

Dated 11 JULY 2022

FILTON TOWN COUNCIL

- and -

ACTIVE NATION UK LTD

APPOINTMENT

**Of Employer's Agent
in connection with remodelling works to leisure facilities
at Elm Park, Filton**

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EMPLOYER'S AGENT APPOINTMENT

DATED

11 JULY

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PARTIES

- (1) **FILTON TOWN COUNCIL** whose principal office is at Elm Park, Filton, South Gloucestershire BS34 7PS (the "**Employer**"); and
- (2) **ACTIVE NATION UK LTD** (company registration number 03072216 registered charity 10477742) whose registered office is at Unit 1b, Hatton Rock Business Centre, Hatton Rock, Stratford-Upon-Avon, Warwickshire, CV37 0NQ (the "**Employer's Agent**").

WHEREAS

- (A) The Employer intends to carry out remodelling works ("**Works**") at Elm Park, Filton ("**the Site**").
- (B) The Employer wishes to appoint the Employer's Agent
 1. to act as its agent in the procurement and letting of the Building Contract and
 2. to perform the Services in relation to the whole of the Works on the terms and conditions set out in this Appointment.

1 DEFINITIONS AND INTERPRETATION

- 1.1 The following words or phrases, where they appear in capitalised form in this Appointment shall have the meanings stated or referred to below:

'Building Contract'	the contract entered into in relation to the Works;
'Building Contractor'	the Building Contractor appointed to carry out the Works under the Building Contract being Speller Metcalfe Malvern Limited or any substitute for the same;
'Building Regulations'	the Building Act 1984 and all relevant subordinate legislation made under the Act;
'Consents'	all statutory and other consents, licences, permissions, approvals, authorisations and certificates that are necessary for starting, carrying out the Works, including

	where necessary owners or occupiers of neighbouring property;
'Documents'	all designs, drawings, details, specifications, calculations and other documents produced pursuant to this Appointment;
'Fee'	the lump sum fee and hourly rates (if any) set out in SCHEDULE 2;
'Other Consultants'	such other consultants and professionals as may be engaged from time to time engage in connection with the Works;
'Programme'	the overall programme for the Works prepared by the Building Contractor and approved by the Employer;
'Prohibited Materials'	the materials described in SCHEDULE 3;
'Services'	the services listed in SCHEDULE 2;
'Working Day'	A day other than a Saturday or Sunday when banks generally are open for the transaction of normal banking business in London;
'Works'	has the meaning given to it under the Building Contract.

- 1.2 In this Appointment unless the context requires otherwise:
- 1.2.1 'person' includes any firm and any entity having legal capacity;
 - 1.2.2 any term importing gender includes any gender;
 - 1.2.3 any term importing the singular includes the plural and vice versa;
 - 1.2.4 any reference to any clause, schedule or appendix is a reference to a clause, schedule or appendix of or to this Appointment;
 - 1.2.5 any reference to a statute, statutory provision or subordinate legislation ('legislation') shall (except where the context otherwise requires) be construed as referring to such legislation as amended and in force from time to time and to any legislation which re-enacts or consolidates (with or without modification) any such legislation; and
- 1.3 Clause headings do not form part of or affect the interpretation of this Appointment.

2 SCOPE OF THE APPOINTMENT

- 2.1 The Employer appoints the Employer's Agent as its agent to procure and manage the Building Contract and Works at the Site.
- 2.2 The Employer's Agent shall enter into the Building Contract on behalf of the Employer as the agent of the Employer and such agency arrangement shall be a disclosed agency arrangement.
- 2.3 The Employer shall be the principal in relation the Building Contract and the Works and shall be responsible for making payments to the Building Contractor which shall be required to render to the Employer a valid VAT invoice with respect to each payment.
- 2.4 The Employer's Agent shall have full authority to manage the Building Contract and the Works within the parameters set out in this agreement.

