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**SAMPLE**

**PRE-BID AGREEMENT,**

**JOINT VENTURE**



CHAMBER OF COMMERCE AND INDUSTRY  
WESTERN AUSTRALIA

## JOINT VENTURES

A joint venture is a means of combining the skills and resources of two or more companies in order to obtain a better commercial result than if they acted independently. Joint Ventures may be formed for a number of purposes but the particular one which will be considered here is for tendering for and if successful executing a contract for a specific project.

### Legal Form

The joint venture can either be unincorporated or can be incorporated as a company. Normally for a single contract it will unincorporated. Incorporation is usually only appropriate if the parties intend establishing a business which will bid for a number of projects over a period of time. This could apply if a UK firm was interested in bidding for government projects in an overseas country in which it was either compulsory or preference was given, to companies with a certain percentage of local participation. In general for the UK market joint ventures will be unincorporated.

A joint venture established for bidding for a single project would probably not constitute in law partnership as it is doubtful if it would be considered as "the carrying on of a business in common". However, to avoid any doubts in the matter it should be provided specifically in the Joint Venture Agreement that it is not a partnership so as to remove the possibility of the joint venturer committing the other in his dealings with a third party.

The other two general issues concern the relationship between the joint venturers and the person with whom they are hoping to enter into a contract, "the Client", and as between themselves.

Invariably their obligation towards the client will be joint and several. That is they will each be liable to the client not only for their own default but also for a default by any member of the joint venture. The client is enabled therefore to proceed against any member of the joint venture he chooses regardless of which particular member is to blame for the default. This has a significant impact where the financial strength of the several parties is significantly different since in the event of an alleged default the client may well decide to proceed against the party having the greatest financial resources regardless of his actual individual responsibility for the problem. If found liable then he in turn may find it impossible to recover from the other joint venturer actually responsible the damages which he is called upon to pay.

As between themselves the members have a choice of their form of participation. Either the joint venture can be integrated, ie each of them pool their resources in the performance of the contract, or it can take the form of a consortium in which there are specific tasks allocated to each of the joint venture members. The latter is the more normal form in the UK and is that which is given in the text.

Although the shares of the participating members of the joint venture may be equal, and the consent of all is normally required for any significant decision, it is convenient to appoint one member of the joint venture to act as leader and to take responsibility for the organisation of the tender and leading negotiations and if successful of the contract itself. For this purpose he is paid a small fee.

### Pre-bid Agreement

Joint ventures are normally entered into for major projects which are advertised well in advance of the actual invitation to tender. Since one of the purposes of those participating in the joint venture is in practice to reduce the amount of competition for the project they will wish to form the joint venture at the latest when the project is announced. At that stage however they are unlikely to want to be involved with the negotiation of a formal Joint Venture Agreement and will be content to enter into a pre-bid agreement which contains the main terms for the joint venture and agree on the details later when they actually submit the bid:

The pre-bid agreement will provide specifically that the parties will work exclusively together in seeking to obtain the contract.

This does raise the question within the EC as to whether or not such agreements may be affected by Article 85(1) of the EC Treaty. In a Notice on co-operation agreements OJ

1968 C84/4 the Commission stated that among the agreements not restricting competition were those "having as their sole object the setting up of consortia for the joint execution of orders, where the participating enterprises do not compete with each other or where each of them by themselves is unable to execute the orders".

In many instances the participants will in fact be competitors and it may be a moot point as to whether or not any one of them could have executed the contract on their own. On some occasions they clearly could not do so, as in the case of the joint ventures established to execute the Channel Tunnel, but on other occasions, as for instance the construction of a bridge or motorway, this could well be within the technical and financial competence of each of the firms forming the Consortium. However, provided that under either the de minimus principal or the Notice on agreements of minor importance, the Commission would be unlikely to take the view that there was restriction of competition.

### **Taxation**

The issue of taxations should always be considered in the formation of a joint venture. Indeed if the bid is for a client outside the UK and any part of the work is to be performed outside the UK, then it is essential, before the form of the joint venture is decided upon, that specialist taxation advice is obtained.

