

ANNEX 4: GENERAL TERMS AND CONDITIONS

TABLE OF CONTENTS

GENERAL TERMS AND CONDITIONS.....2

1. Interpretation.....2

2. Headings.....2

3. Allocation of Risk and Liability.....2

4. Insurance.....3

5. Taxation3

6. Intellectual Property3

7. Confidentiality4

8. Severable Provisions5

9. Assignment.....5

10. Project Equipment.....5

11. Amendments6

12. Termination6

13. Jurisdiction and Applicable Law7

14. Dispute Resolution.....7

15. Child Protection8

16. Right to Audit.....8

17. Fraud9

18. Anti-Corruption.....9

19. Anti-Money Laundering and Anti-Terrorism Financing.....9

20. Entire Agreement.....10

21. Force Majeure.....11

22. No Joint Venture or Partnership11

GENERAL TERMS AND CONDITIONS

1. Interpretation

1.1. In this Agreement, unless the context otherwise requires, reference to:

1.1.1. words importing the singular number only shall include the plural number also and vice versa and words importing the masculine gender include the feminine gender and neuter and vice versa;

1.1.2. clauses shall be construed as references to Clauses of this Agreement;

1.1.3. any statute or any provision of any statute shall be deemed to refer to any statutory modification or re-enactment thereof and to any statutory instrument, order or regulation made there under or under any such re-enactment;

1.1.4. indemnifying any person against any circumstance includes indemnifying and keeping him harmless from all actions, claims and proceedings from time to time made against that person and all loss or damage and all payments, costs and expenses made or incurred by that person as a consequence of or which could not have arisen but for that circumstance;

1.1.5. costs, charges, expenses or remuneration shall be deemed to include, in addition, references to any value added tax or similar tax charged or chargeable in respect thereof; and

1.1.6. any reference to any document means that document as is supplemented, amended or varied from time to time between the Parties thereto in accordance with the terms (if applicable) hereof and thereof.

2. Headings

2.1. Headings to clauses are for convenience only and shall not affect the construction or interpretation of this Agreement.

3. Allocation of Risk and Liability

3.1. The Partner :

3.1.1. accepts all risks and consequences connected with; and

3.1.2. releases ICRAF (including its officers, employees and agents) from all liability arising directly or indirectly from this Agreement.

- 3.2. Each Party (“Indemnifying Party”) shall indemnify, defend and hold harmless the other party (“Indemnified Party”) and its parent, partner, operator, subsidiaries and affiliated entities and its and their respective directors, officers, employees and agents from and against any and all liabilities, costs (including attorneys’ fees and other costs of defense), fines, penalties, losses, damages, amounts paid in settlement, expenses, claims, actions, hearings, investigations, suits and causes of action of any and every kinds and character, judgments, orders, decrees and rulings to the extent arising out of this Agreement or the fault, negligence, willful misconduct or other wrongful act or omission of or by the indemnifying party, or any of its agents, employees, representatives, contractors, vendors or suppliers of any tier that are providing or performing products or services in connection with the activities contemplated by this Agreement.
- 3.3. The Parties’ right to be indemnified under clause 3.2 is in addition to any other right, power or remedy provided by law.
- 3.4. Where this clause refers to an officer, employee or agent of a Party, such Party holds the benefit of this clause in trust for that person.

4. Insurance

- 4.1. ICRAF declines every form of responsibility for actions, claims, demands, costs and expenses which may arise from or be a consequence of any unlawful or negligent act or omission of the Partner or its employees or agents in carrying out the work described in the Work Plan (Annex 1).
- 4.2. Therefore when deemed necessary, the Partner should take out appropriate insurance cover for all staff and/or activities financed through this agreement, such as, but not limited to: health, life, accidents, long term disability, workers compensation, travel, public liability, etc. The decision whether or not such insurances are required, rests entirely with the Partner.

5. Taxation

ICRAF undertakes no liability for taxes, duty or other contribution payable by the Partner on payments made under this Agreement. No statement of earnings will be issued by ICRAF.

6. Intellectual Property

- 6.1. Nothing in this Agreement shall affect the Background Intellectual Property Rights of each Party. The Party introducing the Background Intellectual Property hereby grants to the

Other Party a license to use and sublicense the Background Intellectual Property for the purposes of the Research Project.

