engagement.

## [*The Client may have a defence to corporate offences for tax evasion under the Criminal Finances Act 2017 if it has put in place certain reasonable prevention procedures. One example of these procedures could be the insertion of relevant clauses in contracts with third party service providers such as contractors or consultants. However, the Client will need to review this clause carefully and may need to make amendments depending on the level of risk involved, as the level of risk will influence the type of prevention measures and contractual provisions that the Client could be expected to implement in order to benefit from the defence.*]

## The Consultant Company shall, and (where relevant) shall procure that the Individual Consultant shall, provide the Client promptly upon request with any information or documentation that it may reasonably require (and shall also inform the Client immediately of any material changes to such information or documentation) in order to determine the employment status of the Individual Consultant and, if applicable, for the purposes of complying with any obligation on the Client in relation to deducting tax and National Insurance Contributions from the fees due under paragraph [3].

## [*This clause is designed to ensure that a medium or large Client can obtain the information or documentation that it needs to produce an employment status determination in relation to the Individual Consultant for the purposes of changes to the IR35 tax regime which come into force on 6 April 2021 (see General Drafting Notes). For example, this could include asking the Consultant Company if the Engagement takes up the majority of its time (which could be an indication of deemed employment). It may also want to ask if the Consultant Company has carried out any similar self-employed work for other clients in the previous 12 months (which can point towards self-employment). This type of information is required when using HMRC’s CEST online tool. If the Engagement is found to be inside the IR35 tax regime, this clause also provides for the Client to request the necessary information or documentation so that it can operate payroll in respect of the Individual Consultant (e.g. the Client may request details of the Individual Consultant’s full name, date of birth and National Insurance number).*]

# fees and expenses

## The Client will pay the Consultant Company [[a fee of £[xxxx] per [hour/day] OR [fees for the Services as set out in the Services Annex [A]] [exclusive/inclusive of VAT] less any deductions for income tax or National Insurance Contributions (if required by law). The Consultant Company shall submit invoices to the Client [on a [weekly/monthly] basis] during the Engagement setting out details of the Services provided and [[the [hours/days] that the Individual Consultant [(or any Substitute)] has worked,] OR [the date and description of any [INSERT DETAILS OF DELIVERABLES/PROJECT/MILESTONE] completed, to the satisfaction of the Client, and in accordance with its requirements in the Services]. Invoices will also specify the amount of the fee payable (and VAT, if applicable) for [the Services provided during that [week/month].] OR [the achievement of any of the [INSERT DETAILS OF DELIVERABLES/PROJECT/ MILESTONE] which have been completed.] The Client will pay such invoices [in accordance with its usual payment terms/within [xx] days of receipt].

## [*This clause includes one, time-based option which assumes that the Consultant Company will be paid for the actual time spent by the Individual Consultant providing the Services rather than receiving a fixed amount at regular payment intervals (which is more typical of how employees are paid). A self-employed consultant would not usually benefit from the security of being paid a regular salary. Alternatively, there is wording which provides for fees to be paid on the basis of deliverables achieved or ‘staged payments’ (which should be described in detail in the Services Annex). This can help to reduce the risk of deemed employment (although it will not be conclusive of self-employment status). For both options, the clause provides for tax and National Insurance Contributions (NICs) to be deducted if it has been established that there is ‘deemed employment’ for tax purposes and the new post 6 April 2021 IR35 tax regime applies to the Engagement with a medium or large Client. If these rules apply, the parties should consider the commercial implications carefully and how this might affect the fee payable to the Consultant Company. For example, who will absorb any additional costs such as employer’s NICs or, where applicable, payments of the apprenticeship levy – the Client or the Consultant Company? Where the Client is required to deduct tax and NICs under the updated IR35 tax regime, the new rules apply in respect of payments made on or after 6 April 2021 but only if the services were also provided on or after 6 April 2021. (Transitional provisions apply where the services operate both before and after this date.) Regarding VAT, the Consultant Company will only need to be registered for VAT if their taxable supplies exceed a certain amount every year. If there is a deemed employment relationship, bear in mind that a medium or large Client will need to report pay and deductions to HMRC (in the same way as for other workers who are on their payroll). When doing so, the Client should indicate to HMRC that the Individual Consultant is an ‘off-payroll worker’. Off-payroll workers can be added to the Client’s existing PAYE scheme for reporting payments to HMRC or, alternatively, the Client can choose to open a new one.*]