### **Management of the Joint Venture**

On the assumption that the joint venture is unincorporated then the agreement will need to provide for the establishment of a Management Committee which will be responsible for the management of the bid and later the contract, although day-to-day management of the latter would be delegated to a Project Manager. The agreement needs to set out the duties and powers of the Committee and how disagreements are to be decided.

### **Division of the Work**

Even at the pre-bid agreement stage it is important that the basic division of work between the parties is written into the agreement and also the responsibility for the inter-faces between the different work packages. The latter is often over-looked.

### **Pricing of the Work Packages**

Each Party is responsible for the pricing of his own package of work and then the parties come together to agree on the overall price for the bid. There are two ways in which the agreement on pricing may be handled. Either each party is wholly responsible for the entire price of his work package, including profit and contingencies, or else the profit margin and contingencies are excluded from his pricing, and then the parties come together to agree upon these for the bid as a whole. Whichever method is adopted the intention will be that the prices are openly disclosed and agreed so that the bid is competitive.

In order to avoid argument on pricing, particularly where more than one party is carrying out work of a similar nature, it is important that the parties should first have agreed upon the methodologies to be used in the performance of the work.

# PRE-BID AGREEMENT

This agreement is made the .....day of ..... 20 ..... between .....  
of the first part, and .....

WHEREAS .....(hereinafter individually called a "Party"  
and together called "the Parties") wish to collaborate to pursue and ultimately to prepare a bid  
(hereinafter called "the Consortium Bid") for [Insert title of Project] (hereinafter called "the  
Project") to the (Client) in relation to the design, supply and construction of [describe project in  
outline], all as is more fully described in Appendix I (hereinafter called "the Works") and if  
successful to negotiate, enter into and execute the resultant Works contract.

NOW IT IS HEREBY agreed as follows:

1. The Parties will act in Consortium to submit the Consortium Bid to the Client when required and will if such bid is successful, negotiate a Works contract with the Client with joint and several responsibility for the execution of the Project.
- 2.1 The Consortium Bid shall be in such form and shall contain such terms and conditions as the Parties shall jointly agree. After the preparation approval and submission of the Consortium Bid the Parties shall as between themselves be jointly and severally bound to the Client by its provisions and no Party shall vary or seek to vary the same without the previous written consent of all the other Parties.
- 2.2 If the Client neither accepts nor rejects the Consortium Bid and invites the Parties to attend negotiations the negotiating team and the timing and tactics of the negotiations shall be decided upon by the Parties. No significant deviations from the terms of the Consortium Bid shall be agreed with the Client without the prior approval of the Parties.
- 2.3 Unless extended by agreement in writing of the Parties this Agreement shall remain in force until:
  - a) the Parties shall fail to agree as to the terms and conditions of the Consortium Bid and therefore no Consortium Bid is made; or
  - b) the Consortium Bid shall not be accepted by the Client by the date for acceptance therein or any extension thereof or any negotiations with the Client shall prove conclusively unsuccessful;
  - c) the signing of the Consortium Agreement provided for below; or
  - d) [Insert an expiry date]Upon the happening of the first of any such events this Agreement shall (save as to the provisions of this sub-clause) automatically cease and determine and each of the Parties shall (subject to any agreement between them to the contrary) be separately and solely liable for all costs and expenses which may have expended or incurred in connection with the Consortium Bid or negotiations and shall not have any further obligations except as provided in Clause 8.
3. The Parties will work exclusively together in the pursuit of the Project and no Party will at any time pursue all or part of the Project independently without the written approval of the other Parties.
4. No Party shall be permitted to transfer or assign its rights under this Agreement without the previous written permission of the other Parties but subject as provided below the Parties shall be permitted to sub-contract in accordance with their normal practice provided that they remain fully responsible at all times for the performance of such sub-contractors and that this does not in any way reduce their obligations to the Client as a Consortium Partner. In order to maximise participation of the Parties in the Works Contract the Parties shall first offer work to be sub-contracted to appropriately experienced and qualified companies which are either parties or members of groups to which such other Parties belong subject to any commercial constraints which may become apparent during the preparation of the bid.
5. .... will be the Consortium Leaders and as such will act as spokesman of the Consortium and represent the Consortium in all decision making. Acting in accordance with the instructions and approval of the other Parties  
..... will lead negotiations with the Client.