3 SERVICES TO BE PROVIDED

- 3.1 The Employer's Agent shall provide the Services and their duties under this Appointment using the professional skill and care and diligence reasonably to be expected of a qualified and experienced employer's agent undertaking services similar to those to be undertaken by the Employer's Agent in relation to projects of the scale and character of the Works.
- 3.2 The Employer's Agent shall in accordance with clause 3.1 provide any other services the Employer may request, reasonably incidental to the above.
- 3.3 The Employer's Agent shall comply with their statutory duties, the Building Regulations and other applicable statutory and regulatory requirements.
- 3.4 No inspection or approval or review by the Employer or any person on the Employer's behalf and no omission to inspect or review or to disapprove shall negate or diminish any duty or liability on the Employer's Agent's part under and in connection with this Appointment.
- 3.5 Insofar as any Consents are made known to the Employer's Agent, the Employer's Agent shall comply with all Consents in carrying out the Services.

4 OBLIGATIONS OF THE EMPLOYER'S AGENT

- 4.1 The Employer's Agent shall, without prejudice to clause 3: -
- 4.1.1 keep the Employer fully and properly informed on all material aspects of the Works for which the Employer's Agent is responsible and provide the Employer with such information as they may from time to time be reasonably require from the Employer's Agent with regard to the Works;
 - 4.1.2 co-operate fully with Other Consultants;
 - 4.1.3 comply in all respects with the duties of a designer under the Construction (Design and Management) Regulations 2015 as if all such regulations apply to the Works.
 - 4.1.4 comply with all reasonable instructions and directions given to it by the Employer on any matter connected with the Works;
 - 4.1.5 not do anything which would, or would be likely to affect the date for the completion of any part of the Works or increase the cost of any part of the Works without first obtaining the Employer's prior written approval thereto.
- 4.2 The Employer's Agent shall notify the Employer in writing of any information it requires to enable it to perform the Services and/or comply with its obligations under this Appointment.
- 4.3 If the Employer's Agent is prevented or delayed in the performance of the whole or any part of the Services for any reason beyond its control, or has reason to believe the cost of any part of the Works are increasing over and above the Employer's budget then the Employer's Agent shall as soon as reasonably practicable notify the Employer.

5 OTHER CONSULTANTS

- 5.1 The Employer's Agent shall integrate into the overall design of the Works the Services provided by the Other Consultants and where required for the proper performance of the Services, the Building Contractor and its sub-contractors and specialist suppliers engaged in respect of the Works up to the completion of the Works.
- 5.2 The Employer's Agent shall immediately notify the Employer if it considers the elements of the design prepared the parties referred to in clause 5.1 above are incompatible with the design prepared for the Employer or will be unsuitable for or detract from the quality or performance specifications of the finished Works.

6 MATERIALS

- 6.1 The Employer's Agent shall use the level of skill and care referred to in clause 3.1 to specify materials which are of good quality and appropriate for the Works and shall not specify and (so far as the Services allow) not to permit to be used in the Works any Prohibited Materials.
- 6.2 In the event that the Employer's Agent becomes aware that any Prohibited Materials are being used or any circumstances which will give rise to their use then the Employer's Agent shall immediately notify the Employer.

7 DESIGN CHANGES

- 7.1 Save in an emergency where there is a risk to health and safety or damage to property, the Employer's Agent shall not, without the Employer's written consent, make or permit any material change in the designs and specifications for the Works after they have been settled or approved.

8 PROFESSIONAL INDEMNITY INSURANCE

- 8.1 The Employer's Agent shall maintain, during the performance of the Services and for a period of 6 years from the date of Acceptance of the works, professional indemnity insurance for each and every claim or series of claims arising out of the same originating cause in the sum of not less than three million pounds (£3,000,000) provided that such cover is generally available in the market for the Employer's Agent at reasonable commercial rates and terms; and
- 8.2 As and when required by the Employer, the Employer's Agent will produce for inspection documentary evidence that such insurance is being properly maintained.
- 8.3 The Employer's Agent shall as soon as reasonably practicable notify the Employer if:
 -
 - 8.3.1 such insurance cover ceases to be available or is likely to become unavailable in the market at reasonable commercial rates and terms; or
 - 8.3.2 in the event that such insurance ceases to be available, becomes void or unenforceable, or is not being maintained for any reasonthe Employer's Agent shall discuss and endeavour to agree with the Employer how best to protect their respective interests under this Appointment.
- 8.4 The Employer's Agent shall not compromise, settle or waive any insurance claim which it may have in respect of any professional liability under this Appointment

without the prior consent of the Employer, provided that nothing in this clause precludes the Employer's Agent's insurers from taking over (in the name of the Employer's Agent) the defence of any claim made by the Employer under this Appointment and (in that capacity) from conducting and settling as they see fit.