## [The Client will pay the Consultant Company [a completion incentive/commission payment] of [xx] at the end of [the Engagement]. This will be dependent on achievement of agreed objectives [set out in the Services Annex [A]]. The agreed amount will be invoiced by the Consultant Company to the Client in accordance with paragraph [3.1]]

## [*It is common for self-employed consultants to receive a commission/specific incentives based on agreed targets or objectives. Similarly, the Client may wish to stipulate in the Services Annex if there are any consequences for failure to meet these objectives or agreed timescales (such as reduction in fees payable). Providing for the Consultant Company to assume this type of financial risk can help to indicate that the relationship is more akin to a commercial agreement and self-employment.*]

## [The Consultant Company shall bear the cost of its own expenses (and those incurred by the Individual Consultant) in the course of the Engagement.] OR [The Consultant Company is not entitled to reimbursement of any travelling or subsistence costs incurred by the Individual Consultant between their home and any assignment location nor any subsistence costs while on assignment. Other reasonable expenses incurred [shall not exceed [xx] in any given [week] and] must be reimbursed by the Client within [xx] [days] of receipt of the Consultant Company’s invoice and all relevant receipts.]

## [*Ideally, the Consultant Company should bear as many of the costs of providing the Services as possible within its overall fee. Bearing the cost of significant equipment or materials (which carries a financial risk for the Consultant Company) is highly influential when using HMRC’s online CEST tool and can be a strong indicator of self-employment status. If this is not commercially acceptable to the parties, the Client could agree to limited and ‘authorised expenses’ with the Consultant Company as the second option suggests in this clause (or set an upper limit). However, the less financial risk that is taken on by the Consultant Company, the greater the likelihood of deemed employment rather than self-employed status.*]

## The Client is entitled to deduct from any fees or other sums payable to the Consultant Company, any sums that the Consultant Company (or the Individual Consultant [and any Substitute]) may owe the Client at any time.

## [*This clause provides the necessary contractual authority to make non-statutory deductions if the Individual Consultant is found to be a worker or an employee. S13(1) Employment Rights Act 1996 stipulates that deductions cannot be made from an employee or worker’s wages unless they have given written consent or the deduction is required/authorised by statute or a provision in the contract of employment.*]

# other activities

The Consultant Company and the Individual Consultant may be engaged, employed, concerned or have any financial interest in any capacity in any other business, trade, profession or other activity during the Engagement provided that such activity does not result in a conflict of interest with the Client or a breach of the Consultant Company’s obligations under this agreement. [However, the Consultant Company shall not, and shall procure that the Individual Consultant shall not, engage in any such activity with a business which is similar to or competes with Business of the Client without the Client’s prior written consent (which should not be unreasonably delayed or withheld). **Business of the Client** includes [INSERT DETAILS]]

[*Typically, self-employed consultants often work for different clients at the same time. Having multiple clients is regarded as a useful indicator of self-employment. HMRC’s online CEST tool specifically asks if a worker has carried out any self-employed work of a similar nature for other clients in the last 12 months. It also asks if there are any restrictions on contractors performing work for others – a potential indicator of deemed employment. However, a completely unrestricted approach may not be commercially acceptable to the Client. In this situation, a middle ground could be to partially restrict the Consultant Company’s (and the Individual Consultant’s) activities by requiring the Consultant Company to obtain the Client’s prior written consent if the Consultant Company wants to undertake any activity which is similar to or in competition with the business of the Client. To ensure that the protection is sufficiently well targeted it is important to define the term ‘Business of the Client’ very carefully. The Client may want to go further and include post-termination restrictions to prevent the Consultant Company from competing with it after the Engagement has terminated (e.g. non-solicitation of the Client’s customers or employees). This is a matter for negotiation for the parties but it also comes with a high risk that HMRC would find that the Client was exercising a level of control over the Individual Consultant which is more akin to employment than self-employment.*]