6. For the purpose of preparing the Consortium Bid the Parties will agree upon a detailed split of work and responsibilities in accordance with Appendix I to this agreement.
7. The Parties will prepare at their own cost offers on the basis required for that part of the work agreed to be their responsibility and will co-ordinate their representations through the Proposal Manager in a form to be mutually agreed.
8. Each Party agrees to keep confidential and not disclose to Third Parties nor to use for its own purposes information which may have to be disclosed to the other Parties for the purposes of this Agreement but this obligation shall not apply to:
  - a) Information already in the possession of the receiving Party at the date of disclosure;
  - b) Information which is in the public domain or enters the public domain through no fault of the receiving Party; and
  - c) Information received by the receiving Party from a Third Party which it was reasonable to believe was both lawfully in possession of the same and had not received the information directly or indirectly from the disclosing Party.
- 9 Except in the case of any breach under paragraph 8 above, the Parties shall not be liable to each other for any costs or damages incurred howsoever arising during the period of proposal preparation. Withholding of approval of the bid by any of the Parties shall not give rise to legal liability towards the others.
- 10.1 Before the submission of the Consortium Bid the Parties shall enter into an agreement (hereinafter called "the Consortium Agreement") setting out in greater detail the particular rights, duties and obligations and liabilities of the Parties to each other that shall apply if the Consortium Bid is accepted by the Client including joint and several liability to the Client. The Consortium Agreement shall (inter alia) clearly identify such part of the Works comprised in the Consortium Bid as shall be intended to be carried out by and be the responsibility of each of the Parties and shall set out such further terms and conditions as shall be required to enable the Works Contract to take effect.
- 10.2 In addition, the Consortium Agreement will include provisions for the management of the consortium by a Management Board comprising equal members of representatives from each of the Parties. Decisions of the Management Board shall be reached by unanimous vote. The Chairman of the Management Board, who shall not have a special or casting vote, shall be elected from the members of the Management Board. The Management Board shall appoint a Project Managing Director who will be responsible for co-ordinating the activities of the Parties.
11. The Parties shall also agree before submission of the Consortium Bid what guarantees or indemnities if any may be necessary to support the Parties' obligations to the Client's defined requirements. Any bonds, guarantees or other similar obligations required by the Client to be given by bankers and other financial institutions shall be arranged jointly by the Parties but with several responsibilities. The charges of such bankers and other financial institutions for giving such bonds, guarantees or like obligations shall be borne by the Parties in the proportion which the value of the part of the Works for which each Party is responsible bears to the value of the whole of the Works. Each of the Parties shall be responsible for arranging on a several basis its own counter-indemnities, counter guarantees and other similar securities required in support of such bonds, guarantees and the like and for all expenses in connection therewith.
12. The Parties further agree that each Party shall bear full technical and financial responsibility for its scope of work as presently agreed and set out in Appendix I hereto. Each Party will be responsible for estimating and presenting to the other Parties a price for its scope of work including contingencies relating to the Party's performance of that scope of work but excluding profit, contingencies and provisions to cover interface uncertainties, such as those relating to quantity estimates provided by one Party to another Party, and liabilities to the Client for liquidated damages. The prices as prepared by each of the Parties and their breakdown shall be fully disclosed to the other Parties for review and discussion, with the mutual intention of arriving at the most competitive bid price excluding the items referred to above, but the ultimate decision as to whether and how a particular price should be changed will rest with the Party responsible for preparing it. As soon as possible after the competitive bid price has been established the Parties shall discuss and agree a percentage to be added to the

competitive bid price as the element incorporating profit, contingencies and provisions to cover interface uncertainties, referred to above.