9 REMUNERATION

- 9.1 In consideration of the Employer's Agent performing the Services in accordance with the terms of this Appointment, the Employer shall pay the Fee. Save where expressly stated to the contrary in SCHEDULE 2 the Fee is inclusive of all reasonable out of pocket expenses and disbursements and is exclusive of VAT.
- 9.2 If for any reason the Employer does not proceed with or curtail the Works, or if the Employer's Agent's employment is terminated or suspended by the Employer other than for the Employer's Agent's breach, the Employer's Agent will be paid the relevant portion of the Fee for all Work Stages properly completed and a fair and reasonable amount for the services provided and any abortive work in relation to incomplete Work Stages for which they would not otherwise be remunerated.
- 9.3 If at the Employer's instruction the Employer's Agent undertakes any services in additional to the Services, or if by reason of any design changes, financial constraints or any other circumstances beyond their control the Employer's Agent is required to undertake significant extra work, then provided the Employer's Agent has notified the Employer in writing before undertaking such work that they may require an additional fee, the Employer shall either agree a lump sum or pay the Employer's Agent a fair and reasonable additional fee for the additional services or work based on the Employer's Agent's records of the time spent by its employees.
- 9.4 The Employer's Agent will be reimbursed all statutory fees necessarily incurred for the purposes of the Works.
- 9.5 The due date for payment of a valid invoice submitted by the Employer's Agent shall be 14 days from receipt by the Employer of the invoice.
- 9.6 No later than 5 days after payment becomes due, the Employer shall notify the Employer's Agent of the sum that they consider to have been due at the due date in respect of the payment and the basis on which that sum is calculated ('the Notified Sum').
- 9.7 The final date for payment of any sum which becomes due under this Appointment shall be 28 days from the date of receipt by the Employer of the invoice.

- 9.8 Unless the Employer has served a notice under clause 9.9, the Employer shall pay the Employer's Agent the Notified Sum referred to in clause 9.6 (or, if the Employer has not served notice under clause 9.6, the sum referred to in the Employer's Agent's invoice on or before the final date for payment).
- 9.9 Not later than 2 days prior to the final date for payment the Employer shall be entitled to give written notice of its intention to pay less than the notified sum ('a Pay Less Notice'). Any Pay Less notice shall specify the sum the Employer intends to pay on the date the notice is served and the basis on which that sum is calculated.
- 9.10 In relation to the requirements for giving notices under this clause 9, it is immaterial that the amount considered to be due or payable under clause 9.6 shall be zero, the Employer shall be obliged to give a notice pursuant to that clause, failing which clause 9.8 shall apply.

10 **COPYRIGHT**

- 10.1 The Employer shall own copyright in the Documents, but the Employer's Agent is hereby granted an irrevocable, royalty free, non-exclusive licence to use the Documents and the designs contained in them for any purpose whatsoever connected with the Works. Such licence shall continue notwithstanding any termination of this Appointment and shall be assignable and carry the right to grant sub-licences in the terms of this licence.
- 10.2 The Employer's Agent shall not be liable for the use of any of the Documents for any purpose other than those for which they produced them.
- 10.3 The Employer's Agent agrees to supply to the Employer upon request (after as well as before the termination of their services under this Appointment), one paper copy of the Documents and two digital copies of the Documents. The Employer shall pay the Employer's Agent their reasonable reproduction costs if incurred after such termination.
- 10.4 The Employer's Agent warrants that use of the Documents by the Employer or its licensees shall not infringe any rights of any third party.

11 ASSIGNMENT AND SUB-LETTING

11.1 The Employer's Agent shall not assign, delegate or sub-let the whole or any part of its duties except as may be permitted under clause 59 of the Leisure Operating Agreement.