- 6.2. Both Parties view the final research outputs as "International Public Goods" and as such shall use the most appropriate mechanisms to make the results freely and widely available to all.
- 6.3. Parties hereby agree to make any data and/or models generated as a consequence of this Agreement accessible to the public through the Projects' data portals or other established media in compliance with CGIAR Open Access and Data Management Policy¹ and its implementation guidelines and in accordance to normal academic practice.
- 6.4. ICRAF will take steps to ensure that it is in full and complete compliance with international Intellectual Property Rights treaties and national regulations.
- 6.5. In case there will be a need for transfer of biological materials among the Parties or Third Parties relevant to the Project, the Parties shall conclude the requisite Material Transfer Agreement.

7. Confidentiality

- 7.1. During the course of this Agreement, either party may acquire confidential information or trade secrets of the other ('Confidential Information'). Confidential Information of a party means all information of whatever description, whether in permanently recorded form or not and whether or not belonging to a third party, which is by its nature is confidential or which the party identifies as confidential to itself. It does not include information to the extent that information is: (i) independently created or rightfully known by, or in the possession or control of, the Other Party and not subject to an obligation of confidentiality on the Other Party; (ii) in the public domain (otherwise than as a result of a breach of this Agreement); or (iii) required to be disclosed by law.
- 7.2. Each party agrees to keep all such Confidential Information in a secure place, and further agrees not to publish, communicate, divulge, use or disclose, directly or indirectly, for its own benefit or for the benefit of another, either during or after performance of this Agreement. This obligation of confidence shall not apply with respect to information that is (a) available

¹ <http://library.cgiar.org/bitstream/handle/10947/2875/CGIAR%20OA%20Policy%20-%20October%202%202013%20-%20Approved%20by%20Consortium%20Board.pdf?sequence=4>

to the receiving party from third parties on an unrestricted basis; (b) independently developed by the receiving party; or (c) disclosed by the Other Party to others on an unrestricted basis.

8. Severable Provisions

Each and every provision in this Agreement shall be read (where possible) in relation to each and every individual case instanced by each and every individual word or combination of words contained in that provision as a combination of separable provisions and each and every of such separable provisions shall be read as entirely independent and severable from the other or others. In all cases where a provision of this Agreement is reducible, invalid or unenforceable in terms of any legislation or other legal authority, such provision shall not affect the validity of the remaining portion of this Agreement which shall remain in force and effect as if this Agreement had been granted with no such provision and it is hereby declared the intention of the parties that they would have executed the remaining portion of this Agreement without including therein any such provision.

9. Assignment

- 9.1. The Partner can assign or delegate any of its duties to any other parties of equivalent skill, experience, resources, and expertise to provide the services set out provided it receives consent for such action in advance and in writing from ICRAF;
- 9.2. The appointment of any 3rd Party by the Partner shall not affect the obligations of the Partner towards the ICRAF under the terms of this Agreement;
- 9.3. ICRAF shall have the right to accept or reject the parties proposed assignee within five days of receiving notification from the Partner of the proposed assignation or delegation.

10. Project Equipment

- 10.1. All materials and equipment furnished by ICRAF or purchased by the Partner for the implementation of the Project Activities (the "Property") shall remain the property of ICRAF or ICRAF's Donor as per the Project Agreement.
- 10.2. Unless otherwise agreed between ICRAF and the Partner, the Property shall be transferred to ICRAF at the end of the Project period.

10.3. The Partner shall properly maintain, and shall be responsible for any loss or damage to, the Property. The Partner shall retain such responsibility until the Property is returned to ICRAF.

11. Amendments

Any amendment to this Agreement must, to be effective be in writing and signed by the authorized representatives of each Party.

12. Termination

12.1. This Agreement may be terminated by either party by giving written notice of intent to terminate the Agreement. Such termination shall not affect the execution and conclusion of specific activities in effect under the terms of this Agreement nor publication and dissemination of results of research in progress. Such notice will be given 90 days in advance of the desired termination date.

12.2. Either party may terminate this Agreement by giving one month's notice in writing to the Other Party if there is a material breach by the Other Party of any of its obligations hereunder which, if it can be remedied remains unremedied on the expiry of five days after receipt by the party in breach of written notice from the other specifying the breach and the action required to remedy same.