13. Prior to submission of the Consortium Bid it is the intention of the Parties to specifically limit the total liability applying to the resultant Works Contract.

## NOTES

- Article 2.2 This refers to the important principle that any modifications to the terms of the bid must be agreed to by both parties. In practice this may cause difficulties if one party wishes to accept risks or reduce the price beyond the limits to which the other is willing to agree. It is important that an agreed policy is established between the parties at the beginning.
- Article 3 This is vital in order to protect the interests of all parties.
- Article 9 It is normal for the parties not to be liable to each other for any costs incurred during the bidding phase as a result of one party not proceeding.
- Article 12 In this form while each party estimates its own costs, the margin for contingencies and profit is added on afterwards by agreement between the parties. In the alternative each party could be totally responsible for his own costs, contingency and profit. However, whichever form is adopted the finalisation of the bid price is often traumatic with each party concerned to maintain his own price level while being critical of that of the others and suggesting reductions to make the bid more competitive.
- Article 13 This is a hope which may not be acceptable to the client.

## DRAFT CONSORTIUM AGREEMENT

AN AGREEMENT made the ..... day of ..... 200

BETWEEN:

(the "First Party") of the first part and ..... (the "Second Party") of the second part. The parties are herein referred to singly as a "Participant" and collectively as the "Participants"

WHEREAS the Participants wish to form a Consortium for the purpose of preparing and submitting a proposal (the "Proposal") to the Client and thereafter negotiating and, if successful, performing the contract resulting therefrom (hereinafter called the "Contract") all in accordance with the provisions of this agreement, for a Project ("the Project") comprising the [description of the scope of the project to be executed]

It is therefore agreed by the Participants as follows:

### ARTICLE ONE

#### FORMATION AND PURPOSE OF CONSORTIUM AND CONSORTIUM SHARES

- 1.1 The Participants hereby constitute themselves as a Consortium for purpose of preparing and submitting the Proposal for the Project to the Client and thereafter negotiating and if successful entering into and performing the Contract with the Client for the supply, construction, completion, commissioning and maintenance of the Project.
- 1.2 The purpose for which the Consortium is constituted under this Agreement shall be limited strictly to the purpose referred to in Article 1.1 and as further described in this Agreement. It is further agreed that the Consortium is not intended or deemed to constitute a partnership between the Participants.
- 1.3 Each Participant shall have a scope of work setting out the extent and nature of his share of the Project (a "Scope of Work"). Each Scope of Work is as described and set forth in the Schedule hereto.
- 1.4 The Participants shall agree and submit the Proposal to the Client in the name of the Consortium as a single package.
- 1.5 For the purpose only of sharing in the costs of administration and co-ordination and payment of the change of bonds, guarantees and insurance premiums the shares of the

Participants in the Consortium shall be:  
First Party..... %  
Second Party..... %

**ARTICLE TWO  
DURATION**

- 2.1 The Consortium shall come into effect as soon as the Participants have signed this Agreement and shall continue in effect until terminated. Termination shall occur if either
- a) the Client at any time advises or it becomes apparent to the Consortium that the Client has entered into a contract with others for the Project or has decided to abandon the Project or
  - b) the Contract for any reason has not been entered into by the Consortium on or before the ..... day of ..... with the proviso that this date may be extended by agreement between the Participants – or
  - c) the contract be entered into by the Consortium is subsequently terminated; or
  - d) when the purpose and objectives of the Consortium as described in Article 1.1 are completely achieved.