12 SUSPENSION

12.1 The Employer shall be entitled to suspend the Employer's Agent's services by written notice. Upon suspension the Employer's Agent's fee entitlement shall be as provided in clause 9.2. If a suspension lasts more than 1 month, the Employer's Agent may make a written request for their services to be resumed, and if no instructions to resume are given within 28 days after their request, their employment hereunder shall then terminate.

13 TERMINATION

13.1 Termination of the engagement of the Employer's Agent shall be determined in accordance with Part 5 of the Leisure Operating Agreement.

14 ADDITIONAL DUTIES

14.1 The Employer's Agent shall not issue the Acceptance Certificate under the Building Contract unless the Employer's Agent has given the Employer at least five Working Days' notice of the date it proposes to carry out the inspection of the Works with a view to issuing the Acceptance Certificate ("Inspection").

14.2 The Employer may attend every Inspection and the Employer's Agent shall co-operate with the Employer insofar as such co-operation does not contravene the Services.

14.3 The Employer's Agent shall have due regard to any proper representations made promptly by the Employer to the Employer's Agent concerning the issue of the Acceptance Certificate and the contents of any snagging list to be issued with it however, the issue or non-issue of the Acceptance Certificate will be in the Employer's Agent's sole professional discretion.

14.4 Subject to clauses 14.1 and 14.3, the Employer's Agent shall issue the Acceptance Certificate as soon as in their professional opinion such a certificate may properly be issued. The Employer's Agent shall in addition to the copies of the Acceptance Certificate supply a copy of the Acceptance Certificate to the Employer within two Working Days of Acceptance.

15 DISPUTES

- 15.1 Either party may give notice at any time of its intention to refer a dispute to adjudication under the Technology and Construction Solicitors Association adjudication rules (the "TeCSA rules") 2018 version 3.2.2 as may be updated from time to time by TeCSA and amend all the dates of the Notice of Adjudication which are deemed incorporated into this Appointment by reference to this clause.

16 RELATIONSHIP WITH CLAUSE 9 OF THE LEISURE OPERATING AGREEMENT

- 16.1 This Appointment is subject to clause 9 of the Leisure Operating Agreement.

17 NOTICES

- 17.1 Notices under this Appointment must go to the addresses stated below and shall be served either personally (where service shall be deemed effective on delivery) or by pre-paid recorded delivery post (in which case service shall be deemed effective two working days after the date of posting).

Employer's address for service is: Elm Park, Filton, South Gloucestershire BS34 7PS for the attention of Lesley Reuben.

Employer's Agent's address for service is: Unit 1b, Hatton Rock Business Centre, Hatton Rock, Stratford-Upon-Avon, Warwickshire, CV37 0NQ for the attention of Shaun Tasker.

18 THIRD PARTY RIGHTS

- 18.1 Save where expressly stated otherwise in this Appointment, nothing in this Appointment confers or purports to confer on any third party any benefit or any right to enforce any term of this Appointment.

19 EFFECTIVE DATE

- 19.1 Notwithstanding the date of this Appointment, the effective date of the agreement contained in this Appointment shall be the date at which the Employer's Agent commenced the Services.

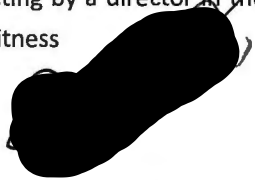
20 GOVERNING LAW AND INTERPRETATION

- 20.1 This Appointment shall be governed by and construed in accordance with English Law and all disputes and differences between the parties shall be submitted to the exclusive jurisdiction of the English Courts.

20.2 Neither party shall be entitled to commence legal proceedings against the other party following the expiry of 6 years from the date the whole Works, or last section of the Works is certified as practically complete in accordance with the Building Contract save in respect of death, personal injury and/or fraud.

Agreed by the parties on the date set out at the beginning of this Agreement.

EXECUTED by ACTIVE NATION UK LTD)
acting by a director in the presence of a)
witness)



..... Director

Witness Signature



Witness Name and Address

MARK JOHNSON



EXECUTED by FILTON TOWN COUNCIL)
by duly authorised signatories)
)

Councillor



D.W. COLLINS

Councillor



A.P. MONK

Witnessed by the Proper Officer:



L.A. RUMBEN

SCHEDULE 1
SCOPE OF SERVICES

CORE SERVICES

To agree and enter into the Building Contract as agent on behalf of the Employer

Attend project and site meetings as required

Issue instructions on behalf of the Employer to the Building Contractor.

