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Dear Sirs

### **Review of Appointment Agreement with Eddisons Commercial Ltd (Agreement)**

I have reviewed the proposed Agreement between Oakham Town Council (**Council**) and Eddisons Commercial Ltd (**Eddisons**). The report in the table below is on the basis of identifying any matters which appear to be an issue from the face of the document, rather than a detailed clause by clause report.

This report has been prepared for you for the purposes of providing you with observations on the draft Agreement and is not intended to be for any other purpose.

This report is not intended to be a comprehensive review of all potential issues but to highlight any issues which I consider to be an issue on the face of the document. However, if there are any specific issues you would like advice on please do not hesitate to contact me.

I have undertaken my review on the basis of the Agreement you provided on the 26<sup>th</sup> July. As I am sure you will appreciate, the enforceability and validity of a Contract will depend on the specific circumstances relevant to it at any one time. It is advisable to take advice on any specific issues or changes in circumstances at the time of or soon after their occurrence. As part of my review I have not considered the pricing structure or any other commercially specific information. If you would like further advice in this regard, please do not hesitate to contact me.

Please note that this review is not intended to replace reading the Agreement or to act as a recommendation as to whether you should enter into it.

You should consider the contents of this letter carefully.

Please do not hesitate to contact me if you have any queries on the contents or the issues that have been highlighted.



#### **Local legal team offices**

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## REVIEW OF APPOINTMENT AGREEMENT

Clause Number	Issue	Hegarty Comment
Appointment Particulars	The appointment particulars do not specify who the contractor will be or who the “members of the professional team” will be.	These are both defined terms that I will reference later on in the document and I would have thought needed to be included in the appointment particulars.
Appointment Particulars	Fee is a percentage rather than a monetary amount.	The fee is specified as being 11% of the agreed final account for design project management, administrator services and designer services. This is on the face of it quite flexible in favour of Eddisons on the basis that that figure is not yet known and therefore for budgetary purposes the overall fee will not be known. I would recommend that you liaise with Eddisons to give an indication to you, if they have not done so already, what their likely fees are going to be.
Appointment Particulars	Additional services and expenses	You may want to clarify the costs of the reimbursable expenses and to get Eddisons to agree that additional services will only be provided if you have specifically asked for them in writing. This will allow you to control the budget better.
Appointment Particulars	Payment terms	The fees are payable by instalments as set out in the particulars. It is unclear exactly when you will be invoiced but they could ask for payment on account every month. Bearing in mind we do not know the value of the works and indeed what Eddisons’ fees are going to be, you will need to consider from a cashflow perspective whether or not this is doable.
1.1	Deemed start	Whilst the Agreement itself is not yet signed; the terms do apply from the point that Eddisons start to commence performing services for you. If that has already happened then effectively the Contract is deemed to have been entered into. It is not unusual where there may be a delay between the issue of the engagement letter and when they perform services, but it is a point to note as it could limit any negotiation room that you might have.
1.2	Defined terms missing	As noted above, this clause refers to contractor and professional team and as they are capitalised, this indicates that they should be defined terms but there are no definitions in the appointment particulars. I would query this with Eddisons.
2.	Standard of services	The standard of care specified in the Agreement is using reasonable skill and care. You could insist on that to be in accordance with best industry practice but I suspect this will be a non-negotiable point for Eddisons, as the document very much appears to be a standard set of conditions.
4.	Prohibited Materials	Whilst Eddisons will use reasonable endeavours to ensure that they do not use any materials that do not meet the relevant British or EU standards they used in the project, they do not guarantee that this will be