**ARTICLE THREE  
PROPOSAL PREPARATION AND CONTRACT NEGOTIATION**

- 3.1 The Participants shall agree on the extent of their respective Scopes of Work including the interface between them so that taken together they comprise the whole Project. Then they shall each prepare a proposal for the cost and method of execution for their respective Scopes of Work. These proposals shall be discussed and agreed between the Participants and then combined into the Proposal to be submitted to the Client.
- 3.2 The Participants shall jointly agree the terms and conditions of all aspects of the Proposal which shall include the terms of the Contract that they are prepared to negotiate with the Client. The technical content and casting of each Participants share of the Proposal as defined in its Scope of Work shall be ultimately the responsibility of each Participant but shall be discussed and reviewed by the Participants who will ensure full compatibility of all aspects of their respective proposals and Scopes of Work.
- 3.3 The Participants shall agree on the margin for profit and contingencies which shall be included by each Participant in his price for his Scope of Work including for interface risks. Neither Participant however will have any claim against the other if the agreed allowance for either profit or contingencies included in his price results in the event in his not earning the profit on his work which he had anticipated or in his making a loss. Each party shall include in his price the proportion represented by his Consortium Share of the amount agreed between the Participants to cover the total costs of the obligations of the First Party in respect of co-ordination and administration, (including the services of a Project Manager), bonds, guarantees and insurances.
- 3.4 Once the Proposal has been submitted neither Participant may withdraw from the Consortium and if the Proposal is accepted without amendment by the Client each Participant will be jointly and severally bound to the Client and will sign a formal Contract with the Client when required.
- 3.5 If the Client calls for negotiations these shall be held by the First Party under the direction of the Management Committee. As soon as the negotiations are concluded with the Client then if the Participants both agree to enter the Contract of the finally negotiated terms each Participant will be jointly and severally bound thereby to the Client and will sign a formal Contract with the Client when required.
- 3.6 All costs incurred by each Participant in connection with the preparation of the Proposal and the negotiation of the contract shall be borne by that Participant.



## **ARTICLE FOUR PERFORMANCE OF THE CONTRACT AND VARIATIONS**

- 4.1 In the event that that Consortium enters into the Contract then each Participant shall perform his own Scope of Work in accordance with the terms and conditions of the Contract.
- 4.2 Each Participant shall provide all supplies and services and carry out all work required for proper fulfilment of its Scope of Work, irrespective of whether or not such work supplies and services are therein fully specified and described.
- 4.3 It shall be the sole and entire responsibility of each Participant to perform or have performed at its own cost all the obligations assumed by it under the Contract and this Agreement. Each Participant agrees that it will indemnify and hold harmless the other from all costs, expenses or liabilities incurred or imposed upon the other as a result of or in connection with its breach of the said obligations.
- 4.4 If a claim is made against the Participants or either of them under the Contract or otherwise in connection with the Project, whether that claim is from the Client or any third party, each Participant shall be liable therefore as between themselves to the extent that it has caused the claim.
- 4.5 Notwithstanding anything else stated herein or in the Contract, the Participants agree to act severally with respect to each other in the performance of the Contract and be solely responsible for the sufficiency of their own estimates of costs and time related to their own Scope of Work.
- 4.6 Each Participant shall be under an obligation to the other Participant to schedule, plan and execute his own Scope of Work in a manner such that it facilitates the work of the other Participant and allows both Participants jointly to fulfil the obligations to the Client assumed under the Contract in a timely and cost effective manner.
- 4.7 Each Participant agrees that all contracts entered into by it with third parties in connection with its Scope of Work shall be expressed to be assignable to such other person as the Management Committee may appoint. This is only to enable a continuing Participant to take over a defaulting Participant's contracts in order to ensure completion of the Contract.
- 4.8 The First Party shall be responsible for arranging any bonds or guarantees required in connection with the Contract. The cost of such bonds or guarantees (including the bid bond) shall be shared between the Participants in proportion to the respective values of their Consortium shares. Each Participant shall counter indemnify the bank or insurance company issuing bonds or guarantees in proportion to such values.
- 4.9 The First Party shall be responsible for coordinating arrangements for the provision of insurances as required by the Contract and as agreed by the Participants to be necessary, and for the payment of premiums the cost of which will be shared by the Participants in relation to their Consortium shares.
- 4.10 If the Client calls for any variations in accordance with the terms of the Contract then all negotiations shall be co-ordinated and managed by the First Party on behalf of the Participant affected by the variation, but that Participant shall be responsible for the technical content and costing of the variation in the like manner as for his original Scope of Work.
- 4.11 Any claims or requests by a Participant for extra costs and/or time relating to its Scope of Work shall be prepared by the Participant initiating such claims or requests and presented to the Client by the First Party. If the claim affects the contractual obligations of the Participant to the Client then the substance of the claim shall be agreed by the Management Committee and shall be negotiated with the Client in the same manner as the original Contract.
- 4.12 The First Party shall keep the accounts of the Consortium and shall make these available to the Second party on a periodic basis and in such detail as is determined by the Management Committee.