# Confidential information

## The Consultant Company shall not, and (where relevant) shall procure that the Individual Consultant shall not, other than in the proper course of providing the Services, use or disclose to any person (either during, or at any time after, termination of the Engagement) any Confidential Information and will also use its or their best endeavours to prevent the publication and disclosure of any such Confidential Information. For the purposes of this paragraph 5, **Confidential Information** means [any information or matter which relates to the business or affairs of the Client or any of its business contacts or about any other confidential matters which may come to the Consultant Company’s or the Individual Consultant’s knowledge in the course of providing the Services. It includes, but is not limited to [INSERT FURTHER DETAILS].]

## The restriction in paragraph 5.1 does not apply to any:

### use or disclosure authorised by the Client (or which has been required by law); or

### information which is already in the public domain (or comes into the public domain) otherwise than through the Consultant Company’s (or the Individual Consultant’s) unauthorised disclosure.

## [*There is no implied duty of confidentiality between a self-employed consultant and a hiring entity (unlike the implied duty that exists between an employer and an employee). Accordingly, these express confidentiality provisions are required to protect the Client against misuse of confidential information. The definition of Confidential Information should be tailored to the particular Client and its business.*]

# data protection

## The Client processes personal data in relation to the Individual Consultant for the purposes of the Engagement and in accordance with its data protection privacy notice, as required under the data protection laws in the UK including the Data Protection Act 2018 and the EU General Data Protection Regulation (to the extent that its provisions have legal effect in the UK) or any successor or other legislation in force from time to time which relate to the processing of personal data (the **‘UK Data Protection Laws’**). A copy of the Client’s privacy notice can be found on [INSERT LINK TO WEBSITE OR OTHER DETAILS]].

## [The Client and the Consultant Company acknowledge that for the purposes of this Engagement, the Client is a controller and the Consultant Company is a processor. In accordance with UK Data Protection Laws, the Client and the Consultant Company shall comply with the obligations set out in [Annex [C]] regarding the processing of personal data in relation to this Engagement.] [If the Consultant Company appoints a Substitute in accordance with paragraph [2.4] it will also comply with any further obligations in relation to the sub-processing of personal data under UK Data Protection Laws.]

## The Consultant Company shall be liable for and shall indemnify the Client for any loss, liability, costs (including legal costs) damages or expenses which result from any breach by the Consultant Company (or by the Individual Consultant [or by the Substitute] or any third party processor appointed by the Consultant Company) of UK Data Protection Laws and shall maintain in force adequate insurance cover with reputable insurers acceptable to the Client.

## [*Clause 6.1 refers to the Client’s privacy notice, as required under UK Data Protection Laws, and Clause 6.3 provides for the Consultant Company to insure against and indemnify the Client for breaches of UK Data Protection Laws. Clause 6.2 is an optional clause which will only be relevant if the Consultant Company is acting as a processor for the Client (rather than operating as a data controller in its own right). Controllers are the main decision-makers in relation to the processing of personal data. A processor acts on behalf of, and only on the instructions of, the relevant controller. Guidance on determining whether the Consultant Company is acting as a processor or a controller can be found in the UK Information Commissioner’s (ICO) Guidance* [*here*](https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/controllers-and-processors/)*. If the Consultant Company is a processor, UK Data Protection Laws stipulate that the consultancy agreement must include certain minimum obligations. These should be included in the Data Processing Obligations Annex. If a Substitute is appointed, the Consultant Company will need to enter into an agreement with the Substitute which replicates the contractual obligations between the Client and the Consultant Company as detailed in the Data Processing Obligations Annex. The indemnity and insurance requirements in clause 6.3 are a matter for negotiation between the parties although keep in mind that the more financial risk the Consultant Company is prepared to assume, the stronger the argument that it is operating as business.*]

# Intellectual property

## The Consultant Company warrants to the Client that it has obtained from the Individual Consultant a valid written assignment (as permitted by law) of all existing and future inventions and works embodying intellectual property rights (including, without limitation, patents, copyright and related rights) which relate to the Services, or are reasonably capable of being used in the business of the Client (the **Intellectual Property Rights**).