		the case. Given that these are facilities to be utilised by the public, you may want them to offer a stronger commitment here.
5.	Adjustment of fee	The clause anticipates that the fees might need to be adjusted if the services are materially delayed or disrupted for anything outside of Eddisons' control. Whilst the clause goes on to say that you will agree any adjustment and timing of payment, if those points cannot be agreed then Eddisons reserve the right to increase in accordance with the rates set out for additional services, being a director rate of £200 per hour, associate director £175 per hour and surveyor £125 per hour. I would have thought that you would want any adjustment to be subject to your prior agreement. I would therefore suggest clause 5 is reworded accordingly, if possible.
6.	Additional services prior agreement	The clause does not require your prior agreement for Eddisons carrying out any additional services on your behalf. This is so that if they end up having to carry out additional services they will get paid for it, but again you may want to insist that any additional services will only be carried out if you specifically instruct them to do so.
7.1	Invoices	You will be issued regular invoices in connection with the services which will be payable in this clause. The wording in the clause is slightly confusing and does not give a specified due date for payment, so it is something to clarify. The clause appears to allow you to counter the amount of any such invoice within 5 days after the due date but the wording again is quite confusing. If an invoice is genuinely disputed you should be able to dispute that invoice accordingly. I do not think clause 7 is clear enough in its intentions.
8.	Final date for payment	You are able to give a pay less notice no later than 7 days before the final date for payment which is 14 days after the due date. This is quite normal in construction type of arrangements; however care must be taken as to when this pay less notice can be given because the dates for payment are not that clear from the current drafting. Notice must be given even if the amount due is zero. Again, I would ask Eddisons practically how this would work as the wording is unclear.
9.	Default interest	If you do not pay any amounts when due Eddisons have the right to charge you at 4% above the Bank of England's base rate and if that non-payment continues for a period of time, Eddisons may give you notice that they will suspend the services and suspend the right to use any drawings, plans, specifications and similar that they have prepared as part of the services. You may want to consider amending clause 9 preventing Eddisons from charging interest, suspending the licence or services where there is a genuine dispute as to the amount due under an invoice.
10.1	Amount of limitation of liability	Eddisons limit their liability to £5m. You should consider whether or not this is a high enough level of liability given that the facilities are to be made available to the public.
10.2	Exclusions of liability	You would only be able to claim for just and equitable loss and damages having regard to Eddisons' responsibilities under the Contract. This anticipates that you will be given contractual undertakings from

		the members of the professional team (not defined) but it is not clear what those undertakings might be. In any form of construction related matters, particularly where the facilities or building may be accessible by the public, I would normally expect to see some form of contractor's or collateral warranties to provide you with further protection. Again, this is a point that you ought to raise with Eddisons.
10.3	Time limitation on claims	This clause prevents you from issuing any proceedings against Eddisons after a period that is 6 years from practical completion of the project. I would normally expect this to be in the region of 10 to 12 years.
11.	Insurance	Eddisons will only carry professional indemnity insurance in the sum of £5m. If there is any other insurances required such as an employer's liability and public liability then this ought to be added in at this stage.
12.	Ownership of copyright	All of the drawings, plans, specification schedules, reports, calculations and documents that Eddisons are preparing for you will remain their property. You have the ability to use them solely for the purposes of the project but not otherwise. Liability is also excluded for any use of the documents for any purpose other than for which they were originally prepared. This is quite normal but is a point to note.
13.1	Suspension of services	You can suspend at any time but if it does continue for more than 3 months then either you or Eddisons can give notice to terminate the engagement. It is not clear whether or not that notice would take effect immediately but without wording to the contrary I would presume that that would be the case.
14.1	Termination	You are able to terminate on giving 14 days prior written notice. There are some mutual termination provisions relating to insolvency and breach which are quite standard.
15.1 (a)	Payment on termination	You will be required to pay any sums due on suspension or termination of the services which could include a proportion of the anticipated next instalment. Again, this is not unusual but is a point to note.
15.2	Handover of copyright documents	The clause intimates that you will only receive the documents that Eddisons have prepared for you on payment of any sums due.
16.	Assignment	Eddisons will not assign or sub-contract their rights under the Agreement without your consent, however you would not be able to unreasonably withhold or delay that consent. I would not have thought that you would want to. However, taking the point in relation to failing to be able to agree on a contractor, if they did sub-contract out of their obligations to somebody that you simply did not like, you would not necessarily be able to say no. You may want to change that to the consent not being unreasonably delayed only.
16.	Assignment	You are able to assign the Agreement to anybody that is providing financing in connection with the project. This is quite normal in this type of Agreement.
17.	Disputes	The adjudication rules for construction contracts in England and Wales will apply to any dispute and the adjudicator's decision will be binding until settled by the Courts. Again, this could cause you some issues if you are unable to agree on a contractor. In any event, I would have thought Eddisons would be working

		with you as a supplier as opposed to not working in your best interests.
1. Scope of Building Surveying Services	Specification	I have presumed that this is the schedule that they refer to in the conditions but you ought to clarify as it is not appropriately numbered. In any event, this section sets out the services that they are going to provide with you. It does not deal with the actual appointment of the contractor and therefore the indication is that either you will be expected to appoint a contractor or they will go out and find one for you. I would normally recommend that you ask to see at least two quotations for contractors so that you can make a determination as to what is most appropriate.

You also queried two questions as to whether or not you have the right to ask for quotes from different contractors and what costs you are likely to incur if you cannot agree. The Agreement is effectively silent on both points. That being the case, I would recommend that you ask Eddisons specifically for this to be included within the Agreement or to require contractor sign off to be confirmed by you in writing. This should be a fairly straightforward change for them and I would not have thought would have been too contentious an issue.

In any event if you did not agree or like any steps that Eddison's were taking, you can terminate at any point on 14 days' notice so the Agreement is fairly easy to get out of.

If you would like to discuss the report then please do let me know.

Yours faithfully



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