**ARTICLE FIVE  
MANAGEMENT COMMITTEE**

- 5.1 The overall management and control of the affairs of the Consortium (other than any matters falling solely within either party's Scope of Work) shall be vested in a management committee consisting of four (4) persons (herein called the "Management Committee"). Each Participant shall be entitled to appoint two (2) representatives to the Management Committee.
- 5.2.1 The First Party hereby appoints ..... to be its representatives.  
The Second Party hereby appoints ..... to be its representatives.
- 5.2.2 Each Participant or either of its representatives may by notice in writing to the other Participant appoint themselves alternatives to act in place of an absent representative.
- 5.2.3 Each Participant may replace its representatives or alternates or revoke such appointments at any time by giving written notice to the other Participant.
- 5.2.4 Each representative, or alternate in the absence of the representative shall have the authority to represent the Participant appointing him in respect of all matters concerning the Management Committee.
- 5.3 Except where Articles 5.9 or 5.11 apply, at all meetings of the Management Committee, a quorum shall be two (2) persons consisting of one representative or alternate from each of the Participants.
- 5.4 Any representatives may call a meeting of the Management Committee by serving notice thereof on all the other representatives.
- 5.5 The representatives shall be entitled to at least five working days notice of the time and place of each meeting of the Management Committee unless all the representatives waive notice thereof. The meetings shall normally be held at the site of the Project or either Participant's place of business or otherwise as mutually agreed. Decisions may also be reached by telephone, correspondence, telex or cable.  
All decisions arrived at by telephone shall be promptly confirmed in writing to every representative on the Management Committee by the Committee's secretary.
- 5.6 All decisions of the Management Committee must be unanimous save where otherwise specifically stated in this Agreement.
- 5.7 In the event that the necessary unanimity cannot be reached on any matter the meeting shall be adjourned and reconvened not less than one (1) working day later. If at that later meeting unanimity cannot be reached the matter in question shall be referred to the Managing Directors (or their equivalent) of the Participants. If they are unable to reach a decision within ten (10) working days after the original meeting then the matter in question shall be deemed rejected. Any Participant aggrieved by such rejection shall be entitled to refer the matter to arbitration as a dispute.
- 5.8 One of the representatives (or alternate in the absence of a representative) appointed by the First Party shall be the Chairman at all meetings of the Management Committee. The secretary appointed by the Management Committee shall be responsible for keeping the minutes of all meetings of the Management Committee.
- 5.9 If either Participant fails to cause at least one of its representatives or alternates to attend at a duly convened meeting of the Management Committee the meeting shall be adjourned for two (2) working days and the Participants shall immediately be notified by telex or cable of such adjournment. If the non-attending Participant fails to cause any representatives or alternates to attend at the resumed meeting other than as a result of causes beyond the control of that Participant, then unanimous decisions taken by those present at such meeting shall constitute a valid decision of the Management Committee.
- 5.10 The costs incurred by each Participant in respect of its representative or alternate in the functioning of the Management Committee shall be borne by such Participant and shall not be a cost chargeable to the Consortium.
- 5.11 If any Participant is in default under Article Eight then notwithstanding any other provision in this Article Five, such defaulting Participant shall not be entitled to take part

in any approval, action, step or proceeding with respect to the Consortium and the representatives or alternates of such defaulting Participant shall have no right to participate in the voting at any meetings of the Management Committee and any decisions or actions to be taken by the Management Committee in its absence shall be deemed a valid decision or action of the Consortium.