12.3. In the event funding from the ICRAF Donor is withdrawn, reduced, or limited in any way after the effective date of this agreement and prior to normal completion, ICRAF may terminate the agreement, reduce funding, or re-negotiate subject to those new funding conditions.

12.4. The Agreement will end automatically if either party enters into bankruptcy, or makes other arrangements for the benefit of its creditors, or becomes otherwise legally incapacitated.

12.5. Upon receiving a termination notice, the Partner must take immediate action to cease all project expenditures other than those reasonably necessary to effect the close out of this Agreement.

12.6. In the event that the Agreement comes to an end or is terminated before the completion of the services, the Partner shall be entitled to payment by ICRAF for work completed on a pro-rata basis.

12.7. Termination of this agreement shall not affect the rights of either party against the other in respect of the period up to the date of termination.

12.8. The failure on the part of either party to exercise or enforce any right conferred upon it under this Agreement shall not be deemed to be a waiver of any such right or operate to bar the exercise or enforcement thereof at any time or time thereafter.

13. Jurisdiction and Applicable Law

The applicable law shall be the law of Kenya in so far as it is not in conflict with municipal law of the country of implementation. Should any dispute arise it is the intention of the parties that it is resolved amicably. However, should any matter remain unresolved both parties agree to be subject to dispute resolution mechanism set out in this agreement.

14. Dispute Resolution

14.1. The Parties shall try to settle amicably through direct negotiations, any dispute, controversy or claim arising out of or relating to the present Agreement, including breach and termination of the Agreement.

14.2. Should such negotiations fail to achieve a resolution within Fifteen (15) days, either Party may declare a dispute by written notification to the other in terms spelt out under Clause 8 of the Letter of Agreement, whereupon such dispute shall be referred to arbitration under the following terms:-

14.2.1. Such arbitration shall be resolved in accordance with United Nations Commission on International Trade Law Arbitration Rules;

14.2.2. The tribunal shall consist of one arbitrator to be agreed upon between the Parties failing which each party shall appoint one arbitrator. The two arbitrators shall then appoint a third arbitrator who shall be the Chairman of the Tribunal;

14.2.3. The place and seat of arbitration shall be Nairobi and the language of arbitration shall be English;

14.2.4. The award of the arbitration tribunal shall be final and binding upon the Parties to the extent permitted by law and any Party may apply to a court of competent

jurisdiction for enforcement of such award. The award of the arbitration tribunal may take the form of an order to pay an amount or to perform or to prohibit certain activities; and

14.2.5. Notwithstanding the above provisions of this clause, a Party is entitled to seek preliminary injunctive relief or interim or conservatory measures from any court of competent jurisdiction pending the final decision or award of the arbitrator.

14.3. Upon receipt of the notice under Clause 14.2 above, the Partner must cease all actions related to the project and stop all expenditures pending the conclusion of the dispute.

15. Child Protection

15.1. The Partner agrees to:

15.1.1. not permit any of its personnel to work with children if they pose an unacceptable risk to the safety and wellbeing of children;

15.1.2. undertake child-safe recruitment and screening processes for all personnel who will have contact with children, including but not limited to undertaking targeted interview questions, verbal referee checks and criminal record checks (where possible);

15.1.3. immediately notify ICRAF of a child protection incidents.

16. Right to Audit

16.1. The Partner shall establish and/or maintain a reasonable accounting system, which enables ready identification of the Partner's use of Project funds. ICRAF and its authorized representatives shall have the right to conduct a full audit, to examine, and to make copies of or extracts from all financial and related records relating to or pertaining to this Agreement kept by or under the control of the Partner, including, but not limited to those kept by the Partner, its employees, agents, assigns, successors, and sub-grantees.

16.2. The Partner shall, at all times during the term of this Agreement and for a period of 7 years after the completion of this Agreement, be responsible for keeping all invoices and financial documents relating to this Agreement and shall maintain in safe custody such records, together with such supporting or underlying documents and materials.

16.3. The Partner shall at any time requested by ICRAF, make such records available for inspection and audit and shall allow ICRAF to carry out verifications of the accounts in order to assess the implementation of the Project, through the review of documents or by means of on-the-spot checks.