## The Consultant Company also warrants that it has obtained from the Individual Consultant a written irrevocable waiver of the moral rights in the Intellectual Property Rights (as permitted by law).

## To the extent that the legal title of any of the Intellectual Property Rights has not passed (or cannot pass) to the Consultant Company, it warrants to the Client that the Individual Consultant has agreed to hold those rights on trust for the Consultant Company.

## The Consultant Company hereby assigns to the Client (as permitted by law) all the Intellectual Property Rights referred to in this paragraph 7. To the extent that any of these rights do not vest automatically, the Consultant Company will hold them on trust for the Client.

## The Consultant Company agrees to promptly execute all documents and do all acts as may, in the opinion of the Client, be necessary to give effect to this paragraph [7] and will, if required by the Client, irrevocably appoint the Client to be its attorney in its name and on its behalf to execute documents, use the Consultant Company’s name and do all things which are necessary or desirable for the Client to obtain for itself (or its nominee) the full benefit of this paragraph [7].

## [*Some intellectual property rights, which come about as a result of performing the Services, will belong to the Consultant Company. This is likely to be a matter for negotiation between the parties but if the Client wishes to secure ownership of these rights they will need to be assigned (which the wording of this clause anticipates). However, note that this clause is very basic and should not be relied upon if an engagement involves new inventions, etc. As intellectual property could be a valuable aspect of the agreement we recommend that the parties take specific advice in relation to this clause*. *However, also bear in mind that HMRC’s CEST online tool asks specific questions regarding ‘ownership rights’ and its accompanying guidance explains that where a worker retains ownership of assets they have created during an engagement or sells them to their client once the work has been completed (and outside of the original contractual arrangements), this is an indicator that the worker is running an independent business. However, if ownership and/or the ability to exploit such assets sits with a client this is more indicative of an employment relationship.*]

# Insurance and liability

The Consultant Company shall be liable for and shall indemnify the Client for any loss, liability, costs (including reasonable legal costs), damages or expenses that arise from [any breach by the Consultant Company or the Individual Consultant [or any Substitute] of the terms of this agreement which includes any negligent or reckless act, omission or default in] the provision of the Services. Accordingly, the Consultant Company shall maintain in force during the Engagement adequate insurance cover with reputable insurers acceptable to the Client.

[*Self-employed contractors would normally be expected to take on a degree of financial risk (unlike employees) and, accordingly, it is common to expressly state in the consultancy agreement that the Consultant Company will have liability for losses incurred by the Client in connection with provision of the Services (and require the Consultant Company to maintain adequate insurance cover). However, the level of risk that the parties each assume is a matter for negotiation. This clause could be limited by restricting the Consultant Company’s level of liability to losses incurred through its or the Individual Consultant’s breach of contract, etc. but as the degree of financial risk assumed by the Consultant Company decreases, the risk of deemed employment will correspondingly increase.*]

# Termination

The Client may at any time terminate this agreement with immediate effect with no liability to make any further payment to the Consultant Company (other than in respect of any accrued fees [or expenses] at the date of termination) if:

### the Consultant Company (or the Individual Consultant [or any Substitute]) is in material breach of any of the obligations under this agreement; or

### after notice in writing, the Consultant Company (or the Individual Consultant [or any Substitute]) wilfully neglects to provide or fails to remedy any default in providing the Services.

Any delay by the Client in exercising its rights to terminate shall not constitute a waiver of those rights.

[*A contract for services, rather than employment, would generally end when a project has been completed or if there is an early breach of contract, as detailed above. There are no references to disciplinary terms such as ‘gross misconduct’ as that type of language is more in keeping with an employment relationship. Also, caution should be applied if the Client is terminating due to illness or injury of the Individual Consultant – there is a risk that the Client could breach the disability discrimination provisions in the Equality Act 2010 as the Individual Consultant may have protection under the Act even if their status is not that of an employee or a worker. Note that there is no provision in this clause for any extension of the Engagement upon termination as that would suggest some ongoing mutuality of obligation (i.e. an ongoing obligation on the Client to provide work and an ongoing obligation on the Consultant Company (and the Individual Consultant) to complete the work) which is a key element of an employment contract. Any extensions to the Engagement should be under a new contract. In particular, provisions enabling the Client to extend without obtaining prior consent of the Consultant Company should be avoided. The ability to extend the Engagement (or if, in reality, there are a series of back-to-back contracts with the same client) will also be picked up by HMRC’s online CEST tool as a potential flag, signalling deemed employment status.*]