**ARTICLE SIX  
RECEIPTS AND PAYMENTS**

- 6.1 The First Party shall co-ordinate all requests from the Participants for payment to the Client.
- 6.2 All payments made by the Client to the Consortium shall be made to a bank account opened in the joint names of the Participants. Upon receipt of such payments the Consortium shall immediately remit to the Participants the amounts due to them in accordance with their requests for payment.
- 6.3 The Consortium shall only be obliged to make such payments as and when payment is made by the Client.
- 6.4 If full payment is not received in accordance with the amount invoiced to the Client, any part payments received shall be distributed to the Participants in proportion to their respective requests for payment unless the Client's deduction or non-payment is specifically related to any particular item in their requests in which case such deduction shall be carried by the Participant responsible for the work referred to in such item.
- 6.5 The Second Party shall reimburse the First Party for its share of the payments made by the First Party in the discharge of its duties under Articles 4.8 and 4.9 (including premiums, bank fees and charges). Such reimbursement shall be within ten (10) working days of the date of the First Party's relevant invoice.

**ARTICLE SEVEN  
PROJECT CO-ORDINATION AND PROJECT MANAGER**

- 7.1 Subject at all times to the direction and control of the Management Committee, the administration of the Contract and the affairs of the Consortium shall be co-ordinated by the First Party.
- 7.2 The First Party with the approval of the Management Committee shall appoint and pay for a project manager (hereinafter referred to as the "Project Manager") who will be resident on or close to the site of the Project nominally for the whole duration of the Contract. The duties and authority of the Project Manager shall be determined by the Management Committee.
- 7.3 The Participants agree that the duties of the Project Manager shall be generally limited to co-ordination, site organisation and liaison with the Client and shall not extend to either Participant's management of its own Scope of Work.
- 7.4 The First Party may with the approval of the Management Committee and shall upon instruction from the Management Committee remove the Project Manager from office and shall in such case appoint, after approval of the Management Committee, another Project Manager proposed by the First Party in place of the one removed.
- 7.5 The cost of the co-ordination and administration of the Contract by the First Party including those for the Project Manager shall be shared between the Participants in proportion to their Consortium Shares. The Second Party shall pay its share to the First Party by instalments each instalment being paid within thirty (30) days of each payment received by the Second Party under the Contract at the rate of ..... percent (%) of the value of such payments or such other rate as the Management Committee may determine.

**ARTICLE EIGHT  
DEFAULT**

- 8.1 In the event of one of the participants (the "defaulting Participant" which expression shall include any of its successors assigns or legal representatives) becoming insolvent or having a receiver appointed or going into liquidation (unless the liquidation shall be

for the sole purpose of reconstruction or amalgamation of a solvent Participant) or committing any breach of the terms of this Agreement or the Contract and failing to take positive steps to remedy the same within thirty (30) days (or such time as is considered reasonable in all the circumstances by the other Participant) of being required in writing by the other Participant so to do then the other Participant (the "continuing Participant") shall be entitled in addition to any other right or remedy to exclude the defaulting Participant from further participation in the Consortium and in the management and control thereof and may take over its interest under this Agreement but without releasing it from any of its indemnities undertakings or warranties under this Agreement.

- 8.2 The continuing Participant shall have the right to retain for the completion of the Project all assets of the defaulting Participant and all plant equipment and materials provided by it or hired, purchased or acquired by it at the time when it was excluded until the completion and handing over the Project to the Client. The defaulting Participant shall execute and do all deeds and documents and things necessary or expedient to facilitate the exercise of such right and allow the continuing Participant to proceed with the performance of the Contract (including without prejudice to the generality of the foregoing the operation of any bank accounts in the name of the Consortium and the employing of subcontractors) without reference to the defaulting Participant. In such event all references in this Agreement to the administration and direction of the Consortium shall be deemed to exclude the defaulting Participant.
- 8.3 In addition the defaulting Participant's Scope of Work may be assigned at the discretion of the Management Committee to another company either from the Consortium or from without and all costs incurred by the Consortium so far as not paid by the Client will be the sole responsibility of the defaulting Participant.
- 8.4 A defaulting Participant shall remain bound by all guarantees undertakings and securities given by it to third parties in respect of the Project.