16.4. Costs of any audits conducted under this Clause and not addressed elsewhere will be borne by ICRAF. If the audit discovers substantive findings related to fraud, misrepresentation, or non-performance, ICRAF may recoup the costs of the audit work from the Partner.

17. Fraud

17.1. The Partner and their personnel must not engage in any fraudulent activity (meaning dishonestly obtaining a benefit by deception or other means). The Partner is required to act reasonably to prevent and detect fraud and to investigate any detected, suspected or attempted fraud in accordance with their usual processes. The Partner will notify ICRAF within a reasonable time if they become aware of any detected, suspected or attempted fraud.

17.2. The Partner will cooperate fully with ICRAF in relation to any investigation and each Party will keep each other regularly informed of any issues relevant to the investigation.

18. Anti-Corruption

18.1. The Partner warrants that they will not make or cause to be made, nor will they seek or agree to receive any offer, gift, payment, consideration or benefit of any kind which could be construed as an illegal or corrupt practice, either directly or indirectly, as an inducement or reward in relation to the execution of this Agreement.

18.2. The Partner will not bribe any public officials and will use reasonable endeavours to ensure that all Personnel comply with this clause.

18.3. Any breach of this clause will be grounds for immediate termination of this Agreement.

19. Anti-Money Laundering and Anti-Terrorism Financing

19.1. The Partner undertakes to comply with all statutory and other requirements relating to Anti Money Laundering and Anti-Terrorism Financing. In particular the Partner

undertakes to adhere to the provisions of the Proceeds of Crime and Anti-Money Laundering Act CAP 59B of the Laws of Kenya.

- 19.2. The Partner warrants that none of its personnel (officers, employees and agents) shall enter into any agreement or engage in any transaction or arrangement with anyone in connection with any monies or property which the Partner's personnel (officers, employees and agents) know or ought to reasonably have known is or forms part of illegally obtained funds or proceeds of crime which has the effect of attempting to disguise or conceal the nature, source, location, disposition or ownership of illegally obtained funds or proceeds of crime or in any way attempt to disguise the sources of illegally-obtained funds.
- 19.3. The Partner further represents and warrants that no such attempt of the sort described in 18.2 above has been made prior to the date of this Agreement or will be made in the execution of this Agreement.
- 19.4. The Partner further warrants and agrees that it shall not promote or engage in violence, terrorism, bigotry or the destruction of any state, and that it shall take reasonable measures in the prevailing circumstances to prevent any portion of the Grant from being used to engage in support, or promote violence, terrorist activity or related training or radicalism. This includes not making sub-grants to any organisation engaging in these activities.
- 19.5. Notwithstanding any other provision of this Agreement, ICRAF may immediately terminate this Agreement, and any payments required under this Agreement, in the event it should receive information which it determines in good faith and in its sole discretion to be evidence of a breach by the Partner of the undertaking in this article. ICRAF shall not be liable to the Partner for any claims, losses, costs or damages related to its decision to withhold payments under this provision.

20. Entire Agreement

- 20.1. This Agreement supersedes all prior representations, arrangements and understandings between the Parties relating to the subject matter hereof and except as

expressly provided herein is intended by the Parties to be the complete and exclusive statement of the terms and conditions of this Agreement.

- 20.2. The Parties may sign a facsimile or photocopy of this Agreement and any such copy shall be deemed to be an original and no objection shall be made to the introduction into evidence of any such copy on the grounds that it is not an original.

21. Force Majeure

- 21.1. Neither Party shall be liable to the Other Party in respect of any delay in performing or failure to perform any of its obligations hereunder if such delay or failure results from:

21.1.1. Acts or intervention of Government or Government agencies;

21.1.2. Fire, flood or explosion;

21.1.3. Acts of God;

21.1.4. Declared or undeclared war or riots or civil commotion;

21.1.5. Strikes or other industrial disputes; or

21.1.6. Any cause outside reasonable control of either party.

22. No Joint Venture or Partnership

- 22.1. Nothing in this Agreement shall be construed to create a relationship between the Parties, nor to render any Party liable for the debts or obligations incurred by any 3rd Party. No Party is authorized to make representations on behalf of the others, or to bind the others in any manner whatsoever.