# client property and termination obligations

## For the purposes of this paragraph 10, **Client Property** means [INSERT DETAILS e.g. all documents, manuals, books, records, papers, materials and information on any media regardless of location, which relate to the business or affairs of the Client or any of its business contacts or customers. It also includes any equipment, hardware or software provided by the Client for the Consultant Company or Individual Consultant’s use during the Engagement, and any data processed, produced, maintained or stored on the computer systems, electronic equipment or devices belonging to the Client, the Consultant Company or the Individual Consultant during the Engagement].

## Client Property (including but not limited to Confidential Information) in the possession of the Consultant Company or Individual Consultant [or any Substitute], (or under its or their control), whether original or in copy, which has been obtained in the course of providing the Services, shall be returned to the Client by the Consultant Company promptly at any time on request and, in any event, on or before the termination of this agreement.

## The Consultant Company (subject to any Client data retention policy or requirements) undertakes to irretrievably delete any information relating to the business of the Client (including but not limited to Confidential Information) stored on any magnetic or optical disk or memory and all matter derived from such sources which are outside the premises of the Client but in the possession of or under the control of the Consultant Company (or the Individual Consultant). [This obligation includes requiring any Substitute to delete such information where applicable].

# Status and indemnities

## The relationship of the Consultant Company (and the Individual Consultant) to the Client will be one of an independent contractor and its client. Nothing in this agreement shall make the Consultant Company (or the Individual Consultant) an employee, worker, agent or partner of the Client and the Consultant Company shall not hold itself out as such (and shall procure that the Individual Consultant shall also not hold itself out as such).

## This agreement constitutes a contract for the provision of services and not a contract of employment and accordingly the Consultant Company shall be responsible for and indemnify the Client against any liability, assessment or claim (or related costs, expenses or penalties) for:

### any taxation, National Insurance or social security contributions whatsoever arising from or in connection with the performance of the Services where such recovery is not prohibited by law; and

### any employment-related claim or any claim based on worker or employment status (including reasonable costs and expenses) brought by the Individual Consultant [or any Substitute] against the Client arising out of or in connection with the provision of the Services, except where such claim is as a result of any act or omission of the Client.

### The Client may satisfy such indemnity (in whole or in part) by way of deduction from any payment due to the Consultant Company.

## The indemnity in paragraph [11.2 (a)] shall not apply to income tax or National Insurance Contributions deducted by the Client prior to payment of the fees due to the Consultant Company under paragraph 3 because the Engagement has been assessed by the Client as a deemed employment relationship for tax purposes under Chapter 10, Part 2 of the Income Tax (Earnings and Pensions) Act 2003.

[*This clause confirms the independence of the parties and that their intention is not to create a relationship of employer/employee. However, this clause is not conclusive. It is also important to ensure that the parties’ intention as recorded here reflects the practical reality of the Engagement and that this is supported throughout the agreement by avoiding the use of language or concepts which are usually only found in employment agreements (e.g. references to training, overtime, employee benefits, performance appraisals, staff uniforms and equipment, etc.)*

*Clause 11.2 provides for the Consultant Company to indemnify the Client against losses, etc. flowing from the consequences of the Engagement being found not to be a genuine self-employment relationship but rather one of employer and employee or worker for employment purposes. This is a matter for negotiation between the parties. However, it should be noted that there is a possibility that this clause won’t be effective if the Individual Consultant is found to be an employee or a worker for employment law purposes. This is because section 203 of the Employment Rights Act provides that any attempt to limit or exclude the rights of an employee or worker will be void and this type of indemnity could be perceived as an attempt to dissuade individuals from challenging their employment status, falling foul of section 203.*