Agree project reporting and recording procedures with the Employer and implement the same

Monitor performance of the Building Contractor and report to the Employer

Liaise with the Building Contractor, Other Consultants and prepare regular quality, cost and programme reports. Advise the Employer of any decisions required and obtain authorisation.

Administer the Building Contract, receive invoices from the Building Contractor addressed to the Employer and submit requests for payment to the Employer.

STAGE 1 - PRE-CONTRACT SERVICES

The pre-contract services will include:

(a) Preparation of estimated total construction costs including a detailed budget estimate.

(b) The preparation of the Building Contract documents for signing and sealing by the contractor, and checking prior to completion by the Employer.

(c) Attending all meetings as necessary as agent of the Employer to ensure that the scheme progresses without delay, and is in accordance with the Employer's Requirements

STAGE 2 - POST CONTRACT SERVICES

The post-contract services will involve the administration of the Building Contract in accordance with the terms of those contracts and will include:

(a) Regular inspection of the works in progress, to check on the Employer's behalf that the agreed specification and drawings are being complied with, and that the works are of sufficient quality. These inspections will be carried out at least twice monthly and more regularly if necessary at critical stages of the works. Site inspection reports are to be provided within 3 working days of these visits, the format of the report to be agreed with the Employer prior to start on site and to include progress photographs.

(b) Notifying the Employer and Building Contractor, in writing, of any items of work or any other matters that fall below the standard outlined in the contract document. This will include, where necessary, consultation with other bodies (e.g. Sport England and statutory and local authorities).

- (c) Chair and minute monthly site meetings with the Employer and Building Contractor.
- (d) To seek quotations for any specialist treatments, surveys or other, that arise throughout the course of the Works.
- (e) Visiting the site to agree, on the Employer's behalf, the amount due for payment to the Building Contractor under the Building Contract and notifying the Employer and the Building Contractor accordingly, and requesting that contractor issues invoices to the Employer.
- (f) Prepare a monthly Contract Progress Report. The report format shall be agreed with the Employer prior to start on site and shall include:
- Information and comment upon the contractor's quality and progress of work
 - Any possible problems or discrepancies which may affect progress or the contract sum
 - Any possible variation to the contract completion date
 - An up-dated version of the project cash-flow
- (g) Prior to the issue of instructions to the contractor for any variations, to obtain and submit prices to the Employer for agreement and approval.
- (h) Prior to the anticipated handover date, produce a detailed snagging list of all unsatisfactory items and circulate to both the Employer and the Building Contractor.
- (i) Issuing statements and notices, as required, on the Employer's behalf.
- (j) The preparation, in conjunction with the Employer, of a Schedule of Defects that occur within the defects liability period.
- (k) Checking and agreeing the final account as presented by the Building Contractor and formally notifying the Employer and the contractor when the contract is finally complete.
- (l) At Acceptance of the Project, hand over a project file, complete with original or certified copies of:
- An As 'Built Estate' plan
 - Planning Permission – letters confirming sign off and conditions have been satisfied from local planning authority
 - Building Regulation Consent and sign off of any conditional consents
 - Certificate of Acceptance
 - Environmental Reports/Final Reports and confirmation of compliance with recommendations
 - Any warranties (architect, main contractor, sub contractor, where applicable)
 - Deeds of Grant to statutory authorities of rights/easements
 - Any other site specific approval / statutory approval / legal agreement

SCHEDULE 2

FEE PAYMENT SCHEDULE

SCHEDULE 3

PROHIBITED MATERIALS

Any materials which at the time of specification:

- (a) are generally known at the time of use to be harmful to health or detrimental to safety; or
- (b) are likely adversely to affect durability in the circumstances in which they are used; or
- (c) do not meet British or European Standards (where these apply) or codes of practice or good building practice,

the judgement being based if appropriate on guidance in the edition of the British Council for Offices 2011 Report: "Good Practice in the Selection of Construction Materials" as may be revised or reissued from time to time current at the date of this Agreement