## **ARTICLE NINE CONFIDENTIALITY**

- 9.1 Each of the Participants shall keep in strict confidence and shall use all reasonable endeavours to bind all of its employees and agents to keep in strict confidence all the commercial and technical information received, or to which it obtains access directly or indirectly from the other Participant in connection with this Agreement and the Contract and shall not in any time disclose such information to any third party or make use of any such information for any purpose other than as required to fulfil this Agreement.
- 9.2 The restrictions referred to in Article 9.1 shall not apply with respect to:
- a) information which at the time of disclosure is generally available to the public through no breach of this Agreement;
  - b) information which after disclosure becomes generally available to the public through no fault of the Participant receiving the information;
  - c) information which was in the possession of the Participant receiving the information prior to its disclosure and of which documented proof exists and which was not acquired directly or indirectly from the other Participant
- 9.3 The confidentiality provisions contained in Article 9.1 shall survive the termination or expiration of this Agreement and remain in force for a period of 10 years from the date hereof.

## **ARTICLE TEN ARBITRATION**

- 10.1 All disputes arising between the Participants in connection with this Agreement shall be settled by arbitration and such arbitration shall be carried out in London by an arbitrator or arbitrators appointed under the Arbitration Acts 1950 and 1979 or any subsequent legislation. Either Participant may refer such dispute to arbitration by giving ten (10) days' written notice to the other Participant.
- 10.2 Work on the Project shall not stop or be suspended by reason of any arbitration proceedings.

## **ARTICLE ELEVEN GOVERNING LAW**

- 11 This Agreement shall be interpreted and governed in all respects in accordance with the laws of England.

## **ARTICLE TWELVE NOTICE**

- 12.1 Any notices, requests, consents and other communications to be given by either Participant under this Agreement (hereinafter called a "Notice") shall be validly given if personally served on the other Participant or sent by registered prepaid mail or telex to the following addresses. In the case of personal services such Notice shall be deemed to be given at the time of service; in the case of prepaid registered mail, such Notice shall be deemed to be given two (2) days after the date of mailing and in the case of telex, such Notice shall be deemed to be given on the date a receipt-acknowledged telex is sent.

In the case of the First Party –

Telex No.

In the case of the Second Party –

Telex No.

- 12.2 Either Participant may by notice to the other Participant change its address for purposes of this Agreement.

## **ARTICLE THIRTEEN ENTIRE AGREEMENT**

- 13 This Agreement constitutes the entire Agreement relating to the Consortium between the Participants pertaining to the Project and supersedes all prior agreements, understanding, negotiations and discussions, whether oral or written, of the Participants and there are no warranties, representations or other agreements between the Participants in connection with the Project except as specifically set forth herein.

## **ARTICLE FOURTEEN SUCCESSORS AND ASSIGNS**

- 14 This Agreement is binding upon and shall operate for the benefit of the Participants hereto and their retrospective successors and assigns.

## **NOTES**

- Article 1.5 The purposes of the shares is only to indicate the proportions in which certain common costs eg bonds will be shared.
- Article 3.3 This follows the lines of the pre-bid agreement.
- Article 4.3 The liability has not been limited. It could have excluded loss of profits. Also note that the liability in this instance is not bonded. If there were any doubts as to the financial strength of one party it would be essential to require him to provide a bond.
- Article 5.7 This is one way often adopted of providing for the resolution of disagreements. However Arbitration is not a very practical way of dealing with inter-party disputes and it could be preferable to include a reference to Alternative Dispute Resolution (ADR).

CONTRACTS FOR THE SETTLEMENT OF DISPUTES