*Clause 11.3 makes an exception for any income tax or NICs deductions which the Client has made from the fees payable because the Engagement, post 6 April 2021, has been assessed for tax purposes as one of deemed employment with a medium or large Client.* *In this situation, the Client has not suffered any loss as it is obliged to deduct and pay income tax and NICs if it has determined that the Individual Consultant has deemed employment status. However, the indemnity will still operate where the Client has incorrectly concluded that the Engagement is outside of IR35. In these circumstances, the Client is likely to have paid a gross fee to the Individual Consultant and it will then have to account to HMRC for the unpaid tax. As far as NICs are concerned, the Client is generally prohibited from recovering NICs under social security laws (which accounts for the qualification in clause 11.2 (a)).*]

# Variation

This agreement may only be varied by a document signed by both the Consultant Company and the Client.

# Third party rights

The Contracts (Rights of Third Parties) Act 1999 shall not apply to this agreement and no person other than the Consultant Company and the Client shall have any rights under it. The terms of this agreement or any of them may be varied, amended or modified or this agreement may be suspended, cancelled or terminated by agreement in writing between the parties or this agreement may be rescinded (in each case), without the consent of any third party.

# entire agreement

# This agreement and, unless otherwise stated, any documents referred to in it constitutes the entire agreement between the parties with respect to its subject matter and supersedes all prior agreements, understandings and negotiations.

# Governing law

This agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

# Jurisdiction

The courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims).

Please acknowledge receipt of this letter agreement and acceptance of its terms by signing, dating and returning the enclosed copy.

Yours sincerely,

....................................

**[INSERT NAME AND JOB TITLE OF REPRESENTATIVE OF THE CLIENT]**

For and on behalf of

**[INSERT CLIENT COMPANY NAME]**

I hereby acknowledge receipt and accept the contents of this letter.

Signed: ..............................................................................................

**[INSERT NAME AND JOB TITLE OF REPRESENTATIVE OF THE CONSULTANT COMPANY]**

For and on behalf of

**[INSERT CONSULTANT COMPANY NAME]**

Date: ...................................................................................................

**ANNEX A: SERVICES**

**[INSERT DESCRIPTION OF THE SERVICES AND, WHERE APPLICABLE, DETAILS OF ANY DELIVERABLES/PROJECT/MILESTONE INCLUDING TIMETABLES AND RELATED PAYMENT TERMS]**

**ANNEX B: PURCHASE ORDER**

|  |  |  |  |
| --- | --- | --- | --- |
| **Purchase Order Number:** | |  | |
| **Contract Number:** | |  | |
| **Date:** | |  | |
| **Parties:**   1. **[INSERT CLIENT COMPANY NAME & NUMBER (000000)]** **(“the Client”) and** | | | |
| 1. **[INSERT CONSULTANT COMPANY NAME & NUMBER (000000)] (“the Consultant Company”)** | | | |
| 1. **[INSERT NAME OF INDIVIDUAL] (“the Individual Consultant”)** | | | |
| **Assignment:** | | | |
| **Location (if relevant):** | | | |
| **Duration:** | **Start:** | | **Finish:** |
|  |  | |  |
| **Special Conditions:** | | | |

**[ANNEX C: DATA PROCESSING OBLIGATIONS]**

[*UK Data Protection Laws require the Engagement to include the following provisions where the Consultant Company is acting as a processor on behalf of the Client:*

* *the subject matter and duration of the processing;*
* *the nature and purpose of the processing;*
* *the type of personal data and categories of data subject; and*
* *the controller’s obligations and rights.*

*There must also be specific terms or clauses which provide for:*

* *Processing only on the documented instructions of the controller*
* *Duty of confidence*
* *Appropriate security measures*
* *Using sub-processors*
* *Data subjects’ rights*
* *Assisting the controller*
* *End-of-contract provisions*
* *Audits and inspections*

*The provisions above are the minimum legal requirements, but the Client and the Consultant Company may agree to supplement these terms. The drafting of these data processing terms must be tailored to the specific processing activities undertaken by the Consultant Company and, accordingly, is outside the scope of this template agreement. However, if you would like to discuss obtaining further support with drafting these terms please contact* [*www.makeuk.org/HR-services*](http://www.makeuk.org/HR-services) *or call 0808 1685874.*